Commercial
List

Book of Authorities

[The following is a list of those cases which are frequently relied upon by the Toronto Commercial List. If you are relying on an authority that is listed below, it is not necessary to include it as part of the materials filed for the matters before the Commercial List in Toronto.

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Oppression / Just and Equitable Winding-Up

1. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560
2. *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.), 1995 CanLII 959 (ON C.A.)

Interim Relief

3. *Le Maitre v. Segeren* (2009), 55 B.L.R. (4th) 123, 2009 CanLII 6419 (ON S.C.)

Liability of Corporate Officers

4. *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.), 1999 CanLII 1527 (ON C.A.)
5. *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, a division of Imasco Retail Inc., 124 O.A.C. 137, [1999] O.J. No. 3243 (C.A.), 1999 CanLII 2316 (ON C.A.)
6. *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*, 26 O.R. (3d) 481, [1995] O.J. No. 3556 (C.A.)., 1995 CanLII 1301 (ON C.A.)

Receiverships

7. *Royal Bank v. Soundair Corp.* (1991) 4 O.R. (3d) 1 (C.A.), 1991 CanLII 2727 (ON C.A.)

CCAA as Amended

Initial Order

8. *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, [2010] C.C.S. No. 2083, [2010] O.J. No. 188, 2010 ONSC 222 (CanLII)

Injunctive Proceedings

Interlocutory Injunctions

9. *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311

Anton Piller Orders

10. *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189

Norwich Pharmacal Orders

11. *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133, [1973] 3 W.L.R. 164, [1973] 2 All E.R. 943 (H.L.), [1973] UKHL 6

12. *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619, 96 O.R. (3d) 481, 2009 ONCA 619 (CanLII)

Valuation

13. *Brant Investments Ltd. v. KeepRite Inc.*, [1991] O.J. No. 683, 3 O.R. (3d) 289, (C.A.), 1991 CanLII 2705 (ON C.A.)

Business Judgment

14. *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412, 214 D.L.R. (4th) 496, (Sup. Ct.)., 2002 CanLII 49507 (ON S.C.)

Sealing Orders

15. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522

May 2019

BCE Inc. and Bell Canada *Appellants/Respondents on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

BCE Inc. et Bell Canada *Appelantes/Intimées aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

- and -

6796508 Canada Inc. *Appellant/Respondent on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

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A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada,

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

- et -

6796508 Canada Inc. *Appelante/Intimée aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

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CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

INDEXED AS: BCE INC. *v.* 1976 DEBENTUREHOLDERS

Neutral citation: 2008 SCC 69.

File No.: 32647.

2008: June 17; 2008: June 20.

Reasons delivered: December 19, 2008.

Present: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Fiduciary duty of directors of corporation to act in accordance with best interests of corporation — Reasonable expectation of security holders of fair treatment — Directors approving change of control transaction which would affect economic interests of security holders — Whether evidence supported reasonable expectations

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

RÉPERTORIÉ : BCE INC. *c.* DÉTENTEURS DE DÉBENTURES DE 1976

Référence neutre : 2008 CSC 69.

N° du greffe : 32647.

2008 : 17 juin; 2008 : 20 juin.

Motifs déposés : 19 décembre 2008.

Présents : La juge en chef McLachlin et les juges Bastarache*, Binnie, LeBel, Deschamps, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Obligation fiduciaire des administrateurs envers la société d'agir au mieux des intérêts de la société — Attente raisonnable des détenteurs de valeurs mobilières d'être traités équitablement — Approbation par les administrateurs d'une opération de changement de contrôle qui porterait atteinte aux intérêts financiers de

* Le juge Bastarache a pris part au jugement du 20 juin 2008, mais n'a pas pris part aux présents motifs de jugement.

asserted by security holders — Whether reasonable expectation was violated by conduct found to be oppressive, unfairly prejudicial or that unfairly disregards a relevant interest — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 122(1)(a), 241.

Commercial law — Corporations — Plan of arrangement — Proposed plan of arrangement not arranging rights of security holders but affecting their economic interests — Whether plan of arrangement was fair and reasonable — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192.

At issue is a plan of arrangement that contemplates the purchase of the shares of BCE Inc. ("BCE") by a consortium of purchasers (the "Purchaser") by way of a leveraged buyout. After BCE was put "in play", an auction process was held and offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada, a wholly owned subsidiary of BCE, would be liable. BCE's board of directors found that the Purchaser's offer was in the best interests of BCE and BCE's shareholders. Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser represents a premium of approximately 40 percent over the market price of BCE shares at the relevant time. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

The plan of arrangement was approved by 97.93 percent of BCE's shareholders, but was opposed by a group of financial and other institutions that hold debentures issued by Bell Canada. These debentureholders sought relief under the oppression remedy under s. 241 of the *Canada Business Corporations Act* ("*CBCA*"). They also alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA*. The crux of their complaints is that, upon the completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status.

détenteurs de valeurs mobilières — Les attentes raisonnables invoquées par les détenteurs de valeurs mobilières étaient-elles étayées par la preuve? — Une attente raisonnable a-t-elle été frustrée par un comportement constituant un abus, un préjudice injuste ou une omission injuste de tenir compte d'un intérêt pertinent? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1)a), 241.

Droit commercial — Sociétés par actions — Plan d'arrangement — Plan d'arrangement proposé ne visant pas les droits de détenteurs de valeurs mobilières, mais portant atteinte à leurs intérêts financiers — Le plan d'arrangement était-il équitable et raisonnable? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 192.

Le litige porte sur un plan d'arrangement concernant l'achat des actions de BCE Inc. (« BCE ») par un consortium (l'« acquéreur ») au moyen d'une acquisition par emprunt. BCE ayant été « mise en jeu », un processus d'enchères a été lancé et trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada, une filiale en propriété exclusive de BCE. Le conseil d'administration de BCE a conclu que l'offre d'achat de l'acquéreur servait les intérêts de BCE et des actionnaires de BCE. Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE. Le prix offert par l'acquéreur représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions de BCE à la date pertinente. Le capital requis pour l'opération s'élève au total à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. L'acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

Les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100, mais des détenteurs de débentures de Bell Canada, notamment des institutions financières, s'y sont opposés. Ces détenteurs de débentures ont intenté un recours pour abus prévu à l'art. 241 de la *Loi canadienne sur les sociétés par actions* (« *LCSA* »). Ils ont aussi allégué que l'arrangement n'était pas « équitable et raisonnable » et contesté l'approbation de l'arrangement exigée par l'art. 192 *LCSA*. Leur principal argument est que, une fois la transaction achevée, la valeur marchande à court terme de leurs débentures fléchirait de 20 p. 100 en moyenne, et leurs débentures ne seraient plus cotées comme admissibles pour des placements.

The Quebec Superior Court approved the arrangement as fair and dismissed the claim for oppression. The Court of Appeal set aside that decision, finding the arrangement had not been shown to be fair and held that it should not have been approved. It held that the directors had not only the duty to ensure that the debentureholders' contractual rights would be respected, but also to consider their reasonable expectations which, in its view, required directors to consider whether the adverse impact on debentureholders' economic interests could be alleviated. Since the requirements of s. 192 of the *CBCA* were not met, the court found it unnecessary to consider the oppression claim. BCE and Bell Canada appealed the overturning of the trial judge's approval of the plan of arrangement, and the debentureholders cross-appealed the dismissal of the claims for oppression.

Held: The appeals should be allowed and the cross-appeals dismissed.

The s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. The Court of Appeal's decision rested on an approach that erroneously combined the substance of the s. 241 oppression remedy with the onus of the s. 192 arrangement approval process, resulting in a conclusion that could not have been sustained under either provision, read on its own terms. [47] [165]

1. *The Section 241 Oppression Remedy*

The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. [45] [58-59]

In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"

La Cour supérieure du Québec a approuvé l'arrangement, le jugeant équitable, et elle a rejeté la demande de redressement pour abus. La Cour d'appel a annulé cette décision, jugeant que le caractère équitable de l'arrangement n'avait pas été démontré et qu'il n'aurait pas dû être approuvé. Elle a statué que les administrateurs avaient l'obligation non seulement de s'assurer du respect des droits contractuels des détenteurs de débentures, mais aussi de tenir compte de leurs attentes raisonnables, ce qui, selon elle, les obligeait à examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Les conditions fixées par l'art. 192 n'étant pas remplies, la cour a jugé inutile d'examiner la demande de redressement pour abus. BCE et Bell Canada ont interjeté appel de l'annulation de l'approbation du plan d'arrangement par le juge de première instance, et les détenteurs de débentures ont formé un appel incident contre le rejet des demandes de redressement pour abus.

Arrêt : Les pourvois sont accueillis et les pourvois incidents sont rejetés.

La demande de redressement pour abus prévue à l'art. 241 et l'approbation judiciaire d'une modification de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. La décision de la Cour d'appel s'appuie sur un raisonnement qui combine à tort les éléments substantiels de la demande de redressement pour abus de l'art. 241 et le fardeau de la preuve applicable à l'approbation d'un arrangement exigée par l'art. 192, ce qui l'a menée à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier. [47] [165]

1. *La demande de redressement pour abus prévue à l'art. 241*

La demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity d'un vaste éventail de parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours confère au tribunal un vaste pouvoir d'imposer le respect non seulement du droit, mais de l'équité. Le sort d'une demande de redressement pour abus dépend en outre des faits : ce qui est juste et équitable est fonction des attentes raisonnables des parties intéressées compte tenu du contexte et des rapports entre les parties. [45] [58-59]

Le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste

of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241. [68] [72] [89] [95]

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one. [81-83]

Here, the debentureholders did not establish that they had a reasonable expectation that the directors of BCE would protect their economic interests by putting forth a plan of arrangement that would maintain the investment grade trading value of their debentures. The trial judge concluded that this expectation was not made out on the evidence, given the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, the fact that the claimants could have protected themselves against reductions in market value by negotiating appropriate contractual terms, and that any statements by Bell Canada suggesting a commitment to retain investment grade ratings for the debentures were accompanied by warnings precluding such expectations. The trial judge recognized that the content of the directors' fiduciary duty to act in the best interests of the corporation was affected by the various interests at stake in the context of the auction process, and that they might have to approve transactions that were in the best interests of the corporation

de tenir compte » d'un intérêt pertinent? En ce qui a trait à la première question, les facteurs utiles d'appréciation d'une attente raisonnable qui ressortent de la jurisprudence incluent : les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées. En ce qui concerne la deuxième question, le plaignant doit prouver que le défaut de répondre à son attente raisonnable est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241. [68] [72] [89] [95]

Lorsque surgit un conflit d'intérêts, les administrateurs doivent le résoudre conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société. Dans son ensemble, la jurisprudence en matière d'abus confirme que cette obligation inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues ni de principe voulant que les intérêts d'un groupe doivent prévaloir sur ceux d'un autre groupe. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable. Lorsqu'il est impossible de satisfaire toutes les parties intéressées, il importe peu que les administrateurs aient écarté d'autres transactions qui n'étaient pas plus avantageuses que celle qui a été choisie. [81-83]

En l'espèce, les détenteurs de débentures n'ont pas démontré qu'ils s'attendaient raisonnablement à ce que les administrateurs de BCE protègent leurs intérêts financiers en proposant un plan d'arrangement qui maintiendrait la valeur marchande de leurs débentures cotées comme admissibles pour des placements. Le juge de première instance a conclu que la preuve de cette attente n'avait pas été établie compte tenu du contexte global de la relation, de la nature de la société, de sa situation en tant que cible de plusieurs offres d'achat, du fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées et que les déclarations de Bell Canada concernant son engagement à conserver aux débentures une cote de placements admissibles s'accompagnaient de mises en garde excluant pareilles attentes. Le juge de première instance a reconnu que le contenu de l'obligation fiduciaire des administrateurs d'agir au mieux des intérêts de la société dépendait des divers intérêts en jeu dans le contexte du processus

but which benefited some groups at the expense of others. All three competing bids required Bell Canada to assume additional debt. Under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions they were elected to perform. In this case, there was no error in the principles applied by the trial judge nor in his findings of fact. [96-100]

The debentureholders had also argued that they had a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures. While the evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration, it is apparent that the directors considered the interests of debentureholders, and concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests and did not amount to "unfair disregard" of the interests of debentureholders. What the claimants contend is, in reality, an expectation that the directors would take positive steps to restructure the purchase in a way that would provide a satisfactory price to shareholders and preserve the high market value of the debentures. There was no evidence that it was reasonable to suppose this could be achieved, since all three bids involved a substantial increase in Bell Canada's debt. Commercial practice and reality also undermine their claim. Leveraged buyouts are not unusual or unforeseeable, and the debentureholders could have negotiated protections in their contracts. Given the nature and the corporate history of Bell Canada, it should not have been outside the contemplation of debentureholders that plans of arrangements could occur in the future. While the debentureholders rely on the past practice of maintaining the investment grade rating of the debentures, the events precipitating the leveraged buyout transaction were market realities affecting what were reasonable practices. No representations had been made to debentureholders upon which they could reasonably rely. [96] [102] [104-106] [108-110]

d'enchères et qu'ils pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada. La règle de l'appréciation commerciale commande la retenue à l'égard des décisions commerciales prises de bonne foi par les administrateurs dans l'exécution des fonctions pour lesquelles ils ont été élus. En l'espèce, le juge de première instance n'a pas commis d'erreur dans son application des principes ni dans ses conclusions de fait. [96-100]

Les détenteurs de débentures avaient aussi fait valoir qu'ils s'attendaient raisonnablement à ce que les administrateurs tiennent compte de leurs intérêts financiers en préservant la valeur marchande des débentures. La preuve, considérée objectivement, permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures dans leurs décisions sur les diverses offres à l'étude, mais ils ont manifestement pris en considération les intérêts des détenteurs de débentures et conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures et ne constituait pas une « omission injuste de tenir compte » de leurs intérêts. Ce que les plaignants font valoir en réalité, c'est qu'ils comptaient que les administrateurs adoptent des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint, puisque les trois offres comportaient toutes un accroissement substantiel de l'endettement de Bell Canada. Le réalité et les pratiques commerciales affaiblissent aussi leur prétention. Les acquisitions par emprunt n'ont rien d'inhabituel ou d'imprévisible, et les détenteurs de débentures auraient pu négocier des mesures de protection contractuelles. Compte tenu de la nature et de l'historique de Bell Canada, les détenteurs de débentures devaient savoir que des arrangements pouvaient être conclus dans l'avenir. Bien que les détenteurs de débentures invoquent les pratiques antérieures selon lesquelles la cote des débentures comme admissibles pour des placements avait toujours été maintenue, les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie des conditions du marché au gré desquelles les pratiques raisonnables peuvent changer. Aucune déclaration à laquelle les détenteurs de débentures auraient pu raisonnablement se fier ne leur avait été faite. [96] [102] [104-106] [108-110]

With respect to the duty on directors to resolve the conflicting interests of stakeholders in a fair manner that reflected the best interests of the corporation, the corporation's best interests arguably favoured acceptance of the offer at the time. The trial judge accepted the evidence that Bell Canada needed to undertake significant changes to be successful, and the momentum of the market made a buyout inevitable. Considering all the relevant factors, the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression. [111-113]

2. *The Section 192 Approval Process*

The s. 192 approval process is generally applicable to change of control transactions where the arrangement is sponsored by the directors of the target company and the goal is to require some or all shareholders to surrender their shares. The approval process focuses on whether the arrangement, viewed objectively, is fair and reasonable. Its purpose is to permit major changes in corporate structure to be made while ensuring that individuals whose rights may be affected are treated fairly, and its spirit is to achieve a fair balance between conflicting interests. In seeking court approval of an arrangement, the onus is on the corporation to establish that (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is "fair and reasonable". [119] [126] [128] [137]

To approve a plan of arrangement as fair and reasonable, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups. Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan. Courts must focus on the terms and impact of the arrangement itself, rather than the process by which it was reached, and must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. Courts on a

En ce qui a trait à l'obligation des administrateurs de résoudre les conflits entre parties intéressées de façon équitable conformément aux intérêts de la société, il est possible de soutenir que les intérêts de la société favorisaient à l'époque l'acceptation de l'offre. Le juge de première instance a retenu la preuve tendant à démontrer que Bell Canada devait procéder à des changements substantiels pour continuer à prospérer et la dynamique du marché rendait l'acquisition inévitable. Compte tenu de tous les facteurs pertinents, les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. [111-113]

2. *Le processus d'approbation prévu à l'art. 192*

Le processus d'approbation prévu à l'art. 192 s'applique en général aux changements de contrôle lorsque l'arrangement est appuyé par les administrateurs de la société ciblée et vise la remise d'une partie ou de la totalité des actions. Le processus d'approbation est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif. Il a pour but de permettre la réalisation de changements importants dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés, et l'esprit du processus consiste à établir un juste équilibre entre des intérêts opposés. La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est « équitable et raisonnable ». [119] [126] [128] [137]

Pour approuver un plan d'arrangement, parce qu'il le juge équitable et raisonnable, un tribunal doit être convaincu que l'arrangement a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. Pour décider si un arrangement répond à ces critères, on tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société, l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés. En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan. Le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir, et être convaincu que l'intérêt de la société justifie le fardeau imposé par

s. 192 application should refrain from substituting their views of the "best" arrangement, but should not surrender their duty to scrutinize the arrangement. [136] [138] [145] [151] [154-155]

The purpose of s. 192 suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. It is the fact that the corporation is permitted to alter individual rights that places the matter beyond the power of the directors and creates the need for shareholder and court approval. However, in some circumstances, interests that are not strictly legal could be considered. The fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities generally does not, without more, constitute a circumstance where non-legal interests should be considered on a s. 192 application. [133-135]

Here, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192, and the trial judge was correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests, and he did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The arrangement did not fundamentally alter the debentureholders' rights, as the investment and return they contracted for remained intact. It was well known that alteration in debt load could cause fluctuations in the trading value of the debentures, and yet the debentureholders had not contracted against this contingency. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada. No superior arrangement had been put forward and BCE had been assisted throughout by expert legal and financial advisors. Recognizing that there is no such thing as a perfect arrangement, the trial judge correctly concluded that the arrangement

l'arrangement aux détenteurs de valeurs mobilières. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception du « meilleur » arrangement, mais ne doivent pas renoncer pour autant à s'acquitter de leur obligation d'examiner l'arrangement. [136] [138] [145] [151] [154-155]

L'objet de l'art. 192 laisse croire qu'il ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. C'est le fait que la société puisse modifier les droits des parties qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Toutefois, dans certaines circonstances, des intérêts qui ne constituent pas des droits à strictement parler peuvent être pris en considération. Une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, une situation où de simples intérêts doivent être pris en compte pour l'examen d'une demande sous le régime de l'art. 192. [133-135]

En l'espèce, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat porte sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures ne constituaient pas une catégorie touchée pour l'application de cette disposition et le juge de première instance était fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures et il n'a pas commis d'erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. L'arrangement ne modifiait pas fondamentalement les droits des détenteurs de débentures, l'investissement et le rendement prévus par leur contrat demeurant inchangés. Il était bien connu qu'une variation de l'endettement pouvait faire fluctuer la valeur marchande des débentures et les détenteurs de débentures ne se sont malgré tout pas prémunis contractuellement contre cette éventualité. Il était clair pour le juge que, pour la continuité de la société, l'approbation

had been shown to be fair and reasonable. [157] [161] [163-164]

Cases Cited

Referred to: *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68; *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015; *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324; *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36; *Stech v. Davies*, [1987] 5 W.W.R. 563; *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, var'd (1989), 45 B.L.R. 110; *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113; *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48; *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368; *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251; *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275; *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300, var'd (1998), 110 O.A.C. 160; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289, leave to appeal refused, [2002] 1 S.C.R. vi; *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718; *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294, aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304; *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613, aff'd (1993), 113 Sask. R. 3; *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302; *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7, var'd (1998), 38 O.R. (3d) 749; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (1985); *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d)

d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance. Reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu à bon droit que le caractère équitable et raisonnable de l'arrangement avait été démontré. [157] [161] [163-164]

Jurisprudence

Arrêts mentionnés : *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, [2004] 3 R.C.S. 461, 2004 CSC 68; *Bradbury c. English Sewing Cotton Co.*, [1923] A.C. 744; *Zwicker c. Stanbury*, [1953] 2 R.C.S. 438; *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015; *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331, 2007 CSC 44; *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205; *Scottish Co-operative Wholesale Society Ltd. c. Meyer*, [1959] A.C. 324; *Diligenti c. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36; *Stech c. Davies*, [1987] 5 W.W.R. 563; *First Edmonton Place Ltd. c. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, mod. par (1989), 45 B.L.R. 110; *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113; *Westfair Foods Ltd. c. Watt* (1991), 79 D.L.R. (4th) 48; *Wright c. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368; *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360; *Main c. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200; *GATX Corp. c. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251; *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275; *SCI Systems Inc. c. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300, mod. par (1998), 110 O.A.C. 160; *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 200 D.L.R. (4th) 289, autorisation de pourvoi refusée, [2002] 1 R.C.S. vi; *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718; *Gibbons c. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *Alberta Treasury Branches c. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294, conf. par (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194; *Lyall c. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304; *Tsui c. International Capital Corp.*, [1993] 4 W.W.R. 613, conf. par (1993), 113 Sask. R. 3; *Deutsche Bank Canada c. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302; *Themadel Foundation c. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7, mod. par (1998), 38 O.R. (3d) 749; *Revlon, Inc. c. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (1986); *Unocal Corp. c. Mesa Petroleum Co.*, 493 A.2d

435; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069; *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] Q.J. No. 16158 (QL), 2007 QCCS 6830; *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212; *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163; *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789; *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL); *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213; *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173; *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496, aff'd (2004), 42 B.L.R. (3d) 34.

Statutes and Regulations Cited

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 102(1), 122, 192, 239, 241.

Companies Act Amending Act, 1923, S.C. 1923, c. 39, s. 4.

Authors Cited

Canada. Consumer and Corporate Affairs Canada. *Detailed background paper for an Act to amend the Canada Business Corporations Act*. Ottawa: Consumer and Corporate Affairs Canada, 1977.

Canada. Industry Canada. Corporations Canada. *Policy concerning Arrangements Under Section 192 of the CBCA: Policy Statement 15.1*. Ottawa: Industry Canada, November 7, 2003 (online: www.strategis.ic.gc.ca/epic/site/cd-dgc.nsf/print-en/cs01073e.html).

Dickerson, Robert W. V., John L. Howard and Leon Getz. *Proposals for a New Business Corporations Law for Canada*, vol. I. Ottawa: Information Canada, 1971.

Koehnen, Markus. *Oppression and Related Remedies*. Toronto: Thomson/Carswell, 2004.

Nicholls, Christopher C. *Mergers, Acquisitions, and Other Changes of Corporate Control*. Toronto: Irwin Law, 2007.

Shapira, G. "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134.

Veasey, E. Norman, with Christine T. Di Guglielmo. "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399.

APPEALS and CROSS-APPEALS from judgments of the Quebec Court of Appeal (Robert C.J.Q. and Otis, Nuss, Pelletier and Dalphond JJ.A.), [2008]

946 (1985); *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435; *Pacifica Papers Inc. c. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069; *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] J.Q. nº 16158 (QL), 2007 QCCS 6830; *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212; *Cinar Corp. c. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163; *PetroKazakhstan Inc. c. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789; *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL); *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213; *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173; *UPM-Kymmene Corp. c. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496, conf. par (2004), 42 B.L.R. (3d) 34.

Lois et règlements cités

Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 102(1), 122, 192, 239, 241.

Loi de 1923 modifiant la Loi des compagnies, S.C. 1923, ch. 39, art. 4.

Doctrine citée

Canada. Consommation et Corporations Canada. *Exposé détaillé d'une Loi modifiant la Loi sur les corporations commerciales canadiennes*. Ottawa : Consommation et Corporations Canada, 1977.

Canada. Industrie Canada. Corporations Canada. *Politique à l'égard des arrangements pris en vertu de l'article 192 de la LCSA : Énoncé de politique 15.1*. Ottawa : Industrie Canada, 7 novembre 2003 (en ligne : www.strategis.ic.gc.ca/epic/site/cd-dgc.nsf/print-fr/cs01073f.html).

Dickerson, Robert W. V., John L. Howard et Leon Getz. *Propositions pour un nouveau droit des corporations commerciales canadiennes*, vol. I. Ottawa : Information Canada, 1971.

Koehnen, Markus. *Oppression and Related Remedies*. Toronto : Thomson/Carswell, 2004.

Nicholls, Christopher C. *Mergers, Acquisitions, and Other Changes of Corporate Control*. Toronto : Irwin Law, 2007.

Shapira, G. « Minority Shareholders' Protection — Recent Developments » (1982), 10 *N.Z. Univ. L. Rev.* 134.

Veasey, E. Norman, with Christine T. Di Guglielmo. « What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments » (2005), 153 *U. Pa. L. Rev.* 1399.

POURVOIS PRINCIPAUX et POURVOIS INCIDENTS contre des arrêts de la Cour d'appel du Québec (le juge en chef Robert et les juges Otis,

R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] Q.J. No. 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] Q.J. No. 4170 (QL), 2008 QCCA 930; [2008] Q.J. No. 4171 (QL), 2008 QCCA 931; [2008] Q.J. No. 4172 (QL), 2008 QCCA 932; [2008] Q.J. No. 4174 (QL), 2008 QCCA 933; [2008] Q.J. No. 4175 (QL), 2008 QCCA 934, setting aside decisions by Silcoff J., [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] Q.J. No. 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] Q.J. No. 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] Q.J. No. 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] Q.J. No. 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] Q.J. No. 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Appeals allowed and cross-appeals dismissed.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* and *Steve Tenai*, for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* and *Christopher L. Richter*, for the appellant/respondent on cross-appeals 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* and *Mark Meland*, for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* and *Erin Cowling*, for the respondent/appellant on cross-appeals Group of 1997 Debentureholders.

Written submissions only by *Robert Tessier* and *Ronald Auclair*, for the respondent Computershare Trust Company of Canada.

Christian S. Tacit, for the intervener Catalyst Asset Management Inc.

Nuss, Pelletier et Dalphond), [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] J.Q. nº 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] J.Q. nº 4170 (QL), 2008 QCCA 930; [2008] J.Q. nº 4171 (QL), 2008 QCCA 931; [2008] J.Q. nº 4172 (QL), 2008 QCCA 932; [2008] J.Q. nº 4174 (QL), 2008 QCCA 933; [2008] J.Q. nº 4175 (QL), 2008 QCCA 934, qui ont infirmé des décisions du juge Silcoff, [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] J.Q. nº 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] J.Q. nº 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] J.Q. nº 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] J.Q. nº 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] J.Q. nº 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Pourvois principaux accueillis et pourvois incidents rejetés.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* et *Steve Tenai*, pour les appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* et *Christopher L. Richter*, pour l'appelante/intimée aux pourvois incidents 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* et *Mark Meland*, pour les intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* et *Erin Cowling*, pour l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997.

Argumentation écrite seulement par *Robert Tessier* et *Ronald Auclair*, pour l'intimée la Société de fiducie Computershare du Canada.

Christian S. Tacit, pour l'intervenante Catalyst Asset Management Inc.

Raynold Langlois, *Q.C.*, and *Gerald Apostolatos*, for the intervener Matthew Stewart.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board ("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

[2] The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

[3] On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

Raynold Langlois, *c.r.*, et *Gerald Apostolatos*, pour l'intervenant Matthew Stewart.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Les pourvois ont pour origine une offre d'acquisition visant la totalité des actions d'une grande société de télécommunications, BCE Inc. (« BCE »), offre émanant d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario (« RREO ») et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, filiale en propriété exclusive de BCE. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations. Lors de l'examen de la demande d'approbation d'un arrangement exigée par l'art. 192 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« *LCSA* »), ils ont fait valoir que l'arrangement ne devait pas être jugé équitable. Ils ont également plaidé qu'il constituait un abus de leurs droits au sens de l'art. 241 de la *LCSA*.

[2] Le juge Silcoff de la Cour supérieure du Québec a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus. La Cour d'appel du Québec a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Elle n'a donc pas jugé utile d'examiner la demande de redressement pour abus.

[3] Le 20 juin 2008, notre Cour a accueilli les pourvois interjetés contre le refus de la Cour d'appel d'approuver l'arrangement et elle a rejeté deux pourvois incidents formés à l'encontre du rejet des demandes de redressement pour abus, avec motifs à suivre. Voici maintenant ces motifs.

II. Facts

[4] At issue is a plan of arrangement valued at approximately $52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

[5] Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

[6] At the time relevant to these proceedings, Bell Canada had $7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

[7] Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance

II. Les faits

[4] Le litige porte sur un plan d'arrangement d'une valeur approximative de 52 milliards de dollars concernant l'achat des actions de BCE au moyen d'une acquisition par emprunt. Un groupe de détenteurs de débentures, composé principalement d'institutions financières, s'est opposé à l'arrangement. Son principal argument est que l'arrangement ferait fléchir la valeur marchande de leurs débentures de 20 p. 100 en moyenne, tout en permettant aux actionnaires de toucher une prime d'environ 40 p. 100 par rapport au cours des actions de BCE.

[5] Bell Canada a été constituée en société en 1880 par une loi spéciale du Parlement du Canada. Elle a ensuite été prorogée en vertu de la *LCSA*. BCE est une société de portefeuille de gestion qui a été constituée en 1970, puis prorogée en vertu de la *LCSA* en 1979. Bell Canada est devenue une filiale en propriété exclusive de BCE en 1983, conformément à un plan d'arrangement en vertu duquel les actionnaires de Bell Canada ont reçu des actions de BCE en échange de leurs actions. BCE et Bell Canada sont des entités juridiques distinctes possédant chacune leurs propres chartes, statuts constitutifs et règlements administratifs. Depuis janvier 2003, elles ont les mêmes administrateurs et quelques hauts dirigeants en commun.

[6] À l'époque pertinente pour l'examen des pourvois, Bell Canada avait une dette à long terme de 7,2 milliards de dollars composée de débentures émises en vertu de trois actes de fiducie établis respectivement en 1976, 1996 et 1997. Ces actes ne comportent aucune disposition concernant le changement de contrôle ou la cote financière et ils autorisent expressément Bell Canada à contracter ou à garantir de nouvelles dettes sous réserve de certaines restrictions.

[7] Les débentures de Bell Canada étaient considérées comme des placements sûrs par les investisseurs et, jusqu'à la proposition d'acquisition par emprunt, elles étaient cotées admissibles pour des placements. Les détenteurs de débentures sont des institutions financières, des caisses de retraite et

companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

[8] A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

[9] Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

[10] In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with

des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada. Ce sont des participants d'envergure dans les marchés de la dette, qui ont une expérience approfondie et une connaissance historique des marchés financiers.

[8] Le secteur d'activité de BCE a connu des changements d'ordre technologique, réglementaire et concurrentiel qui en ont profondément modifié le cadre. Auparavant très réglementée et axée sur la téléphonie classique par ligne téléphonique, l'industrie des télécommunications obéit aujourd'hui principalement aux forces du marché et se caractérise par l'augmentation continue des participants, l'arrivée de nouveaux concurrents et des attentes croissantes en matière de services aux consommateurs. Pour s'ajuster à ces changements, BCE a établi un nouveau plan d'entreprise mettant l'accent sur son activité centrale, les télécommunications, et prévoyant l'abandon de sa participation dans des entreprises non liées à ce secteur. Ce plan, toutefois, n'a pas donné les résultats escomptés, de sorte que les gains des actionnaires de BCE sont demeurés beaucoup moindres que ceux des actionnaires de ses concurrents.

[9] En outre, à la fin de 2006, BCE disposait d'un important flux de trésorerie et ses indicateurs financiers étaient très positifs, caractéristiques qui en faisaient une cible toute désignée pour une acquisition aux yeux des analystes financiers. Au mois de novembre 2006, BCE a appris que Kohlberg Kravis Roberts & Co. (« KKR »), une société américaine gérant un fonds privé d'investissement, pouvait être intéressée par une transaction visant BCE. Monsieur Michael Sabia, président et chef de la direction de BCE, a pris contact avec KKR pour lui indiquer que BCE n'était alors pas intéressée par une telle transaction.

[10] Au mois de février 2007, la rumeur que KKR et l'Office d'investissement du régime de pensions du Canada préparaient le montage financier d'une offre d'achat de BCE a recommencé à courir. Peu après, d'autres rumeurs se sont propagées, selon lesquelles une société bancaire d'investissement assistait le RREO relativement à une éventuelle

BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

[11] On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

[12] On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

[13] Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

[14] In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its

transaction visant BCE. Après avoir rencontré le conseil d'administration de BCE (« Conseil d'administration »), M. Sabia a communiqué avec les représentants de KKR et avec ceux du RREO et leur a réitéré que BCE n'était pas intéressée à une « opération de fermeture » parce que BCE avait pour objectif de créer une valeur actionnariale par la réalisation de son plan d'entreprise de 2007.

[11] Le 29 mars 2007, à la suite de la parution à la une du *Globe and Mail* d'un article faisant incorrectement état de discussions entre BCE et un consortium constitué de KKR et du RREO, BCE a publié un communiqué de presse dans lequel elle affirmait qu'aucune discussion n'était en cours avec des fonds privés d'investissement au sujet d'une « opération de fermeture » de BCE.

[12] Le 9 avril 2007, le RREO a déposé un formulaire 13D auprès de la Securities and Exchange Commission des États-Unis, dans lequel il indiquait que, de passive, sa participation comme actionnaire de BCE devenait active. Le dépôt de ce formulaire est venu renforcer l'hypothèse, véhiculée par les médias, de la transformation possible de BCE en société fermée.

[13] Devant la recrudescence des conjectures et la « mise en jeu » de BCE résultant du dépôt du formulaire 13D par le RREO, le Conseil d'administration a convoqué ses conseillers juridiques et financiers afin d'examiner différentes options stratégiques. Il en est venu à la conclusion qu'il était dans l'intérêt de BCE et de ses actionnaires de bénéficier de la concurrence entre plusieurs groupes soumissionnaires et de parer au risque qu'un groupe soumissionnaire mobilise à lui seul une telle part des prêts et des capitaux disponibles qu'il empêcherait les groupes concurrents potentiels de participer efficacement au processus d'enchères.

[14] Dans un communiqué de presse daté du 17 avril 2007, BCE a annoncé qu'elle examinait les options stratégiques qui s'offraient à elle en vue d'améliorer davantage la valeur actionnariale. Le même jour, elle a mis sur pied un comité de surveillance stratégique (« CSS »), dont aucun des

mandate was, notably, to set up and supervise the auction process.

[15] Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

[16] On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

[17] Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. (the "Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from $42.25 to $42.75.

membres n'avait déjà fait partie de la direction de BCE. Le mandat du CSS consistait notamment à mettre en marche et à surveiller le processus d'enchères.

[15] À la suite du communiqué de presse du 17 avril, plusieurs détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant la possibilité d'une acquisition par emprunt. Ils voulaient recevoir l'assurance que le Conseil d'administration tiendrait compte de leurs intérêts. BCE leur a répondu par écrit qu'elle avait l'intention de respecter les dispositions contractuelles des actes de fiducie.

[16] Le 13 juin 2007, BCE a communiqué aux soumissionnaires potentiels les règles de soumission des propositions ainsi qu'une ébauche générale d'entente définitive. Elle les a informés que, lorsqu'elle étudierait les offres, elle tiendrait compte de l'incidence du mécanisme de financement proposé sur BCE et sur les détenteurs de débentures de Bell Canada et, en particulier, du fait que leurs offres respectent ou non les droits contractuels que les actes de fiducie conféraient aux détenteurs de débentures.

[17] Trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada. Les trois offres auraient probablement pour effet d'abaisser la cote des débentures au-dessous de celle requise pour qu'elles constituent un placement admissible. L'offre initiale présentée par l'appelante 6796508 Canada Inc. (l'« Acquéreur »), une société constituée par le RREO, et des membres du groupe de Providence Equity Partners Inc. et de Madison Dearborn Partners LLC, prévoyait une fusion de Bell Canada qui aurait déclenché l'exercice des droits de vote des détenteurs de débentures en vertu des actes de fiducie. Le Conseil d'administration a informé l'Acquéreur que ce projet de fusion rendait son offre moins attrayante. L'Acquéreur a donc présenté une nouvelle offre dans laquelle il proposait une structure différente pour la transaction qui n'impliquait pas de fusion de Bell Canada. De plus, il haussait à 42,75 $ le prix de 42,25 $ initialement offert pour chaque action.

[18] The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

[19] On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

[20] Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is $42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

[21] As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

[18] Après avoir étudié les trois offres, le Conseil d'administration a conclu, suivant la recommandation du CSS, que l'offre révisée de l'Acquéreur servait les intérêts de BCE et des actionnaires de BCE. Pour évaluer le caractère équitable de la contrepartie qui serait versée aux actionnaires selon cette offre, le Conseil d'administration et le CSS ont sollicité l'avis de plusieurs conseillers financiers réputés. Par ailleurs, l'Acquéreur a accepté de prêter son concours au Conseil d'administration pour l'obtention d'un certificat de solvabilité attestant que BCE demeurerait solvable (et serait donc en mesure de respecter ses obligations une fois la transaction achevée). Le Conseil d'administration n'a pas sollicité l'avis d'experts sur le caractère équitable de la transaction pour les détenteurs de débentures, estimant que l'arrangement ne visait pas leurs droits.

[19] Le 30 juin 2007, l'Acquéreur et BCE ont conclu une entente définitive. Le 21 septembre suivant, les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100.

[20] Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE au prix de 42,75 $ l'action ordinaire, ce qui représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions en date du 28 mars 2007. Le capital requis pour la transaction s'élève à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. Enfin, l'Acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

[21] L'annonce de cette entente a entraîné une baisse de la cote de crédit des débentures de sorte que, lors du procès, elles n'étaient plus considérées comme des placements admissibles. Du point de vue des détenteurs de débentures, cette décote pose problème à deux égards. Premièrement, elle a entraîné une diminution de la valeur des débentures de l'ordre d'environ 20 p. 100 en moyenne. Deuxièmement, elle risque d'obliger les détenteurs de débentures qui sont assujettis à des restrictions concernant la cote de crédit des titres qu'ils détiennent à vendre leurs débentures à perte.

[22] The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us: (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

III. Judicial History

[23] The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests

[22] En première instance, les détenteurs de débentures ont invoqué plusieurs motifs d'opposition à l'arrangement. Ils ont d'abord invoqué la disposition de la *LCSA* applicable en cas d'abus, l'art. 241. Ils ont ensuite contesté la demande d'approbation de l'arrangement exigée par l'art. 192 de la *LCSA* en alléguant que l'arrangement n'était pas « équitable et raisonnable » en raison de ses effets préjudiciables sur leurs intérêts financiers. Enfin, ils ont présenté des demandes de jugement déclaratoire fondées sur les actes de fiducie, sur lesquelles la Cour n'est pas appelée à se prononcer : (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

III. Historique judiciaire

[23] Le juge de première instance a examiné les demandes de redressement pour abus à la fois contre Bell Canada et contre BCE, puisque l'art. 241 vise la situation provoquée par « la société ou l'une des personnes morales de son groupe ». Il a rejeté ces recours parce que, selon lui, la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue : (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] Pour parvenir à ces conclusions, le juge a considéré que l'art. 122 de la *LCSA* imposait aux administrateurs de BCE l'obligation fiduciaire d'agir au mieux des intérêts de la société. Selon lui, bien que les intérêts de la société ne doivent pas être confondus avec ceux des actionnaires ou d'autres parties intéressées, le droit des sociétés reconnaît l'existence de différences fondamentales entre les actionnaires et les détenteurs de titres de créance. À son avis, ces différences ont une incidence sur le contenu de l'obligation fiduciaire des administrateurs. Ainsi, leur devoir d'agir au mieux des intérêts de la société pourrait les obliger à

of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

[25] The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

[26] Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA*: (2008), 43 B.L.R. (4th) 1, 2008 QCCS

approuver des transactions qui, tout en servant les intérêts de la société, privilégient une partie ou la totalité des actionnaires au détriment d'autres parties intéressées. Le juge a aussi indiqué que, suivant la règle de l'appréciation commerciale, les tribunaux canadiens ont tendance à faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi et dans l'exécution des fonctions que les actionnaires leur ont confiées en les élisant.

[25] Le juge de première instance a statué que les attentes raisonnables des détenteurs de débentures doivent être évaluées objectivement et qu'elles doivent, à moins de motifs impérieux, découler des actes de fiducie et des prospectus d'émission des débentures. Les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles n'ont été d'aucun secours pour les détenteurs de débentures, car ces déclarations étaient accompagnées de mises en garde, réitérées dans les prospectus d'émission des débentures, qui excluaient toute attente quant au maintien indéfini de cette politique. En outre, le fait que les détenteurs de débentures auraient pu se protéger contractuellement contre les risques associés à un changement de contrôle en négociant des clauses de protection rendait leurs prétendues attentes déraisonnables. Le fait que la transaction serait profitable pour les actionnaires alors qu'elle désavantagerait les détenteurs de débentures ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que leurs auteurs étaient disposés à traiter les détenteurs de débentures différemment. Par conséquent, la réalisation de certains risques par suite des décisions prises par les administrateurs en conformité avec leur obligation fiduciaire envers la société ne constituait ni un abus des droits des détenteurs de débentures ni une omission injuste de tenir compte de leurs intérêts.

[26] Après avoir rejeté les demandes de redressement pour abus, le juge de première instance a examiné la demande d'approbation de la transaction exigée par l'art. 192 de la *LCSA* : (2008), 43 B.L.R.

905. He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

(4th) 1, 2008 QCCS 905. Il a refusé aux détenteurs de débentures le droit de voter sur l'arrangement, estimant que celui-ci ne compromettait pas leurs droits et qu'il serait injuste de leur permettre en fait d'opposer leur veto au vote des actionnaires. Toutefois, pour déterminer si l'arrangement était équitable et raisonnable — la question déterminante pour l'octroi de l'approbation — le juge a examiné le caractère équitable de la transaction à l'égard à la fois des actionnaires et des détenteurs de débentures, et il a conclu que l'arrangement était équitable et raisonnable. Il a pris en compte la nécessité de l'arrangement pour la continuité des activités de Bell Canada; le fait que le Conseil d'administration — constitué presque entièrement d'administrateurs indépendants — avait déterminé que l'arrangement était équitable et raisonnable et qu'il servait au mieux les intérêts de BCE et des actionnaires; l'approbation de l'arrangement par plus de 97 p. 100 des actionnaires; le fait que l'arrangement était l'aboutissement d'un processus rigoureux d'analyse stratégique et d'enchères; l'aide de conseillers juridiques et financiers renommés reçue par le Conseil d'administration pendant tout le processus; l'absence d'offre supérieure; et le fait que l'offre ne modifiait ni ne visait les droits contractuels des détenteurs de débentures. Bien que l'offre modifie les intérêts financiers des détenteurs de débentures, au sens où l'accroissement de l'endettement ferait fléchir la valeur marchande de leurs titres, leurs droits contractuels demeuraient intacts. Le juge de première instance a souligné que les détenteurs de débentures auraient pu se protéger contractuellement contre ce risque, mais qu'ils ne l'avaient pas fait. Il a conclu dans l'ensemble que, compte tenu de tous les facteurs pertinents, l'arrangement était équitable et raisonnable et devait être approuvé.

[27] The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, the Court of Appeal found that the directors were required to consider

[27] La Cour d'appel a accueilli les appels, jugeant que BCE n'avait pas démontré que la transaction était équitable et raisonnable pour les détenteurs de débentures, de sorte qu'elle ne satisfaisait pas au critère d'approbation d'un arrangement en vertu de l'art. 192. S'appuyant sur nos motifs dans l'affaire *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, [2004] 3 R.C.S. 461, 2004 CSC 68, elle a conclu que les administrateurs avaient l'obligation

the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

[29] BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

IV. Issues

[30] The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan

d'examiner les intérêts non contractuels des détenteurs de débentures. À son avis, les déclarations que Bell Canada avaient faites au cours des années pouvaient avoir créé des attentes raisonnables qui s'ajoutaient aux droits contractuels des détenteurs de débentures. Les administrateurs n'avaient donc pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. Comme cet examen n'avait pas été fait, BCE ne s'était pas acquittée de son obligation d'établir le caractère équitable et raisonnable de l'arrangement pour l'application de l'art. 192. La Cour d'appel a donc infirmé l'ordonnance d'approbation rendue par le juge de première instance : (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] La Cour d'appel a jugé inutile d'examiner les demandes de redressement pour abus fondées sur l'art. 241, estimant que le rejet de la demande d'approbation visée à l'art. 192 en scellait en fait le sort. Selon elle, lorsqu'une demande d'approbation présentée en vertu de l'art. 192 est contestée, les détenteurs de valeurs mobilières touchés n'ont généralement nullement besoin de présenter une demande de redressement pour abus sous le régime de l'art. 241.

[29] BCE et Bell Canada se pourvoient devant notre Cour, soutenant que la Cour d'appel a infirmé à tort l'approbation du plan d'arrangement par le juge de première instance. Bien qu'ils aient officiellement formé un pourvoi incident fondé sur l'art. 241, les détenteurs de débentures font valoir que la Cour d'appel a statué à bon droit sur leurs prétentions sous le régime de l'art. 192, ce qui rendait théoriques leurs appels fondés sur l'art. 241.

IV. Les questions en litige

[30] En résumé, la Cour doit décider si la Cour d'appel a commis une erreur en rejetant les demandes de redressement pour abus des détenteurs de débentures fondée sur l'art. 241 et en infirmant

of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

[31] In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

[32] Accordingly, these reasons will consider:

(1) the rights, obligations and remedies under the *CBCA* in overview;

(2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;

(3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

[33] We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the

l'ordonnance d'approbation du plan d'arrangement prononcée par la Cour supérieure en vertu de l'art. 192. Pour ce faire, la Cour doit déterminer quelle preuve doit être faite pour établir l'existence d'un abus des droits des détenteurs de débentures dans le contexte du changement de contrôle d'une société et comment le juge saisi d'une demande d'approbation d'un arrangement en vertu de l'art. 192 de la *LCSA* doit traiter des prétentions de la nature de celles formulées en l'espèce par les détenteurs de débentures. Les présents motifs traitent de ces deux questions.

[31] Pour situer ces questions dans le contexte du droit canadien des sociétés, il peut être utile de décrire d'abord les recours que peuvent exercer les actionnaires et les autres parties intéressées sous le régime de la *LCSA* devant la perspective d'un changement de contrôle de la société.

[32] Par conséquent, les présents motifs comportent :

(1) un aperçu des droits, obligations et recours prévus par la *LCSA*;

(2) un examen du droit des détenteurs de débentures à un redressement en cas d'abus en application de l'art. 241;

(3) une analyse du droit des détenteurs de débentures à un redressement dans le contexte de l'approbation d'un arrangement exigée par l'art. 192.

[33] Il n'est pas nécessaire pour trancher les pourvois de faire une distinction entre le comportement des administrateurs de BCE, la société de portefeuille, et celui des administrateurs de Bell Canada. Les mêmes administrateurs siégeaient aux conseils d'administration de l'une et l'autre de ces sociétés. Bien que la demande de redressement pour abus ait été dirigée à la fois contre Bell Canada et contre BCE, les juridictions inférieures ont tenu compte de toutes les circonstances dans lesquelles les administrateurs ont été appelés à prendre leurs décisions, ce qui incluait les obligations de Bell Canada envers ses détenteurs de débentures. Elles n'ont pas conclu que les administrateurs de BCE et de Bell

distinct corporate character of the two entities does not figure in our analysis.

V. Analysis

A. *Overview of Rights, Obligations and Remedies Under the CBCA*

[34] An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438. While the corporation is ongoing, shares confer no right to its underlying assets.

[35] A share "is not an isolated piece of property . . . [but] a 'bundle' of interrelated rights and liabilities": *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

[36] The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(*a*) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(*b*) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

Canada auraient dû prendre des décisions différentes relativement aux deux sociétés. Par conséquent, le caractère distinct des deux entités ne sera pas pris en considération dans notre analyse.

V. Analyse

A. *Aperçu des droits, obligations et recours prévus par la LCSA*

[34] Une composante essentielle d'une société est son capital social, qui est fractionné en actions : *Bradbury c. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), p. 767; *Zwicker c. Stanbury*, [1953] 2 R.C.S. 438. Tant que la société continue d'exister, les actions ne confèrent aucun droit sur ses éléments d'actifs.

[35] Une action « n'est pas un bien pris isolément [. . .] [mais] un "ensemble" de droits et d'obligations étroitement liés entre eux » : *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, p. 1025, le juge La Forest. Ces droits comprennent le droit à une part proportionnelle des éléments d'actif de la société lors de sa liquidation et un droit de regard sur la façon dont le conseil d'administration gère la société, qui s'exprime par l'exercice du droit de vote lors des assemblées des actionnaires.

[36] Les administrateurs sont responsables de la gouvernance de la société. À ce titre, ils doivent s'acquitter de deux obligations : leur obligation fiduciaire envers la société prévue à l'al. 122(1)*a*) (l'obligation fiduciaire) et l'obligation d'agir avec le soin, la diligence et la compétence dont ferait preuve une personne prudente en pareilles circonstances, prévue à l'al. 122(1)*b*) (l'obligation de diligence). Cette deuxième obligation n'est pas en cause en l'espèce, car on ne reproche pas aux administrateurs d'avoir manqué à leur obligation de diligence. L'obligation fiduciaire des administrateurs envers la société est toutefois en cause, plus particulièrement en ce qui concerne l'une de ses composantes, soit l'obligation de « traitement équitable » qui, comme on le verra, est fondamentale pour ce qui est des attentes raisonnables des parties intéressées qui présentent une demande de redressement pour abus.

[37] The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

[38] The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

[39] In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

[37] L'obligation fiduciaire des administrateurs envers la société tire son origine de la common law. Elle leur impose d'agir au mieux des intérêts de la société. Souvent les intérêts des actionnaires et des parties intéressées concordent avec ceux de la société. Toutefois, lorsque ce n'est pas le cas, l'obligation des administrateurs est claire : elle est envers la société (*Magasins à rayons Peoples*).

[38] L'obligation fiduciaire des administrateurs est un concept large et contextuel. Elle ne se limite pas à la valeur des actions ou au profit à court terme. Dans le contexte de la continuité de l'entreprise, cette obligation vise les intérêts à long terme de la société. Son contenu varie selon la situation. Elle exige à tous le moins des administrateurs qu'ils veillent à ce que la société s'acquitte de ses obligations légales mais, selon le contexte, elle peut aussi englober d'autres exigences. Quoi qu'il en soit, l'obligation fiduciaire des administrateurs est de nature impérative; ils sont tenus d'agir au mieux des intérêts de la société.

[39] Selon l'arrêt *Magasins à rayons Peoples* de notre Cour, bien que les administrateurs *doivent* agir au mieux des intérêts de la société, il peut également être opportun, *sans être obligatoire*, qu'ils tiennent compte de l'effet des décisions concernant la société sur l'actionnariat ou sur un groupe particuliers de parties intéressées. Comme l'ont indiqué les juges Major et Deschamps au par. 42 :

> Nous considérons qu'il est juste d'affirmer en droit que, pour déterminer s'il agit au mieux des intérêts de la société, il peut être légitime pour le conseil d'administration, vu l'ensemble des circonstances dans un cas donné, de tenir compte notamment des intérêts des actionnaires, des employés, des fournisseurs, des créanciers, des consommateurs, des gouvernements et de l'environnement.

On verra plus loin que la jurisprudence sur les recours en cas d'abus a clarifié davantage le contenu de l'obligation fiduciaire des administrateurs quant à l'éventail des intérêts qu'ils doivent prendre en compte pour déterminer ce qui est au mieux des intérêts de la société, en agissant de façon équitable et responsable.

[40] In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[40] En déterminant ce qui sert au mieux les intérêts de la société, les administrateurs peuvent examiner notamment les intérêts des actionnaires, des employés, des créanciers, des consommateurs, des gouvernements et de l'environnement. Les tribunaux doivent faire preuve de la retenue voulue à l'égard de l'appréciation commerciale des administrateurs qui tiennent compte de ces intérêts connexes, comme le veut la « règle de l'appréciation commerciale ». Cette règle appelle les tribunaux à respecter une décision commerciale, pourvu qu'elle s'inscrive dans un éventail de solutions raisonnables possibles : voir *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331, 2007 CSC 44. Elle rend compte du fait que les administrateurs qui, aux termes du par. 102(1) de la *LCSA*, ont pour fonction de gérer les activités commerciales et les affaires internes de la société, sont souvent plus à même de déterminer ce qui sert au mieux ses intérêts. Cela vaut tant pour les décisions touchant les intérêts des parties intéressées que pour d'autres décisions relevant des administrateurs.

[41] Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

[41] Normalement, seul le bénéficiaire d'une obligation fiduciaire peut en réclamer l'exécution. Toutefois, dans le contexte du droit des sociétés, suivre cette règle se révélerait souvent illusoire. Il est en effet invraisemblable que les administrateurs qui contrôlent la société intentent contre eux-mêmes une action pour manquement à leur propre obligation fiduciaire. Les actionnaires ne peuvent agir à la place de la société. Leur seul pouvoir réside dans leur droit de regard sur le comportement des administrateurs qui s'exprime par l'exercice de leur droit de vote aux assemblées des actionnaires. D'autres parties intéressées n'ont même pas ce pouvoir.

[42] To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

[42] Pour pallier ces difficultés, la common law a élaboré des recours spéciaux visant à protéger les intérêts des actionnaires et des parties intéressées. La *LCSA* a maintenu, modifié et complété ces recours.

[43] The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling

[43] Le premier recours prévu par la *LCSA* est l'action oblique, décrite à l'art. 239, qui permet aux parties intéressées de forcer les administrateurs récalcitrants à s'acquitter de leurs obligations

to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

[44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

[45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

[46] Additional "remedial" provisions are found in provisions of the *CBCA* providing for court

envers la société. Le plaignant peut, avec l'autorisation du tribunal, intenter une action oblique au nom et pour le compte de la société ou de l'une de ses filiales (ou y intervenir) pour faire respecter un droit de la société, et notamment un droit corrélatif à une obligation des administrateurs envers la société. (L'obligation d'obtenir une autorisation vise à prévenir les actions frivoles ou vexatoires ainsi que les actions qui, même intentées de bonne foi, ne servent pas les intérêts de la société.)

[44] Deuxièmement, les administrateurs peuvent faire l'objet d'une action civile pour manquement à leur obligation de diligence. Comme il en a été fait mention, l'al. 122(1)*b*) de la *LCSA* oblige les administrateurs et les dirigeants d'une société à agir « avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente ». Cette obligation, à la différence de l'obligation fiduciaire énoncée à l'al. 122(1)*a*), n'est pas uniquement envers la société. Elle peut donc engager la responsabilité des administrateurs envers les autres parties intéressées, conformément aux principes régissant la responsabilité délictuelle et extracontractuelle : *Magasins à rayons Peoples*. L'alinéa 122(1)*b*) ne peut servir de fondement indépendant à un recours, mais les tribunaux peuvent s'en inspirer, conformément aux principes énoncés dans *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, pour définir la norme de conduite à laquelle on peut raisonnablement s'attendre.

[45] Un troisième recours de common law codifié par la *LCSA* est la demande de redressement pour abus prévue à l'art. 241. Contrairement à l'action oblique, qui a pour objet le respect d'un droit de la société proprement dite, la demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity des parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours est ouvert à un large éventail de parties intéressées — détenteurs de valeurs mobilières, créanciers, administrateurs et dirigeants.

[46] Enfin, les dispositions de la *LCSA* qui exigent l'obtention d'une approbation judiciaire

approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

[47] Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims

dans certains cas ont aussi une vocation réparatrice. L'article 192, relatif aux arrangements, en est un exemple. Bien que cet article ne puisse pas être décrit comme une disposition qui établit un recours à proprement parler, il comporte des aspects qui s'y apparentent. Il vise les situations où une société envisage des changements fondamentaux qui modifient les droits d'une partie intéressée. La *LCSA* prévoit que de tels arrangements doivent être approuvés par le tribunal. Contrairement à l'action civile et à la demande de redressement pour abus, qui mettent l'accent sur le comportement des administrateurs, l'examen prévu à l'art. 192 exige simplement que le tribunal qui approuve un plan d'arrangement soit convaincu que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable. Si la société ne s'acquitte pas de son fardeau de prouver ces éléments, sa demande d'approbation sera rejetée et elle ne pourra procéder au changement proposé. Pour décider s'il approuvera l'arrangement, le tribunal entend les détenteurs de valeurs mobilières dont les droits sont visés par l'arrangement et qui s'y opposent, ce qui leur donne la possibilité de faire valoir leurs objections au changement proposé.

[47] Deux de ces recours sont en cause en l'espèce : la demande de redressement pour abus et l'approbation d'un arrangement sous le régime de l'art. 192. Le juge de première instance a appliqué des considérations distinctes à chacun de ces recours, et conclu que les détenteurs de débentures n'avaient établi le bien-fondé ni de l'un ni de l'autre. La Cour d'appel a considéré, au contraire, que les recours se chevauchaient de façon importante, en ce qu'ils posaient tous deux la question de savoir si les administrateurs avaient suffisamment tenu compte des attentes des détenteurs de débentures. Ayant conclu, à cet égard, que les exigences de l'art. 192 n'avaient pas été respectées, elle a considéré la demande de redressement pour abus comme théorique. La Cour ne souscrit pas à ce raisonnement, comme elle l'expliquera plus loin. À notre avis, la demande de redressement pour abus et l'approbation judiciaire d'une modification

for oppression and the s. 192 application for approval.

[48] The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

[49] Against this background, we turn to a more detailed consideration of the claims.

B. *The Section 241 Oppression Remedy*

[50] The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*.

[51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

[52] We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. Par conséquent, la Cour estime nécessaire d'examiner tant les demandes de redressement pour abus que la demande d'approbation fondée sur l'art. 192.

[48] Les détenteurs de débentures ont formé officiellement un pourvoi incident relativement à la demande de redressement pour abus. Toutefois, la Cour d'appel ne s'étant pas prononcée sur ce recours, ils n'ont pas présenté d'argumentation distincte à cet égard devant notre Cour. Néanmoins, comme certains aspects de leur position sont traités à bon droit dans le cadre de l'analyse de la demande de redressement pour abus en vertu de l'art. 241, ils seront examinés dans les présents motifs.

[49] À la lumière de ce qui précède, la Cour passe maintenant à l'examen plus approfondi des demandes.

B. *La demande de redressement pour abus prévue à l'art. 241*

[50] Les détenteurs de débentures soutiennent que les administrateurs ont agi de façon abusive en l'espèce en approuvant la vente de BCE, contrevenant ainsi à l'art. 241 de la *LCSA*.

[51] Les détenteurs de valeurs mobilières d'une société ou de l'une des personnes morales de son groupe appartiennent à la catégorie des personnes qui peuvent être autorisées à demander un redressement pour abus en vertu de l'art. 241 de la *LCSA*. Le juge de première instance a autorisé les détenteurs de débentures à présenter une telle demande, mais il a conclu en bout de ligne qu'ils n'en avaient pas établi le bien-fondé. Il faut maintenant déterminer si le juge de première instance a commis une erreur en rejetant cette demande.

[52] La Cour décrira d'abord la preuve exigée pour que soit établi le droit à un redressement en vertu de l'art. 241, puis elle examinera le comportement visé à la lumière de ces exigences.

(1) The Law

[53] Section 241(2) provides that a court may make an order to rectify the matters complained of where

> (*a*) any act or omission of the corporation or any of its affiliates effects a result,
>
> (*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

[54] Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct. . . . The difficulty with adjectives is they provide no assistance in formulating principles that should underlie court intervention."

(1) L'état du droit

[53] Le paragraphe 241(2) permet au tribunal de redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

> *a*) soit en raison de son comportement;
>
> *b*) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> *c*) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[54] Deux façons différentes d'aborder les dispositions de la *LCSA* applicables en cas d'abus se dégagent de la jurisprudence relative à l'art. 241 : M. Koehnen, *Oppression and Related Remedies* (2004), p. 79-80 et 84. L'une d'elles appelle à une interprétation stricte des trois types de comportement énumérés à l'art. 241 (abus, préjudice injuste et omission injuste de tenir compte des intérêts) : voir *Scottish Co-operative Wholesale Society Ltd. c. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti c. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (C.S.); *Stech c. Davies*, [1987] 5 W.W.R. 563 (B.R. Alb.). Les arrêts guidés par cette interprétation s'intéressent à la teneur exacte d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » des intérêts en cause. Bien que ces décisions puissent fournir des indications valables sur ce qui constitue un abus dans une situation donnée, envisager la notion d'abus à partir de catégories définies pose problème parce que les termes utilisés ne peuvent être classés dans des compartiments étanches ni définis une fois pour toutes. Comme le dit Koehnen (p. 84) : [TRADUCTION] « Les trois composantes légales de l'abus sont en fait des qualificatifs destinés à décrire un comportement incorrect. [. . .] Le problème lié aux qualificatifs tient à ce qu'ils ne sont d'aucun secours pour la formulation des principes qui doivent fonder l'intervention du tribunal. »

[55] Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[57] We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

[58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the

[55] D'autres décisions sont axées sur les principes plus larges qui sous-tendent et unifient les différents aspects de la notion d'abus : voir *First Edmonton Place Ltd. c. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (B.R. Alb.), mod. par (1989), 45 B.L.R. 110 (C.A. Alb.); *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (C. div. Ont.); *Westfair Foods Ltd. c. Watt* (1991), 79 D.L.R. (4th) 48 (C.A. Alb.).

[56] À notre avis, la meilleure façon d'interpréter le par. 241(2) est de combiner les deux approches exposées dans la jurisprudence. Il faut d'abord considérer les principes sur lesquels repose la demande de redressement pour abus et, en particulier, le concept des attentes raisonnables. S'il est établi qu'une attente raisonnable a été frustrée, il faut déterminer si le comportement reproché constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause au sens du par. 241(2) de la *LCSA*.

[57] En guise d'introduction aux deux volets de l'examen d'une allégation d'abus, la Cour formulera deux remarques préliminaires issues de l'ensemble de la jurisprudence.

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice — ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité : *Wright c. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (C. Ont. (Div. gén.)), p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (C.A. Alb.), p. 374; voir, de façon plus générale, Koehnen, p. 78-79. Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques : *Scottish Co-operative Wholesale Society*, p. 343.

[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les

relationships at play. Conduct that may be oppressive in one situation may not be in another.

[60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

> The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

[61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

[62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[60] À partir de ces considérations générales, la Cour passe maintenant au premier volet de l'analyse, soit à l'examen des principes qui sous-tendent la demande de redressement pour abus. Dans *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), p. 379, lord Wilberforce, qui interprétait l'art. 222 de la *Companies Act, 1948* du Royaume-Uni, a décrit la demande de redressement pour abus en ces termes novateurs :

> [TRADUCTION] Par ces mots [« juste et équitable »] on reconnaît le fait qu'une société à responsabilité limitée est davantage qu'une simple entité légale dotée d'une personnalité morale propre. Il y a place, en droit des sociétés, pour la reconnaissance du fait que, derrière cette société, ou au sein de celle-ci, il y a des individus et que ces individus ont des droits, des attentes et des obligations entre eux qui ne se dissolvent pas nécessairement dans la structure de la société.

[61] Lord Wilberforce a présenté le recours en equity en faisant référence aux « droits », « attentes » et « obligations » des individus. Les mots « droits » et « obligations » renvoient à des intérêts dont on peut exiger le respect en droit sans faire appel à des recours spéciaux, par exemple, au moyen d'un recours contractuel ou de l'action oblique prévue à l'art. 239 de la *LCSA*. Restent donc les « attentes » des parties intéressées comme objet de la demande de redressement pour abus. Les attentes raisonnables de ces parties intéressées constituent la pierre angulaire de la demande de redressement pour abus.

[62] Comme le suggère le mot « raisonnable », le concept d'attentes raisonnables est objectif et contextuel. Les attentes réelles d'une partie intéressée en particulier ne sont pas concluantes. Lorsqu'il s'agit de déterminer s'il serait « juste et équitable » d'accueillir un recours, la question est de savoir si ces attentes sont raisonnables compte tenu des faits propres à l'espèce, des rapports en cause et de l'ensemble du contexte, y compris la possibilité d'attentes et de demandes opposées.

[63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

[64] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

[65] Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable

[63] Des circonstances particulières suscitent des attentes particulières. Les parties intéressées entretiennent des rapports entre elles et avec la société, sur le fondement de perceptions et d'attentes sur lesquelles elles sont en droit de miser, sous réserve de leur caractère raisonnable dans les circonstances : voir *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (C.S.J. Ont.). Le recours en cas d'abus vise précisément à assurer le respect de ces attentes.

[64] La possibilité d'un conflit entre les intérêts et les attentes de différentes parties intéressées ajoute à la complexité de l'appréciation du caractère raisonnable d'une attente particulière. La demande de redressement pour abus reconnaît qu'une société est une entité qui comprend et touche différents groupes et individus dont les intérêts peuvent être opposés. Les administrateurs ou d'autres parties impliquées dans les affaires de la société peuvent, en prenant des décisions à son égard ou en tentant de résoudre des conflits, retenir des solutions qui maximisent abusivement ou injustement les intérêts d'un groupe en particulier au détriment d'autres parties intéressées. Certes, la société et les actionnaires ont le droit de maximiser les bénéfices et la valeur des actions, mais ils ne peuvent le faire en traitant des parties intéressées inéquitablement. Un traitement équitable est, fondamentalement, ce à quoi les parties intéressées peuvent « raisonnablement s'attendre » — et le thème central récurrent de toute la jurisprudence en matière d'abus.

[65] Le paragraphe 241(2) parle du « comportement » de la société ou de l'une des personnes morales de son groupe, de la conduite de « ses activités commerciales ou ses affaires internes » et de l'exercice par « ses administrateurs » de leurs « pouvoirs ». La situation dont on se plaint est souvent provoquée par le comportement de la société ou de ses administrateurs, qui sont responsables de la gouvernance de la société. Une demande de redressement pour abus peut toutefois découler du comportement d'autres parties impliquées dans les affaires de la société, comme des actionnaires : voir Koehnen, p. 109-110; *GATX Corp. c. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (C. Ont. (Div. gén.)). Dans les présents pourvois,

expectations of the debentureholders, and it is unnecessary to go beyond this.

[66] The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of

les demandes de redressement pour abus sont fondées sur des allégations selon lesquelles les administrateurs de BCE et de Bell Canada ont frustré les attentes raisonnables des détenteurs de débentures et il est inutile d'étendre notre examen au-delà de ces allégations.

[66] Le fait que le comportement des administrateurs soit souvent au centre des actions pour abus peut sembler indiquer que les administrateurs sont assujettis à une obligation directe envers les parties intéressées qui risquent d'être touchées par une décision de la société. En agissant au mieux des intérêts de la société, les administrateurs peuvent être obligés de considérer les effets de leurs décisions sur les parties intéressées, comme les détenteurs de débentures en l'espèce. C'est ce qu'on entend lorsqu'on affirme qu'un administrateur doit agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable. Toutefois, les administrateurs ont une obligation fiduciaire envers la société, et uniquement envers la société. Certes, on parle parfois de l'obligation des administrateurs envers la société et envers les parties intéressées. Cela ne porte habituellement pas à conséquence, puisque les attentes raisonnables d'une partie intéressée quant à un résultat donné coïncident souvent avec les intérêts de la société. Il peut néanmoins arriver (comme en l'espèce) que ce ne soit pas le cas. Il importe de préciser que l'obligation des administrateurs est alors envers la société et non envers les parties intéressées, et que les parties intéressées ont pour seule attente raisonnable celle que les administrateurs agissent au mieux des intérêts de la société.

[67] Après avoir examiné le concept des attentes raisonnables qui sous-tend la demande de redressement pour abus, la Cour passe au second volet du recours prévu à l'art. 241. Toutes les attentes déçues, même lorsqu'elles sont raisonnables, ne donnent pas ouverture à une demande sous le régime de l'art. 241. Cette disposition exige que le comportement visé constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause. Le terme « abus » désigne un comportement coercitif et excessif et évoque la mauvaise foi. Le « préjudice injuste »

interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[69] Against the background of this overview, we turn to a more detailed discussion of these inquiries.

(a) *Proof of a Claimant's Reasonable Expectations*

[70] At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is

peut impliquer un état d'esprit moins coupable, mais dont les conséquences sont néanmoins injustes. Enfin, l'« omission injuste de tenir compte » d'intérêts donnés étend l'application de ce recours à une situation où un intérêt n'est pas pris en compte parce qu'il est perçu comme sans importance, contrairement aux attentes raisonnables des parties intéressées : voir Koehnen, p. 81-88. Ces expressions décrivent, à l'aide de qualificatifs, des façons dont les parties impliquées dans les affaires d'une société peuvent frustrer les attentes raisonnables des parties intéressées.

[68] En résumé, les considérations qui précèdent indiquent que le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions interreliées : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement qui correspond à la définition d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » d'un intérêt pertinent?

[69] C'est sur cette toile de fond que la Cour examinera maintenant ces questions de façon plus approfondie.

a) *La preuve de l'attente raisonnable*

[70] L'auteur de la demande de redressement doit d'abord préciser quelles attentes ont censément été frustrées par le comportement en cause et en établir le caractère raisonnable. Comme cela a déjà été mentionné, on peut d'emblée déduire qu'une partie intéressée s'attend raisonnablement à être traitée équitablement. Toutefois, comme on l'a vu, l'abus touche généralement une attente particulière propre à une situation donnée. Il faut dès lors établir l'existence de cette attente raisonnable de la partie intéressée. La preuve d'une attente peut se faire de différentes façons selon les faits.

[71] Il est impossible de dresser une liste exhaustive des situations qui peuvent susciter une attente raisonnable, compte tenu de leur nature circonstancielle. Il est toutefois possible d'énoncer quelques

not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

[72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

(i) Commercial Practice

[73] Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)), var'd (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 1 S.C.R. vi.

(ii) The Nature of the Corporation

[74] The size, nature and structure of the corporation are relevant factors in assessing reasonable

principes généraux. Le recours prévu par l'art. 241 n'exige pas qu'il y ait illégalité; cet article entre en jeu « lorsque la conduite attaquée est [fautive], même si elle n'est pas en fait illégale » : Comité Dickerson (R. W. V. Dickerson, J. L. Howard et L. Getz), *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971), vol. I, p. 188. Ce recours est axé sur les notions de justice et d'équité plutôt que sur les droits. Pour déterminer si des intérêts ou attentes raisonnables doivent être pris en considération, les tribunaux vont au-delà de la légalité et se demandent ce qui est équitable compte tenu de tous les intérêts en jeu : *Re Keho Holdings Ltd. and Noble*. Il s'ensuit que toute conduite préjudiciable pour une partie intéressée ne donnera pas nécessairement ouverture à une demande de redressement pour abus contre la société.

[72] Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

(i) Les pratiques commerciales

[73] Les pratiques commerciales jouent un rôle important dans la formation des attentes raisonnables des parties. Une dérogation aux pratiques commerciales habituelles qui entrave ou rend impossible l'exercice de ses droits par le plaignant donnera généralement (mais pas inévitablement) ouverture à un recours : *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (C.S.J. Ont.); *SCI Systems Inc. c. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (C. Ont. (Div. gén.)), mod. par (1998), 110 O.A.C. 160 (C. div.); *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 200 D.L.R. (4th) 289 (C.A. Ont.), autorisation d'appel refusée, [2002] 1 R.C.S. vi.

(ii) La nature de la société

[74] La taille, la nature et la structure de la société constituent également des facteurs pertinents

expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

(iii) Relationships

[75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iv) Past Practice

[76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

[77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the

dans l'appréciation d'une attente raisonnable : *First Edmonton Place*; G. Shapira, « Minority Shareholders' Protection — Recent Developments » (1982), 10 *N.Z. Univ. L. Rev.* 134, p. 138 et 145-146. Il est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille.

(iii) Les rapports existants

[75] Les rapports personnels entre le plaignant et d'autres parties impliquées dans les affaires de la société peuvent également donner naissance à des attentes raisonnables. Par exemple, il se peut que les rapports entre actionnaires fondés sur des liens familiaux ou des liens d'amitié n'obéissent pas aux mêmes normes que les rapports entre actionnaires sans lien de dépendance d'une société ouverte. Pour reprendre les propos tenus dans l'affaire *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (C.A. Ont.), [TRADUCTION] « lorsqu'une société fermée est en cause, le tribunal peut tenir compte du rapport entre les actionnaires et non simplement des droits » (p. 727).

(iv) Les pratiques antérieures

[76] Les pratiques antérieures peuvent faire naître des attentes raisonnables, plus particulièrement chez les actionnaires d'une société fermée quant à leur participation aux profits et à la gouvernance de la société : *Gibbons c. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario.* Dans *Gibbons*, par exemple, la Cour a jugé que les actionnaires pouvaient légitimement s'attendre à ce que tous les versements faits aux actionnaires par la société soient proportionnels au pourcentage d'actions qu'ils détenaient. La décision des nouveaux administrateurs de se verser des honoraires, pour lesquels les actionnaires ne recevraient pas de paiements correspondants, était contraire à ces attentes.

[77] Il importe de souligner que les pratiques et les attentes peuvent changer avec le temps. Lorsqu'un changement est motivé par des raisons

change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Preventive Steps

[78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

[79] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main*; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C.C.A.).

[80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. (Gen. Div.)); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen. Div.), var'd (1998), 38 O.R. (3d) 749 (C.A.).

(vii) Fair Resolution of Conflicting Interests

[81] As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary

commerciales valides et qu'il ne porte pas atteinte aux droits du plaignant, il ne saurait exister d'attente raisonnable que les administrateurs s'abstiendront de déroger aux pratiques antérieures : *Alberta Treasury Branches c. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (B.R. Alb.), conf. par (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Les mesures préventives

[78] Lorsqu'il apprécie le caractère raisonnable d'une attente d'une partie intéressée, le tribunal peut se demander si le plaignant aurait pu prendre des mesures pour se protéger contre le préjudice qu'il allègue avoir subi. Ainsi, il peut être pertinent de déterminer si un créancier garanti qui se plaint d'un abus aurait pu négocier des mesures de protection contre le préjudice en cause : *First Edmonton Place*; *SCI Systems*.

(vi) Les déclarations et conventions

[79] On peut considérer une convention d'actionnaires comme l'expression des attentes raisonnables des parties : *Main*; *Lyall c. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (C.A.C.-B.).

[80] Les déclarations faites à des parties intéressées ou au public dans des documents promotionnels, des prospectus, des circulaires d'offre et d'autres communications peuvent également influer sur les attentes raisonnables : *Tsui c. International Capital Corp.*, [1993] 4 W.W.R. 613 (B.R. Sask.), conf. par (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada c. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (C. Ont. (Div. gén.)); *Themadel Foundation c. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Div. gén.), mod. par (1998), 38 O.R. (3d) 749 (C.A.).

(vii) La conciliation équitable d'intérêts opposés

[81] Comme cela a été souligné, des conflits peuvent surgir soit entre les intérêts de différentes parties intéressées, soit entre les intérêts des parties intéressées et ceux de la société. Lorsque le conflit touche les intérêts de la société, il revient aux administrateurs de la société de le résoudre

duty to act in the best interests of the corporation, viewed as a good corporate citizen.

[82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods*, *per* Weiler J.A., at p. 192.

[84] There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[85] On these appeals, it was suggested on behalf of the corporations that the "*Revlon* line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

[86] The "*Revlon* line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon, Inc. v. MacAndrews*

conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable.

[82] Dans son ensemble, la jurisprudence en matière d'abus confirme que l'obligation des administrateurs d'agir au mieux des intérêts de la société inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées qui sont touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable.

[83] Les administrateurs peuvent se retrouver dans une situation où il leur est impossible de satisfaire toutes les parties intéressées. [TRADUCTION] « Il importe peu que les administrateurs aient écarté d'autres transactions, sauf si on peut démontrer que l'une de ces autres transactions pouvait effectivement être réalisée et était manifestement plus avantageuse pour l'entreprise que celle qui a été choisie » : *Maple Leaf Foods*, la juge Weiler, p. 192.

[84] Aucun principe n'établit que les intérêts d'un groupe — ceux des actionnaires, par exemple — doivent prévaloir sur ceux d'un autre groupe. Tout dépend des particularités de la situation dans laquelle se trouvent les administrateurs et de la question de savoir si, dans les circonstances, ils ont agi de façon responsable dans leur appréciation commerciale.

[85] En l'espèce, les appelantes ont fait valoir que le courant jurisprudentiel émanant du Delaware et représenté par l'arrêt *Revlon* appuie le principe voulant qu'un conflit entre les intérêts des actionnaires et ceux des créanciers doive être résolu en faveur des actionnaires.

[86] Le courant jurisprudentiel dit *Revlon* regroupe une série de décisions rendues au Delaware dans le contexte d'offres publiques d'achat (« OPA ») et

& Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, . . . such concern for non-stockholder interests is inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

dont les deux plus importantes sont *Revlon, Inc. c. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), et *Unocal Corp. c. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Dans ces deux décisions, il s'agissait de déterminer comment les administrateurs devaient réagir à une OPA hostile. L'arrêt *Revlon* donne à croire que, dans ce contexte, les intérêts des actionnaires doivent l'emporter sur ceux des autres parties intéressées, comme les créanciers. L'arrêt *Unocal* a appliqué cette approche aux situations dans lesquelles la société ne poursuivra pas ses activités et précisé que, bien que le conseil d'administration d'une société visée par une OPA hostile [TRADUCTION] « puisse tenir compte de diverses parties intéressées lorsqu'il s'acquitte de ses fonctions [. . .] il n'est pas approprié de prendre ainsi en compte les intérêts des non-actionnaires lorsque [. . .] l'objectif n'est plus de protéger la société ou d'en poursuivre les activités, mais de la vendre au plus offrant » (p. 182).

[87] What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

[87] Ce qui est clair, c'est que le courant jurisprudentiel dit *Revlon* n'a pas remplacé la règle fondamentale selon laquelle l'obligation des administrateurs ne peut se réduire à l'application de règles de priorité particulières, mais relève plutôt de l'appréciation commerciale de ce qui sert le mieux les intérêts de la société, dans la situation où elle se trouve. L'ancien juge en chef de la Cour suprême du Delaware, E. Norman Veasey, s'est exprimé ainsi dans une analyse des tendances jurisprudentielles en droit des sociétés au Delaware :

> [I]t is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]
>
> (E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on

> [TRADUCTION] [I]l faut garder à l'esprit le contenu précis du concept « d'obligation d'agir au mieux des intérêts » — c'est-à-dire envers qui et quand s'applique cette obligation. Naturellement, on pense souvent que les administrateurs sont ainsi obligés tant envers la société qu'envers les actionnaires. Cette façon de voir est le plus souvent inoffensive parce qu'il y a concordance des intérêts, puisque ce qui est bon pour la société est habituellement bon pour les actionnaires. Il arrive bien sûr que l'accent soit mis directement sur les intérêts des actionnaires [comme dans *Revlon*]. En général, cependant, les administrateurs sont obligés envers la *société*, et non envers les actionnaires. [En italique dans l'original.]
>
> (E. Norman Veasey, assisté de Christine T. Di Guglielmo, « What Happened in Delaware Corporate Law and Governance from 1992-2004?

Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

[88] Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(*b*) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) *Conduct Which Is Oppressive, Is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests*

[89] Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

A Retrospective on Some Key Developments » (2005), *153 U. Pa. L. Rev.* 1399, p. 1431)

[88] Par ailleurs, l'arrêt *Magasins à rayons Peoples* n'établit pas non plus de règle fixe qui ferait prévaloir les droits des créanciers. Dans cet arrêt, la Cour devait décider s'il fallait accorder une attention particulière aux créanciers d'une société menacée de faillite (par. 46). Elle a statué que l'obligation fiduciaire envers la société ne change pas au cours de la période précédant la faillite, mais qu'une partie intéressée peut intenter un recours en cas de manquement des administrateurs à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la *LCSA* (par. 66).

b) *La conduite abusive ou injuste à l'égard des intérêts du plaignant en ce qu'elle lui porte préjudice ou ne tient pas compte de ses intérêts*

[89] Jusqu'à maintenant, la Cour a examiné la façon dont le plaignant doit établir la preuve du premier élément de la demande de redressement pour abus — à savoir qu'il s'attendait raisonnablement à être traité d'une certaine manière. Or, pour parfaire sa demande de redressement pour abus, le plaignant doit prouver que le défaut de répondre à cette attente est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241 de la *LCSA*. Ce ne sont pas, en effet, tous les cas où une attente raisonnable a été frustrée qui commandent la prise en compte des considérations en equity sur lesquelles repose la demande de redressement pour abus. Le tribunal doit être convaincu que la conduite en cause relève des notions d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » des intérêts du plaignant, au sens de l'art. 241 de la *LCSA*. Dans cette perspective, l'analyse des attentes raisonnables qui constitue l'assise théorique de la demande de redressement pour abus et les types particuliers de comportement décrits à l'art. 241 apparaissent comme des approches complémentaires, et non des approches distinctes, comme on l'a parfois supposé. Ensemble, ces approches offrent un tableau complet de ce qui constitue une conduite injuste et inéquitable, pour reprendre les termes de l'arrêt *Ebrahimi*.

[90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees

[90] Dans la plupart des cas, la preuve d'une attente raisonnable sera liée aux notions d'abus, de préjudice injuste ou d'omission injuste de tenir compte des intérêts, ainsi que le prévoit l'art. 241, et les deux volets de la preuve se trouveront dans les faits réunis. Il faut néanmoins souligner que, comme dans toute action en equity, la demande de redressement pour abus requiert que l'on prouve la conduite fautive, le lien de causalité et le préjudice indemnisable.

[91] Les notions d'abus, de préjudice injuste et d'omission injuste de tenir compte des intérêts pertinents sont de nature descriptive. Elles indiquent le type de faute ou de comportement visé par le recours prévu à l'art. 241 de la *LCSA*. Toutefois, il ne s'agit pas de compartiments étanches. Ces notions se chevauchent et s'enchevêtrent souvent.

[92] À l'origine, la jurisprudence décrivait simplement l'acte fautif comme un abus, généralement associé à une conduite qualifiée selon les cas d'[TRADUCTION] « accablante, dure et illégitime », d'« écart marqué par rapport aux normes de traitement équitable », ou d'« abus de pouvoir » mettant en cause la probité dans la conduite des affaires de la société : voir Koehnen, p. 81. C'est de cet acte fautif que le recours tire son nom, lequel sert dorénavant à désigner de façon générale tous les recours fondés sur l'art. 241. Toutefois, ce terme sous-entend également un type particulier de préjudice relevant de la conception moderne de l'abus au sens général, soit un acte fautif très grave.

[93] À la notion initiale de la common law, la *LCSA* a ajouté les notions de « préjudice injuste » et d'« omission injuste de tenir compte » des intérêts, indiquant ainsi clairement que les actes fautifs qui ne peuvent être qualifiés d'abusifs peuvent néanmoins tomber sous le coup de l'art. 241. Règle générale, le « préjudice injuste » est considéré comme supposant une conduite moins grave que l'« abus », par exemple l'éviction d'un actionnaire minoritaire, l'omission de divulguer des transactions avec des apparentés, la modification de la structure de la société pour changer radicalement les ratios d'endettement, l'adoption d'une « pilule

and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

[94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

(2) Application to These Appeals

[95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[96] The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

[97] As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation

empoisonnée » pour éviter une OPA, le versement de dividendes sans déclaration formelle, le fait de privilégier certains actionnaires par le paiement d'honoraires de gestion et le paiement aux administrateurs d'honoraires plus élevés que la norme appliquée dans le secteur d'activité en cause : voir Koehnen, p. 82-83.

[94] L'« omission injuste de tenir compte » des intérêts est considérée comme le moins grave des trois préjudices ou actes fautifs mentionnés à l'art. 241. Favoriser un administrateur en omettant d'engager une poursuite, réduire indûment le dividende d'un actionnaire ou ne pas remettre au plaignant un bien lui appartenant en sont autant d'exemples : voir Koehnen, p. 83-84.

(2) Application aux présents pourvois

[95] Comme cela a déjà été expliqué (au par. 68), le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » d'un intérêt pertinent?

[96] En l'espèce, les détenteurs de débentures soutiennent avoir eu deux attentes distinctes. Leur position première est qu'ils avaient des motifs raisonnables de s'attendre à ce que les administrateurs de BCE protègent leurs intérêts financiers comme détenteurs de débentures de Bell Canada en proposant un plan d'arrangement qui maintiendrait la cote de leurs débentures comme admissibles pour des placements. Devant notre Cour, cependant, ils ont plaidé subsidiairement avoir eu une attente plus limitée — l'attente raisonnable que les administrateurs tiendraient compte de leurs intérêts financiers en préservant la valeur marchande des débentures.

[97] Ainsi que la Cour l'a exposé brièvement plus haut (au par. 25), le juge de première instance a étudié la prétention des détenteurs de débentures qu'ils s'attendaient à ce que les administrateurs agissent de façon à préserver la cote de placements

was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

[98] The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

[99] The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

admissibles de leurs débentures. Il a conclu que la preuve de cette attente n'avait pas été établie étant donné que les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles s'accompagnaient de mises en garde faisant explicitement en sorte que les investisseurs ne pourraient former de telles attentes, mises en garde qui figuraient aussi dans les prospectus d'émission des débentures.

[98] L'absence d'une attente raisonnable quant au maintien de la cote de placements admissibles des débentures trouvait confirmation, selon le juge de première instance, dans le contexte global de la relation entre la société et les détenteurs de débentures, la nature de la société, sa situation en tant que cible de plusieurs offres d'achat, de même que dans le fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées.

[99] Le juge de première instance a procédé à l'examen des facteurs pertinents en utilisant le cadre juridique approprié. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Il a conclu que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que les soumissionnaires étaient disposés à accepter un endettement moindre. Selon la règle de l'appréciation commerciale, il faut faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi dans l'exécution des fonctions pour lesquelles ils ont été élus par les actionnaires.

[100] We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

[101] The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

[102] The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

[103] Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North,

[100] La Cour estime que le juge de première instance n'a commis aucune erreur dans son application des principes ni dans ses conclusions de fait, qui étaient amplement étayées par la preuve. La Cour est donc d'accord pour dire que la première attente alléguée en l'espèce — soit le maintien de la cote de placements admissibles des débentures — n'a pas été établie.

[101] L'attente subsidiaire, plus limitée, avancée par les plaignants, est que les administrateurs prendraient en compte les intérêts des créanciers obligataires en maintenant la valeur marchande des débentures. Dans le contexte de ses motifs concernant l'application de l'art. 192, la Cour d'appel a reconnu qu'il s'agissait là d'une attente raisonnable. Elle a conclu que les déclarations faites au cours des années, bien que non juridiquement contraignantes, avaient créé des attentes qui s'ajoutaient aux droits contractuels. Elle a ajouté que, dans ces circonstances, il incombait aux administrateurs non seulement de retenir la meilleure offre, mais encore d'examiner s'il était possible de restructurer l'arrangement de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures.

[102] Considérée objectivement, la preuve permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures pour prendre leurs décisions concernant les diverses offres à l'étude. Comme cela a été mentionné, dans le cadre d'une demande de redressement pour abus, les attentes raisonnables ne se limitent pas aux droits. Étant donné les répercussions potentielles des transactions proposées sur les détenteurs de débentures, on s'attendrait à ce que les administrateurs, agissant au mieux des intérêts de la société, tiennent compte de leurs intérêts à court et à long termes dans leur décision ultime.

[103] De fait, la preuve indique que les administrateurs ont effectivement tenu compte des intérêts des détenteurs de débentures. Un certain nombre de détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant l'acquisition par emprunt proposée et demander l'assurance que leurs intérêts seraient pris en

representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

[104] It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

[105] What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

[106] The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value

compte. L'un des administrateurs, M. Pattison, a rencontré les représentants des détenteurs de débentures, Phillips, Hager & North. Les administrateurs ont répondu à l'expression de ces inquiétudes en affirmant qu'ils respecteraient les dispositions contractuelles rattachées aux débentures, mais aucune autre assurance n'a été donnée.

[104] Les administrateurs ont manifestement pris en considération les intérêts des détenteurs de débentures et, cela fait, ils ont conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures. Cela ne constituait pas une « omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme nous l'avons vu, il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, le Conseil d'administration a pris en compte les intérêts des plaignants. Cela fait, et après avoir examiné ses options dans les circonstances difficiles auxquelles il faisait face, il a pris la décision qui lui paraissait servir le mieux des intérêts de la société.

[105] Ce que les plaignants font valoir en réalité dans le présent pourvoi, ce n'est pas simplement qu'ils s'attendaient à ce qu'on tienne compte de leurs intérêts, mais bien qu'ils comptaient que le Conseil d'administration adopte des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Sur ce point, la seconde attente, plus limitée, rejoint la première attente alléguée, soit le maintien de la cote de placements admissibles des débentures.

[106] La difficulté rattachée à cette prétention est que rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint. Dans la perspective d'une prise de contrôle certaine, BCE a agi de façon raisonnable pour créer un processus de soumissions concurrentiel. Le processus a suscité trois offres. Toutes les offres comportaient un emprunt, qui accroîtrait substantiellement

of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

[107] We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

[108] Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

l'endettement de Bell Canada. C'est ce facteur qui mettait à risque la valeur des débentures. Rien dans la preuve n'indique que BCE aurait pu faire quoi que ce soit pour écarter ce risque. En fait, la preuve démontrait le contraire.

[107] Il a déjà été fait mention de facteurs à prendre en considération pour déterminer si une attente est raisonnable dans le cadre d'une demande de redressement pour abus fondée sur l'art. 241, notamment les pratiques commerciales, la taille, la nature et la structure de la société, les rapports entre les parties, les pratiques antérieures, l'omission de négocier une protection, les conventions et déclarations, ainsi que la conciliation des intérêts opposés. De l'avis de la Cour, tous ces facteurs militent contre la conclusion qu'il existait en l'espèce une attente allant au-delà du respect des obligations contractuelles rattachées aux débentures.

[108] Les pratiques commerciales — en fait la réalité commerciale — affaiblissent la prétention qu'il aurait été possible de trouver une façon de préserver la valeur marchande des débentures dans le cadre d'une acquisition par emprunt. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Plus généralement, deux considérations sont pertinentes en ce qui concerne l'influence des pratiques commerciales générales sur le caractère raisonnable des attentes des détenteurs de débentures. Premièrement, les acquisitions par emprunt de ce type n'ont rien d'inhabituel ou d'imprévisible, bien que la transaction en cause en l'espèce se démarque par son ampleur. Deuxièmement, les actes de fiducie peuvent inclure des dispositions concernant un changement de contrôle et la cote financière dans les cas où ces protections ont été négociées. Des protections de ce type auraient assuré aux détenteurs de débentures un droit de vote, peut-être par l'intermédiaire de leur fiduciaire, sur l'acquisition par emprunt, comme l'a souligné le juge de première instance. Le défaut de négocier des mesures de protection revêtait de l'importance dans un cas où, soulignons-le, les détenteurs de débentures étaient en règle générale des institutions financières, des caisses de retraite et des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada.

[109] The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

[110] The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

[111] Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

[112] The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization

[109] La nature et la taille de la société viennent également ébranler la prétention selon laquelle il aurait été raisonnable de s'attendre à ce que les administrateurs rejettent les offres présentées et recherchent un arrangement susceptible de préserver la cote de placements admissibles des débentures. On a déjà signalé (au par. 74) qu'il est possible que les tribunaux accordent plus de latitude quant aux attentes raisonnables dans le cas d'une petite société fermée que dans celui d'une société ouverte de plus grande taille. Bell Canada était devenue une filiale en propriété exclusive de BCE en 1983, en vertu d'un plan d'arrangement par lequel les actionnaires de Bell Canada cédaient leurs actions en échange d'actions de BCE. Compte tenu de l'historique du rapport en cause, les détenteurs de débentures de Bell Canada de 1996 et 1997 devaient savoir, lorsqu'ils les ont acquises, que des arrangements de ce type avaient déjà été conclus et pouvaient l'être dans l'avenir.

[110] Les détenteurs de débentures invoquent les pratiques antérieures, affirmant que la cote de placements admissibles avait toujours été maintenue. Rappelons toutefois que les pratiques raisonnables peuvent changer au gré des fluctuations de l'économie et des conditions du marché. Les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie de ces conditions. Le juge de première instance n'a pas non plus conclu que des déclarations auxquelles les détenteurs de débentures auraient pu raisonnablement se fier leur avaient été faites.

[111] Enfin, il faut examiner la demande sous l'angle de l'obligation des administrateurs de résoudre les conflits entre les parties intéressées de façon équitable, au mieux des intérêts de la société.

[112] À l'époque, les intérêts de la société concordaient sans doute avec l'acceptation de l'offre. BCE avait été mise en jeu, et la dynamique du marché rendait l'acquisition inévitable. La preuve, acceptée par le juge de première instance, indiquait que Bell Canada devait procéder à des changements substantiels pour continuer à

would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

prospérer, et que la fermeture de la société élargirait la marge de manœuvre nécessaire à l'atteinte de ses objectifs à long terme en supprimant la pression à court terme créée par les obligations de communication de l'information financière au public et en permettant l'injection de capitaux propres par des investisseurs avisés soucieux d'améliorer le rendement de la société. Dans la mesure où il conclut que la décision des administrateurs se situe dans l'éventail des solutions raisonnables qu'ils auraient pu choisir en soupesant des intérêts opposés, le tribunal ne poursuivra pas son examen pour déterminer si cette décision est la solution parfaite.

[113] Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

[113] Considérant tous les facteurs pertinents, la Cour conclut que les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. Comme l'a dit le juge de première instance, l'allégation selon laquelle on pouvait s'attendre au maintien de la cote de placements admissibles des débentures n'est pas étayée par la preuve. On a démontré que les détenteurs de débentures pouvaient raisonnablement s'attendre à ce que leurs intérêts soient pris en compte, mais cette attente a trouvé satisfaction. La preuve ne permet pas de conclure à une attente plus grande, à savoir qu'il était possible de négocier un meilleur arrangement répondant aux exigences auxquelles la société faisait face, tout en préservant mieux la valeur marchande des débentures.

[114] Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

[114] Les détenteurs de débentures n'ayant pas démontré que leurs prétendues attentes étaient raisonnables, ou qu'elles avaient été frustrées, il n'est pas utile d'examiner en détail la question de savoir si le comportement dont ils se plaignent constituait un abus, un préjudice injuste ou une omission injuste de tenir compte de leurs intérêts au sens de l'art. 241 de la *LCSA*. Disons simplement que l'« abus », dans son sens où il implique la mauvaise foi, n'a pas été allégué et encore moins prouvé. Au mieux, on a plaidé l'« omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme cela a été dit plus tôt, cette prétention n'est pas étayée par la preuve.

C. *The Section 192 Approval Process*

[115] The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seem[ed] only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected": (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 151. On the basis of Corporations Canada's *Policy concerning Arrangements Under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

[116] The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

C. *Le processus d'approbation prévu à l'art. 192*

[115] La seconde voie de droit empruntée par les détenteurs de débentures est le processus d'approbation des arrangements complexes établi par l'art. 192 de la *LCSA*. BCE a présenté une demande d'approbation sous le régime de cette disposition. À l'instruction, les détenteurs de débentures ont été autorisés à contester la demande. Le juge de première instance a conclu qu'[TRADUCTION] « [i]l n'est que logique et "équitable" de procéder à cette analyse en tenant compte des intérêts de BCE et des intérêts de ses actionnaires et autres parties intéressées, le cas échéant, dont les intérêts sont visés ou touchés par l'arrangement » : (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 151). En se fondant sur la *Politique à l'égard des arrangements pris en vertu de l'article 192 de la LCSA* de Corporations Canada, datant de novembre 2003 (« Énoncé de politique 15.1 »), le juge de première instance a conclu que le processus d'approbation prévu à l'art. 192 n'obligeait pas le Conseil d'administration à accorder un droit de vote aux détenteurs de débentures. Il a néanmoins pris leurs intérêts en compte dans l'évaluation du caractère équitable de l'arrangement. Après une audition complète, il a approuvé l'arrangement, l'estimant « équitable et raisonnable » en dépit des objections des détenteurs de débentures selon lesquelles il aurait un effet préjudiciable sur la valeur marchande de leurs titres.

[116] La Cour d'appel a infirmé cette décision, concluant essentiellement que les administrateurs n'avaient pas suffisamment tenu compte des attentes raisonnables des détenteurs de débentures, lesquelles ne s'arrêtaient pas, selon elle, à leurs droits, mais commandaient aux administrateurs d'examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Elle a jugé que la société ne s'était pas acquittée du fardeau de prouver qu'il était impossible de structurer la vente de façon à éviter les effets financiers préjudiciables sur les débentures et, par suite, qu'elle n'avait pas établi que le plan d'arrangement proposé était équitable et raisonnable.

[117] Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

[118] As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

[119] As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

[120] These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

[117] Avant d'examiner la question de la preuve exigée pour l'approbation d'un arrangement en vertu de l'art. 192, il peut être utile de revenir brièvement à la question, déjà abordée, des différences entre la demande de redressement pour abus prévue à l'art. 241 de la *LCSA* et la demande d'approbation d'un arrangement fondée sur l'art. 192.

[118] Comme on l'a vu (au par. 47), le raisonnement de la Cour d'appel a eu pour effet d'amalgamer la demande de redressement pour abus de l'art. 241 et la procédure d'approbation prévue à l'art. 192 et de convertir cette dernière en un examen axé sur les attentes raisonnables.

[119] La Cour estime que la demande de redressement pour abus de l'art. 241 et le processus d'approbation de l'art. 192 constituent des recours différents comportant des exigences différentes. Bien que la conclusion que l'arrangement proposé a des conséquences abusives puisse étayer celle qu'il ne s'agit pas d'un arrangement équitable et raisonnable au sens de l'art. 192, il importe de garder à l'esprit les différences entre les deux recours. La demande de redressement pour abus est un recours en equity, d'une grande portée, qui met l'accent sur les attentes raisonnables des parties intéressées, alors que le processus d'approbation prévu à l'art. 192 est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif, et tient principalement compte des intérêts des parties dont les droits sont visés par l'arrangement. De plus, dans le cadre d'une demande de redressement pour abus, c'est au plaignant qu'il incombe de prouver l'abus ou l'injustice, tandis que c'est à la société qu'il appartient d'établir que l'arrangement est « équitable et raisonnable » dans le cadre de la procédure prévue à l'art. 192.

[120] Il ressort de ces différences qu'un plaignant pourrait ne pas réussir à prouver l'abus au sens de l'art. 241, mais néanmoins avoir gain de cause sous le régime de l'art. 192 en établissant que la société ne s'est pas acquittée du fardeau de prouver que l'arrangement est équitable et raisonnable. C'est pourquoi la Cour doit examiner les prétentions soumises par les détenteurs de débentures dans le cadre de l'art. 192, en dépit de sa conclusion antérieure selon laquelle ils n'ont pas établi l'abus.

[121] Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

(1) The Requirements for Approval Under Section 192

[122] We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

(a) *The Nature and Purpose of the Section 192 Procedure*

[123] The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

[121] La Cour n'a pas à se demander en l'espèce si l'inverse est vrai. Compte tenu des différences entre les deux recours en ce qui concerne le fardeau de la preuve et la perspective dans laquelle l'examen est effectué, on pourrait soutenir qu'il est possible, en théorie, de conclure à l'existence d'un abus au sens de l'art. 241 tout en approuvant l'arrangement en application de l'art. 192. Par contre, le bon sens donne à penser, comme l'a fait la Cour d'appel, qu'on peut difficilement conclure à la fois qu'il y a abus et que l'arrangement est équitable et raisonnable. Cette intéressante question devra toutefois être résolue dans le cadre d'une affaire où elle se posera.

(1) La preuve exigée pour l'approbation selon l'art. 192

[122] La Cour commencera par décrire la nature et l'objet du processus prévu à l'art. 192. Elle examinera ensuite la philosophie sous-jacente à l'approbation requise par cette disposition, les circonstances dans lesquelles elle s'applique, les intérêts en jeu dans le processus et les critères que le juge doit appliquer pour trancher une demande présentée en vertu de l'art. 192.

a) *La nature et l'objet de la procédure prévue par l'art. 192*

[123] Le processus d'approbation établi à l'art. 192 remonte à une loi de 1923 qui visait à permettre aux sociétés de modifier leur capital-actions : *Loi de 1923 modifiant la Loi des compagnies*, S.C. 1923, ch. 39, art. 4. Cette loi avait pour but de permettre des modifications aux droits des actionnaires tout en protégeant les actionnaires. En 1974, les plans d'arrangement n'ont pas été inclus dans la *LCSA*, parce que le législateur les jugeait superflus et craignait qu'ils puissent être utilisés pour évincer les actionnaires minoritaires. Après avoir constaté que ces plans offraient un moyen pratique et souple de réaliser des transactions complexes, le législateur a ajouté à la *LCSA* une disposition les régissant, en 1978 : Consommation et Corporations Canada, *Exposé détaillé d'une Loi modifiant la Loi sur les corporations commerciales canadiennes* (1977), p. 5 (« Exposé détaillé »).

[124] In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

[125] This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

[126] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

[127] Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

[124] La souplesse de cette disposition lui a valu d'être élargie pour s'appliquer, non seulement à la réorganisation du capital-actions, mais plus généralement aux réaménagements d'une société. Suivant le par. 192(1) de la loi actuelle, un arrangement s'entend de la modification des statuts d'une société, de la fusion de deux sociétés ou plus, du fractionnement de l'activité commerciale d'une société, d'une opération de fermeture ou d'éviction, de la liquidation ou de la dissolution d'une société ou de toute combinaison de ces transactions.

[125] Il ne s'agit pas là d'une liste exhaustive, et les tribunaux lui ont donné une interprétation large. L'article 192 est de plus en plus utilisé dans le cadre d'un changement de contrôle en raison des avantages qu'il comporte pour l'acquéreur : C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), p. 76. Il permet notamment à l'acquéreur d'acheter des actions de la société ciblée sans avoir à se conformer aux règles provinciales régissant une OPA.

[126] Le processus prévu à l'art. 192 s'applique, en général, aux changements de contrôle qui présentent deux caractéristiques : l'arrangement est appuyé par les administrateurs de la société ciblée et il vise la remise, à l'acquéreur ou à la société ciblée, d'une partie ou de la totalité des actions.

[127] Fondamentalement, la procédure prévue à l'art. 192 repose sur le principe selon lequel la décision sur une transaction qui modifiera les droits des détenteurs de valeurs mobilières ne constitue pas une décision de simple gestion des affaires de la société, qui relève des administrateurs. L'article 192 crée deux mécanismes pour surmonter cet obstacle. Premièrement, les propositions d'arrangement peuvent généralement être soumises aux détenteurs de valeurs mobilières pour approbation. Bien que l'art. 192 n'exige pas expressément un vote des détenteurs de valeurs mobilières, comme on le verra, leur vote constitue une caractéristique importante du processus d'approbation des plans d'arrangement. Deuxièmement, les plans d'arrangement doivent être approuvés par le tribunal à la suite d'une audience à laquelle peuvent participer les parties dont les droits sont touchés.

(b) *The Philosophy Underlying Section 192*

[128] The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

> . . . the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.
>
> (Detailed Background Paper, at p. 6)

[129] Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) *Interests Protected by Section 192*

[130] The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

[131] Section 192 clearly contemplates the participation of security holders in certain situations.

b) *La philosophie qui sous-tend l'art. 192*

[128] Comme cela a été mentionné, l'art. 192 a pour but de permettre la réalisation de changements substantiels dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés. Le juge qui procède à l'examen exigé par l'art. 192 ne doit pas perdre de vue l'esprit de cette disposition, qui consiste à établir un juste équilibre entre des intérêts opposés. Le ministre de Consommation et Corporations Canada a présenté ainsi l'objectif de la disposition relative aux arrangements introduite dans la *LCSA* en 1978 :

> . . . le projet de loi tente d'atteindre un juste équilibre entre une gestion souple et le traitement équitable des actionnaires minoritaires, d'une façon qui corresponde aux autres pratiques de modification de structure stipulées dans la Partie XIV.
>
> (Exposé détaillé, p. 5-6)

[129] Bien que l'art. 192 ait été conçu initialement et utilisé principalement pour permettre des restructurations utiles tout en protégeant les actionnaires minoritaires contre leurs effets préjudiciables, l'objectif du maintien d'un juste équilibre entre les différentes parties touchées s'applique avec autant de force lorsqu'il s'agit des droits de détenteurs de valeurs mobilières non-actionnaires visés à l'art. 192. L'article 192 reconnaît que des changements substantiels peuvent être opportuns même s'ils ont des effets préjudiciables sur les droits de personnes ou groupes particuliers. Il vise à garantir le traitement équitable et la prise en compte des intérêts de ces titulaires de droits et, en définitive, à confirmer que l'arrangement devrait être mis en œuvre.

c) *Les intérêts protégés par l'art. 192*

[130] La procédure prévue à l'art. 192 visait initialement à protéger les actionnaires touchés par la restructuration de la société. Bien que cet objet demeure fondamental, cette protection s'est par la suite étendue à d'autres détenteurs de valeurs mobilières, dans certaines circonstances.

[131] L'article 192 envisage clairement la participation des détenteurs de valeurs mobilières dans

Section 192(1)(*f*) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(*c*) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

[132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

[133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

[134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

[135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary

certaines situations. L'alinéa 192(1)*f*) précise qu'un arrangement peut inclure l'échange de valeurs mobilières contre des biens. L'alinéa 192(4)*c*) énonce que le tribunal peut rendre une ordonnance enjoignant à la société « de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières ». Le directeur nommé en vertu de la *LCSA* est d'avis, au moins, que tous les détenteurs de valeurs mobilières dont les droits sont touchés par la transaction doivent être autorisés à voter sur l'arrangement : Énoncé de politique 15.1, par. 3.08.

[132] Une question difficile se pose toutefois : l'art. 192 s'applique-t-il uniquement aux détenteurs de valeurs mobilières dont les *droits* sont touchés par la proposition ou aussi à ceux dont les droits demeurent intacts, mais dont les *intérêts financiers* risquent de subir un préjudice.

[133] L'objet de l'art. 192, exposé précédemment, laisse croire que cette disposition ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. La procédure établie par l'art. 192 a été conçue et généralement perçue comme visant à permettre aux sociétés d'effectuer des changements qui ont une incidence sur des *droits* des parties. C'est la modification des droits qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Le fait que le processus d'approbation d'un arrangement soit axé sur les droits et la demande de redressement pour abus sur les attentes raisonnables de parties est une distinction cruciale. La demande de redressement pour abus est fondée sur le traitement inéquitable des parties intéressées, plutôt que sur leurs droits au sens strict.

[134] Toutefois, cette règle générale n'écarte pas la possibilité que, dans certaines circonstances — par exemple en présence d'un risque d'insolvabilité ou de réclamations de certains actionnaires minoritaires —, des intérêts qui ne constituent pas des droits à strictement parler soient pris en considération : Énoncé de politique 15.1, par. 3.08, faisant état de « circonstances particulières ».

[135] Il n'est pas nécessaire pour trancher les pourvois de statuer sur ce qui constituerait exactement

circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

(d) *Criteria for Court Approval*

[136] Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

[137] In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

[138] In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

[139] In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the

des « circonstances particulières » autorisant la prise en compte de simples intérêts dans l'examen d'une demande fondée sur l'art. 192. La Cour est d'avis qu'une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, ce type de circonstances.

d) *Les critères d'approbation*

[136] Le paragraphe 192(3) exige que la société fasse approuver le plan par un tribunal. Pour statuer sur la demande d'approbation, le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir. Il faut que l'arrangement lui-même, considéré substantiellement et objectivement, soit de nature à pouvoir être approuvé.

[137] La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable : voir *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (B.R.), p. 444. En comparaison, c'est le plaignant qui doit prouver ses prétentions dans le cas de la demande de redressement pour abus prévue par l'art. 241. Le respect des deux premières conditions n'est pas contesté en l'espèce. La seule question en litige est celle du caractère équitable et raisonnable de l'arrangement.

[138] Pour conclure, sous le régime de l'art. 192, que la décision des administrateurs au sujet de l'arrangement proposé est équitable et raisonnable, le tribunal doit être convaincu que l'arrangement : a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. C'est en appliquant ce cadre d'analyse à deux volets que les tribunaux peuvent établir si un plan est équitable et raisonnable.

[139] Certains tribunaux ont déjà statué sur le caractère équitable et raisonnable d'un arrangement en appliquant le test dit de l'appréciation

business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

[140] First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] Q.J. No. 16158 (QL), 2007 QCCS 6830. To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

[141] Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable.

commerciale, qui consiste à déterminer si un homme ou une femme d'affaires intelligent et honnête, membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt, approuverait raisonnablement l'arrangement : voir *Trizec*, p. 444; *Pacifica Papers Inc. c. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. Toutefois, bien que cette question puisse être importante, elle ne constitue pas un énoncé utile et complet des éléments à considérer pour l'examen d'une demande fondée sur l'art. 192.

[140] Premièrement, la similitude d'appellation du test de l'appréciation commerciale qui nous intéresse ici et de la règle de l'appréciation commerciale examinée précédemment (au par. 40) sème la confusion. La *règle* de l'appréciation commerciale exprime la nécessité de faire preuve de retenue à l'égard de l'appréciation par les administrateurs de ce qui sert le mieux les intérêts de la société. Le *test* de l'appréciation commerciale pour l'application de l'art. 192, quant à lui, vise à déterminer si l'arrangement proposé est équitable et raisonnable compte tenu des intérêts de la société et des parties intéressées. Ces deux analyses diffèrent passablement. Or, la similitude des termes employés pour les désigner sème la confusion. Ainsi, il est arrivé que des tribunaux citent le test de l'appréciation commerciale à l'appui du principe selon lequel il n'est pas nécessaire que les arrangements soient parfaits, c.-à-d. en tant que principe de retenue judiciaire : voir *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] J.Q. n^{o} 16158 (QL), 2007 QCCS 6830. Lorsqu'on confond le test de l'appréciation commerciale et la règle de l'appréciation commerciale, il devient plus difficile de comprendre le sens de l'expression « équitable et raisonnable » et la façon dont un arrangement peut satisfaire à cette condition.

[141] Deuxièmement, lorsque les détenteurs de valeurs mobilières dont les droits sont touchés ont voté en faveur d'un plan d'arrangement, il paraît redondant de se demander ce que ferait une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt. Comme on le verra plus loin (au par. 150), les

However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

[142] In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

[143] The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (Que. Sup. Ct.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] We now turn to a more detailed discussion of the two prongs.

[145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation.

votes tenus au sujet d'arrangements constituent un indicateur important de leur caractère équitable et raisonnable. Toutefois, le critère de l'appréciation commerciale n'est pas plus éclairant que le résultat d'un vote. L'article 192 établit clairement que, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement qui lui est soumis, le juge doit aller au-delà de la question de savoir si un homme ou une femme d'affaires raisonnable l'approuverait. Dans la mesure où le critère de l'appréciation commerciale donne à entendre qu'il suffit au juge d'adopter le point de vue du groupe majoritaire, il est incomplet.

[142] En résumé, la Cour conclut que le critère de l'appréciation commerciale n'est pas utile dans le contexte de l'application de l'art. 192, et qu'il peut même semer la confusion.

[143] Le cadre proposé dans les présents motifs reformule le critère d'appréciation du caractère équitable et raisonnable pour l'application de l'art. 192 en accord avec la logique de cette disposition et la jurisprudence. L'appréciation du caractère équitable et raisonnable suppose deux examens. Le premier consiste à déterminer si l'arrangement poursuit un objectif commercial légitime, et le second s'il répond d'une façon juste et équilibrée aux objections de ceux dont les droits sont visés. Les tribunaux appelés à approuver un arrangement ont souvent mentionné des facteurs qui répondaient à ces deux questions, comme cela sera expliqué plus loin : *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. c. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Qué.); *PetroKazakhstan Inc. c. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] Passons maintenant à un examen plus détaillé de chacun de ces deux volets.

[145] Le volet de l'analyse du caractère équitable et raisonnable qui se rapporte à l'objectif commercial légitime reconnaît que l'arrangement doit procurer à la société un avantage qui compense l'atteinte aux droits. Autrement dit, le tribunal doit être convaincu que l'intérêt de la société justifie le fardeau imposé par l'arrangement aux détenteurs de

The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

[146] The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied. [Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

[147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

valeurs mobilières. Le plan proposé doit en outre servir les intérêts de la société dans la perspective de la continuité de l'entreprise, critère qui peut avoir une portée plus réduite que le critère de ce qui est « au mieux des intérêts de la société » utilisé pour définir l'obligation fiduciaire imposée aux administrateurs par l'art. 122 de la *LCSA* (voir les par. 38-40).

[146] L'examen de l'objectif commercial légitime est invariablement lié aux faits. Par conséquent, la nature et l'étendue de la preuve requise pour répondre à ce critère variera suivant les circonstances. Un important facteur à considérer pour établir si un plan d'arrangement poursuit un objectif commercial légitime est celui de la nécessité de l'arrangement pour la poursuite des activités de la société. Cette nécessité est fonction des conditions du marché, notamment sur les plan de la technologie, de la réglementation et de la concurrence. L'existence de solutions de rechange et la réaction du marché au plan constituent des indices de la nécessité du plan. Le degré de nécessité de l'arrangement a une incidence directe sur la rigueur de l'examen. Dans *Canadian Pacific*, la juge Austin a conclu :

> [TRADUCTION] . . . bien que les tribunaux soient disposés à exercer leur compétence malgré l'absence de nécessité suffisante pour la société, moins la nécessité est grande, plus l'examen doit être rigoureux. [Nous soulignons; p. 223.]

Si le plan d'arrangement est nécessaire pour que la société continue d'exister, les tribunaux seront plus enclins à l'approuver en dépit de ses effets préjudiciables sur certains détenteurs de valeurs mobilières. À l'inverse, si la situation financière ou commerciale de la société ne requiert pas l'arrangement, les tribunaux se montreront plus circonspects et procéderont à un examen minutieux pour s'assurer qu'il ne sert pas uniquement les intérêts d'une partie intéressée en particulier. Par conséquent, la nécessité relative de l'arrangement peut en justifier les effets négatifs sur les intérêts des détenteurs de valeurs mobilières touchés.

[147] Le second volet de l'analyse du caractère équitable et raisonnable est axé sur la question de savoir si les objections de ceux dont les droits sont visés ont été résolues de façon juste et équilibrée.

[148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

[150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Gen. Div.).

[151] Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and

[148] Un plan d'arrangement peut susciter des objections lorsqu'il existe des tensions entre les intérêts de la société et ceux de détenteurs de valeurs mobilières ou lorsque différents groupes dont les droits sont touchés ont des intérêts opposés. Le juge doit être convaincu que l'arrangement établit un juste équilibre compte tenu des intérêts continus de la société et des circonstances de l'affaire. Pour cela, il devra souvent procéder à une pondération complexe en déterminant si des mesures d'accommodement ou de protection appropriées ont été offertes aux parties concernées. Toutefois, comme l'a indiqué le juge Forsyth dans *Trizec*, par. 36,

> [TRADUCTION] le tribunal doit prendre garde de ne pas s'attacher aux besoins particuliers d'un groupe donné et s'efforcer de traiter équitablement tous ceux qui sont touchés par la transaction compte tenu des circonstances. Le caractère équitable de l'arrangement doit s'apprécier globalement ainsi qu'à l'égard de chacune des différentes parties intéressées.

[149] Il faut se demander si le plan, considéré dans cette perspective, est équitable et raisonnable. Pour répondre à cette question, les tribunaux ont tenu compte de divers facteurs, selon la nature de l'affaire. Aucun de ces facteurs n'est déterminant à lui seul et la pertinence de chacun varie d'un cas à l'autre, mais ils fournissent des indications utiles.

[150] Le fait que la majorité des détenteurs de valeurs mobilières aient voté en faveur du plan constitue un facteur important. Le caractère équitable et raisonnable d'un plan qui ne recueille qu'une minorité ou une faible majorité des voix peut être mis en doute, tandis qu'une majorité substantielle a l'effet inverse. Bien que le résultat du vote des détenteurs de valeurs mobilières ne soit pas déterminant pour l'approbation judiciaire du plan, les tribunaux attribuent un poids considérable à ce facteur. Il s'agit d'un indice capital permettant de savoir si les parties touchées estiment que l'arrangement est équitable et raisonnable : *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Div. gén.).

[151] En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de

acting in his or her own interest, might reasonably approve of the plan: *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

[154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's

la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan : *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] La proportionnalité du compromis entre les divers détenteurs de valeurs mobilières, la situation des détenteurs de valeurs mobilières avant et après l'arrangement et les effets de l'arrangement sur les droits des divers détenteurs de valeurs mobilières sont aussi des indices de son caractère équitable : voir *Canadian Pacific*; *Trizec*. Les tribunaux peuvent également tenir compte de la réputation des administrateurs et conseillers qui défendent l'arrangement et ses modalités. Ainsi, les tribunaux ont déjà tenu compte du fait qu'un plan avait été approuvé par un comité spécial d'administrateurs indépendants, de l'existence d'une opinion formulée par un spécialiste de renom sur le caractère équitable du plan et des moyens auxquels les actionnaires avaient accès pour exprimer leur dissidence et obtenir une évaluation : voir *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (C.S.J. Ont.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] Les facteurs susmentionnés représentent les éléments pris en considération jusqu'à maintenant pour l'examen des demandes prévues à l'art. 192. Cette énumération n'est pas exhaustive, mais vise simplement à donner un aperçu des facteurs retenus par les tribunaux pour établir si un plan avait résolu de façon raisonnable les objections soulevées et les conflits entre parties intéressées. Beaucoup de ces facteurs pourront aussi indiquer si le plan poursuit un objectif commercial légitime. L'appréciation globale du caractère équitable et raisonnable d'un arrangement dépend des faits et peut faire intervenir différents facteurs suivant les circonstances.

[154] Cela mène donc à la conclusion suivante : pour qu'un plan d'arrangement soit déclaré équitable et raisonnable, le juge doit être convaincu qu'il poursuit un objectif commercial légitime et qu'il répond adéquatement aux objections et aux conflits entre différentes parties intéressées. Pour décider si un arrangement répond à ces critères, le juge tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société,

continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

[155] As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec*; *Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

(2) Application to These Appeals

[156] As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

[157] The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés.

[155] Comme cela a souvent été dit, il n'existe pas d'arrangement parfait. Ce qui est requis, c'est que la décision soit raisonnable au regard des circonstances particulières de l'espèce, et non qu'elle soit parfaite : *Trizec*; *Maple Leaf Foods*. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception de ce qui constituerait le « meilleur » arrangement. Mais ils ne doivent pas pour autant renoncer à s'acquitter de leur obligation d'examiner l'arrangement. Étant donné que l'art. 192 facilite la modification de droits, le tribunal doit procéder à un examen attentif des transactions proposées. Comme la juge Lax l'a déclaré dans *UPM-Kymmene Corp. c. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (C.S.J. Ont.), par. 153 : [TRADUCTION] « Bien qu'il n'y ait pas lieu de scruter les décisions du conseil d'administration à la loupe dans la perspective idéale que permet le recul, il faut tout de même les examiner. »

(2) Application aux présents pourvois

[156] Comme il a déjà été mentionné (aux par. 137-138), la société qui soumet une demande en vertu de l'art. 192 doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande est soumise de bonne foi et (3) l'arrangement est équitable et raisonnable au sens où a) il poursuit un objectif commercial légitime et b) il répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés par l'arrangement.

[157] En l'espèce, les deux premières conditions sont indiscutablement remplies et, en ce qui concerne la troisième, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat, devant la Cour, porte donc sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée.

[158] The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

[159] The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

[160] Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately $35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

[161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding

[158] Suivant les détenteurs de débentures de Bell Canada, l'arrangement ne tient pas compte de leurs droits d'une façon équitable et équilibrée. Leur principal argument porte que le processus adopté par les administrateurs pour négocier et conclure l'arrangement n'a pas tenu suffisamment compte de leurs intérêts, plus particulièrement parce que l'arrangement, bien qu'il maintienne leurs droits contractuels, réduirait la valeur marchande de leurs débentures et, dans certains cas, leur ferait perdre leur cote de placements admissibles.

[159] La première question qui se pose est de savoir si les administrateurs étaient tenus de prendre en considération les intérêts financiers des détenteurs de débentures quant au maintien de la valeur marchande de leurs titres dans le cadre de l'application de l'art. 192. La Cour a conclu précédemment qu'il ressort des principes et de la jurisprudence que l'art. 192 concerne généralement les droits, en l'absence de circonstances particulières. Elle a aussi indiqué que la diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits sont demeurés intacts ne constitue habituellement pas ce type de circonstances.

[160] En s'appuyant sur l'Énoncé de politique 15.1, le juge de première instance a conclu que les détenteurs de débentures ne devaient pas se voir accorder le droit de voter sur le plan d'arrangement parce qu'il ne visait pas leurs droits : [TRADUCTION] « Leur accorder ce droit [leur] conférerait injustement un droit de veto sur une transaction d'une valeur totale d'environ 35 milliards de dollars d'actions ordinaires, approuvée par plus de 97 p. 100 des actionnaires » (par. 166). Le juge a néanmoins tenu compte du point de vue des détenteurs de débentures.

[161] Selon la Cour, le juge de première instance pouvait à bon droit conclure ainsi. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures

that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

[162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> . . . the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

[163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of

ne constituaient pas une catégorie touchée pour l'application de cette disposition. Le juge de première instance était donc fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures, comme il l'a fait, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement en vertu de l'art. 192.

[162] Il faut ensuite se demander si le juge de première instance a conclu à tort que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. Il a indiqué que les détenteurs de débentures, s'ils l'avaient désiré, auraient pu négocier des mesures de protection contre l'accroissement de la dette ou les risques de changement dans la structure de la société. Il a ajouté :

> [TRADUCTION] . . . la preuve révèle que leurs droits [des détenteurs de débentures] ont effectivement été pris en compte et évalués. Le Conseil d'administration a conclu, à juste titre, que les actes de fiducie de 1976, 1996 et 1997 ne renfermaient aucune stipulation concernant un changement de contrôle et que, par ailleurs, aucun changement de contrôle de Bell Canada n'était envisagé, de sorte que les détenteurs de débentures ne pouvaient raisonnablement s'attendre à ce que BCE rejette une transaction qui maximisait la valeur actionnariale parce qu'elle avait des effets négatifs pour eux.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 162, citant (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, par. 199)

[163] La Cour ne décèle aucune erreur dans ces conclusions. L'arrangement ne modifie pas fondamentalement les droits des détenteurs de débentures. L'investissement et le rendement prévus par contrat demeurent inchangés. La fluctuation de la valeur marchande des débentures associée à une variation de l'endettement est un phénomène commercial bien connu. Les détenteurs de débentures

the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

ne se sont pas prémunis contractuellement contre une telle éventualité. La diminution éventuelle de la valeur marchande de leurs titres par suite de l'arrangement prévoyant l'accroissement de l'endettement constituait un risque prévisible, et non des circonstances particulières. Il était clair pour le juge que, pour la continuité de la société, l'approbation d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. La nécessité était établie. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance, ce qui donne à croire que l'arrangement poursuivait un objectif commercial légitime.

[164] Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

[164] En s'appuyant sur ces considérations, et reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu que le caractère équitable et raisonnable de l'arrangement avait été démontré. Cette conclusion n'est à notre avis entachée d'aucune erreur.

[165] The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant. By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

[165] Comme cela a déjà été précisé, l'opinion contraire de la Cour d'appel procédait d'un raisonnement qui amalgamait la demande de redressement pour abus de l'art. 241, axé sur les attentes raisonnables, et le processus d'approbation d'un arrangement établi à l'art. 192. Après avoir conclu que les attentes raisonnables des détenteurs de débentures (que le Conseil d'administration tienne compte de leurs intérêts) n'avaient pas été satisfaites, la cour a associé cette conclusion au fardeau de preuve imposé à la société par l'art. 192. Elle a ainsi combiné les éléments substantiels de la demande de redressement pour abus au fardeau de la preuve applicable dans le cadre d'une demande d'approbation sous le régime de l'art. 192. De ce croisement a découlé la conclusion que la société ne s'était pas acquittée de son obligation de démontrer qu'il n'était pas possible de répondre aux attentes raisonnables des détenteurs de débentures. L'application de l'art. 241, qui impose au plaignant l'obligation de prouver l'abus, n'aurait pas pu produire un tel résultat. En combinant les éléments substantiels de l'art. 241 au fardeau de preuve inversé prévu à l'art. 192, la Cour d'appel est parvenue à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier.

VI. Conclusion

[166] We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

[167] For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed with costs. Cross-appeals dismissed with costs.

Solicitors for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada: Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Solicitors for the appellant/respondent on cross-appeals 6796508 Canada Inc.: Woods & Partners, Montréal.

Solicitors for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders: Fishman, Flanz, Meland, Paquin, Montréal.

Solicitors for the respondent/appellant on cross-appeals Group of 1997 Debentureholders: McMillan, Binch, Mendelsohn, Toronto.

Solicitors for the respondent Computershare Trust Company of Canada: Miller, Thomson, Pouliot, Montréal.

Solicitor for the intervener Catalyst Asset Management Inc.: Christian S. Tacit, Kanata.

Solicitors for the intervener Matthew Stewart: Langlois, Kronström, Desjardins, Montréal.

VI. Conclusion

[166] La Cour est d'avis que les détenteurs de débentures n'ont établi ni qu'il y avait eu abus au sens de l'art. 241 de la *LCSA* ni que le juge de première instance a commis une erreur en approuvant l'arrangement sous le régime de l'art. 192 de la *LCSA*.

[167] Pour ces motifs, les pourvois sont accueillis, la décision de la Cour d'appel est annulée et l'approbation du plan d'arrangement par le juge de première instance est rétablie, avec dépens devant toutes les cours. Les pourvois incidents sont rejetés avec dépens devant toutes les cours.

Pourvois principaux accueillis avec dépens. Pourvois incidents rejetés avec dépens.

Procureurs des appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada : Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Procureurs de l'appelante/intimée aux pourvois incidents 6796508 Canada Inc. : Woods & Partners, Montréal.

Procureurs des intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996 : Fishman, Flanz, Meland, Paquin, Montréal.

Procureurs de l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997 : McMillan, Binch, Mendelsohn, Toronto.

Procureurs de l'intimée la Société de fiducie Computershare du Canada : Miller, Thomson, Pouliot, Montréal.

Procureur de l'intervenante Catalyst Asset Management Inc. : Christian S. Tacit, Kanata.

Procureurs de l'intervenant Matthew Stewart : Langlois, Kronström, Desjardins, Montréal.

Naneff v. Con-Crete Holdings Limited et al.

[Indexed as: Naneff v. Con-Crete Holdings Ltd.]

23 O.R. (3d) 481
[1995] O.J. No. 1377
No. C20548

Court of Appeal for Ontario,
Carthy, Galligan and Austin JJ.A.
May 16, 1995

Corporations -- Oppression -- Remedies -- Father building up business and then making two sons equal owners of equity in business while retaining complete control himself -- Family rupture resulting in one son being removed as officer of all companies comprising family business and excluded from participation in and income from business -- Conduct of family oppressive -- Trial judge erring in ordering that business be sold publicly as going concern with each of or any combination of father and sons being entitled to purchase it -- Remedy going further than rectification of oppression and not giving expression to reasonable expectations of son -- Remedy being punitive towards father -- Appropriate remedy being to have family purchase son's shares at fair market value without minority discount.

NN built a very successful business, refusing to borrow from outside sources and financing all expansion by retaining profits in the business. In 1977, by means of an estate freeze, he made his two sons, AN and BN, equal owners of all of the equity in the business, while retaining complete control himself through redeemable voting special or preference shares.

In 1990, a family rupture occurred; angry over AN's lifestyle and his relationship with a woman, the family not only threw AN

out of the family home, but also removed him as an officer of all of the companies comprising the family business and excluded him from participation in and management of the business. His income from the business was virtually cut off.

In an application by AN for a remedy under s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"), the trial judge found that the family's conduct was oppressive to AN. No appeal was taken from that finding. The trial judge ordered that the business be sold publicly as a going concern with each of or any combination of NN, AN and BN being entitled to purchase it. The Divisional Court upheld, with one variation, that judgment: [1994] O.J. No. 1811. The family appealed with respect to the remedy granted.

Held, the appeal should be allowed.

The remedy of public sale of the family business amounted to an error in principle and was unjust to NN. While the fact that this case concerned a family business could not oust the provisions of s. 248 of the OBCA, the fact that this was a family business had to be kept in mind when fashioning a remedy as it bore directly upon the reasonable expectations of the principals. Any remedy granted under s. 248(3) had to be fashioned so that it was just, having regard to the considerations of a personal character which existed among NN, AN and BN.

The discretionary powers in s. 248(3) of the OBCA, broad as they are, must nevertheless be exercised within two important limitations: they must only rectify oppressive conduct, and they may protect only the person's interest as a shareholder, director or officer as such. The provisions of s. 248 cannot be used to protect or to advance the personal interests of shareholders, officers, or directors.

AN could not reasonably have expected to control the family business while NN was alive and active. Moreover, he could not reasonably expect NN's paternal bounty to continue if NN no longer considered him to be a dutiful son and if the family ties were severed. The remedy granted by the trial judge did

more than simply rectify oppression. It gave AN something which he knew he could never have while NN was alive and active -- the opportunity to obtain full control of the family business. Moreover, the remedy was a punitive one towards NN, since it put at risk the very condition upon which NN exercised his bounty in favour of his sons: his total control during his active life of a business to which he had devoted 40 years of his life. The OBCA authorizes a court to rectify oppression; it does not authorize the court to punish it.

The second error in the remedy was that it attempted to protect AN's interest in the family business as a son and family member, in addition to protecting his interest as a shareholder as such.

The appropriate remedy in this case was that NN and BN acquire AN's shares of the companies at fair market value, without minority discount.

Cases referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), affg (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.); Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 All E.R. 492, [1972] 2 W.L.R. 1289, 116 Sol. Jo. 412 (H.L.); H.R. Harmer Ltd. (Re), [1958] 3 All E.R. 689, [1959] 1 W.L.R. 62, 103 Sol. Jo. 73 (C.A.); Mason v. Intercity Properties Ltd. (1987), 59 O.R. (2d) 631, 38 D.L.R. (4th) 681, 37 B.L.R. 6, 22 O.A.C. 161 (C.A.); Mathers v. Mathers (1993), 123 N.S.R. (2d) 14, 340 A.P.R. 14, 16 C.P.C. (3d) 16 (C.A.), revg (1992), 113 N.S.R. (2d) 284, 309 A.P.R. 284 (T.D.); Stone v. Stonehurst Enterprises Ltd. (1987), 80 N.B.R. (2d) 290, 202 A.P.R. 290 (Q.B.)

Statutes referred to

Business Corporations Act, R.S.N.B. 1973, c. B-9.1, s. 166(2)
Business Corporations Act, R.S.O. 1990, c. B.16, s. 248
Companies Act, 1948 (U.K.), s. 222
Courts of Justice Act, R.S.O. 1990, c. C.43

Authorities referred to

MacIntosh, J.G., "The Retrospectivity of the Oppression Remedy" (1987-88), 13 Can. Bus. L.J. 219, p. 225

APPEAL from a judgment of the Divisional Court (1994), 19 O.R. (3d) 691, 16 B.L.R. (2d) 169, affirming with one variation a judgment in the respondent's favour (1993), 11 B.L.R. (2d) 218 (Ont. Gen. Div.), in an application for a remedy under s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16.

J. Edgar Sexton, Q.C., and Larry P. Lowenstein, for appellants.

Brian P. Bellmore and Roger W. Proctor, for respondent.

The judgment of the court was delivered by

GALLIGAN J.A.: -- One usually reads of unfortunate family break-ups in family law cases. This appeal demonstrates that they can also occur in commercial cases.

The appellants appeal, with leave, from a judgment of the Divisional Court ((1994), 19 O.R. (3d) 691, 16 B.L.R. (2d) 169) upholding, with one variation, a judgment in the respondent's favour given at trial by Blair J. ((1993), 11 B.L.R. (2d) 218). The respondent's application was for relief under the oppression provisions contained in s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16 ("O.B.C.A."). The text of s. 248 is set out as a schedule to these reasons [see p. 496-97 post]. Blair J. found oppression by the appellants and granted remedies to the respondent. The appellants did not contest the findings of oppression before the Divisional Court and they do not do so before this court.

A. THE CIRCUMSTANCES

The facts and the evidence upon which they were found are set out in great detail in the very full reasons for judgment delivered by Blair J. The reasons for judgment show great sensitivity for the feelings of all of the family members. It will do a disservice to those excellent reasons when I briefly summarize the facts. But it is necessary to do so in order to put the issues in the appeal in their factual context.

This case involves a family business operated through a number of different companies. For the purposes of my decision, it is not necessary to outline the details of how the companies are owned and controlled nor the way in which they are inter-related. Except where it becomes necessary to refer to specific details of the companies and their holdings, I will refer to them comprehensively as the business, or the family business.

Natscho Naneff is the father of the family. In these reasons, I will refer to him as Mr. Naneff. Ingeborg Gina Naneff is the mother and I will refer to her as Mrs. Naneff. Alexander Naneff, the respondent in the appeal, is the elder of Mr. and Mrs. Naneff's two children. He is 36 years of age. In the factums filed, he has been referred to as Alex. I will also refer to him by that shortened name. Boris Naneff is now 33 years of age and is the second Naneff son.

Mr. Naneff came to Canada from Bulgaria in 1951. He was a graduate civil engineer but because his European degree was not recognized here and because of his limited English, he could not work in his chosen profession. He found work at Inco and settled in Sudbury. He saved his money and after a short time started his own business producing concrete blocks in Sudbury. Through his keen business sense and hard work, Mr. Naneff's enterprise thrived. His business expanded both geographically and in terms of product. It now includes a number of concrete block plants and ready-mix plants in Dowling, Espanola, Elliott Lake, Blind River, Sturgeon Falls and South River. The original plant in Sudbury has been modernized and expanded to include a precast concrete plant. The business either owns or has rights to extract aggregates from gravel pits and quarries in Sudbury, Elliott Lake and North Bay. In North Bay, the business has two

concrete block plants, a precast plant and a ready-mix plant. In addition to the original plant in Sudbury, it has a concrete pipe plant and manufactures prestressed hollow core building slabs. It also has a second ready-mix plant and a Kwik-Mix manufacturing plant. Most of this growth and expansion took place well before Alex and Boris became active in the business. In the last year in which Alex was involved in the business, the gross revenues of only some of its companies were well in excess of $23 million.

Mr. Naneff has demonstrated a business acumen that is rare in the business world of the 1980s and 1990s. Throughout the history of the business, he has refused to borrow from outside sources and has financed all of the expansion by retaining profits in the business. At the time of the trial, the family business was debt free. Blair J. said (at p. 227): "Mr. Naneff can be justifiably proud of the thriving business which he has created and fashioned into such a successful enterprise."

It was Mr. Naneff's passionate desire that his sons come into the business with him and succeed him in it when he died or chose to retire. To that end, he had both of his sons work in the business, particularly after school, on weekends and during school vacations. He showered his bounty upon them in the form of educational opportunities, flying lessons, vacations, powerful cars, snowmobiles and boats.

In 1977, when Alex and Boris were still in high school, Mr. Naneff took the step which is at the root of these unhappy proceedings under the O.B.C.A. By means of an estate freeze with respect to one of his companies, he made his two sons equal owners of all of the common shares of the company through which the business was then being operated. Reorganization took place in 1987 but did not change the effect of the estate freeze.

While he gave the equity in his business to his sons, he did not give them control. In fact he retained complete control of the business through redeemable voting special or preference shares. Those shares gave him the right, which he has never ceased to exercise, of complete and final operating control and

the right to declare what dividends will be paid, when they will be paid, and to whom they will be paid. He has always directed what the recipients of the dividends would do with them. The arrangement ensured that he would have that control for as long as he lived. It is not necessary to set out the details of the estate freeze; what is important, however, is that the effect of it was that Mr. Naneff gave the equity of his business to his sons but retained full, final and ultimate control over it until he died.

Alex entered the business full-time in 1981 and Boris followed him into the business in 1985. They both undertook and executed important responsibilities. There is no doubt that both sons worked hard and effectively. Blair J. found that the business became "a team effort" between father and sons and that it prospered during the years that the three of them worked together. Blair J. also found that Mr. Naneff "remained -- and still remains -- the ultimate decisionmaker in these operations" (at p. 229).

In 1989 and 1990, dark clouds appeared over this happy family and its prosperous business. Alex's parents began to have legitimate parental concerns about his lifestyle when he was not at work. Coupled with that concern was what the parents considered a far more serious development. Alex began to keep company with a woman of whom Mr. and Mrs. Naneff ardently disapproved. It is unnecessary to recount the details of the parents' attempts to have Alex change his ways nor of Alex's reaction to them. A year of threats and promises, of estrangements and reconciliations, culminated in a family rupture on Christmas Day 1990 which Blair J. described as immediate, traumatic, and unfortunately, lasting (at p. 238):

> Alex was thrown out of the family home. Boris physically threw some of Alex's belongings after him. He was told that he was out of Rainbow [the family business], and that the family was going to teach him a lesson.

The other family members followed through on the threat. As soon as the necessary directors' meetings could be held and the paperwork completed, Alex was removed as an officer of all of

the companies comprising the family business and ordered to stay off the business premises. He was excluded from all participation in and management of the business. He was virtually cut off from income from it. Until this litigation was started and an interim order was made in November 1992, all Alex received from the business was $35,000.

This conduct, and other conduct by Mr. and Mrs. Naneff and Boris toward Alex after December 25, 1990, was found by Blair J. to be oppressive to Alex within the meaning of s. 248 of the O.B.C.A. No appeal is taken, nor could it successfully be taken, from that finding.

Before turning to a consideration of the remedies granted to Alex I think this review of the background should be completed by the following extract from the reasons for judgment given by Blair J. (at p. 251):

> The desire -- understandable and genuine as it may be -- to chastise and correct the actual and perceived failing of a son or brother in his personal life, is not a basis for ignoring the duties and obligations which the parent and sibling owe in their corporate capacities to the son and brother in his corporate capacity. In circumstances such as these, the strictures of the O.B.C.A. and of corporate law override the family desires. In their corporate capacity as directors they are required to act in good faith and in the best interests of the company, and not for some extraneous purpose . . . [references omitted].
>
> Here, the Naneffs may have felt that their interests as a family in dealing with Alex's perceived failings and the interests of the Rainbow Group in this respect were one and the same. They are not. Alex's personal life had no adverse effect on his business/company life.

I agree that family differences can never justify oppression under s. 248 of the O.B.C.A.

B. THE REMEDIES ORDERED BY BLAIR J.

The judgment at trial contained a number of specific remedies. The fundamental and most important remedy, contained in para. 9, was that the business, i.e., those corporations which comprise it, be sold publicly as a going concern with each of or any combination of Mr. Naneff, Alex and Boris being entitled to purchase it. There were remedies contained in paras. 4 to 7 inclusive of the judgment which set aside certain changes in corporate structure and other corporate arrangements which were made after Alex was ejected. Those remedies were ordered in an effort to restore the corporate arrangements to the state which they were in at the time of Alex's ejection. One remedy ordered the payment to Alex of his outstanding shareholder's loans to two of the corporations together with interest. There were two other ancillary remedies which I will mention later. I propose to discuss those remedies and give my opinion with respect to their validity.

1. Public Sale of the Companies Forming the Business as a Going Concern

Before discussing the merits of the challenge to this remedy, I wish to make brief reference to the principles which guide an appellate court in its review of a remedy ordered under s. 248(3) of the O.B.C.A. Section 248(3) empowers a court upon a finding of oppression to make any order "it thinks fit". When that broad discretion is given to a court of first instance, the law is clear that an appellate court's power of review is quite limited. In Mason v. Intercity Properties Ltd. (1987), 59 O.R. (2d) 631 at p. 636, 38 D.L.R. (4th) 681 (C.A.), Blair J.A. set out the governing principle:

> The governing principle is that such a discretion must be exercised judicially and that an appellate court is only entitled to interfere where it has been established that the lower court has erred in principle or its decision is otherwise unjust.

I approach this issue, therefore, keeping in mind that this court can only interfere with the remedy if it concludes that there was an error in principle on the part of Blair J. or if the remedy in all of the circumstances is an unjust one. It

cannot be interfered with, as Carruthers J. said (at p. 701) when giving the judgment of the Divisional Court, "simply because someone else might prefer a different way of going about things". With great deference to Blair J., who is a distinguished jurist with extensive commercial law experience, I regret to say that I have concluded, in the circumstances of this case, that the remedy of public sale of this business amounts to an error in principle and is unjust to Mr. Naneff.

At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held, the fact that this is a family business cannot oust the provisions of s. 248 of the O.B.C.A. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals.

I have come to that conclusion after considering certain observations made by Lord Wilberforce during the course of his speech in Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.). The statute under consideration, the Companies Act, 1948, s. 222, authorized the court to wind up a company if it was "just and equitable" to do so. In my opinion, the words "just and equitable" convey the same meaning as the word "fit" in s. 248(3) of the O.B.C.A. Lord Wilberforce explained that when this jurisdiction is being exercised, the relationship between the principals should not be looked at from a technical legal point of view; rather the court should examine and act upon the real rights, expectations and obligations which actually exist between the principals. He said at p. 379:

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality

> in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

(Emphasis added)

Thus, I think any remedy granted under s. 248(3) in this case had to be fashioned so that it was just, having regard to the considerations of a personal character which existed among Mr. Naneff, Alex and Boris.

The provisions of s. 248(3) give the court a very broad discretion in the manner in which it can fashion a remedy. Broad as that discretion is, however, it can only be exercised for a very specific purpose; that is, to rectify the oppression. This qualification is found in the wording of s. 248(2) which gives the court the power, if it finds oppression or certain other unfair conduct, to "make an order to rectify the matters complained of". Therefore, the result of the exercise of the discretion contained in s. 248(3) must be the rectification of the oppressive conduct. If it has some other result the remedy would be one which is not authorized by law. I agree with the opinion expressed by Professor J.G. MacIntosh in his paper "The Retrospectivity of the Oppression Remedy" (1987-88), 13 Can. Bus. L.J. 219 at p. 225:

> The private law character of the enactment strengthens the argument, for in seeking to redress equity between private parties the provision does not seek to punish but to apply a measure of corrective justice.

(Emphasis added)

That opinion was referred to with approval by Glube C.J.T.D. in Mathers v. Mathers (1992), 113 N.S.R. (2d) 284 (N.S.T.D.) at p. 304, 309 A.P.R. 284, reversed on other grounds (1993), 123 N.S.R. (2d) 14, 340 A.P.R. 14 (C.A.).

My analysis of s. 248(2) indicates that there is another limit imposed by law upon the apparently unlimited discretionary powers contained in s. 248(3). Section 248(2) provides that when the court is satisfied that in respect of a corporation there is certain specified conduct "that is oppressive, or unfairly prejudicial to or that unfairly disregards the interest of any security holder, creditor, director, or officer of the corporation, the court may make an order to rectify the matters complained of" (emphasis added). The expression "security holder" includes a shareholder. Thus, the provision only deals with the interest of a shareholder, creditor, director or officer. It follows from a plain reading of the provision that any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer.

In Stone v. Stonehurst Enterprises Ltd. (1987), 80 N.B.R. (2d) 290, 202 A.P.R. 290 (Q.B.), Landry J. was called upon to interpret s. 166(2) of the New Brunswick Business Corporations Act, R.S.N.B. 1973, c. B-9.1, whose provisions are the same as s. 248(2) of the O.B.C.A. The company in question was a family company run as a family business. The company decided to sell its assets. A minority shareholder in his personal capacity wanted to buy the assets and bid for them. When the majority shareholder exercised her controlling interest and sold the assets to someone else, the minority shareholder attacked the transaction as being oppressive to him as a shareholder. Landry J. held that the Act protected a person's interest as a shareholder "as such". Basing his

opinion on the judgment of Jenkins L.J. in Re H.R. Harmer Ltd., [1958] 3 All E.R. 689 at p. 698, [1959] 1 W.L.R. 62 (C.A.), Landry J. said at p. 305:

> It must be remembered, and it is very important in this case, that it is only the interest of a shareholder as such, or of a director or officer as such that is protected by this section.
>
> The applicant must establish that his interest as a shareholder has been affected. He may of course have other interests, such as being a prospective purchaser of the assets of the company. But it is only the applicant's interest as a shareholder which we must be concerned with in applying s. 166.

(Emphasis in original)

I agree with and adopt Landry J.'s analysis as a correct statement of the law. Persons who are shareholders, officers and directors of companies may have other personal interests which are intimately connected to a transaction. However, it is only their interests as shareholder, officer or director as such which are protected by s. 248 of the O.B.C.A. The provisions of that section cannot be used to protect or to advance directly or indirectly their other personal interests.

I conclude, therefore, that the discretionary powers in s. 248(3) O.B.C.A. must be exercised within two important limitations:

(i) they must only rectify oppressive conduct

(ii) they may protect only the person's interest as a shareholder, director or officer as such.

The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals. The cases on this issue are collected and analyzed by Farley J. in

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at p. 123 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.). I agree with his comment at pp. 185-86:

> Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

The determination of reasonable expectations will also, in my view, have an important bearing upon the decision as to what is a just remedy in a particular case.

The finding made by Blair J. that Alex expected ultimately to be an equal co-owner of the business with his brother cannot be challenged. However, it must be interpreted in the light of two other important and intertwined considerations. The first consideration is that Alex fully understood that until death or voluntary retirement his father retained ultimate control over the business even to the extent of deciding what dividends would be paid and what would be done with any of those dividends. The second consideration is that this was a family business which had been built by his father.

The importance of the first of those considerations is that Alex knew that until his father died or retired he could under no circumstances have any right to have or even to share absolute control of the business. Therefore, under no circumstances could Alex's reasonable expectations include the right to control the family business while his father was alive and active. The second consideration is important because, while Alex expected that his father would give him an equal share in the control of the business upon his death or retirement, that expectation was based upon his belief that his father would continue to be bountiful to him in the future. It should have been apparent to Alex that he could not expect that paternal bounty to continue if his father for good reason or

bad no longer considered him to be a dutiful son. It would have been quite unrealistic of Alex to expect that his father would continue to be bountiful to him if his family ties were severed. Alex knew that the reason for his father giving him one-half of the equity in the family business was his father's desire for his sons to work with him in his business. He must also have known that it would be impossible for him, Mr. Naneff and Boris to work together in the business as a family if the family bonds ceased to exist. It is for those reasons that Alex's reasonable expectation must be looked at in the light of the family relationship.

It is my view that the first error in principle in this remedy is that it did more than simply rectify oppression. As I noted above, the O.B.C.A. authorizes a court to rectify oppressive conduct. I think the words of Farley J. in Ballard, supra, at p. 197 are very appropriate in this respect:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party. I note that in Explo [Explo Syndicate v. Explo Inc., a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
> > In approaching a remedy the court, in my view, should interfere as little as possible and only to the extent necessary to redress the unfairness.

(Emphasis added)

The order of Blair J. gave Alex something which he knew he could never have while his father was alive and active -- the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy which gives a shareholder something that even he never could have reasonably expected.

Moreover, I am unable to view the remedy as anything other than a punitive one towards Mr. Naneff. There was never any doubt among the three men that Mr. Naneff would exercise ultimate control of the family business until he died or retired. Mr. Naneff solidified his right of complete control by the corporate arrangements he put in place at the time of the estate freeze and which he kept in place to the knowledge of his sons throughout the time that the three of them worked together. It is not the task of any court of law to judge the family dispute or to rule upon the justice of the expulsion of Alex from the family. However, I am unable to accept as anything other than punitive, a remedy which puts at risk the very condition upon which Mr. Naneff exercised his bounty in favour of his sons -- his total control of the business during his active life. The O.B.C.A. authorizes a court to rectify oppression; it does not authorize the court to punish for it.

The second error in this remedy is that it attempts to protect Alex's interest in the family business as a son and family member, in addition to protecting his interest as a shareholder as such. As I mentioned above, it is my view that Alex's expectation of ultimately obtaining an equal share of the control of the business with Boris was based upon his expectation of being the continuing object of his father's bounty. That in turn depended upon him remaining in his father's favour and remaining in his father's eyes a member of the family. The remedy of public sale, which gives Alex the opportunity to buy the company, enables him to obtain that control while out of his father's favour. This appears to protect much more than his interest as a shareholder as such; it protects, indeed it advances, his interest as a son.

It is my view, therefore, that the remedy imposed in this case constituted an error in principle in that it did more than rectify oppression, and it did more than protect Alex's interest as a shareholder as such in the companies.

As well as concluding that the remedy granted to Alex was wrong in principle, it is my view that the remedy was unjust to Mr. Naneff. By the time of Alex's ouster from the business, Mr.

Naneff had devoted almost 40 years of his life to creating, nurturing and building the business into a very significant enterprise. Instead of using profits from the business to acquire other personal assets, he used them to finance the growth and expansion of the business. There was never any doubt in the minds of his sons that their father gave them their equity positions upon the understanding that he would retain ultimate control as long as he wanted to exercise it. No one can disparage the productive and devoted work which Alex put into the business. But his nine years of contribution pales to almost insignificance when compared with that of his father's contribution.

The effect of the relief granted to Alex is to put Mr. Naneff in the position where he is just another person, equal to Alex, who is entitled to buy the business which he had himself founded and built from nothing. The remedy jeopardizes something which Alex knew was always to be his father's, the right to ultimate control of the business. The remedy gives to Alex the possibility of taking control of the business, something he knew he could never have during his father's lifetime. Having regard to the circumstances of this case this remedy, which jeopardizes the right which everyone knew belonged to Mr. Naneff and which gives Alex the opportunity to take away that right, strikes me as unjust.

At trial there were three possible fundamental remedies suggested to the trial judge. One of them was properly rejected out of hand. No more need be said about it. The alternative remedy to public sale of the business as a going concern was that Mr. Naneff and Boris acquire Alex's shares of the companies at fair market value, without minority discount. In my view that was the just remedy in this case. While I find that Mr. Naneff's oppressive conduct should not endanger his right to control the business, neither should he be able to take away what he had given to Alex, or to take away what Alex had contributed to the business. This remedy, together with certain of the other remedies ordered by Blair J., would have had the effect of fully compensating Alex for the value of the equity given to him by his father and for his own contributions to the business. The value of his shares would reflect the

success of the business and Alex's contribution toward that success, as well as the value of the gift of equity which he had received from his father. When I discuss the remedy respecting the shareholders' loans, it will be seen that when the business was ordered to repay Alex the amounts of his loans, in fact he was receiving his share of the operating profits of the business over previous years.

This remedy would be just because it will put Alex, in so far as money can, in the position which he would have been in had he not been ejected. It would not give him an opportunity to which he had no reasonable expectation. It would not put at risk Mr. Naneff's right to ultimate control which Alex knew was a condition of his father's gift of equity. The remedy would protect Alex's interest as a shareholder as such.

It is my opinion that para. 9 of the trial judgment, which provides for the sale of the appellant companies on the open market as a going concern, cannot be sustained. In its place, I would order that the appellants acquire Alex's shares of the companies at fair market value fixed as of the date of his ouster, December 25, 1990. It is conceded on behalf of the appellants that it would not be fair to apply a minority discount to the market value of Alex's shares. I agree and would order that there be no minority discount when fixing the fair market value of his shares. Alex is also entitled to prejudgment interest on the value of his shares as provided in the Courts of Justice Act, R.S.O. 1990, c. C.43, from December 25, 1990.

In the event that the parties cannot agree upon the value of the shares or to having the value of them fixed in some other way, I would direct a new trial restricted to fixing the value of Alex's shares in the appellant companies as of December 25, 1990. In my view the costs of such a new trial ought to be in the discretion of the judge presiding at it.

2. The Remedies Contained in Paras. 4 to 7 Inclusive of the Trial Judgment

These remedies all relate to steps taken after December 25,

1990. They are directed to returning the companies to their status as of that date. Because I would set aside the remedy of public sale and direct that the appellants acquire Alex's shares as of December 25, 1990, those remedies are no longer relevant. I would, therefore, set them aside.

3. Lansing Avenue

Blair J. directed that Mr. Naneff convey to Alex a certain property on Lansing Avenue in Sudbury. That remedy was varied by the Divisional Court. No appeal was taken from that remedy as varied. It is, therefore, unnecessary to say anything more about it except that I would uphold the judgment of the Divisional Court in so far as it maintained that remedy in its varied form.

4. Repayment of Alex's Outstanding Shareholder's Loans to Rainbow Concrete Industries Limited and to Skead Transport Inc.

The only issue now outstanding about this remedy is the date upon which interest on the loans ought to begin to run. Blair J. held that interest ought to be paid upon them from April 1, 1992. The argument that a later date ought to have been chosen is not persuasive. I would not interfere with the date chosen by Blair J.

Strictly speaking, while this is all that need be said about this issue, I think I should outline the way in which those loans were created. When Mr. Naneff was of the opinion that sufficient profits had been earned from the business, he would direct that dividends be paid equally to his sons who would then pay the income tax upon them. After the taxes were paid, the amount of the dividends remaining were required to be loaned back by Alex and Boris to one of the companies making up the business. It was out of those transactions that the substantial loan balances were generated in Alex's account. Alex's loan to Rainbow Concrete Industries Limited amounted to just under $835,000 on December 25, 1990 and his loan to Skead Transport Inc. was just under $100,000. Both Alex and Boris had all of their personal expenses of every kind paid by the business and those payments were charged against their loan

accounts. In addition, each drew a very modest salary from the business. Thus, it can be seen that the loan balances were Alex's share of profits earned by the business over a number of years. When the appellants were ordered to pay Alex's outstanding shareholders' loans he was being paid his share of profits accumulated in the business.

5. Compensation Akin to Damages for Wrongful Dismissal

Blair J. found that when dismissal is part of an overall pattern of oppression the provisions of s. 248(3)(j) of the O.B.C.A. authorize payment of compensation to the aggrieved person. He ordered monetary compensation in the amount of $200,000. While no challenge is taken to the making of an award, the amount of it is in dispute.

It is my view that the evidence justified an award of compensation in the amount of $200,000 in this case. I would not interfere with that assessment.

C. COSTS

1. Costs of the Trial

Blair J. awarded the respondent his costs of the trial on a solicitor and client basis. It is apparent that a very large part of this trial involved an attempt by the appellants to defeat the claim of oppression and to prove that Alex's job performance and personal life justified his expulsion from the family business. Without a doubt, that stance must have greatly prolonged the trial and must have been calculated to humiliate Alex. While I respectfully disagree with Blair J. upon the appropriate remedy in this case, the stance of the appellants on the issue of oppression convinces me that his order of costs at trial should not be interfered with.

2. Costs of the Appeals

Because I think the appellants should succeed on the remedy issue and because they have not maintained their untenable defence to the claim of oppression, they are entitled to their

costs of the appeals. I would therefore allow them their costs of the appeal to the Divisional Court and to this court, including the costs of the motion for leave to appeal.

3. Costs of the New Trial

As indicated above I think that the costs of a new trial, if one is held, should be in the discretion of the judge presiding at it.

D. DISPOSITION

For the reasons set out above I would dispose of this appeal on the following basis:

1. I would allow the appeal from the Divisional Court and set aside its judgment except in so far as it upholds with a variation the order of Blair J. relating to the Lansing Avenue property.

2. I would strike out paras. 4 to 7 inclusive and para. 9 of the judgment of Blair J. and in their place I would order that the appellants acquire all of the shares which the respondent owns in any of the companies making up the family business at fair market value as of December 25, 1990 without minority discount together with prejudgment interest as provided in the Courts of Justice Act from that date. That a new trial be ordered to fix the value of the respondent's shares as provided for in para. 2. above. The costs of the new trial to be in the discretion of the judge presiding at it.

4. That in all other respects the judgment of Blair J. be affirmed.

5. That the appellants should have their costs of the appeal to the Divisional Court and to this court including the motion for leave to appeal.

SCHEDULE

Excerpt from the Ontario Business Corporations Act, R.S.O. 1990, c. B.16

248(1) A complainant, the Director and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. E(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in

addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186(4); and

(b) no other amendment to the articles or by-laws shall be

made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Appeal allowed.

COURT FILE NO.: 07-CL-6910
DATE: 2009-02-11

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

B E T W E E N:	)	
	)	
Le Maitre Limited, Karen Haddon, Harold Berlinski, Colin Lane and Richard Wilson	)	David Wingfield and Kim Mullin, for the Applicants
	)	
	)	
Applicants	)	
	)	
	)	
- and -	)	
	)	
	)	
Adrian Segeren, Le Maitre Special FX Inc., Le Maitre Special FX (U.S.A.) Inc., Le Maitre Pyrotechnics Inc., Le Maitre Orlando Inc. and 793862 Ontario Inc.	)	Ronald G. Slaght and Nadia Campion, for the Respondents
	)	
	)	
Respondents	)	
	)	

Pepall J.

REASONS FOR DECISION

Relief Requested

[1] The applicants, Karen Haddon, Harold Berlinski, Colin Lane and Richard Wilson (the "UK Shareholders") claim relief pursuant to s. 248 of the *Ontario Business Corporations Act* (the "*OBCA*"), the oppression remedy. They request an order appointing one of them and a third unaffiliated director to the boards of directors of the respondents, 793862 Ontario Inc. ("793"), Le Maitre Special Effects Inc. ("LMSE") and such other affiliates as may be necessary, and

prohibiting the respondent, Adrian Segeren, from competing or causing the corporate respondents to compete with the applicant, Le Maitre Limited ("LML"), without the UK Shareholders' consent. For his part, Mr. Segeren requests an order directing the UK Shareholders to transfer their shares to him for fair market value. Although he did not formally bring a cross application, counsel agreed at the outset of the hearing that he was seeking relief pursuant to section 207 of the *OBCA* arguing that it is just and equitable to order the share transfer.

History of Proceedings

[2] On March 22, 2007, the UK Shareholders commenced proceedings against the respondents. They requested, amongst other things, relief from oppression and interim relief. In response to the request for interim relief which was argued in May, 2007, I restrained the respondents from concluding a transaction with an Alabama company, Luna Tech Inc. (“Luna Tech”), pending further order of the court. My decision was released on May 24, 2007. The parties were to attend before me to obtain an immediate trial date and were to attend forthwith at mediation. They attended mediation which was unsuccessful. While a trial date was scheduled for August, 2007, the parties repeatedly postponed the hearing of the matter. In the spring of 2008, the applicants brought a motion requiring the respondents to make their best efforts to complete the Luna Tech transaction but withdrew that request for relief and instead agreed to a consent order dated May 5, 2008, that maintained the status quo with respect to the Luna Tech transaction. They also agreed that transactions involving in excess of $50,000 in value required the signature of one of the UK Shareholders. Ultimately the application was heard more than one year later. The parties agreed that a trial was unnecessary and that the dispute could be determined without the need for any *viva voce* evidence. 19 affidavits were filed each typically responding to factual assertions contained in the most recent affidavit. The facts advanced by the parties are therefore often at odds. Nevertheless, I am prepared to decide the case without the need of a trial. In this regard, I note that neither side wanted a trial.

Facts

a) The Parties

[3] The applicant, LML, is a UK company the shares of which are held by all of the individual applicants with the exception of Colin Lane. It is a world leader in the manufacture of pyrotechnic products. These products include fireworks that are used for special effects at, amongst other things, concerts and theater productions. LML is also a manufacturer of special effects machines ("FX machines"). LML sells its products all over the world by direct sales or through a network of distributors. The trademark “Le Maitre” has been registered in Canada and the United States.

[4] The respondent, Mr. Segeren, began distributing LML products in the early 1990’s through a small company he owned. It imported LML products into North America for resale to end users. This was a non-exclusive arrangement and therefore Mr. Segeren was permitted to sell products manufactured by companies other than LML.

[5] In or about 1993, LML and Mr. Segeren agreed to establish a new company to be the exclusive distributor of LML products in North America. LML could not sell its products in North America through any other distribution channel and the new company would sell only LML product.[1] Mr. Segeren and LML agreed that LML would provide preferential pricing on pyrotechnic products and the UK Shareholders would get shares in the new distribution company. LML also agreed that the new distribution company could use the Le Maitre name. Mr. Segeren states that the UK Shareholders assured him that LML would provide first class support.

[6] LMSE was incorporated in 1993 as a wholly owned subsidiary of 793 to operate as the exclusive North American distributor of LML products. 793 is purely a holding company. The UK Shareholders collectively own 50% of the shares in 793 and Mr. Segeren owns the remaining 50%. Mr. Segeren is the sole director of 793 and holds the office of President. LMSE in turn

[1] Later the parties entered into a distribution agreement dated January 31, 2003.

owns 100% of the shares of the remaining respondents Le Maitre Special Effects (U.S.A.) Inc. ("LMUSA"), Le Maitre Pyrotechnics Inc. ("LMP") and Le Maitre Orlando ("LMO"). LMUSA and LMP were incorporated in the United States. LMUSA sells FX machines in the United States and LMP sold pyrotechnic products in the United States but according to Mr. Segeren, was allowed to go dormant. In 2001, LMO was incorporated to set up an event planning business but that business did not materialize. Mr. Segeren is the sole officer and director of LMSE, LMUSA and LMP. He is the sole director of LMO. The UK Shareholders did not wish to be directors or officers of LMSE. The UK Shareholders benefit from an increase in sales of LML product in North America. Consistent with these arrangements, LMSE has never declared any dividends in favour of the UK Shareholders.

[7] As indicated in my reasons for decision dated May 24, 2007, according to the applicants, the corporate respondents were treated by management as one company. At the end of each year, revenues, expenses and assets were allocated to each of the corporate respondents for the purposes of preparing financial statements and filing tax returns.[2]

[8] Mr. Segeren has operated and managed the business on a day to day basis since its inception. He relies on the business as his primary source of income. The UK Shareholders have not been involved in the daily operations of LMSE's business. They reside in the UK.

[9] In addition to distributing pyrotechnic products for LML, LMSE manufactures FX machines. The former accounts for 40% of the business and the latter for 60%. Since LMSE was incorporated, LML has not sold pyrotechnic products to any other distributor or end user in North America (except for one small transaction for a customer that needed smoke effects for an air show). Accordingly, in effect, LMSE controls the distribution network for LML pyrotechnic products in all of North America. This distribution network consists of distributors of which approximately 75 sell pyrotechnic products. LMSE uses the "Le Maitre" brand name and also uses the LML logo.

[2] The Cole & Partners Valuation Report also observes that the companies operate essentially as one entity. See page 10 of that report.

b) The Written Agreements

[10] In 1996, the UK Shareholders, Mr. Segeren, and 793 entered into a unanimous shareholders agreement ("USA") dated May 28, 1996. The USA noted that 793 owned all of the shares of LMSE and that in turn LMSE held all of the shares of LMUSA. The USA provided that:

- the shareholders were to ensure that the affairs of 793 were to be managed by a sole director who was to consist "at all times of the following person: Adrian Segeren" and that all contracts or cheques, in the aggregate, in excess of $25,000 were to be in writing and were to require the signature of the sole director and the written approval of at least one of the UK Shareholders;

- without the consent of not less than 75% of the shareholders: there was to be no material change in the nature of the business of 793, nor any action taken which might lead to or result in such a material change; 793 was not to invest in the debts of any other company or person; and it was not to enter into any contract or other commitment out of the ordinary course of the business of 793;

- in addition, without the consent of not less than 75% of the shareholders, none of the shares held by the parties was to be transferred or disposed of except as provided in the USA;

- the shareholders covenanted that they would not sell or deal with any of the shares of 793 beneficially owned or controlled by them except in accordance with the terms of the USA;

- sale was only permitted in circumstances involving either a *bona fide* offer from an arm's length third party who would agree to be bound by the USA or, in the event of death, by bequest or sale to one of the surviving shareholders;

- any sale to a non-shareholder could take place only if Mr. Segeren first declined to purchase the shares;

- the USA could be terminated at any time with the written consent of all parties; and

- the agreement contained an entire agreement provision.

[11] Mr. Segeren and 793 which was described as the company also entered into a services agreement dated May 28, 1996. The services agreement provided that:

- the company appointed Mr. Segeren as the sole director and he agreed to serve as the managing director of the company upon the terms and conditions contained in the agreement;

- the appointment was to continue in force until May 30, 1997 and thereafter until either party gave not less than three months' notice;

- Mr. Segeren was to perform such duties as were consistent with his position as managing director and exercise such powers in relation to the business of the company as from time to time were assigned to or vested in him by the shareholders and "subject to such restrictions consistent as aforesaid as the shareholders may from time to time impose subject thereto (i) the sole director's duties hereunder shall include all the duties ordinarily performed by persons holding the position of managing director of a company carrying on a business similar to that of the company and (ii) the sole director shall be invested with the management of the business and affairs of the company to do all acts and things in the ordinary course of business of the company consistent with his position as managing director which he may consider necessary or conducive to the interests of the company *subject to consultation with the shareholders*." (emphasis added);

- he was to devote the whole of his abilities to his duties and without the prior consent in writing of the Board, was not to be directly or indirectly engaged in any other business, trade, vocation or employment competing with the business of the company;

- he was to faithfully serve the company and was to use his best endeavors to promote and develop its interests;

- without the prior written consent of the shareholders, he was not to directly or indirectly engage or be concerned or interested in any other business of a similar nature to or which would or might compete with any business for the time being carried on by the company either alone or jointly;

- the company could terminate the agreement without liability for compensation or damages by summary notice if the sole director committed any serious breach of his obligations under the agreement; and

- during the period of six months following the termination of his appointment, the sole director was not to directly or indirectly carry on in Canada or be engaged, concerned or interested in Canada in any business competing or seeking to compete with any business carried on by the company at the date of the termination of his appointment.

[12] On August 11, 2000, Mr. Segeren confirmed in writing that he managed the corporation and that no one else had any management control or management influence over the company. This confirmation was sent to the applicant, Mr. Lane. Mr. Segeren has operated LMSE since its inception. Between 2003 and 2007, he earned between $125,000 and $190,000 per annum. There is no suggestion of any abuse in this regard.

[13] While the parties had an unwritten distribution agreement, on January 31, 2003, LML, LMSE, LMUSA and LMP entered into a written distribution agreement. The distribution agreement provided that:

- the agreement commenced on April 1, 2003 and was to continue for an initial term of four years (March 31, 2007) following which it would continue for an indefinite term provided that it could be terminated by LML or LMSE giving the other party no less than six months' prior written notice;

- LMSE was required to achieve certain sales quotas in the initial term;

- LML guaranteed the delivery of products to LMSE in an amount sufficient for LMSE to meet its monthly sales quota. LML agreed to extend credit to LMSE for the purchase of products in specified amounts and at cost plus 63%, a lower price than that charged by LML to other distributors;

- LMSE agreed to purchase "those pyrotechnic products set out on Schedule "A" attached (the "Products" which, for greater certainty means all of those items set out in Schedule "A" and all similar or competing pyrotechnic products to those produced by LML) exclusively from LML. The list of Products set forth in Schedule "A" may be amended from time to time by LML." In that regard, LML could add any new pyrotechnic products it produced to Schedule "A";

- if LML did not manufacture a pyrotechnic product required by LMSE or a reasonable alternative, it was agreed that after discussion with LML on the possibility of manufacturing that pyrotechnic product, LMSE could purchase that product from a different supplier;

- LMSE agreed not to sell or distribute any "Products" in Canada, the USA or Mexico except products purchased from LML;

- LMUSA and LMP agreed to exclusively purchase products they sold from LMSE;

- LMSE, LMUSA and LMP also agreed to refrain from manufacturing any pyrotechnic products;

- the distribution agreement could be terminated forthwith without notice by either party at any time if the other committed any material breach of any of the provisions of the agreement;

- the right of termination was to be the exclusive remedy for the parties. Neither party was to be liable for any indirect or consequential losses (including any loss of profit direct or indirect, loss of revenue, loss of business or loss of opportunity); and

- the agreement included an entire agreement provision and a non-waiver provision.

[14] I conclude that LMSE agreed to purchase exclusively from LML. LMSE could only purchase pyrotechnic products from a third party if firstly, LML did not manufacture a product and secondly, only if LMSE had discussed the possibility of LML manufacturing the product beforehand. LMSE also agreed not to manufacture pyrotechnic product.

[15] A security agreement was also entered into between LML as secured creditor and LMSE as the debtor wherein LMSE granted security over inventory located in Ontario and Florida, USA. As of April 12, 2007, LMSE owed LML $700,000.

c) Mr. Segeren's Activities

[16] In July, 2004, the UK Shareholders learned that LMSE was manufacturing a product called "Fireball". Mr. Lane wrote to Mr. Segeren to express the UK Shareholders' concern. Mr. Segeren asserted that LMSE was entitled to manufacture Fireball because LML had declined to manufacture a comparable product. The distribution agreement prohibited any manufacture of pyrotechnic products by LMSE. This activity breached the parties' agreements.

[17] A rival manufacturer of pyrotechnic products, DMD Systems LLC ("DMD"), manufactures the Angel Fire range of pyrotechnic products. On June 30, 2005, Mr. Segeren wrote to Mr. Lane confirming that he would be using Angel Fire products in a show on which he was bidding. He inquired as to whether Mr. Lane wanted samples to assess the possibility of manufacturing the products for future supply. Mr. Lane responded affirmatively. Mr. Segeren then advised Mr. Lane that due to DMD's patent, LML's products could not be modified or improved to simulate the effects of the Angel Fire products. In December, 2005, Mr. Segeren caused LMSE to enter into an agreement with DMD. That agreement gave LMSE the exclusive right to distribute DMD's products in the world for a period of one year and also contemplated

that by the end of the year, LMSE would begin manufacturing DMD's products. This too would be contrary to the agreements. Mr. Segeren did not tell any of the UK Shareholders about LMSE's agreement with DMD until January 5, 2007, after the agreement with DMD had expired.

[18] In addition, in November, 2006, the UK Shareholders learned that LMSE was displaying the full range of DMD's Angel Fire products on its website as well as products manufactured by another competitor, Santore & Sons Inc. When the UK Shareholders confronted Mr. Segeren, he removed the products from the LMSE website. Mr. Segeren maintains that the UK Shareholders had raised no objection to this until recently. In mid December, 2006, LML learned that LMSE had sold pyrotechnic products for its UK Disney On Ice shows to Feld Entertainment Inc. ("Feld"). 16 of the products were Angel Fire products manufactured by DMD and only three were manufactured by LML. Mr. Segeren states that Feld had initially contacted LML directly for the product but LML was unable to meet its needs and, as a result, Feld turned to LMSE who supplied it with Angel Fire. Mr. Segeren says he removed the products from LMSE's website in a good faith effort to resolve the issue with the UK Shareholders, however, he has since restored them to the website.

[19] Luna Tech, a company based in Alabama, U.S.A., was a major manufacturer of pyrotechnic products. According to the applicants, its products competed with LML's products. In 2002, Mr. Lane approached Luna Tech and inquired into the availability of its facility but nothing materialized from this overture. In 2003, 99 people died in a fire in a Rhode Island nightclub. In class action litigation, families of the victims sued Luna Tech on the basis that the fire was caused by the pyrotechnic products manufactured by Luna Tech. In January, 2004, Mr. Segeren met with Amanda McLean, the principal of Luna Tech. At Ms. McLean's invitation, Mr. Segeren toured the Luna Tech facility but he did not tell the UK Shareholders. Mr. Segeren admits that he began thinking about acquiring a manufacturing facility in 2005 or 2006. The applicant, Mr. Wilson, says he asked him if he had any such intention and Mr. Segeren told Mr. Wilson that he did not. Mr. Segeren says this is untrue. In September, 2006, Luna Tech lost its US license to manufacture, import, sell and/or use regulated commercial pyrotechnic products. Luna Tech was also ordered to vacate its premises by March 30, 2007. Ms. McLean expressed

interest in selling the assets of Luna Tech to LMSE. These included its manufacturing facility, inventory, and licenses. At that time, Mr. Segeren had discussions with Ms. McLean about acquiring Luna Tech but did not tell the UK Shareholders about these discussions. As stated in his affidavit of September 16, 2008, Mr. Segeren felt it was important for LMSE to have an alternate source of supply given delivery problems he said LMSE had been experiencing with LML and the fact that the relationship between LMSE and LML was quickly deteriorating. He also maintained that many of LML's products were defective.

[20] In December, 2006, Mr. Segeren visited Luna Tech's plant in Alabama. He subsequently caused LMO to enter into a letter of intent dated January 1, 2007 for the purchase of certain of Luna Tech's assets and the lease of Luna Tech's manufacturing facility but failed to tell the UK Shareholders. LMO negotiated and finalized the wording of the asset purchase agreement, obtained the necessary insurance and manufacturing licenses, moved its pyrotechnic inventory from Florida to the Luna Tech facility in Alabama, commissioned the repair of machinery and employed manufacturing personnel to recommence operations at the Luna Tech facility. In late February, 2007, after he had already entered into the letter of intent, Mr. Segeren for the first time mentioned to Mr. Lane that he was close to closing a transaction with Luna Tech. On March 9, 2007, LMO began operating the manufacturing facility although the purchase agreement had not been executed. The UK Shareholders only learned that LMO was operating the facility when they received a press release advising that LMSE had acquired the assets and undertaking of Luna Tech and would begin manufacturing pyrotechnic products at Luna Tech's facility although Mr. Segeren states that he advised Mr. Lane before formally announcing the transaction to the public.

[21] Luna Tech's range of pyrotechnic products is competitive with LML products. Testing results performed by a pyrotechnics expert, George Kloodt, confirmed that an end user could substitute a number of Luna Tech products for LML products with no loss of functionality. LMO obtained a license to manufacture pyrotechnic products in Alabama. LMO's name was placed on the Luna Tech products as Luna Tech no longer had a manufacturing license. The applicants state that these products compete with pyrotechnic products manufactured by LML.

In contrast, Mr. Segeren states that the products manufactured by Luna Tech are not manufactured by LML and cannot therefore be considered competitive to LML's products. He maintains that the purchase of Luna Tech is in the best interests of LMSE. Ultimately, in August 2007, the UK Shareholders advised Mr. Segeren's counsel that they were prepared to approve the closing of the Luna Tech transaction and that the requisite 75% shareholder approval had been achieved. The UK Shareholders concluded that the best way to deal with the situation was to allow the respondents to acquire the Luna Tech facility so that it could be used to only manufacture LML products.

[22] Luna Tech has now reacquired a license to operate a pyrotechnic facility. Ms. McLean advised the applicant, Ms. Haddon, that Luna Tech was no longer prepared to consummate the transaction negotiated with Mr. Segeren in January, 2007, but would negotiate a new deal. Ms. McLean was not prepared to sign an affidavit to this effect. The Luna Tech vendors advised Mr. Segeren that they were not prepared to close the Luna Tech transaction knowing that there was a possibility that the applicants might become the ultimate owners of the corporate respondents.

[23] Even though the purchase agreement and the lease are unexecuted, LMO has operated the Luna Tech facility since March 5, 2007, and has recorded revenues and expenses as if Luna Tech was a wholly owned subsidiary. LMO has hired Luna Tech's former employees and has assumed the costs of operating the facility. Mr. Segeren has transferred LMSE's phone number to the Luna Tech facility and has instructed LMSE's sales director to tell customers to call the Luna Tech facility to place orders. Now, the majority of the families of products listed on LMSE's website under LML's trademark for sale in North America are not manufactured by LML.

[24] There are other disputed allegations that LMSE is illegally importing DMD's Angel Fire and Luna Tech products into the United Kingdom and that in or about December, 2007, Mr. Segeren began to cause LMSE to import into the UK and Europe pyrotechnic products that LMSE had bought from LML. LMSE has advertised that it has been a leading *manufacturer* of pyrotechnic products for 25 years (emphasis added).

d) Deadlock

[25] The relationship between the parties is very acrimonious. In her affidavit of March 20, 2008, Ms. Haddon states that "It is the UK Shareholders' position that a deep and permanent rift has developed between the parties which has effectively created a deadlock in respect of the operation and control of the LMSE group of companies." She went on to say that the applicants had concluded that they could no longer work with Mr. Segeren and both sides wanted to buy the other out. The applicants have since revised their position and now wish to adjust the composition of the boards of directors of the respondent corporations.

[26] Mr. Segeren is also of the view that there is deadlock. He continues to want to purchase the shares of the UK Shareholders. His plan is to terminate the distribution agreement and negotiate a new agreement with LML although he expects to increase the sale of product manufactured by LMSE and its affiliates.

Value of LMSE and Affiliates

[27] Not surprisingly, over time, Mr. Segeren has developed relationships between LMSE and local distributors in North America. He is considered the face of LMSE and has fostered strong relationships with its clients. The revenues of the consolidated LMSE business have increased from approximately $500,000 in the early 1990's to over $8 million on an annual basis, $3.5 of which is on account of pyrotechnic products. 85% of its revenues is generated by sales in the U.S. The financial performance of LML with respect to sales of pyrotechnic products has deteriorated since the respondent companies began to compete with it. Although Mr. Segeren testified that the market for pyro products was expanding by 10 to 15% per year, LMSE's purchases from LML dropped approximately £300,000 from March 2007 to March 2008 while LMSE's sales of product manufactured through Luna Tech have increased.

[28] A valuation of the corporate respondents was conducted by Cole & Partners Valuation Limited using December 31, 2007 as the valuation date with or without the acquisition of the subject Luna Tech assets. The parties agree that December 31, 2007 is the correct valuation date

to be used and are content to abide by the contents of the report. A going concern approach was used. The en bloc fair market share value findings were between $4,150,000 and $4,700,000 with a mid-point of $4,425,000 including the Luna Tech assets and between $3,650,000 and $3,780,000 with a mid-point of $3,715,000 excluding the Luna Tech assets. The valuations assumed no change to the use of the "Le Maitre" name, patent, or trademarks. The trademark "Le Maitre" was registered by LML in the United States on August 29, 2006 and in Canada on April 12, 2006. The service mark for Le Maitre Special Effects Inc. was registered in the U.S. to LMUSA on November 29, 2005. No adjustments were made in the report for the payment of legal fees that the applicants claim were improperly paid by the respondent companies. Counsel did not address in any degree of detail the fair market value that should be applicable to the relief sought.

Positions of the Parties

[29] The applicants submit that this is a case about abuse of corporate control and that Mr. Segeren used his control of LMSE to turn it and its affiliates into LML's competitor. They state that his actions are contrary to the understanding that formed the basis for the parties' relationship, the terms of the written agreements, and the reasonable expectations of the UK Shareholders. The UK Shareholders were uniquely vulnerable to Mr. Segeren and the court should intervene to prevent Mr. Segeren's misuse of power. It is just and equitable to appoint one of them and an additional unaffiliated director to the boards of LMSE and 793 and such other boards as may be necessary and to restrain the respondents from competing with LML absent the UK Shareholders' consent.

[30] The respondents submit that the most important agreement is the distribution agreement. The only remedy available for breach of the distribution agreement is termination of that agreement and equitable remedies are therefore precluded. Furthermore, the UK Shareholders have consistently acted in a manner that advances the interests of LML at the expense of the interests of LMSE. Mr. Segeren maintains that his actions have been in the best interests of LMSE and its affiliates with a view to maximizing shareholder value. Indeed, in the summer of

2008, the applicants requested that Mr. Segeren close the Luna Tech transaction. In argument, Mr. Slaght, for the respondents, submitted that to the extent that the purchase transaction with Luna Tech and the manufacture of product by LMO constituted material changes within the meaning of the USA, by August, 2007, those complaints had been resolved. The respondents submit that there is no reasonable prospect of the parties working together in the future and that the court should order Mr. Segeren to purchase the shares owned by the UK Shareholders for fair market value as set forth in the Cole & Partners Valuation Report. In Mr. Segeren's cross-examination, he indicated that he would like the court to impose some type of non-competition covenant as a condition of the sale of the shares of the UK Shareholders if they prove to be the vendors although this request was not pursued before me. Mr. Segeren submits that his primary complaint about the applicants is that they have refused to invest resources in researching and developing new products.

The Issues

[31] The issues to consider are:

(i) Does the evidence support the reasonable expectations asserted by the applicants?

(ii) Does the evidence establish that the reasonable expectations were violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest? In that regard, when should the conduct be assessed?

(iii) What is an appropriate remedy?

(iv) Should the *OBCA* section 207 cross application be granted?

The Law

(a) Entitlement

[32] Oppression is an equitable remedy. Section 248 of the *OBCA* provides the court with broad remedial powers to remedy conduct in respect of the business or affairs of an *OBCA*

corporation or its affiliates that is oppressive, unfairly prejudicial or that unfairly disregards the interests of any security holder, creditor, director or officer.

[33] Under section 248, a complainant may apply to the court for an order to remedy conduct in respect of an *OBCA* corporation or its affiliates. The respondent corporations are all affiliated and fall within the ambit of section 248.

[34] Complainant is defined to include a shareholder and clearly the UK Shareholders so qualify. In addition, the definition encompasses a current or former director or officer and any other person who, in the discretion of the court, is a proper person to make an application. The *OBCA* does not state who should so qualify but leaves the determination to the court's discretion. As noted by Markus Koehnen in "Oppression and Related Remedies":[3]

> "It is little wonder that courts have not developed a coherent set of principles to govern their discretion to grant standing to "any proper person." The category of complainant is unlimited, the statute provides no guidance in exercising the discretion and the remedy's broad scope and flexibility attract unconventional plaintiffs. One of the early cases to deal with the "proper person" category noted that s. 238(d) is not so much a definition as a broad grant of power to do justice where a person, not otherwise a complainant, ought to be permitted to have his claim tried. This admission of a purely result oriented approach is perhaps the most candid and prescient observation about the category. The result oriented approach is re-enforced by the fact that courts have generally disposed of the issue of standing as a "proper person" when disposing of the merits. As a result, the reasoning on standing often blends with reasoning on the merits."

While the respondents submit that the UK Shareholders are seeking to protect their interests as owners of LML, they did not take the position that LML did not have standing. If the section had been intended to have a limited ambit, it would not have included the language "and any other proper person." It seems to me that each case must be examined in its own context. In my view, in this case, LML is a proper person. It was and is a creditor of LMSE and its relationship

[3] Toronto: Thomson/Carswell, 2004 at p. 22.

with the UK Shareholders and their interest in the respondent corporations was integral to the genesis and development of those companies.

[35] The Supreme Court of Canada recently had occasion to examine the oppression remedy in the context of a Canada *Business Corporations Act* ("*CBCA*") company in *BCE Inc. v. 1976 Debentureholders*[4]. Given the similarity between the *OBCA* and the *CBCA* oppression provisions, this decision constitutes a definitive statement on the guiding principles associated with oppression relief. For this reason, I will outline the holding in some detail. Counsel made written submissions dated January 13, 16, and 20, 2009 on the application of those principles to the facts of this case.

[36] Firstly, the Court noted that the remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. The Court held that a categorical approach to oppression is problematic because the terms used in the subsection cannot be put into watertight compartments or be conclusively defined. The Court stated "one should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations." If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in the *Act*. The Supreme Court stressed that oppression is an equitable remedy that seeks to ensure fairness--- what is "just and equitable"? It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. Courts should look at business realities, not merely narrow legalities. Secondly, oppression is fact specific and is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play.

[37] Reasonable expectations of stakeholders were described by the Court as being the cornerstone of the oppression remedy. The concept is objective and contextual. "The actual expectation of a particular stakeholder is not conclusive." The Court suggested a two pronged inquiry: (i) does the evidence support the reasonable expectation asserted by the claimant, and

[4] (2008), SCC 69.

(ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

[38] Dealing firstly with proof of a claimant's reasonable expectations, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. "Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders."

[39] To complete a claim, the claimant must show that the failure to meet the expectation involved unfair conduct and prejudicial consequences within section 248 of the *OBCA*. Specifically, the Court stated that wrongful conduct, causation and compensable injury should be established.

(b) Remedy

[40] Section 248 of the *OBCA* provides that the court may make any final order it thinks fit. It expressly includes an order appointing directors in place of or in addition to all or any of the directors then in office; an order directing the corporation or any other person to purchase securities of a security holder; and an order for compensation. The court has a wide discretion to fashion an appropriate remedy. In *Naneff v. Con-Crete Holdings Inc.*,[5] the Court of Appeal suggested that judicial interference with the affairs of a company should be undertaken only to the extent necessary to rectify the oppression in question. It is not to be punitive. Furthermore, rectification can only be made with respect to the person's interest as a shareholder, creditor, director or officer as such. The Court also noted that the determination of reasonable expectations would have an important bearing on the appropriate remedy in a particular case.

[5] (1995), 23 O.R. (3d) 481.

Discussion

[41] Applying these principles to the facts before me, I will identify the reasonable expectations the UK Shareholders' claim have been violated. I will then consider whether these expectations were reasonably held. I must in turn decide whether the reasonable expectations, if any, were violated by conduct falling within the parameters of section 248 of the *Act* and whether prejudicial consequences ensued. Lastly, I will consider the issue of remedy.

(a) Identification of Expectations

[42] The UK Shareholders state that their expectations were that:

i. Mr. Segeren would operate LMSE in a way that was mutually beneficial to LMSE's business as a distributor of LML's products and LML's business as a manufacturer of pyrotechnic products and FX machines;

ii. the business of LMSE and its affiliates would be the sale of pyrotechnic products manufactured by LML, and the manufacture and sale of FX machines, including those manufactured by LML;

iii. the business of LMSE and its affiliates would not change without the consent of the UK Shareholders;

iv. LMSE and its affiliates would only purchase and sell LML pyrotechnic products unless there was a demonstrated customer need for products which LML did not manufacture and LML accepted that it could not fulfill that need;

v. LMSE and its affiliates would not, under any circumstances manufacture pyrotechnic products;

vi. the respondents would honour all contractual and other obligations to LML and the UK Shareholders;

vii. the respondents would not directly or indirectly manufacture or sell competing products sold by LML;

viii. the respondents would not undertake actions to dilute or jeopardize the "Le Maitre" trademark by selling competing products; and

ix. the respondents would obtain the approval of the shareholders for their activities.

They say that it was never expected that Mr. Segeren would operate LMSE and its affiliates in a manner that would undermine the North American sales of LML products or would compete with LML in North America and elsewhere in the world. In my view, the evidence does support the expectations asserted by the applicants.

(b) Reasonableness

[43] Having determined that the evidence supports the expectations relied upon, the applicants must establish that they were reasonably held. Useful factors that may be considered in determining whether a reasonable expectation exists were discussed in the *BCE* case. While not an exhaustive list, they are helpful in conducting the analysis.

[44] In ascertaining the nature of the corporation and the relationship between the parties, it is helpful to examine the genesis and essence of LMSE. This case involves a closely-held corporation consisting of five shareholders. The relationship was not based on ties of family or friendship. Rather, the parties' relationship was borne of a desire to have a mutually beneficial business relationship involving an exclusive distribution arrangement. LMSE was established to be the exclusive distributor of LML products in North America. LML could not sell its products to others in North America and LMSE could not manufacture other product nor could it sell other products. While the reasonable expectations of a shareholder are limited to his or her interests as a shareholder, this was the essence of the parties' compact.

[45] The agreements that governed the parties may be seen as a reflection of their reasonable expectations. The USA contained very limited exit provisions. The shareholders covenanted

that they would not sell their shares except in accordance with the USA. Sale was only permitted in circumstances involving either a *bona fide* offer from an arm's length third party who would agree to be bound by the USA or, in the event of death, by bequest or sale to one of the surviving shareholders. The USA could only be terminated with the written consent of all parties which included all the shareholders. As with the services agreement, the USA provided that the company was to be managed at all times by Mr. Segeren but all cheques in excess of $25,000 required the written approval of one of the UK Shareholders. Certainly the USA contemplated that Mr. Segeren would run 793 and its wholly owned corporations but with significant restrictions that would require keeping the UK Shareholders informed and obtaining their approval in certain circumstances. The USA also provided that the number of directors of the corporation was not to be increased or decreased absent approval by 75% of the shareholders. Furthermore, a 75% approval threshold was required for various events including a material change in the nature of the corporation or any action which might lead or result in such a material change. So, while the distribution agreement and the services agreement could both be terminated with six or three months' notice respectively, in effect, there could be no material change in the nature of the corporation without the approval of at least 25% of the UK Shareholders. The nature of the corporation pre-existed the written distribution agreement but was reflected in its terms. The corporation was to serve as a vehicle for the exclusive distribution of LML product. It was not a manufacturer; it was a distributor and the arrangements were exclusive. This was the business purpose behind the establishment of LMSE.

[46] In the face of the genesis of the companies, the relationship between the parties and the agreements amongst them, I conclude that it was reasonable for the UK Shareholders to hold the expectations they did. Nor am I persuaded that Mr. Segeren's position as sole director or past practice amounted to carte blanche to run the companies absent informing at least one of the UK Shareholders of his activities and obtaining approval (up to the 75% threshold) for his Luna Tech overtures. While a director owes a fiduciary duty to act in the best interests of a corporation, I do not believe that the Supreme Court's decision in *BCE* stands for the proposition that a director may violate agreements and the reasonable expectations of shareholders provided he or she considers the decision to be in the best interests of the corporation. Rather, as the Court stated,

"The corporation and the shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual shareholders unfairly."[6] The business judgment rule accords deference to a business decision so long as it is within a range of reasonable alternatives. Mr. Segeren's actions and decisions were not within that range. Mr. Segeren failed to treat the UK Shareholders fairly. He did not inform them of his activities including the Luna Tech transaction that expressly breached the agreements reached and the reasonable expectations held. He did not seek 75% shareholder approval as required by the USA which in turn reflected the parties' reasonable expectations.

[47] Having considered these factors, I conclude that the applicants' expectations were reasonable and were violated. In the *BCP* case, the Supreme Court states that "oppression" carries the sense of conduct that is coercive and abusive and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind that nevertheless has unfair consequences. "Unfair disregard" of interests may involve ignoring an interest contrary to a stakeholder's reasonable expectations. The concepts are not watertight. I am also persuaded that the applicants have established that the failure by Mr. Segeren and the corporate respondents to meet the aforementioned expectations involved conduct falling within section 248 of the *Act*.

[48] In my view, the evidence, objectively viewed, supports a reasonable expectation that Mr. Segeren and the corporate respondents would comply with the agreements, would not manufacture pyrotechnic products, would not purchase and sell third party pyrotechnic products absent compliance with the terms of the agreements, and would inform and seek the UK Shareholders' approval (up to the 75% threshold) to the entering into of a letter of intent with Luna Tech and that absent same, they would not transition LMSE and the other respondents into companies manufacturing product that competed with that of LML. Their failure to do so was both oppressive and unfairly disregarded the interests of the UK Shareholders. In reaching this conclusion, it is unnecessary to import a fiduciary duty analysis into this aspect of the claim.

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[6] Supra, note 4 at para. 64.

[49] Counsel for the respondents submits that oppression ought not to be found as by the time the application was heard, the UK Shareholders were in favour of closing the Luna Tech transaction. I do not agree. Firstly, in *Diligenti v. RWMD Operations Kelowna Ltd.*,[7] the court held that to determine if oppression exists, one should look at the time the notice of application was filed but in disposing of the matter, the court should consider the state of affairs at the time of the hearing. I agree with that analysis. Put differently, the existence of oppression should be assessed as at the date proceedings are commenced but its continuation is a factor to consider when addressing an appropriate remedy. In addition, steps taken by the respondents to remedy the complaints should be taken into consideration at the hearing itself: *Stapleton v. Fleming Feed Mill Ltd.*[8]. Secondly, while ultimately the applicants took the position that the Luna Tech transaction should close, they reached this conclusion as a solution to ensure that LML's product was manufactured at the Luna Tech premises. Thirdly, while a mere apprehension of future oppression should not in my view ground the granting of the remedy, as stated by Farley J. in *820099 Ontario Inc. v. Harold Ballard Ltd.*,[9] "…it would appear to me that apprehension of future oppression might be dealt with if it was clear on a balance of probabilities that such oppression would take place." Clearly this burden has been met in this case.

[50] Mr. Segeren states that the rationale for his conduct is that LML's products are defective and LML has threatened to cut off supply. The alleged threats to supply were largely explained by LML and took place in 2002 and 2004. Based on the record before me, I am unable to reach a reliable conclusion on the magnitude of defective products. More significantly, however, even if Mr. Segeren's assertions were legitimate, the distribution agreement did provide for termination. Mr. Segeren opted not to rely on that provision. Indeed, he largely ignored the terms of that agreement.

[51] The more fundamental argument that Mr. Segeren advances, however, is that he is acting in the best interests of LMSE. In making this submission, however, he ignores two key facts. Firstly, in light of the provisions of the USA and the parties' reasonable expectations, the

[7] (1976), 1 B.C.L.R. 36.
[8] (2001), 18 B.L.R. (3d) at 295.
[9] (1991) 3 B.L.R. (2d) 123.

assessment of the best interests of LMSE is not his alone to make. Secondly he disregards the purpose for which LMSE was established, namely to serve as a distributor of LML products in North America.

[52] Based on the totality of the evidence, I am also satisfied that causation and prejudicial consequences have been established. LML sells its products in North America through LMSE. LML's sales to LMSE account for 1/4 of all LML's sales. LML's total sales of pyrotechnic products and its sales to LMSE have declined since Mr. Segeren caused the respondent companies to compete with LML. Indeed LMSE's purchase of LML product declined from $693,212.98 in the year ending March 31, 2007 to $395,966.66 in the year ending March 31, 2008. In addition, LMSE has increased the sale of pyrotechnic products manufactured at the Luna Tech facility such that the increase largely mirrors the decline in LML's sales.

Remedy and the Cross Application

[53] I then turn to remedy and the cross application. I will address the latter first.

[54] The respondents seek an order pursuant to section 207 of the *OBCA*. Under this section, the court may consider whether it is just and equitable to wind up the corporation. Deadlock may ground the exercise of that discretion. The company need not be wound up; rather, the court may resort to the remedies contained in section 248 of the *Act*.

[55] Here, Mr. Segeren submits that the relationship began to sour due to the UK Shareholders' indifference to LMSE's business and the deterioration was exacerbated by their refusal to invest in R&D, expand the LMSE business and by their threats to the supply chain. He submits that this all served to undermine Mr. Segeren's reasonable expectations. He submits that there is deadlock and it is therefore just and equitable to order that Mr. Segeren be permitted to purchase the UK Shareholders' shares. He submits that he is prepared to purchase the shares for fair market value less an amount attributable to the Le Maitre trademarks.

[56] Mr. Segeren relies on a decision of Swinton J. in *Gold* v. *Rose*,[10] in support of his argument that there is no purpose in attributing fault as there is a deadlock and therefore it is just and equitable to order that he be permitted to buy the shares. The problem with this analogy is that unlike the case before me, Swinton J. first found that section 248 oppression had not been established and then applied section 207 of the *Act* to order a buy/sell.

[57] I agree that there is deadlock and a lack of mutual trust and confidence. This is readily evident from the materials filed including the transcription of the bi-weekly conference calls agreed to as part of the May, 2008 consent order. That said, I am hard pressed to exercise equitable jurisdiction in favour of Mr. Segeren when he has been the perpetrator of the inequity. As stated by Cullity J. in *Altomare* v. *Oudeh*,[11] "As is very commonly the case when dealing with a breakdown of personal relationships, any solution imposed by the Court is likely to be less than perfect. However, among the factors that are relevant to the exercise of the Court's discretion in the corporate world are the allocation of responsibility for the deadlock that has arisen and the question of clean hands. If the equities in respect of these matters are equal, or substantially equal, I believe it will be a relevant consideration if only one party seeks to continue the business and has the ability to do so."

[58] Here the equities are not equal. There has been no impropriety on the part of the applicants who are largely blameless. The wrongful conduct is one-sided and Mr. Segeren should not be allowed to take advantage of the situation he created: *PWA Corp.* v. *Gemini Group Automated Distribution Systems Inc.*[12] I therefore decline to grant the relief requested by the respondents pursuant to section 207 of the *OBCA.*

[59] As mentioned, the applicants seek an order appointing one of the UK Shareholders plus an unaffiliated director to the boards of directors of 793, LMSE and such affiliates as are necessary. The respondents answer by submitting that this would be an unprecedented intrusion and does nothing to solve the parties' true dilemma and the dysfunction in their relationship.

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[10] [2001] O.J. No. 12 (S.C.J.).
[11] [2000] 9 B.L.R. (3d) 210.
[12] (1993) 15 O.R. (3d) 730 at para. 129.

[60] This case is troublesome in that I have no hesitation in concluding that the UK Shareholders have established oppression. In addition, it is clear that the parties have totally lost trust and confidence in one another such that a viable ongoing relationship is precluded. While I have found oppression, I do not see the remedy sought by UK Shareholders as being appropriate or effective in the hostile environment that exists. As stated by numerous authors, the appointment of directors is one of the most intrusive powers granted.[13] I question the efficacy of appointing an unaffiliated director who would ultimately have to serve as a referee between the two warring factions. It was also not within the parties' reasonable expectations that additional directors would be appointed absent consent by 75% of the shareholders. Certainly it was never the parties' expectations that a third party would in essence control decisions in their enterprise. Furthermore, the cases relied upon by the applicants all involved the removal of directors and did not involve the appointment of additional directors as a means to avoid further oppressive conduct and to diminish the opportunity for deadlock. I have no confidence that such an order would improve the applicants' predicament and repeated court applications could reasonably be anticipated. I decline to grant the remedy requested by the applicants and the ancillary relief prohibiting competition with LML. With respect to the latter, such a provision would not be responsive to the parties' reasonable expectations. The requirements relating to non-competition are adequately addressed in the services agreement.

[61] That does not end the matter, however, as some relief should be granted in the circumstances. Clearly there is an impasse here. No one requested a winding up and it would be a draconian outcome. Although originally they did wish to purchase Mr. Segeren's shares, more recently the applicants have indicated that they had no interest in purchasing them. They submit that ordering Mr. Segeren to sell his shares to the applicants would not rectify the oppression as LML's entire North American distribution network is dependent on Mr. Segeren and he has transferred that network to Luna Tech in Alabama. On the other hand, the era of long term indentured servants is long past and Mr. Segeren cannot be bound to the enterprise.

[13] See D.S. Morritt et al "The Oppression Remedy", Aurora: Canada Law Book, 2008 at p. 6-25 and M. Koehnen "Oppression and Related Remedies", supra, note 4..

[62] In all of the circumstances, it seems just and equitable to give the UK Shareholders the opportunity to purchase Mr. Segeren's shares for 50% of $3,715,000 or $1,857,500. This amount represents the mid point valuation based on an exclusion of the Luna Tech assets. This is premised on my conclusion that based on a balance of probabilities and given Mr. Segeren's evidence on his discussion with the Luna Tech vendors, the Luna Tech transaction will not proceed with the UK Shareholders as purchasers. This amount is also to be adjusted downwards so as to account for the legal fees Mr. Segeren caused the corporate respondents to pay for these proceedings. While the corporate respondents were necessary parties to the proceedings, the real dispute was with Mr. Segeren. See in this regard *Naneff v. Con-Crete Holdings Ltd.*[14] and *Waxman v. Waxman*.[15] While I recognize that Mr. Segeren has been the face of LMSE, I am nonetheless giving the UK Shareholders the opportunity to purchase his shares which is just and equitable in the circumstances.

[63] If the UK Shareholders do not wish to exercise that right, Mr. Segeren is directed to purchase their shares for 50% of $4,150,000 or $2,075,000. This amount represents the low point valuation based on the inclusion of the Luna Tech assets. This is premised on my conclusion that based on a balance of probabilities, Mr. Segeren will close the Luna Tech transaction if he is the ultimate purchaser of the shares of the UK Shareholders. The low point valuation figure accounts for contingencies. The amount of $2,075,000 is also to be adjusted upwards so as to account for the aforementioned legal fees. In addition, absent consent from the applicants, the respondents are to relinquish the use of the "Le Maitre" name. The purchase price is to be adjusted to reflect a reduction on account of that exclusion. Mr. Slaght estimated the value as being about $200,000 although I recognize that this figure is a mere estimate. If the parties are unable to agree on the quantification of the adjustments, they are to seek further direction from me.

[14] *Supra*, note 5 at p. 264.
[15] (2003), 30 C.P.C. 5th 121 at 150.

[64] The UK Shareholders are to make their election within 15 days of these reasons. The transaction is to close within 30 days after written notice of the election has been delivered. The parties are to cooperate with respect to the closing.

[65] This order appears to me to be a fit resolution to the parties' unfortunate circumstances. The selling party or parties are provided with a fair price for his or their shares and all of the parties can get on with their respective businesses. I note that the same approach was taken in *Saarnoh-Vuus v. Teng*[16] where the oppressed complainant was given the option to purchase the respondent's shares but if he did not do so, the oppressor was required to purchase the complainant's 50% interest.

[66] The parties are to make short, written submissions on interest and costs.

_____

Pepall, J.

DATE: February 11, 2009

[16] (2003),12 B.C.L.R. (4th) 324.

COURT FILE NO.: 07-CL-6910
DATE: 2009-02-11

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Le Maitre Limited, Karen Haddon, Harold Berlinski, Colin Lane and Richard Wilson

- and -

Adrian Segeren, Le Maitre Special FX Inc., Le Maitre Special FX (U.S.A.) Inc., Le Maitre Pyrotechnics Inc., Le Maitre Orlando Inc. and 793862 Ontario Inc.

REASONS FOR DECISION

PEPALL J

Released: February 11, 2009

ADGA Systems International Ltd. v. Valcom Ltd. et al.*

[Indexed as: ADGA Systems International Ltd. v. Valcom Ltd.]

43 O.R. (3d) 101
[1999] O.J. No. 27
Docket No. C28907

Court of Appeal for Ontario
Carthy, Laskin and Goudge JJ.A.
January 12, 1999

*Application for leave to appeal to the Supreme Court of Canada was dismissed with costs April 6, 2000 (McLachlin C.J., Iacobucci and Major JJ.). S.C.C. File No. 27184. S.C.C. Bulletin, 2000, p. 608.

Corporations -- Directors -- Personal liability -- Plaintiff bringing action against director and senior employees of competitor in their personal capacity for inducing breach of fiduciary duty -- No principled basis existing for protecting director and employees from liability on basis that their conduct was in pursuance of interests of corporation -- Motion by director and employees for summary judgment dismissing action against them dismissed.

Employment -- Employees -- Liability of employees -- Plaintiff bringing action against director and senior employees of competitor in their personal capacity for inducing breach of fiduciary duty -- No principled basis existing for protecting director and employees from liability on basis that their conduct was in pursuance of interests of corporation -- Motion by director and employees for summary judgment dismissing action against them dismissed.

The plaintiff brought an action against a competitor, V Ltd., the sole director of V Ltd. and two senior employees of V Ltd. alleging that the defendants had raided its employees and caused it economic damage and seeking damages for inducing breach of contract and inducing breach of fiduciary duty. The director and employees, who were sued in their personal capacity, moved for summary judgment dismissing the claim against them. The motion was dismissed. The Divisional Court allowed the appeal from that order, holding that, since the employees of V Ltd. were not furthering their own interests and were pursuing their duties of employment to further the interests of their employer, no cause of action was revealed which justified a trial. The plaintiff appealed.

Held, the appeal should be allowed.

There was no principled basis for protecting the director and employees of V Ltd. from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of V Ltd. It may be that for policy reasons the law as to the allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors.

Craik v. Aetna Life Insurance Co. of Canada, [1995] O.J. No. 3286 (Gen. Div.), affd [1996] O.J. No. 2377 (C.A.); Golden v. Anderson, 64 Cal.Rptr. 404 (1967); Kepic v. Tecumseh Road Builders (1987), 23 O.A.C. 72, 18 C.C.E.L. 218; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 73 B.C.L.R. (2d) 1, 97 D.L.R. (4th) 261, 143 N.R. 1, [1993] 1 W.W.R. 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1; Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711 (C.A.) (sub nom. ScotiaMcLeod Inc. v. Peoples

Jewellers Ltd.); Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 37 O.R. (3d) 97, 155 D.L.R. (4th) 627, 41 C.C.L.T. (2d) 282, 17 C.P.C. (4th) 170 (C.A.); Said v. Butt, [1920] 3 K.B. 497, [1920] All E.R. Rep. 232, 90 L.J.K.B. 239, 124 L.T. 413, 36 T.L.R. 762; Truckers Garage Inc. v. Krell (1993), 68 O.A.C. 106, 3 C.C.E.L. (2d) 157 (Div. Ct.), consd

Other cases referred to

Alper Development Inc. v. Harrowston Corp. (1998), 38 O.R. (3d) 785, 36 C.C.E.L. (2d) 173 (C.A.); Berger v. Willowdale A.M.C. (1983), 41 O.R. (2d) 89, 145 D.L.R. (3d) 247, 23 B.L.R. 19 (C.A.); Lewis v. Boutilier (1919), 52 D.L.R. 383 (S.C.C.); Salomon v. Salomon & Co. Ltd., [1895-9] All E.R. 33 (H.L.); Sullivan v. Desrosiers (1986), 76 N.B.R. (2d) 271, 192 A.P.R. 271, 40 C.C.L.T. 66 (C.A.)

APPEAL from a judgment of the Divisional Court ((1997), 105 O.A.C. 209, 33 C.C.E.L. (2d) 135) allowing an appeal from a dismissal of a motion for summary judgment dismissing an action against the moving parties.

David B. Debenham, for appellant.
M. James O'Grady, Q.C., and Katherine J. Young, for respondents.

The judgment of the court was delivered by

CARTHY J.A.: -- This appeal presents for consideration once again the troublesome issue of the liability of officers and directors of a corporation for acts done in pursuance of a corporate purpose.

The plaintiff, ADGA Systems International Ltd., has claimed that a competitor, the defendant Valcom Ltd., raided its employees and caused the plaintiff economic damage. The plaintiff also claims against three of its own employees for breach of fiduciary duty in acceding to the importunes of

Valcom Ltd. The issue in controversy on this particular appeal is the claim by the plaintiff against the director and two employees of Valcom Ltd. for their personal involvement in this recruitment program. Those three defendants brought a motion for summary judgment seeking to dismiss the claim against them. The motion was dismissed by Mercier J. The Divisional Court then heard an appeal from that order, allowed the appeal, and dismissed the claim against those three defendants. The plaintiff now appeals to this court and seeks to justify proceeding to trial against MacPherson, the Director of Valcom Ltd. and Ewing and McKenzie, senior employees of Valcom Ltd. The question is whether the respondents can be sued for thei r actions as individuals, assuming those actions were genuinely directed to the best interests of their corporate employer. In my view a cause of action does exist against the respondents and a trial is required to determine the merits of that action.

Facts

For purposes of this appeal, a simple sketch of the background facts is sufficient. The plaintiff ADGA and the defendant Valcom were competitors, and for some years the plaintiff had a substantial contract with Correctional Services Canada for technical support and maintenance of security systems in the federal prisons. In 1991 the contract was coming up for renewal and the Department of Supply and Services called for tenders. One of the conditions of the tender was that the tendering party provide the names of 25 senior technicians together with their qualifications, thus assuring that the tendering company would be competent to perform the work required under the contract. Through its long association with this contract, the plaintiff had 45 such employees. Valcom is alleged to have had none. The pleadings and the evidence indicate that Valcom, through its sole director MacPherson and the two senior employees Ewing and McKenzie, set out to interview the senior representatives of the plaintiff's technica l staff to convince them of the following: to permit their names to be used on the tendering document; to come to work for Valcom if the tender was successful; and to use their efforts to convince the other employees on the technical staff of the plaintiff to do likewise. In the result, all but one of

the 45 members of the plaintiff's technical staff apparently "signed on" with Valcom. Both companies presented the same staff in their tender offerings, and Valcom was the successful bidder.

In the statement of claim as amended, and in addition to damages sought against its own employees and Valcom, the plaintiff seeks damages against the respondents to this appeal for inducing breach of contract, for interference with economic interests and relations and for inducing breaches of fiduciary duty. Judging from the argument of the appellant, it appears that the focus of the claim against the respondents is now limited to inducing breach of fiduciary duty.

Decisions Below

On the original motion, Mercier J. commented that the circumstances of this case are very different from those normally found in cases where the plaintiff seeks to pierce the corporate veil in order to claim liability against employees or directors of a company, and concluded that there was more than one triable issue that could not be determined by way of summary judgment.

A review of the reasons of the Divisional Court [(1997), 105 O.A.C. 209, 33 C.C.E.L. (2d) 135] indicates that in allowing the appeal, emphasis was placed on the decision of this court in Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711. [See Note 1 at end of document.] Since the employees of Valcom were not furthering their own interests in any respect and were pursuing their duties of employment to further the interests of their employer, the Divisional Court relied on ScotiaMcLeod as the basis for concluding that no cause of action was revealed which justifies a trial.

In its conclusion, the Divisional Court observed (at p. 216) that, "[i]n commercial cases such as this, our courts are carefully examining the trend of simply suing officers, directors and employees in their personal capacities, without really carefully examining the facts or without carefully

pleading the allegations which relate to them personally."

Analysis

At the outset, my analysis of the pleadings indicates no lack of particularity as is often found in similar instances. The pleadings specifically allege that the competitor's employees and sole director developed the "recruitment" plan, approached the appellant's employees individually, and were successful in accomplishing the intended purpose, thereby causing damage to the appellant. The distinction, if any, between inducing a breach of contract and inducing a breach of fiduciary duty is not a present concern on a summary judgment proceeding. If there is to be a trial, that issue can be resolved on the basis of all of the evidence. The issue that I must deal with is whether, on the assumption that the defendant Valcom committed a tort against the appellant, the sole director and employees of Valcom can be accountable for the same tort as a consequence of their personal involvement directed to the perceived best interests of the corporation.

My first observation is that I recognize the policy concern expressed by the Divisional Court, and other General Division judges, over the proliferation of claims against officers and directors of corporations in circumstances which give the appearance of the desire for discovery or leverage in the litigation process. This is a proper concern because business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or, worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation. That being said, it is not appropriate to extend the reasoning of ScotiaMcLeod beyond its intended application by reading it as protecting all conduct by officers and employees in pursuit of corporate purposes. The common law should not develop on an ad hoc basis to put out fires. When a policy issue arises, here from modern b usiness realities, the courts must proceed on a principled basis to establish a framework for further development which recognizes the new realities but preserves the fundamental purpose served by that area of law. For this

reason I intend to analyze the development of law in this field from its beginnings.

That beginning is found in the House of Lords' decision in Salomon v. Salomon & Co. Ltd., [1895-9] All E.R. 33 (H.L.), which established that a company, once legally incorporated, must be treated like any other independent person, with rights and liabilities appropriate to itself. From time to time, litigants have sought to lift this "corporate veil", by seeking to make principals of the corporation liable for the obligations of the corporation. However, where, as here, the plaintiff relies upon establishing an independent cause of action against the principals of the company, the corporate veil is not threatened and the Salomon principle remains intact.

The distinction between an independent cause of action and looking through the corporation was confirmed by the subsequent case of Said v. Butt, [1920] 3 K.B. 497. This is a King's Bench decision but has been adopted in Canada and throughout the United States. (See, for instance, Kepic v. Tecumseh Road Builders (1987), 18 C.C.E.L. 218 at p. 222, 23 O.A.C. 72; and Golden v. Anderson, 64 Cal.Rptr. 404 (1967) at p. 408.)

In Said v. Butt, the plaintiff was engaged in a dispute with an opera company which refused to sell him tickets to a performance. The plaintiff purchased a ticket through an agent and when he appeared at the opera the defendant, an employee of the opera company recognized him and ejected him. The plaintiff sued the employee for wrongfully procuring the company to break a contract made by the company to sell the plaintiff a ticket.

The court held that there was no contract because the company would not knowingly have sold a ticket to the plaintiff. Nevertheless, on the assumption that there was a contract, the court considered the implications to the defendant employee. McCardie J. stated at p. 504:

> It is well to point out that Sir Alfred Butt possessed the widest powers as the chairman and sole managing director of the Palace Theatre, Ld. He clearly acted within those powers

when he directed that the plaintiff should be refused admission on December 23. I am satisfied, also, that he meant to act and did act bona fide for the protection of the interests of his company. If, therefore, the plaintiff, assuming that a contract existed between the company and himself, can sue the defendant for wrongfully procuring a breach of that contract, the gravest and widest consequences must ensue.

After detailing the mischief that would flow from permitting such claims to be made McCardie J. concluded at p. 506:

> I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. . . . Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong.

For present purposes, I extract the following from McCardie J.'s reasons. First, this is not an application of Salomon. That case is not mentioned anywhere in the reasons. Second, it provides an exception to the general rule that persons are responsible for their own conduct. That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the court has emphasized and left intact the

general liability of any individual for personal conduct.

The third point of interest arises from this excerpt from the reasons at p. 505:

> The explanation of the breadth of the language used in the decisions probably lies in the fact that in every one of the sets of circumstances before the Court the person who procured the breach of contract was in fact a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties. If he is in the position of a stranger, he will be prima facie liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another . . .

The court was there referring to the stranger as the wrongdoer but the same principle might be applied in the converse situation where the stranger is the victim. This suggestion, was picked up later in the dissenting reasons of La Forest J. in London Drugs Ltd. v. Kuehne & Nagel International Ltd., infra, to the effect that a jurisprudential division line might be drawn between those who contract with the company, or voluntarily deal with it, and can be taken to have accepted limited liability, and strangers to the company whose only concern is not to be harmed by the conduct of others. On that theory, those harmed as strangers to the corporate body naturally look for liability to the persons who caused the harm and those who have in some manner accepted limited liability in their dealings with the company would be limited in recourse to the company. As evidenced by the decision in London Drugs v. Kuehne that theory of demarcation of liability has not been adopted in Canada.

The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the Said v. Butt exception.

In Lewis v. Boutilier (1919), 52 D.L.R. 383 at p. 389 (S.C.C.), the president of a company was held personally liable for negligently putting a boy to work in a dangerous area of a sawmill where he was killed. It was held to be no defence to the president that the corporation that owned the sawmill might also be liable.

In Berger v. Willowdale A.M.C. (1983), 41 O.R. (2d) 89 at p. 98, 145 D.L.R. (3d) 247 (C.A.), leave to appeal to the Supreme Court of Canada refused May 17, 1983, this court dealt with a claim by an employee against the president of her employer corporation for damages arising from slipping on an icy sidewalk. Under the Workmen's Compensation Act, employees could not be sued for such workplace accidents. However, executives were excluded from the definition of employees under the Workmen's Compensation Act. The court held that, given the existence of a duty of care owed by the president to this employee, and a failure to respond appropriately to that duty, damages against the president were recoverable even though the action against the company was barred by the provisions of the Workman's Compensation Act. The fact that the duty of care co-existed in the employer and president did not constitute a bar to a claim against the executive officer.

In Sullivan v. Desrosiers (1986), 76 N.B.R. (2d) 271, 40 C.C.L.T. 66 (C.A.), leave to appeal to the Supreme Court of Canada refused June 4, 1987, the plaintiffs were surrounding landowners of a hog farm who claimed that their lands had been polluted by a manure lagoon on the site of the farm. The issue before the Court of Appeal was whether the owner of the company could be held personally liable.

At p. 277 Hoyt J.A. stated:

> The question here is whether Mr. Sullivan, who was the manager and principal employee of the company that committed the nuisance, may be responsible along with the company. I see no reason why, because of his involvement in creating and maintaining the nuisance, Mr. Sullivan should not also be responsible.

And at p. 278:

> Nor am I attracted to the submission that Mr. Sullivan is protected by reason of the rule in Salomon v. Salomon & Co., [1897] A.C. 22. The question here, as I have pointed out, is not whether Mr. Sullivan was acting on behalf of or even if he "was" the company, but whether a legal barrier, here a company, can be erected between a person found to be a wrongdoer and an injured party thereby relieving the wrongdoer of his liability. In my opinion, once it is determined that a person breaches a duty owed to neighbouring landowners not to interfere with their reasonable enjoyment of their property, liability may be imposed on him and he may not escape by saying that as well as being a wrongdoer he is also a company manager or employee.

The Supreme Court of Canada again considered the issue of an employee's liability for acts done in the course of his duties on behalf of the employer in London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261. The plaintiff delivered a transformer to a warehouse company for storage. An employee of the warehouse company negligently permitted the transformer to topple over, causing extensive damage. Even though there was a contractual relationship between the company and the customer, the majority held in favour of the claim against the employee.

Iacobucci J. stated at pp. 407-08:

> There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer. . . .
>
> . . . The mere fact that the employee is performing the "very essence" of a contract between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.

La Forest J. dissented on this issue and was prepared to relieve the employee from personal liability in tort where the tort occurred in the context of a breach of contract between the employer and the customer, and so long as the employee's tort was in the course of duties. His analysis of the distinction between the voluntary and involuntary creditor is, and will continue to be, of interest as policy questions impact upon the evolving jurisprudence in this area. At p. 349 he stated:

> The distinction between voluntary and involuntary creditors is also useful in this area. As commentators have pointed out (Halpern, Trebilcock and Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980), 30 U.T.L.J. 117), different types of claimants against the corporation have differing abilities to benefit from being put on notice with respect to the impact of the limited liability regime. At one end, creditors like bond holders and banks are generally well situated to evaluate the risks of default and to contract accordingly. These "voluntary" creditors can be considered to be capable of protecting themselves from the consequences of a limited liability regime and the practically systematic recourse by banks to personal guarantees by the principals of small companies attests to that fact.
>
> At the other end of the spectrum are classic involuntary tort creditors exemplified by a plaintiff who is injured when run down by an employee driving a motorcar. These involuntary creditors are those who never chose to enter into a course of dealing with the company and correspond to what I have termed as the classic vicarious liability claimant.

These Canadian authorities at the appellate level confirm clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation.

An action for economic recovery on facts quite similar to those before this court was considered by the California Court

of Appeal, Second District, in Golden v. Anderson, supra. There, a brokerage firm claimed that employees of a competitor brokerage firm had conspired together to interfere in the plaintiff's relationship with a customer with the intent of depriving it of a commission. The court upheld recovery and distinguished the situation before it, which involved a claim against strangers to the plaintiff corporation, from that where the employees' conduct relates to a contract made with their employer.

At p. 408, the opinion of Jefferson J. reads:

> The court found that, since the evidence showed these three defendants were acting in their representative capacities as managing agents of the defendant corporations, they were immune from liability. The court erred in so concluding. Plaintiff's action is for an intentional tort. All persons who are shown to have participated are liable for the full amount of the damages suffered. . . . "When conspiring corporate officials act tortiously and individuals are injured as a proximate result, such tortfeasors are liable to the injured persons even though the corporation may also be liable . . .
>
> The case of Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 35 Cal.Rptr. 652, relied on by defendants and by the court below, involved the situation, not here present, where the corporate defendant was charged with breach of contract and with conspiring with its officials and agents to breach that contract. The court applied the familiar rule that corporate officers are privileged to participate in their representative capacities in the breach of a contract by their corporate principal [this refers to the principle in Said v. Butt]. . . .

Although the jurisprudence on this subject has followed a very straight path since the decisions in Salomon v. Salomon and Said v. Butt, in recent years in this jurisdiction judges hearing motions to dismiss claims have tended to smudge these principles, inspired, in my view, and as expressed by them, by the legitimate concern as to the number of cases in which

employees, officers, and directors are joined for questionable purposes. The assumption has filtered into reasons for judgment that the employee is absolved if acting in the interests of the corporation, the employer, even in cases that do not raise the Said v. Butt defence.

An immediate example is found in the reasons of the Divisional Court in this case where at p. 214 of the reasons it is stated:

> There was no evidence to show that what these appellants did was to further their own interests in any respect. All evidence points to the fact that their actions were done as part of their duties of employment and to further the interests of Valcom.

The judgment then proceeds to analyze the jurisprudence in support of the above conclusion. Dealing with the appellate authorities referred to by the Divisional Court, the first is Craik v. Aetna Life Insurance Co. of Canada, [1995] O.J. No. 3286 (Gen. Div.), Court File No. 95-CQ-64403, affirmed by the Court of Appeal [1996] O.J. No. 2377. The facts are somewhat similar to those before this court, but the decision of Cumming J. and the oral endorsement of this court appear to pivot on the fact that the pleadings asserted that the corporation acted tortiously but did not assert that the employees acted in any personal capacity. The claim against the employees was struck out.

Reliance was also placed by the Divisional Court on Truckers Garage Inc. v. Krell (1993), 68 O.A.C. 106, 3 C.C.E.L. (2d) 157. That was a case in which a principal of the defendant corporation allegedly induced a breach of contract of employment of the plaintiff. That was a classic Said v. Butt example and, in this court Osborne J.A. said as follows:

> Marvin Teperman was Truckers' directing mind when Krell was both hired and fired. However, that alone is not enough to find him liable for inducing the breach of the Truckers-Krell employment contract. At the very least the evidence must establish, to a degree of probability, that some separate

interest from Teperman's standpoint was involved. See Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42. If that were not the case the directing mind of any corporate employer would he liable for the tort of inducing a breach of contract in the event an employee was wrongfully terminated. This court's judgment in Kepic v. Tecumseh Road Builders, Division of Countryside Farms Ltd. (1987), 18 C.C.E.L. 218 (C.A.) provides an example of what is required. In that case, the individual defendants acted fraudulently in furtherance of their personal interests. In another case, McFadden v. 481782 Ont. Ltd. (1984), 47 O.R. (2d) 134 (H.C.), the individual defendants wrongfully re moved money from the company for their personal benefit. Thus, personal liability was found in both cases.

In this case, there is no evidence and no finding by the trial judge of an intentional wrongful or unlawful act by Marvin Teperman. There is no evidence that Marvin Teperman acted as he did for his personal gain.

Kepic v. Tecumseh Road Builders, supra, referred to by Osborne J.A. is helpful in putting the expression "acting bona fide in the interests of the company" in proper context.

In Kepic, Brooke J.A. stated at p. 222:

It is well established that the directors of a corporation will not be liable for inducing that corporation to breach its contract when they are performing bona fide their functions as corporate officers. See Said v. Butt, [1920] 3 K.B. 497; Thomson & Co. v. Deakins, [1952] 2 All E.R. 361, [1952] 1 Ch. 6461 (C.A.). This is not the case where a director acts in a fraudulent manner: Fraudulent efforts by a director of a corporation to increase the revenue of that body cannot be said to be bona fide in its best interest. See generally Einhorn v. Westmount Investments Ltd. (1969), 69 W.W.R. 31, 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 73 W.W.R. D.L.R. (3d) 509 (Sask. C.A.) [sic]; McFadden v. 481782 Ontario Ltd. (1984), 47 O.R. (2d) 134, 5 C.C.E.L. 83, 27 B.L.R. 173 (Ont. H.C.).

Thus, an officer is disentitled to the Said v. Butt defence if he is not acting bona fide in the interests of the company. This is not to say that if Said v. Butt has no application the conduct is excused if the interests of the company are being served.

The Divisional Court placed its prime reliance on the judgment in ScotiaMcLeod Inc. and in doing so created a much broader canvass for the reasoning of this court than it was, by its language, intended to fill. That case concerned whether a reasonable cause of action was pleaded against certain individual directors of the defendant company. The plaintiff's complaint was that, as a result of certain filing statements, it had been misled into making investments in the defendant corporation's debentures.

The dismissal of the claim against what I will call a group of non-active directors was upheld because the pleading did not allege any negligence against them. The plaintiff sought to hold those directors vicariously liable for the negligence of the corporation, and no attempt was made in the pleading to single out their activities as individuals. This is similar to the situation in Craik v. Aetna, supra. On the other hand, two of the directors who had attended and made representations at a due diligence meeting were alleged to have been directly and personally involved in the marketing of the debentures and to have made representations which were relied upon by the plaintiffs. The action against those active directors was permitted to go to trial.

An excerpt from the reasoning of Finlayson J.A. in ScotiaMcLeod Inc., at pp. 490-91 O.R., pp. 720-21 D.L.R., has been quoted from time to time by General Division judges and, here, by the Divisional Court, as suggesting some limitation on the liability of directors and officers who are acting in the course of their duties:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit,

> dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.J.C.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

The operative portion of this paragraph is the final sentence which confirms that, where properly pleaded, officers or employees can be liable for tortious conduct even when acting in the course of duty. That this is clearly the intent of what was being stated is evidenced by the conclusion that the action should proceed against two defendants; against whom negligent conduct had been properly pleaded. The reasoning of ScotiaMcLeod has been recently applied by this court in decisions which confirm my interpretation.

In Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 37 O.R. (3d) 97, 155 D.L.R. (4th) 627 (C.A.), Finlayson J.A. again wrote reasons for this court dealing with an allegation that individual directors had conspired with their corporation to cause injury to a company that had a contractual relationship with the defendant corporation. At p. 102 Finlayson J.A. stated:

> It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds: see ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481 at p. 491, 129 D.L.R. (4th) 711 (C.A.). In the statement of claim in appeal, there is no factual underpinning to support an allegation that the personal defendants were at any time acting outside their capacity as directors and officers of the corporations of which they were the directing minds.

Although not stated in the reasons, the individual defendants were ostensibly entitled to rely upon Said v. Butt because their alleged conduct was associated with the breach by the defendant corporation of a contract with the plaintiff corporation. In any event, there is nothing in the reasons to detract from my rationale that, where properly pleaded, a claim may be asserted for the tortious conduct of individuals where the defence in Said v. Butt is not available.

In Alper Development Inc. v. Harrowston Corp. (1998), 38 O.R. (3d) 785, 36 C.C.E.L. (2d) 173 (C.A.), this court dealt with a pleading that the corporate defendant had breached its contract with the plaintiff by failing to obtain appropriate insurance coverage and that the vice-president of the defendant was negligent in discharging his duties to the plaintiff. Goudge J.A. referred to the often quoted excerpt from ScotiaMcLeod and, significantly, italicized the words three lines from the end of that quote "unless it can be shown that their actions are themselves tortious". Having done so, Goudge J.A. concluded that on the basis of the Supreme Court of Canada judgment in London Drugs, the pleading did support an allegation of breach of duty of care against the respondent personally and that this pleading justified the case going forward to trial.

Conclusion

It is my conclusion that there is no principled basis for protecting the director and employees of Valcom from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation. It may be that for policy reasons the law as to the allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors. Any such evolution should await facts which are apposite to the policy concerns and should probably be articulated as a definitive extension of the defence in Said v. Butt. Such a development would be in the direction indicated by La Forest J. in his dissenting reasons in London Drugs and thus may have to await further consideration by the Supreme Court. In the meantime the courts can only be scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort. A principled development of jurisprudence is the tradition and the strength of the common law and must take precedence over incidental attempts to abuse the law as it develops.

For these reasons I would allow the appeal, set aside the order of the Divisional Court, and dismiss the original motion for summary judgment. The costs of the motion, of the application for leave to appeal to the Divisional Court and in the Divisional Court, of the application for leave to this court and in this court, shall be to the appellant on a party-and-party basis as against the three respondents.

Appeal allowed.

Notes

Note 1: This decision is sometimes also referred to as

ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. For the purposes of these reasons, I will refer to it as ScotiaMcLeod.

DATE: 19990909
DOCKET: C30879

COURT OF APPEAL FOR ONTARIO

CARTHY, LABROSSE and FELDMAN JJ.A.

B E T W E E N :	)	
	)	Ronald D. Manes and
MEDITRUST HEALTHCARE INC.	)	David M. Golden,
	)	for the appellant
Appellant	)	
	)	Mark A. Gelowitz and
- and -	)	Lisa Sand,
	)	for the respondents Bloom,
SHOPPERS DRUG MART, a division of IMASCO RETAIL INC., SHOPPERS DRUG MART LIMITED, DAVID BLOOM, ARTHUR KONVISER, LAWRENCE ROSEN, THE SOCIETY FOR CONCERNED PHARMACISTS, GLORIA ANDERSON, CAROLINE BEDARD SMITH, THE METROPOLITAN TORONTO PHARMACISTS ASSOCIATION, RUTH MALLON, SAM HIRSCH, CANADIAN PHARMACEUTICAL ASSOCIATION, LEROY FEVANG, ONTARIO PHARMACISTS' ASSOCIATION, and CANADIAN ASSOCIATION OF CHAIN DRUG STORES	)	Konviser and Anderson
	)	Vanessa Yolles,
	)	for the respondent Hirsch
	)	Cheryl Woodin,
	)	for the respondent Fevang
	)	Sean Dewart,
	)	for the respondents Mallon and The Metropolitan Toronto Pharmacists Association
Respondents	)	
	)	Heard: June 23, 1999

On appeal from the order made by Madam Justice Molloy dated October 13, 1998

LABROSSE J.A.:

[1] This is an appeal from the October 13, 1998 order of Molloy J. (the “motions judge”) striking out the appellant’s claim against certain individual respondents pursuant to motions brought under Rule 21 of the Ontario Rules of Civil Procedure.

[2] The appellant carries on business as a mail-order pharmacy in Canada. It has commenced an action seeking damages from the respondents arising from their alleged participation in a conspiracy to destroy or injure the appellant as a competitor in the retail pharmacy industry. The appellant has also alleged that the respondents have committed numerous other intentional torts against it, namely unlawful interference with economic interests and infliction of economic harm, intentional interference with contractual relations, misleading advertising, injurious falsehood and intimidation.

[3] In October 1997, the respondents moved to strike all or part of the statement of claim pursuant to Rule 25.11 and in the alternative, sought particulars of the pleading. In an endorsement dated February 23, 1998, the motions judge ordered that certain paragraphs be struck without leave to amend and

further ordered that certain particulars be provided with respect to other paragraphs. Given the large number of changes, she considered that the appropriate disposition was to strike out the statement of claim in its entirety with leave to deliver a fresh or amended statement of claim.

[4] Following the delivery of the amended statement of claim, numerous respondents again brought motions, seeking the dismissal of the action pursuant to Rule 21.

[5] In a second endorsement dated October 13, 1998, the motions judge ruled that the claims against the individual defendants Bloom, Konviser, Anderson, Mallon, Fevang and Hirsch (the "individual respondents") be struck out without leave to amend. In reaching her conclusion, the motions judge purported to rely on the decision of this court in ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481.

[6] The issue with respect to the individual respondents is whether corporate officers, directors and employees may be held liable for torts committed by them in the course of their employment. A second issue relating only to the respondent Hirsch will be dealt with separately at the end of these reasons.

[7] In ScotiaMcLeod, a purchaser of debentures sued a firm of underwriters and a law firm after the debentures proved to be worthless. The defendants brought third-party proceedings against the company financed by the transaction (Peoples Jewellers) and two of its senior officers, Gill and Irving Gerstein. Nine other members of the company's board of directors were also named in the third-party claim. Specific allegations of negligent misrepresentation were pleaded against the two senior officers. No such allegations were made against the other directors. Instead the claim against them was simply for contribution and indemnity.

[8] On a motion brought under Rule 21, the third-party claim was dismissed as not disclosing a reasonable cause of action. On appeal, this court upheld the dismissal of the third-party claim against the nine directors but permitted the claim to proceed against Gill and Irving Gerstein. The issue before the court was clearly stated at p. 490 where Finlayson J.A., for the court, wrote:

> To my thinking, the appellants' pleadings seek to hold the directors vicariously liable for the negligence of the corporation, Peoples, on whose board the directors sit. The cause of action pleaded against the respondent directors is predicated on personal liability arising out of the actions of Peoples.

In the court's view, the claim could not succeed against the directors in the absence of an allegation of negligence against them for their personal actions, not only actions of the company for which they were the directing minds. Finlayson J. A. also wrote (at p. 494):

> As I have set out above, the relief claimed against the directors other than Gill and Irving Gerstein is restricted

to
contribution and indemnity. Such a claim cannot succeed without
an allegation of negligence.

And at p. 495:

> …[I]t is obvious from the argument of appellants' counsel that the claim against the directors other than Gill and Irving Gerstein is not based on any personal involvement on the part of any of these directors. No attempt was made to single out their activities as individuals. The claim against them is founded on a theory of liability which does not exist in law.

[9] The court, however, allowed the claim to proceed against Gill and Irving Gerstein on the basis they were identified in the pleadings as having been personally involved in the alleged misrepresentations. Finlayson J.A. further stated (at p. 495):

> Gill and Irving Gerstein are placed in a different position by reason of being the two most senior executive officers of Peoples. It is alleged against them that they were directly and personally involved in the marketing of the debentures and that they were involved in making certain representations personally which were relied upon by the appellants. The appellants have also made an allegation of negligent misrepresentation against both of them personally.
>
> While the authorities make clear that officers of corporations who are the directing minds of the corporation have the same identity of interest as the directors and thus the same immunity to suit, I am not prepared to dismiss the action against Gill and Irving Gerstein at this stage. The threshold of sustainability of pleadings is very low. Although I am of the view that the appellants are attempting to stretch the envelope of available jurisprudence to encompass the acts of Gill and Irving Gerstein, an action should not be dismissed at this stage simply because it is novel in law.

[10] In effect, this court in ScotiaMcLeod held that an action in tort could proceed against the officers, directors and employees of a corporation provided their personal involvement in the alleged tort was specifically pleaded.

[11] The issue of the liability of corporate officers, directors and employees for torts committed by them in the course of their employment was more recently considered by this court in ADGA

Systems International Ltd. v. Valcom Ltd. et al. (1999), 43 O.R. (3d) 101, released subsequent to the decision under appeal.

[12] In ADGA, the plaintiff sued the corporate defendant, its sole director, and two senior employees, claiming that they had raided the plaintiff's staff and thereby caused economic damages. The action was framed in tort (inducing breach of contract, interfering with economic interests, inducing breaches of fiduciary duty). The individual defendants succeeded in having the action summarily dismissed against them on the basis that they could not be held liable for actions taken in the best interests of the corporation. This court reversed this decision and allowed the claims against the individual defendants to proceed.

[13] Carthy J.A., for the court, reviewed the case law from Canadian and American jurisdictions and stated (at p. 107):

> The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the Said v. Butt [[1920] 3 K.B. 497] exception. [The Said v. Butt exception does not permit a claim for inducement of breach of contract to proceed against a corporate officer or employee where a claim for breach of contract lies against the corporation.]

[14] Carthy J.A. further stated (at p. 109):

> These Canadian authorities at the appellate level confirm clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation.

[15] Finally, Carthy J.A. alluded to the passage in ScotiaMcLeod which is often quoted as suggesting some limitation on the liability of directors and officers. Finlayson J.A. wrote (at p. 491):

> Absent allegations which fit within the categories described above [allegations of fraud, deceit, dishonesty or want of authority], officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

Carthy J.A. commented on this passage as follows (at p. 112):

> The operative portion of this paragraph is the final sentence which confirms that, where properly pleaded, officers or employees can be liable for tortious conduct even when acting

in
the course of duty. That this is clearly the intent of what was being stated is evidenced by the conclusion that the action should proceed against two defendants; against whom negligent conduct had been properly pleaded.

[16] In ADGA, Carthy J.A. simply relied upon the principles previously enunciated by Finlayson J.A. in ScotiaMcLeod. Both decisions stand for the proposition that a claim in tort may proceed against directors, officers and employees of corporations for acts performed in the course of their duties, provided that (1) the allegations of their personal tortious conduct are properly pleaded and (2) the limited exception in Said v. Butt does not apply.

[17] In her first endorsement dated February 23, 1998, the motions judge said at p.6 of her reasons:

> This is not a situation in which vague allegations of conspiracy have been made without any factual basis whatsoever.
>
> Rather, there are extensive references in the pleadings to specific actions undertaken, including references in some cases to the dates and some of the individuals and groups directly involved. There is enough information provided to satisfy me that the plaintiff is not asserting a wild hypothesis with no air of reality or that this is nothing more than a fishing expedition. The plaintiff has some, but not all, of the information it needs to set out all of the elements of the conspiracy plea. In these circumstances, and given the nature of the cause of action and the allegations made, I consider it to be in the interests of justice to allow the plaintiff to proceed at least to the discovery stage.

[18] The amended statement of claim expressly alleges that the individual respondents carried out and participated in specifically pleaded tortious acts with the intent necessary for a court to find personal liability if the allegations are established at trial. The constituent elements of the tort of conspiracy have been properly pleaded and it has also been alleged with particularity that the individual respondents, in pursuing the object of destroying the appellant, breached the Competition Act and committed intentional torts.

[19] On a motion brought pursuant to Rule 21, the court must accept the facts pleaded as true and the pleadings must be read generously with reasonable allowance for inadequacies relating to drafting deficiencies. See Nash v. Ontario (1995), 27 O.R. (3d) 1 at 6.

[20] For the above reasons, the claim should be allowed to proceed against the individual respondents.

[21] There is another issue that must be addressed which relates only to the respondent Hirsch. In her first endorsement, the motions judge struck out, without leave to amend, the paragraphs in the statement of claim dealing with an issue of bias with

respect to certain discipline proceedings against a Meditrust pharmacist. In her second endorsement, the motions judge concluded that paragraph 112 of the amended statement of claim was simply a rehashing of the allegations which she had ordered struck from the previous pleading.

[22] The issue relating to the discipline proceedings was dealt with by the motions judge in her first endorsement. No appeal was taken from that decision. In paragraph 112 of the amended statement of claim, the appellant is seeking to re-litigate the issue. It is precluded from doing so, and the paragraph was correctly struck out without leave to amend.

[23] Accordingly, the appeal is allowed, subject to the above exception respecting Hirsch, and the order striking out the amended statement of claim against the individual respondents is set aside. The appellant is entitled to its costs of this appeal. Success being divided as between the appellant and the respondent Hirsch, I would make no order as to costs as between these two parties.

RESERVED:

ScotiaMcLeod Inc. et al. v. Peoples Jewellers Limited et al.

[Indexed as: ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.]

26 O.R. (3d) 481
[1995] O.J. No. 3556
No. C19815

Court of Appeal for Ontario,
Finlayson, Galligan and Doherty JJ.A.
November 22, 1995

Corporations -- Directors -- Liability -- Defendants bringing third party claim against directors of corporation based on directors' acts as controlling minds of corporation -- Defendants seeking contribution and indemnity -- No allegations of negligence made against directors generally except for allegation of negligent misrepresentation on part of two directors who were also officers of corporation -- Third party claim against directors other than officers properly dismissed -- Third party claim against officers allowed to proceed.

The plaintiffs were purchasers of issued senior unsecured debentures of P Ltd. At the time the debentures were issued, P Ltd. was a party to two agreements pursuant to which it was conditionally liable for certain obligations of companies in which it was a shareholder. The prospectus, debenture purchase agreement and the information package did not disclose those agreements. The plaintiffs sued the defendants (a firm of underwriters, a senior vice-president of that firm, and a firm of solicitors who acted for the plaintiffs and for P Ltd. at the material times), alleging that the existence of the undisclosed liabilities was crucial to their decision to purchase the debentures, that they relied on the documents in the information package in making their decision, and that the

omission of any reference to the agreements in the information package and in the other information provided to the plaintiffs constituted an intentional or negligent material misrepresentation on the part of the defendants.

The defendants brought a third party claim against P Ltd. and the directors of P Ltd. Two of those directors, CG and IG, were also officers of P Ltd., and represented to the defendants that the prospectus did not omit any additional information that could be material to P Ltd.'s financial condition. Before purchasing the debentures, representatives of the plaintiffs had discussions with CG during which they specifically sought and obtained CG's assurance that there were no contingent liabilities other than those disclosed in the prospectus. CG and IG signed a "certificate of no material change", addressed to the plaintiffs and to the defendant underwriters, which stated that all representations and warranties of P Ltd. in the debenture purchase agreement were true and correct at the time of closing. Those representations and warranties included a representation that there were no material liabilities whatsoever other than those disclosed in the financial statements. The defendants pleaded that the plaintiffs relied upon the representations by CG and IG in deciding not to purchase the debentures and not upon representations made by the defendants. The third party claim asserted that the directors of P Ltd. knew or ought to have known that the liabilities in question existed, that the prospectus and other material would be used to provide information to prospective purchasers of the debentures, that the financial information and disclosure contained in such documents did not refer to the liabilities, and that the plaintiffs would rely on the information that was certified by them or on their behalf to be accurate when making their decision to invest in the debentures. The defendants claimed contribution and indemnity. The third party claim did not directly allege negligence on the part of the directors, except CG and IG. The claim against the latter was for negligent misrepresentation as well as for contribution and indemnity. The defendants' position was that all of the directors of P Ltd. were collectively responsible as joint tortfeasors with P Ltd. for any negligent misrepresentations made by P Ltd.

On motion by the directors, the third party claim was dismissed on the ground that it did not disclose a reasonable cause of action against them. The defendants appealed.

Held, the appeal should be allowed in part.

To hold the directors of P Ltd. personally liable, there had to be some activity on their part that took them out of the role of directing minds of the corporation. In this case, there were no such allegations.

Section 130(1) of the Securities Act, R.S.O. 1990, c. S.5, had no application to the purchasers of the debentures which were the subject of a private placement. That section renders directors liable to purchasers of the securities offered by the prospectus. It does not embrace subsequent financings. This statutory enlargement of the common law duty of care is very restrictive and did not assist the defendants. Section 130 does not impose any duties on directors per se. It only provides for civil liability for misrepresentations in a prospectus to purchasers of securities offered in that prospectus.

The claim against the directors other than CG and IG for contribution and indemnity could not succeed without an allegation of negligence: the Negligence Act, R.S.O. 1990, c. N.1, s. 1. The claim against those directors was founded on a theory of liability which does not exist in law.

CG and IG were in a different position by virtue of being the two most senior executive officers of P Ltd. It was alleged against them that they were directly and personally involved in the marketing of the debentures and that they were involved in making certain representations personally which were relied upon by the defendants. The defendants had also made an allegation of negligent misrepresentation against both of them personally. While the authorities make clear that officers of corporations who are the directing minds of the corporation have the same identity of interest as the directors and thus the same immunity to suit, the action against CG and IG should not be dismissed at this stage simply because it was novel in

law.

Queen v. Cognos Inc., [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626, 147 N.R. 169, 45 C.C.E.L. 153, 14 C.C.L.T. (2d) 113, 93 C.L.L.C. 14,019, distd

Other cases referred to

British Thomson-Houston Co. v. Sterling Accessories Ltd., [1924] 2 Ch. 33, 93 L.J. Ch. 335, 131 L.T. 535, 40 T.L.R. 544, 68 Sol. Jo. 595, 41 R.P.C. 311; Canadian Dredge & Dock Co. v. R., [1985] 1 S.C.R. 662, 19 D.L.R. (4th) 314, 19 C.C.C. (3d) 1, 45 C.R. (3d) 289 sub nom. R. v. McNamara (No. 1); Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142 (C.A.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, 49 B.C.L.R. (2d) 273, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 sub nom. Hunt v. T & N plc; Lennard's Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705, [1914-15] All E.R. Rep. 280, 84 L.J.K.B. 1281, 113 L.T. 195, 31 T.L.R. 294, 59 Sol. Jo. 411, 13 Asp. M.L.C. 81, 20 Com. Cas. 283 (H.L.); London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261, 73 B.C.L.R. (2d) 1, 143 N.R. 1, [1993] 1 W.W.R. 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1; Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co. (1978), 89 D.L.R. (3d) 195, 22 N.R. 161, 40 C.P.R. (2d) 164 (Fed. C.A.); Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.C.J.); R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 (C.A.); Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153, [1971] 2 All E.R. 127, [1971] 2 W.L.R. 1166, 135 J.P. 289, 115 Sol. Jo. 289, 69 L.G.R. 403 (H.L.); White Horse Distillers Ltd. v. Gregson Associates Ltd., [1984] R.P.C. 61 (Ch. D.)

Statutes referred to

Negligence Act, R.S.O. 1990, c. N.1, s. 1
Securities Act, R.S.O. 1990, c. S.5 (as am. 1992, c. 18, s. 56), ss. 58(1), 130(1)(c)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 21.01(1)(b)

APPEAL from an order dismissing a third party claim.

Dennis R. O'Connor, Q.C., and Benjamin T. Glustein, for appellants.
Brian G. Morgan and Jennifer Dolman, for respondent, Charles Gill.
Robert P. Armstrong, Q.C., and Steven J. Tenai, for respondents, James M. Gillies, Howard P. Berkowitz, Anna M. Porter, Michael G. Shulman, Leighton W. McCarthy and Henry N.R. Jackman.
Allan Sternberg, for respondent, Nicholas I. White.
Robert J. Morris and David D. Conklin, for respondents, Irving R. Gerstein and Bertrand Gerstein.
Kevin R. Aalto, for respondent, Marvin Gerstein.

The judgment of the court was delivered by

FINLAYSON J.A.: -- This appeal deals with whether the issuance of debentures by a public company gave rise to liability on the part of the company's directors. The liability issue is raised by the pleadings in third party proceedings. The judgment under appeal is that of the Honourable Mr. Justice Farley dated September 29, 1994 wherein he granted the motion of the third parties (respondents) Charles F. Gill, Irving R. Gerstein, Bertrand Gerstein, Marvin Gerstein, James M. Gillies, Nicholas I. White, Howard P. Berkowitz, Anna M. Porter, Michael G. Shulman, Leighton W. McCarthy, and Henry N.R. Jackman and dismissed the amended third party claim of the defendants (appellants) ScotiaMcLeod Inc. ("ScotiaMcLeod") and William Wood under rule 21.01(1)(b) of the Rules of Civil Procedure on the ground that it did not disclose a reasonable cause of action against the above-named third parties.

Facts

I have taken the following relevant facts from the pleadings. For the purposes of these reasons I have accepted them as true. Montreal Trust Company of Canada ("Montreal Trust") and Credit Lyonnais Canada ("Credit Lyonnais") are the plaintiffs in the main action against the following defendants: ScotiaMcLeod, a firm of underwriters, Wood, a senior vice-president of ScotiaMcLeod, and Davies, Ward and Beck, a firm of solicitors who acted for the plaintiffs and for Peoples Jewellers Limited ("Peoples") at the material times. The action relates to a financing of Peoples.

The plaintiffs were the purchasers of issued senior unsecured debentures of Peoples in the principal amount of $17 million. Peoples was at the material times a Canadian jewellery retailer carrying on business in the Province of Ontario and a major shareholder in Zale Holding Corporation ("Zale Holding"). Zale Holding owned all of the shares of Zale Corporation ("Zale"), a large jewellery retailer carrying on business in the United States of America. Zale in turn owned all the shares of Gordon Jewellery Corporation ("Gordon"), another large U.S. jewellery retailer.

As an inducement to purchasing the debentures pursuant to a debenture purchase agreement, the plaintiffs were provided with an earlier prospectus relating to a share issuance by Peoples. The prospectus was part of an information package containing an interest and asset coverage sheet, audited financial statements, unaudited interim statements, a press release concerning current financial results, and Peoples' annual information form.

At the time the plaintiffs purchased the debentures, Peoples was a party to two other agreements pursuant to which it was conditionally liable for certain obligations of Zale Holding and Gordon, collectively referred to as the "Zale liabilities". The first of these agreements was an inter-company debt support agreement dated May 8, 1990. The debt support agreement specified that Peoples would provide to Zale Holding the amount necessary to make payment to Zale under promissory notes

evidencing debt owed by Zale Holding to Zale. Such obligation would come into effect only if Zale Holding could not evidence the ability to repay the principal amounts required to be paid on the notes within the year following the date of the demand for payment. The maximum commitment of Peoples pursuant to this agreement was in the amount of $95 million U.S.

This indirect guarantee under the direct support agreement replaced a direct guarantee by Peoples of these debts in favour of Zale entered into in 1989, which in turn replaced a similar previous guarantee entered into in 1987. Both the debt support agreement and the predecessor guarantees were related to the acquisition of Gordon in 1987. The predecessor guarantees to the debt support agreement were not disclosed in any previous financial statements of Peoples.

At the date they purchased the debentures, Peoples was also a party to a bank indemnity agreement dated May 8, 1990 in favour of the bank specified as agent for the bankers of Gordon. Under this agreement, Peoples agreed to indemnify those banks for $40 million U.S., less any amount realized by those banks under their security in the inventory of Gordon. The prospectus, debenture purchase agreement, and the information package disclosed only one contingent liability of Peoples related to Zale Holding, Zale Corporation and Gordon. These materials did not disclose either the May 8, 1990 debt support agreement or its predecessor guarantees that began in 1987 and were replaced in 1989, nor did the materials disclose the May 8, 1990 bank indemnity agreement and its predecessor.

The plaintiffs plead that the existence of the Zale liabilities was crucial to their decision to purchase the debentures. They also plead that they relied on the documents in the information package in making this decision. The plaintiffs further plead that the omission of any reference to the Zale liabilities in the information package and in the other information provided to the plaintiffs constitutes an intentional or negligent material misrepresentation on the part of the appellants.

Each of the named respondents in this appeal was a director

of Peoples at the material times in issue. Furthermore, at all material times, Gill was the Vice-President, Finance and Administration, of Peoples and Irving Gerstein was its President and Chief Executive Officer. At due diligence meetings concerning the issuance of both the preliminary prospectus and the final prospectus relating to the share issue, Gill and Irving Gerstein represented to the appellants that the preliminary prospectus and the documents incorporated therein by reference did not omit any additional information that could be material to Peoples' financial condition. Also at those meetings, both Gill and Irving Gerstein represented directly to the appellants that the Zale liabilities were extremely remote and not material to the financial affairs of Peoples.

The prospectus was signed by the respondents Gill and Irving Gerstein on behalf of Peoples, and by the respondents Jackman and McCarthy on behalf of the Board of Directors. It contained the following statement:

> The foregoing, together with the documents incorporated herein by reference, constitutes full, true and plain disclosure of all material facts relating to the securities offered by this short form prospectus as required by the securities laws of all of the provinces of Canada. For the purposes of the Securities Act (Quebec), this simplified prospectus, as supplemented by the permanent information record, contains no misrepresentation that is likely to affect the value or the market price of the securities to be distributed.

In the amended third party claim, the appellants plead that Gill and Irving Gerstein were integrally involved in the attempt to market the debentures, which involvement included providing information to potential debenture holders that they certified as accurate. Before purchasing the debentures, representatives of both Montreal Trust and Credit Lyonnais had discussions with Gill during which they specifically sought and obtained Gill's assurance that there were no contingent liabilities related to Peoples' investment in Zale and its affiliates other than that disclosed in the prospectus.

Both Gill and Irving Gerstein signed a "certificate of no material change", addressed to ScotiaMcLeod, Montreal Trust, and Credit Lyonnais, which stated that all representations and warranties of Peoples in the debenture purchase agreement were true and correct at the time of closing. These representations and warranties included a representation that there were no material liabilities whatsoever other than those disclosed in the financial statements.

Following the sale of the debentures, Gill continued to represent that the Zale liabilities were remote and not material to Peoples' financial position. At an August 1991 presentation to Credit Lyonnais regarding a proposed further issue of debentures, Gill referred to both the debt support agreement and the bank indemnity agreement and stated that they were remote and not material to the financial affairs of Peoples.

The plaintiffs sent letters of demand to Gill and Irving Gerstein for their failure to disclose the Zale liabilities, but they did not commence an action against Gill or Irving Gerstein or any other director. The appellants plead that the plaintiffs relied upon representations by Gill and Irving Gerstein in deciding to purchase the debentures and not upon representations made by either of the appellants ScotiaMcLeod or Wood. The appellants further claim that Gill advised the appellant Wood that the Zale liabilities would not "spring" because the contingencies, which were conditions precedent to recourse against Peoples under the guarantees, were extremely remote and would not arise.

The amended third party claim asserts the following:

(a) That the respondent directors of Peoples knew or ought to have known that the Zale liabilities existed. The Form 10-K for the year ended March 31, 1989 filed with the Securities and Exchange Commission (U.S.) for Zale Corporation, disclosed the predecessor agreements to the bank indemnity agreement and the debt support agreement, which created the Zale liabilities. There was similar disclosure in the Form 10-Q for the quarterly

periods ended June 30, 1989, September 30, 1989 and December 31, 1989. The Form 10-K was signed by Gill, Irving Gerstein and Bertrand Gerstein, among others.

(b) That the respondent directors knew or ought to have known that Peoples proposed to issue senior unsecured debentures by private placement for an aggregate purchase price of $17 million and that the proceeds from the sale of these debentures were to be used to repay $17 million of debentures with respect to which Peoples had received notice would be retracted by the holders effective June 2, 1990.

(c) That the respondent directors knew or ought to have known that the prospectus, annual information forms, and audited financial statements (all incorporated by reference to the prospectus) would be used, along with the other documents included in the information package, to provide information to prospective purchasers of the debentures. Further, the Peoples directors knew or ought to have known that the financial information and disclosure contained in such documents did not refer to the Zale liabilities.

(d) That the respondent directors knew or ought to have known that proposed debenture purchasers, including the plaintiffs, would rely on the information that was certified by them or on their behalf to be accurate when making their decision to invest in the debentures. They also knew of the representations and warranties in the debenture purchase agreement and that Montreal Trust and Credit Lyonnais would rely upon the contents of the prospectus and other documents contained therein, as alleged by the plaintiffs.

Analysis

As noted above, two of the directors, namely, Gill and Irving Gerstein, were also the president and chief executive officer respectively of Peoples. By virtue of these offices, they were heavily engaged in the financing arrangements. The appellants claim over against them for contribution and indemnity and for negligent representation. I will deal with these directors in their executive capacity later in these reasons.

On the issue of the possible causes of action against the respondents qua directors, it is significant that the plaintiffs in their statement of claim did not allege to have placed any reliance on the actions of the directors as a board or as individual directors. The substance of the plaintiffs' claim against the appellants is that, as purchasers of the debentures, the plaintiffs relied on the prospectus and the other information referred to above. They plead that the appellants did not disclose to them the debt support agreement and the bank indemnity agreement. They maintain that this omission amounted to a material misrepresentation, which was intentional, or alternatively, that it was negligent.

Accordingly, it is notable that the appellants' amended third party claim, even when read with the plaintiffs' statement of claim, is silent on significant particulars concerning the actions of the respondents as directors simpliciter. The third party claim is only for contribution and indemnity. The pleadings do not disclose allegations:

(a) of negligence on the part of the directors;

(b) that the directors knew or ought to have known that the Zale liabilities were material liabilities;

(c) that directors other than Gill and Irving Gerstein had discussions with Montreal Trust or Credit Lyonnais or with the appellants concerning the Zale liabilities or that they were involved in the marketing of the debentures sold to the plaintiffs or that they participated in the due diligence meetings referred to in the amended third party claim;

(d) that the "certificate of no material change" addressed to the appellant ScotiaMcLeod and the plaintiffs was signed by any directors other than Gill and Irving Gerstein or that it was signed by Gill and Irving Gerstein on behalf of the board of directors;

(e) that the debenture purchase agreement contained

representations and warranties made by any of the directors individually or on behalf of the board of directors;

(f) that there was conduct by the directors constituting fraud, bad faith, or absence of authority such as would amount to an intentional tort on their part, or that there was any other type of deliberate or reckless conduct that would render the directors' conduct their own as distinct from that of Peoples.

The appellants' factum and counsel's argument reveal that the failure to make personal allegations of tortious conduct against the directors is not an oversight. The appellants plead that to the extent any liability is found against them because of the plaintiffs' claims, they claim damages against Peoples for breaching its representations and warranties and they further claim damages against Peoples, Gill, Irving Gerstein and Ernst & Young for damages for negligent misrepresentation. The claim against "all other third parties" is for "contribution and indemnity should any finding of liability be made against them [the appellants] at the trial of this action". In sum, the appellants' position is that all of the directors of Peoples are collectively responsible as joint tortfeasors with Peoples for any negligent misrepresentations made by Peoples.

Appellants' counsel submitted that liability for negligent misrepresentation arises where a person makes a representation to a person or a definable group of persons knowing that they may rely on it, and they in fact rely upon the representation to their detriment. He relied upon the judgment of Iacobucci J. in Queen v. Cognos Inc., [1993] 1 S.C.R. 87 at p. 110, 99 D.L.R. (4th) 626, for the following propositions:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;

2. the representation in question must be untrue, inaccurate or misleading;

3. the representor must have acted negligently in making said

misrepresentation;

4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

5. the reliance must have been detrimental to the representee in the sense that damage resulted.

With great respect to counsel, I believe that he is attempting to make more out of Cognos than it stands for. The case does not address in any way the personal liability of officers and directors of a company for negligent misrepresentation. The Court of Appeal for Ontario accepted that there was a special relationship between the representor, Cognos Inc., and the representee, Douglas Queen. The argument here and in the Supreme Court of Canada turned on the manner in which the trial judge dealt with the issues of contractual disclaimer and negligence, neither of which is in issue on this appeal.

In Cognos, the representations relied upon by the plaintiff were made by Sean Johnston, who had recently been appointed to what could be described as a junior management position. His representations in an interview with the plaintiff as a prospective employee of Cognos were found to be misleading and made in a negligent manner. The vicarious liability of the corporation Cognos for the acts of its employee, Johnston, was conceded. The personal liability of Johnston was not an issue. He was not sued. As Iacobucci J. stated for the majority at p. 108:

> This appeal involves an action in tort to recover damages caused by alleged negligent misrepresentations made in the course of a hiring interview by an employer (the respondent), through its representative, to a prospective employee (the appellant) with respect to the employer and the nature and existence of the employment opportunity.

(Emphasis added)

And at p. 110:

> The only issues before this Court deal with the duty of care owed to the appellant in the circumstances of this case and the alleged breach of this duty (i.e., the alleged negligence). The respondent concedes that a "special relationship" existed between itself (through its representative) and the appellant so as to give rise to a duty of care.

(Emphasis added)

I should say immediately that for the purposes of this appeal I am prepared to proceed on the basis that a separate action could have been brought against Johnston for his personal tortious conduct: see London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261. However, at the risk of repetition, I do not think that Cognos is of any assistance when dealing with the liability of directors of a company who were not acting as representatives of that company. In law, as I will develop, the directors of Peoples were the company. Furthermore, unlike in Cognos, no allegations of tortious conduct have been made against the directors as directors. To my thinking, the appellants' pleadings seek to hold the directors vicariously liable for the negligence of the corporation, Peoples, on whose board the directors sit.

The cause of action pleaded against the respondent directors is predicated on personal liability arising out of the actions of Peoples. The appellants plead that to the extent that they are liable to the plaintiffs in the main action, the respondent directors are to indemnify them because the appellants relied upon their actions, qua directors, in causing Peoples to put forward the representations of which the plaintiffs complain.

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the

corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.C.J.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

None of the conduct alleged against the respondent directors falls within the broad categories I have outlined above. Their exposure, if there is any, is narrowly focussed on their formal decision-making in the name of Peoples. A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations.

The common law respecting the liability of directors has been altered by legislative intervention. In the case under appeal, the appellants rely on s. 130(1)(c) of the Securities Act, R.S.O. 1990, c. S.5, as amended, S.O. 1992, c. 18, s. 56, as imposing liability on every director of an issuer of a prospectus. I shall deal with this specific allegation later. First I propose to refer to some well-established authorities as to the role and liability of the directing minds of corporations in the absence of legislation.

In Lennard's Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705 at p. 713, [1914-15] All E.R. Rep. 280 (H.L.), Viscount Haldane for the House of Lords said:

> . . . a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. . . . For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself . . .

The concept that the directors merge with the corporation for the purposes of giving the corporation a directing mind or will is often referred to as the "identification theory". It has been enunciated by Lord Reid in Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153 at p. 170, [1971] 2 All E.R. 127 (H.L.):

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate.

> He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

(Emphasis added)

The other side of the coin is that the company does not act as the agent for the directors. While directors can be liable as principals of the corporation, the agency of the corporation must be established and will not be inferred from the fact that they are directors: see British Thomson-Houston Co. v. Sterling Accessories Ltd., [1924] 2 Ch. 33 at p. 38, 93 L.J. Ch. 335.

The identification theory has been adopted by the Supreme Court of Canada in criminal prosecutions to provide the element of mens rea absent in a corporate entity but present in the natural person or persons who constitute its directing mind. In Canadian Dredge & Dock Co. v. R., [1985] 1 S.C.R. 662 at p. 693, 19 D.L.R. (4th) 314, Estey J. on behalf of the court stated:

> The corporation is but a creature of statute, general or special, and none of the provincial corporation statutes and business corporations statutes, or the federal equivalents, contain any discussion of criminal liability or liability in the common law generally by reason of the doctrine of identification. It is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governig [sic] executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.

There was a good deal of discussion in this court and before the motions judge regarding what conduct of the directors would be sufficient to cause the directors to shed their identity with the corporation and expose themselves to personal liability for the corporation's alleged wrongdoing. We were referred to Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co. (1978), 89 D.L.R. (3d) 195, 22 N.R. 161 (Fed. C.A.), White Horse Distillers Ltd. v. Gregson Associates Ltd., [1984] R.P.C. 61 (Ch. D.), and others in support of various tests. I do not think this type of discussion is useful when there are no allegations whatsoever as to the personal conduct of the directors qua directors. It is not the court's function to educate the appellants as to what conduct could qualify for personal liability.

This brings me to the claim based on breaches of the Securities Act. Ironically, the breaches complained of seem to emphasize that the role of the directors in these financing arrangements was limited to the function of being the directing mind of Peoples. The complaint about all the directors under the Securities Act is that the respondents Jackman and McCarthy signed a certificate "on behalf of the Board of Directors" that was required by the Act to authorize the issue of a prospectus offering shares to the public. This prospectus was not required for the private placement of the debentures which are in issue in this action, although the plaintiffs and the appellants state that they relied upon the prospectus in making the purchase. The sections of the Securities Act relied upon are as follows:

> 58(1) Subject to subsection (3) of this section and subsection 63(2), a prospectus filed under subsection 53(1) or subsection 62(1) shall contain a certificate in the following form, signed by the chief executive officer, the chief financial officer, and, on behalf of the board of directors, any two directors of the issuer, other than the foregoing duly authorized to sign, and any person or company who is a promoter of the issuer:
>
> The foregoing constitutes full, true and plain disclosure of

all material facts relating to the securities offered by this prospectus as required by Part XV of the Securities Act and the regulations thereunder.

. . . . .

130(1) Where a prospectus together with any amendment to the prospectus contains a misrepresentation, a purchaser who purchases a security offered thereby during the period of distribution or distribution to the public shall be deemed to have relied on such misrepresentation if it was a misrepresentation at the time of purchase and has a right of action for damages against,

. . . . .

(c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;

I note that the certificate which I quoted earlier is even more restrictive than what is required. Not only does it restrict the representation as to disclosure to the securities offered by the specific prospectus, but it purports to limit the damages arising out of a misrepresentation to a loss in value of the shares being issued. The certificate states that the "simplified prospectus, as supplemented by the permanent information record, contains no misrepresentation that is likely to affect the value or the market price of the securities to be distributed".

I think it is clear that s. 130(1) has no application to the purchasers of the debentures which were the subject of a private placement. This section renders directors liable to purchasers of the securities offered by the prospectus. It does not embrace subsequent financings. This statutory enlargement of the common law duty of care is very restrictive and does not assist the appellants. Section 130 does not impose any duties on directors per se. It only provides for civil liability for misrepresentations in a prospectus to purchasers of securities offered in that prospectus.

As I have set out above, the relief claimed against the directors other than Gill and Irving Gerstein is restricted to contribution and indemnity. Such a claim cannot succeed without an allegation of negligence. The Negligence Act, R.S.O. 1990, c. N.1, s. 1, provides as follows:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

During the course of argument, appellants' counsel stated that he was prepared, if necessary, to amend the third party claim to allege negligence on the part of the directors other than Gill and Irving Gerstein. He was also prepared to allege that the directors knew that the omission of any reference to the Zale liabilities was material.

I observe, however, that the motions judge gave the appellants leave to reconstitute their claim against the directors by October 3, 1994. Rather than avail themselves of this opportunity, they instituted this appeal. There was no cross-appeal against this portion of the order. The time for compliance with that order has expired and I am not disposed to extend it. I say this not because the appellants failed to avail themselves of the opportunity afforded by the motions judge, but because it is obvious from the argument of appellants' counsel that the claim against the directors other than Gill and Irving Gerstein is not based on any personal involvement on the part of any of these directors. No attempt was made to single out their activities as individuals. The claim against them is founded on a theory of liability which does not exist in law. For these reasons I am not prepared to permit any extension of the time within which the appellants can amend their pleadings.

Accordingly, I am not disposed to allow the appeal with respect to the directors other than Gill and Irving Gerstein. Gill and Irving Gerstein are placed in a different position by reason of being the two most senior executive officers of Peoples. It is alleged against them that they were directly and personally involved in the marketing of the debentures and that they were involved in making certain representations personally which were relied upon by the appellants. The appellants have also made an allegation of negligent misrepresentation against both of them personally.

While the authorities make clear that officers of corporations who are the directing minds of the corporation have the same identity of interest as the directors and thus the same immunity to suit, I am not prepared to dismiss the action against Gill and Irving Gerstein at this stage. The threshold of sustainability of pleadings is very low. Although I am of the view that the appellants are attempting to stretch the envelope of available jurisprudence to encompass the acts of Gill and Irving Gerstein, an action should not be dismissed at this stage simply because it is novel in law: see R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 at p. 782 (C.A.); Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142 at p. 145 (C.A.); and Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 977, 74 D.L.R. (4th) 321.

Disposition

Accordingly I would:

(a) dismiss the appeal against the respondents Bertrand Gerstein, Marvin Gerstein, James M. Gillies, Nicholas I. White, Howard P. Berkowitz, Anna M. Porter, Michael G. Shulman, Leighton W. McCarthy, and Henry N.R. Jackman with costs payable forthwith after assessment thereof; and

(b) allow the appeal against the respondents Charles F. Gill and Irving R. Gerstein with costs to the appellants both here and below in the appeal.

Appeal allowed in part.

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

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

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

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

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

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

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

Held, the appeal should be dismissed.

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

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

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

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

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

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

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

Cases referred to

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

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

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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

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

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

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

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

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

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

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

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

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Consideration of the interests of all parties

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

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

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

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

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

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

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

4. Was there unfairness in the process?

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

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

purchaser would require in order to make a serious bid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the extent that approval of the OEL agreement by Rosenberg

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

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

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

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

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

29, 1990.

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

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

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

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

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

include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I accept that statement as being an accurate statement of the

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

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

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

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

procedure adopted by the receiver.

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

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

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

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

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

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

Appeal dismissed.

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[13] This exception also applies to the other charges granted.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a 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 (ii) 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.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

INDEXED AS: RJR — MACDONALD INC. v. CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada*.

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou

statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la prépondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; **considered:** *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; **referred to:** *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135; *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127; *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269; *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619; *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574; *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294; *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392; *R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577; *Hubbard v. Pitt*, [1976] Q.B. 142; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280; *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59; *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791; *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304; *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158; *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix; *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.

et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

Jurisprudence

Arrêt appliqué: *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110; **arrêts examinés:** *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594; *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396; **arrêts mentionnés:** *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401; *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135; *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127; *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269; *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619; *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574; *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294; *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143; *Tremblay c. Daigle*, [1989] 2 R.C.S. 530; *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392; *R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228; *MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577; *Hubbard c. Pitt*, [1976] Q.B. 142; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Nelles c. Ontario*, [1989] 2 R.C.S. 170; *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280; *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59; *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791; *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304; *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158; *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix; *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373; *R. c. Oakes*, [1986] 1 R.C.S. 103.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*), 24(1).
Code de procédure civile du Québec, art. 523.
Loi constitutionnelle de 1867, art. 91.
Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17*f*), 18.
Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 [aj. L.C. 1990, ch. 8, art. 40], 97(1)*a*).

Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(*a*).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(*f*), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following *Tobacco Products Control Regulations, amendment*, SOR/93-389.) In *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284.
Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and *Yves Lebœuf*, for the respondent.

W. Ian C. Binnie, *Q.C.*, and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by

Loi sur les pêcheries, S.R.C. 1970, ch. F-14.
Règlement sur les produits du tabac — Modification, DORS/93-389.
Règles de la Cour suprême du Canada, 1888, Ordonnance générale nº 85(17).
Règles de la Cour suprême du Canada, DORS/83-74, art. 27.

Doctrine citée

Canada. Ministre de la Santé nationale et du Bien-être social. Résumé de l'étude d'impact de la réglementation. (Résumé accompagnant le *Règlement sur les produits du tabac*, DORS/93-389.) Dans *Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284.
Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et *Yves Lebœuf*, pour l'intimé.

W. Ian C. Binnie, *c.r.*, et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementante que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1er janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)*b*) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2*b*) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard

with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

étant dissident sur ce dernier point. Le juge Brossard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'interdiction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment*, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 $.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent

decision of this Court confirming the validity of *Tobacco Products Control Act*.

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(*b*) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2*b*) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2*b*) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a

tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

conclu que la preuve présentée par l'intimé selon laquelle l'interdiction totale de la publicité diminuait la consommation n'était pas fiable et n'avait aucune valeur probante parce qu'elle n'établissait pas que l'interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l'intimé n'avait pas démontré que l'interdiction de la publicité portait le moins possible atteinte à la liberté d'expression. Le juge Chabot a conclu aussi que la preuve d'un lien rationnel entre la prohibition de la publicité au Canada et l'objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d'ingérence sociale incompatible avec l'essence même d'une société libre et démocratique, qui ne pouvait être justifiée.

La Cour d'appel (relativement au sursis d'exécution du jugement)

En décidant si elle devait exercer son vaste pouvoir en vertu de l'art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d'appel a fait l'observation suivante relativement à la nature du redressement demandé:

> [TRADUCTION] Toutefois, ce qui est en cause en l'espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d'une part, la suspension de l'effet juridique d'une partie de la Loi et de l'obligation de s'y conformer pendant une période de 60 jours et, d'autre part, la suspension du pouvoir des autorités publiques responsables d'en assurer l'application. C'est une question sérieuse que de suspendre ou de retarder l'effet ou l'exécution d'une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l'application ou l'exécution d'une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d'empiéter dans les sphères législative et exécutive. [Souligné dans l'original.]

La cour a fait droit en partie au redressement demandé:

> [TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu'il existe une possibilité que les requérantes soient poursuivies en vertu de l'art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . .

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

. . .

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2*b*) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

rationnel et de l'atteinte minimale, du critère formulé dans l'arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l'article premier était satisfait puisqu'il se peut que l'interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d'après l'existence même d'un «corps d'opinions» favorables à l'adoption d'une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l'atteinte minimale en ce qu'elle n'interdît pas la consommation, n'interdît pas la publicité étrangère et n'écarte pas la possibilité d'obtenir de l'information sur les produits du tabac.

2. Le juge Brossard (dissident en partie)

Le juge Brossard a souscrit à l'opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu'elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement.

Cependant, le juge Brossard n'était pas d'avis que la violation de l'al. 2*b*) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu'elle n'établissait pas l'existence d'un lien, ou même l'existence d'une probabilité de lien, entre l'interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu'il est tout au moins possible que les buts visés soient atteints. Il n'a pas souscrit à l'opinion que la Loi satisfaisait au critère de l'atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu'il soit nécessaire d'imposer une prohibition totale.

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et

that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoi qu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

97....

(*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale nº 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)*a*) de cette disposition prévoit que des règles peuvent être adoptées pour:

97....

a) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet

contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé

regulations constitute conduct under a law that has been declared constitutional by the lower courts.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601:

> Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms*.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.

   (ii) Compliance with the new regulations will cause irreparable harm.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.

2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.

3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.

4. Les critères applicables à une suspension d'instance sont satisfaits:

   (i) Il existe une question constitutionnelle sérieuse à juger.

   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra.* If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

> [TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

> [TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal . . . .

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. *Summary*

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. Le statu quo

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du

constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. *Balance of Inconvenience*

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du

vention of the widespread and serious medical problems directly attributable to smoking.

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.

Canadian Bearings Ltd., Farrokh Khalili, Hossein Banijamali and Canadian Petroleum Processing & Equipment Inc. *Appellants*

v.

Celanese Canada Inc. and Celanese Ltd. *Respondents*

and

Advocates' Society and Canadian Bar Association *Interveners*

Indexed as: Celanese Canada Inc. *v.* Murray Demolition Corp.

Neutral citation: 2006 SCC 36.

File No.: 30652.

2005: December 12; 2006: July 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Removal of counsel — Plaintiffs' lawyers seizing electronic documents from defendants' premises pursuant to Anton Piller order later found to include documents subject to solicitor-client privilege — Plaintiffs' lawyers conducting partial review of documents — Defendants seeking to remove plaintiffs' lawyers as solicitors of record — Whether onus on plaintiffs to rebut presumption of prejudice — Whether plaintiffs' lawyers should be removed.

Civil procedure — Anton Piller order — Requirements for order — Guidelines for preparation and execution of order.

Celanese sued Canadian Bearings for alleged industrial espionage. Following an *ex parte* application, a motions judge granted Celanese an *Anton Piller* order against Canadian Bearings. The order did not contain a provision dealing with privileged documents. It

Canadian Bearings Ltd., Farrokh Khalili, Hossein Banijamali et Canadian Petroleum Processing & Equipment Inc. *Appelants*

c.

Celanese Canada Inc. et Celanese Ltd. *Intimées*

et

Advocates' Society et Association du Barreau canadien *Intervenantes*

Répertorié : Celanese Canada Inc. *c.* Murray Demolition Corp.

Référence neutre : 2006 CSC 36.

N° du greffe : 30652.

2005 : 12 décembre; 2006 : 27 juillet.

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

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

Procédure civile — Déclaration d'inhabilité d'un avocat à occuper — Avocats des demanderesses saisissant dans les locaux des défenderesses, conformément à une ordonnance Anton Piller, des documents électroniques dont certains se sont par la suite révélés assujettis au privilège avocat-client — Avocats des demanderesses effectuant un examen partiel des documents — Défenderesses demandant que les avocats des demanderesses soient déclarés inhabiles à occuper — Les demanderesses ont-elles l'obligation de réfuter la présomption de préjudice? — Y a-t-il lieu de déclarer les avocats des demanderesses inhabiles à occuper?

Procédure civile — Ordonnance Anton Piller — Conditions applicables à l'ordonnance — Lignes directrices applicables à la préparation et à l'exécution de l'ordonnance.

Celanese a poursuivi Canadian Bearings en l'accusant d'espionnage industriel. À la suite d'une demande *ex parte*, un juge des requêtes a accordé à Celanese une ordonnance *Anton Piller* contre Canadian Bearings. Aucune disposition de l'ordonnance ne portait sur les

was executed by an accounting firm. The search was overseen by an independent supervising solicitor. The solicitors for Canadian Bearings, BLG, were also present at the search, but given the volume of electronic materials and the pace at which the search proceeded, BLG lawyers later complained that they were not given time to review the material adequately. Frequently, entire folders would be copied electronically without examination of individual documents. However, material that could be identified as potentially privileged was segregated into an electronic folder which was labelled "Borden Ladner Gervais". In the course of the search, about 1,400 electronic documents thought to be relevant, but not then screened for potential solicitor-client privilege claims, were downloaded by the accounting firm onto a portable hard drive and copied onto CD-ROMs. These were placed in a plastic envelope and sealed. The seal was initialled by a BLG lawyer and by the supervising solicitor. The envelope was then given to the accounting firm. Contrary to the express provision in the *Anton Piller* order, no complete list of the seized documents was made prior to their removal from the searched premises. A lawyer from the law firm of CBB, representing Celanese, later directed the accounting firm to copy the envelope's contents. The seal was broken without the knowledge or consent of BLG or Canadian Bearings, and the contents copied onto CBB's computer. A copy was also provided to Celanese's U.S. counsel, KBTF. When BLG became aware that privileged documents had been transferred to CBB and KBTF, it dispatched a letter requesting their immediate return. CBB and KBTF, rather than returning the documents as requested, advised BLG that the documents subject to the privilege claim had been deleted from their respective systems. Canadian Bearings then brought this motion to disqualify CBB and KBTF from continuing to act for Celanese, but this was dismissed by the motions judge. The Divisional Court allowed Canadian Bearings' appeal and ordered that CBB and KBTF be removed. The Court of Appeal set aside that decision, finding that neither of the courts below had applied the correct test for removal. In its view, Canadian Bearings bore the onus of demonstrating that there is a real risk that opposing counsel will use information obtained from privileged documents to the prejudice of Canadian Bearings and that such prejudice cannot realistically be overcome by a remedy short of disqualification. The matter was therefore remitted back to the motions judge for further consideration.

documents privilégiés. L'ordonnance a été exécutée par un cabinet comptable. La perquisition a été supervisée par un avocat indépendant. Les avocats de Canadian Bearings, BLG, étaient aussi présents sur les lieux, mais en raison de la taille des documents électroniques et du rythme auquel s'est déroulée la perquisition, les avocats de BLG se sont plaints, par la suite, de ne pas avoir disposé du temps nécessaire pour examiner convenablement les documents. À maintes reprises, une copie électronique de dossiers complets a été effectuée sans que l'on vérifie le contenu de chaque document. Toutefois, des documents pouvant être décrits comme étant potentiellement privilégiés ont été placés séparément dans un dossier électronique nommé « Borden Ladner Gervais ». Durant la perquisition, le cabinet comptable a téléchargé sur un disque dur portable et copié sur des cédéroms environ 1 400 documents électroniques jugés pertinents qui n'avaient cependant pas encore été étudiés afin de déterminer s'ils pouvaient faire l'objet d'une revendication de privilège avocat-client. Ces documents ont été placés dans une enveloppe de plastique et mis sous scellés. Un avocat de BLG et l'avocat superviseur ont apposé leurs initiales sur le scellé. L'enveloppe a ensuite été remise au cabinet comptable. Contrairement à ce que prévoyait explicitement l'ordonnance *Anton Piller*, aucune liste complète des documents saisis n'a été dressée avant qu'ils soient retirés des lieux de la perquisition. Un avocat du cabinet CBB, représentant Celanese, a par la suite demandé au cabinet comptable de copier le contenu de l'enveloppe. L'enveloppe scellée a été ouverte à l'insu ou sans le consentement de BLG ou de Canadian Bearings, et son contenu a été copié dans l'ordinateur de CBB. Une copie a également été remise aux avocats américains de Celanese, KBTF. Quand il a appris que des documents privilégiés avaient été transmis à CBB et à KBTF, BLG a, par lettre, demandé la restitution immédiate de ces documents. Au lieu de restituer les documents demandés, CBB et KBTF ont informé BLG que les documents faisant l'objet d'une revendication de privilège avaient été supprimés de leurs systèmes respectifs. Canadian Bearings a alors déposé une requête visant à faire déclarer CBB et KBTF inhabiles à continuer d'occuper pour Celanese, mais le juge des requêtes l'a rejetée. La Cour divisionnaire a accueilli l'appel de Canadian Bearings et a ordonné à CBB et à KBTF de cesser d'occuper. La Cour d'appel a annulé cette décision, statuant que ni l'une ni l'autre des instances inférieures n'avait appliqué le bon critère pour décider si une déclaration d'inhabilité à occuper s'imposait. À son avis, Canadian Bearings avait l'obligation de démontrer qu'il existe un risque réel que l'avocat de la partie adverse utilise à son préjudice les renseignements provenant de documents privilégiés, et que la déclaration d'inhabilité à occuper représente le seul moyen réaliste d'écarter ce risque de préjudice. L'affaire a donc été renvoyée au juge des requêtes pour qu'il en poursuive l'examen.

Held: The appeal should be allowed.

This dispute presents a clash between two competing values — solicitor-client privilege and the right of a party to select counsel of choice. The conflict here must be resolved on the basis that no one has the right to be represented by counsel who has had access to relevant solicitor-client confidences in circumstances where such access ought to have been anticipated and, without great difficulty, avoided and where the searching party has failed to rebut the presumption of a resulting risk of prejudice to the party against whom the *Anton Piller* order was made. [2]

It is procedurally unfair not only to subject the defendant to the intrusion of a surprise search under the exceptional remedy of an *Anton Piller* order in the course of which its solicitor-client confidences are disclosed to its opponent, but then to throw on it the onus of clearing up the problem created by Celanese's carelessness. The principal source of the present difficulty lies in the post-search conduct of Celanese's solicitors. Having created the problem, it should bear the burden of resolving it. [51]

An *Anton Piller* order is not placed in the hands of a public authority for execution, but authorizes a private party to insist on entrance to the premises of its opponent to seize and preserve evidence to further its claim in a private dispute. The only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* case and can demonstrate that on the facts, absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear. The protection of the party against which an *Anton Piller* order is issued ought to be threefold: (1) a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; (2) a vigilant court-appointed supervising solicitor who is independent of the parties; and (3) a sense of responsible self-restraint on the part of those executing the order with a focus on its limited purpose namely to preserve relevant evidence not to rush to exploit it. [1] [31]

Under a properly executed *Anton Piller* order, the searching solicitors should be able to show with some precision what they have seized, what they have seen, who has seen it and the steps taken to contain the wrongful disclosure of confidences. If Celanese's solicitors, who were in frequent telephone contact with the supervising solicitor during the search, had insisted on a proper listing at the site of all the materials seized,

Arrêt : Le pourvoi est accueilli.

Il est question, en l'espèce, d'un conflit entre deux valeurs opposées : le privilège avocat-client et le droit d'une partie à l'avocat de son choix. Pour résoudre ce conflit, il faut tenir pour acquis que le droit d'être représenté par un avocat ayant eu accès à des communications pertinentes effectuées à titre confidentiel entre un avocat et son client n'existe pas dans le cas où cet accès aurait dû être prévu et être sans trop de peine évité et où la partie ayant sollicité la perquisition n'a pas réfuté la présomption de risque de préjudice en résultant pour la partie visée par l'ordonnance *Anton Piller*. [2]

Il est inéquitable sur le plan procédural de faire subir à la défenderesse l'atteinte que représente une perquisition-surprise effectuée en vertu du recours extraordinaire qu'est l'ordonnance *Anton Piller* et au cours de laquelle des communications avocat-client confidentielles sont divulguées à la partie adverse, pour ensuite la contraindre à résoudre le problème causé par l'incurie de Celanese. La présente difficulté découle principalement de la conduite adoptée par les avocats de Celanese après la perquisition. Comme ils sont à l'origine du problème, il devrait leur appartenir de le résoudre. [51]

Aucune autorité publique ne se voit confier l'exécution d'une ordonnance *Anton Piller*, laquelle autorise plutôt une partie privée à exiger que la partie adverse la laisse entrer dans ses locaux pour qu'elle puisse saisir et conserver des éléments de preuve susceptibles d'étayer ses allégations dans un litige privé. Ce recours extraordinaire n'est justifié que dans le cas où le demandeur dispose d'une preuve *prima facie* solide et peut démontrer que, selon les faits, il y a tout lieu de croire qu'à défaut de cette ordonnance des éléments de preuve pertinents risquent d'être détruits ou supprimés de quelque autre manière. La partie visée par une ordonnance *Anton Piller* devrait bénéficier d'une triple protection : (1) une ordonnance soigneusement rédigée décrivant les documents à saisir et énonçant les garanties applicables notamment au traitement de documents privilégiés; (2) un avocat superviseur vigilant et indépendant des parties, nommé par le tribunal; (3) un sens de la mesure de la part des personnes qui exécutent l'ordonnance, l'accent devant être mis sur son objet précis qui est de conserver des éléments de preuve, et non d'en permettre l'utilisation précipitée. [1] [31]

Lorsqu'une ordonnance *Anton Piller* est exécutée correctement, les avocats qui effectuent la perquisition doivent être en mesure d'établir avec une certaine précision ce qui a été saisi, ce qu'ils ont vu et qui l'a vu, et quelles mesures ont été prises pour empêcher la communication abusive de renseignements confidentiels. Si les avocats de Celanese, qui, au cours de la perquisition, ont eu des conversations téléphoniques fréquentes avec l'avocat

the universe of potential confidences would as a starting point have been established. Nevertheless, since the disputed electronic documents had been isolated on a hard drive and on CD-ROMs and placed in a sealed envelope in the custody of the accounting firm, a complete listing could have been made in the days following the search with BLG counsel present. This too was foreclosed by the precipitous and unilateral conduct of CBB. There was no pressing need to open the envelope. Neither CBB nor KBTF set out to obtain access to, or to gain some advantage from privileged material. Their problem stems from carelessness and an excessively adversarial approach in circumstances that called for careful restraint in recognition of the exceptional position of responsibility imposed by the unilateral and intrusive nature of an *Anton Piller* order. Remedial action in cases such as this is intended to be curative not punitive. [34] [52-54]

Here, the Court of Appeal erred in placing on Canadian Bearings' lawyers the onus of establishing a real risk of prejudice. Celanese's lawyers who undertook a search under the authority of an *Anton Piller* order and thereby took possession of relevant confidential information attributable to a solicitor-client relationship, bear the onus of showing there is no real risk such confidences will be used to the prejudice of Canadian Bearings. Difficulties of proof compounded by errors in the conduct of the search and its aftermath should fall on the heads of those responsible for the search, not of the party being searched. The onus was not met by the searching party in this case. [55]

The right of a plaintiff to continue to be represented by counsel of its choice is an important element of our adversarial system of litigation. In modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made. There is no such thing, in these circumstances, as automatic disqualification. If a remedy short of removing the searching solicitors will cure the problem, it should be considered. In this respect, a number of factors should be taken into account: (i) how the documents came into the possession of the plaintiff or its counsel; (ii) what the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege; (iii) the extent of review made of the

superviseur, avaient insisté pour qu'une liste en bonne et due forme de tous les documents saisis soit dressée sur les lieux de la perquisition, l'ensemble des documents potentiellement confidentiels aurait été connu au départ. Néanmoins, étant donné que les documents électroniques en cause avaient été téléchargés sur un disque dur et des cédéroms, puis placés dans une enveloppe scellée dont la garde avait été confiée au cabinet comptable, il aurait été possible, dans les jours qui ont suivi la perquisition, de dresser une liste complète en présence d'un avocat de BLG. Cela n'a pas pu se faire non plus en raison de la conduite précipitée et unilatérale de CBB. Aucun besoin pressant ne justifiait l'ouverture de l'enveloppe. Ni CBB ni KBTF n'a tenté d'avoir accès aux documents privilégiés ou d'en tirer quelque avantage. Leur problème découle d'une incurie et d'une attitude trop agressive dans des circonstances qui commandaient la modération en reconnaissance de la situation de responsabilité exceptionnelle qu'impose la nature unilatérale et attentatoire d'une ordonnance *Anton Piller*. Dans un cas comme la présente affaire, la mesure corrective est censée être réparatrice et non punitive. [34] [52-54]

En l'espèce, la Cour d'appel a eu tort d'imposer aux avocats de Canadian Bearings le fardeau d'établir l'existence d'un risque réel de préjudice. Les avocats de Celanese qui ont effectué une perquisition en vertu d'une ordonnance *Anton Piller* et qui, de ce fait, sont entrés en possession de renseignements confidentiels pertinents ayant été obtenus grâce à des rapports antérieurs d'avocat à client ont l'obligation de démontrer qu'il n'y a aucun risque réel que ces renseignements soient utilisés au préjudice de Canadian Bearings. Les problèmes de preuve auxquels s'ajoutent les erreurs commises pendant et après la perquisition doivent être résolus par les gens qui sont responsables de la perquisition, et non par la partie qui en a fait l'objet. En l'espèce, la partie ayant sollicité la perquisition ne s'est pas acquittée de ce fardeau. [55]

Le droit d'un demandeur de continuer à être représenté par les avocats de son choix constitue un élément important de notre système de justice accusatoire. Dans les litiges commerciaux modernes, il y a parfois un échange important de documents. Des erreurs sont commises. Dans ces circonstances, il n'est pas question d'inhabilité automatique à occuper. S'il est possible de remédier au problème sans avoir à déclarer inhabiles à occuper les avocats ayant effectué la perquisition, il faut examiner cette possibilité. À cet égard, il y a lieu de prendre en considération un certain nombre de facteurs : (i) la manière dont le demandeur ou ses avocats sont entrés en possession des documents; (ii) les mesures que le demandeur et ses avocats ont prises lorsqu'ils

privileged documents; (iv) the contents of the solicitor-client communications and the degree to which they are prejudicial; (v) the stage of the litigation; (vi) the potential effectiveness of a firewall or other precautionary steps to avoid mischief. [56-59]

As to the first factor, the privileged documents came into the hands of CBB and KBTF under the *Anton Piller* order in a way that was unintended but avoidable. Inadequate precautions were taken and those who fail to take precautions must bear the responsibility. As to the second factor, CBB failed to have the electronic documents listed at the search site as required by the order, ignored the obvious significance of BLG's initials on the sealed envelope containing the electronic documents and declined to return to BLG the material over which privilege was claimed as requested. Although, CBB did take steps, as did KBTF, to contain the resulting damage, as a result of their errors the Court does not know, and Canadian Bearings cannot know, the potential scale of that damage. As to the third factor, CBB and KBTF deny any substantive review of the privileged documents, but their review must have been sufficiently thorough for one of KBTF's lawyers to classify documents as "Relevant, Irrelevant, Proprietary, and Hot". Moreover, some of the documents initially read and classified as "Relevant" turned out (on a second reading) to be potentially subject to a claim of privilege. As to the fourth factor, CBB and KBTF failed to discharge the onus of identifying the contents of the solicitor-client communications which they accessed in the course of classifying the material. It is therefore not possible to determine the degree to which they are prejudicial. Again, Celanese's solicitors created this problem by their failure to proceed with prudence. As to the fifth factor, the litigation is at an early stage, and notice of the removal application was made near the outset. Lastly, while CBB advised the court of a number of measures taken, it seems apparent that appropriate firewalls were not in place prior to the occurrence of the mischief. In view of all the circumstances, the searching party did not produce sufficient evidence to demonstrate that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. [60-66]

ont constaté que les documents étaient potentiellement assujettis au privilège avocat-client; (iii) la mesure dans laquelle les documents privilégiés ont été examinés; (iv) la teneur des communications avocat-client et la mesure dans laquelle elles sont préjudiciables; (v) l'étape de l'instance; (vi) l'efficacité potentielle d'une mesure de protection ou d'autres précautions destinées à éviter un préjudice. [56-59]

Quant au premier facteur, CBB et KBTF ont mis la main, d'une façon non intentionnelle mais évitable, sur les documents privilégiés grâce à l'ordonnance *Anton Piller.* Des précautions insuffisantes ont été prises et ceux qui ne prennent pas de précautions doivent en subir les conséquences. En ce qui concerne le deuxième facteur, CBB n'a ni dressé la liste des documents électroniques sur les lieux de la perquisition, comme l'exigeait l'ordonnance, ni tenu compte de l'importance manifeste des initiales de BLG apposées sur l'enveloppe scellée contenant les documents électroniques. De plus, il a refusé de restituer à BLG les documents demandés qui étaient visés par une revendication de privilège. CBB a effectivement pris des mesures, tout comme KBTF, pour limiter le préjudice ayant résulté, mais à cause de leurs erreurs, la Cour ne connaît pas, et Canadian Bearings n'est pas en mesure de connaître, l'ampleur potentielle de ce préjudice. Quant au troisième facteur, CBB et KBTF nient avoir procédé à un examen approfondi des documents privilégiés, mais ils doivent avoir effectué un examen assez minutieux pour qu'un avocat de KBTF puisse classer les documents comme étant « pertinents, non pertinents, exclusifs ou très pertinents ». En outre, certains documents lus et classés au départ comme étant « pertinents » se sont révélés (après une deuxième lecture) susceptibles de faire l'objet d'une revendication de privilège. En ce qui a trait au quatrième facteur, CBB et KBTF ne se sont pas acquittés de l'obligation de décrire la teneur des communications avocat-client dont ils ont pris connaissance en classant les documents. Il n'est donc pas possible de déterminer la mesure dans laquelle ces communications sont préjudiciables. Là encore, les avocats de Celanese ont créé ce problème en omettant d'agir avec prudence. Quant au cinquième facteur, l'instance ne fait que débuter et un préavis de la demande de déclaration d'inhabilité à occuper a été donné presque au départ. Enfin, bien que CBB ait mentionné au tribunal un certain nombre de mesures qui ont été prises, il semble évident qu'aucune mesure de protection suffisante n'avait été prise avant que le préjudice soit causé. En tout état de cause, la partie ayant sollicité la perquisition n'a pas produit suffisamment d'éléments de preuve pour démontrer que le public, c'est-à-dire une personne raisonnablement informée, serait convaincu qu'il ne serait fait aucun usage de renseignements confidentiels. [60-66]

Cases Cited

Applied: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; **distinguished:** *Tilley v. Hails* (1993), 12 O.R. (3d) 306; *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000), 9 B.L.R. (3d) 99; *Coulombe v. Beard* (1993), 16 O.R. (3d) 627; *Nova Growth Corp. c. Kepinski*, [2001] O.J. No. 5993 (QL), leave to appeal refused, [2002] O.J. No. 2522 (QL), leave to appeal refused, [2003] 1 S.C.R. xiv; *Michel v. Lafrentz* (1992), 12 C.P.C. (3d) 119; **referred to:** *Grenzservice Speditions Ges.m.b.H. v. Jans* (1995), 15 B.C.L.R. (3d) 370; *Ridgewood Electric Ltd. (1990) v. Robbie* (2005), 74 O.R. (3d) 514; *Netbored Inc. v. Avery Holdings Inc.* (2005), 48 C.P.R. (4th) 240, 2005 FC 1405; *Neumeyer v. Neumeyer* (2005), 47 B.C.L.R. (4th) 162, 2005 BCSC 1259; *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55; *Nintendo of America, Inc. v. Coinex Video Games Inc.*, [1983] 2 F.C. 189; *Indian Manufacturing Ltd. v. Lo* (1997), 75 C.P.R. (3d) 338; *Netsmart Inc. v. Poelzer*, [2003] 1 W.W.R. 698, 2002 ABQB 800; *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.* (1996), 67 C.P.R. (3d) 202; *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539; *Proctor & Gamble Inc. v. John Doe (c.o.b. Clarion Trading International)*, [2000] F.C.J. No. 61 (QL); *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, [1999] 3 F.C. 621; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *Thermax Ltd. v. Schott Industrial Glass Ltd.*, [1981] F.S.R. 289; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Havana House Cigar & Tobacco Merchants Ltd. v. Jane Doe* (2000), 199 F.T.R. 12, aff'd (2002), 288 N.R. 198, 2002 FCA 75; *Columbia Picture Industries Inc. v. Robinson*, [1987] Ch. 38; *Universal Thermosensors Ltd. v. Hibben*, [1992] 1 W.L.R. 840; *Sulphur Experts Inc. v. O'Connell* (2000), 279 A.R. 246, 2000 ABQB 875.

Statutes and Regulations Cited

Civil Procedure Act 1997 (U.K.), 1997, c. 12, s. 7.
Civil Procedure Rules 1998, S.I. 1998/3132, r. 25.1(1)(h).
Criminal Code, R.S.C. 1985, c. C-46.
Federal Court Rules (Cth.), Order 25B.
Federal Courts Rules, SOR/98-106, r. 374(1).
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 40.02.

Authors Cited

Australia. Federal Court. Practice Note No. 24, May 5, 2006.

Jurisprudence

Arrêt appliqué : *Succession MacDonald c. Martin*, [1990] 3 R.C.S. 1235; **distinction d'avec les arrêts :** *Tilley c. Hails* (1993), 12 O.R. (3d) 306; *Aviaco International Leasing Inc. c. Boeing Canada Inc.* (2000), 9 B.L.R. (3d) 99; *Coulombe c. Beard* (1993), 16 O.R. (3d) 627; *Nova Growth Corp. c. Kepinski*, [2001] O.J. No. 5993 (QL), autorisation d'appel refusée, [2002] O.J. No. 2522 (QL), autorisation d'appel refusée, [2003] 1 R.C.S. xiv; *Michel c. Lafrentz* (1992), 12 C.P.C. (3d) 119; **arrêts mentionnés :** *Grenzservice Speditions Ges.m.b.H. c. Jans* (1995), 15 B.C.L.R. (3d) 370; *Ridgewood Electric Ltd. (1990) c. Robbie* (2005), 74 O.R. (3d) 514; *Netbored Inc. c. Avery Holdings Inc.*, [2005] A.C.F. nº 1723 (QL), 2005 CF 1405; *Neumeyer c. Neumeyer* (2005), 47 B.C.L.R. (4th) 162, 2005 BCSC 1259; *Anton Piller KG c. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55; *Nintendo of America, Inc. c. Coinex Video Games Inc.*, [1983] 2 C.F. 189; *Indian Manufacturing Ltd. c. Lo*, [1997] A.C.F. nº 906 (QL); *Netsmart Inc. c. Poelzer*, [2003] 1 W.W.R. 698, 2002 ABQB 800; *Pulse Microsystems Ltd. c. SafeSoft Systems Inc.* (1996), 67 C.P.R. (3d) 202; *Ontario Realty Corp. c. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539; *Proctor & Gamble Inc. c. M. Untel (f.a.s. Clarion Trading International)*, [2000] A.C.F. nº 61 (QL); *Adobe Systems Inc. c. KLJ Computer Solutions Inc.*, [1999] 3 C.F. 621; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, [2002] 3 R.C.S. 209, 2002 CSC 61; *Thermax Ltd. c. Schott Industrial Glass Ltd.*, [1981] F.S.R. 289; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860; *Havana House Cigar & Tobacco Merchants Ltd. c. Madame Unetelle*, [2000] A.C.F. nº 1827 (QL), conf. [2002] A.C.F. nº 285 (QL), 2002 ACF 75; *Columbia Picture Industries Inc. c. Robinson*, [1987] Ch. 38; *Universal Thermosensors Ltd. c. Hibben*, [1992] 1 W.L.R. 840; *Sulphur Experts Inc. c. O'Connell* (2000), 279 A.R. 246, 2000 ABQB 875.

Lois et règlements cités

Civil Procedure Act 1997 (R.-U.), 1997, ch. 12, art. 7.
Civil Procedure Rules 1998, S.I. 1998/3132, règle 25.1(1)h).
Code criminel, L.R.C. 1985, ch. C-46.
Federal Court Rules (Cth.), ordonnance 25B.
Règles des Cours fédérales, DORS/98-106, art. 374(1).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 40.02.

Doctrine citée

Australie. Federal Court. Practice Note No. 24, May 5, 2006.

Great Britain. *Civil Procedure*, vol. 1, 2nd Supp., Part 25, Practice Direction — Interim Injunctions. London: Sweet & Maxwell, 2005.
Sharpe, Robert J. *Injunctions and Specific Performance*, loose-leaf ed. Aurora, Ont.: Canada Law Book, 1998 (updated 2005, release 13).

APPEAL from a judgment of the Ontario Court of Appeal (Abella, Moldaver and Goudge JJ.A.) (2004), 73 O.R. (3d) 64, 244 D.L.R. (4th) 33, 190 O.A.C. 329, 1 C.P.C. (6th) 254, [2004] O.J. No. 3983 (QL), setting aside a decision of the Divisional Court (MacFarland, Macdonald and Campbell JJ.) (2004), 69 O.R. (3d) 632, 237 D.L.R. (4th) 516, 183 O.A.C. 296, 46 C.P.C. (5th) 285, [2004] O.J. No. 372 (QL), setting aside a decision of Nordheimer J. (2003), 69 O.R. (3d) 618, [2003] O.J. No. 4211 (QL). Appeal allowed.

Robert B. Bell, *Douglas M. Worndl* and *Benjamin T. Glustein*, for the appellants.

Gavin MacKenzie and *Michelle Vaillancourt*, for the respondent Celanese Canada Inc.

Alan J. Lenczner, for the respondent Celanese Ltd.

C. Clifford Lax, *Q.C.*, and *M. Paul Michell*, for the intervener Advocates' Society.

Mahmud Jamal and *Derek Leschinsky*, for the intervener Canadian Bar Association.

The judgment of the Court was delivered by

BINNIE J. — An *Anton Piller* order bears an uncomfortable resemblance to a private search warrant. No notice is given to the party against whom it is issued. Indeed, defendants usually first learn of them when they are served and executed, without having had an opportunity to challenge them or the evidence on which they were granted. The defendant may have no idea a claim is even pending. The order is not placed in the hands of a public authority for execution, but authorizes a private party to insist on entrance to the premises of its opponent to conduct a surprise search, the purpose of which is to seize and preserve evidence to further its claim

Grande-Bretagne. *Civil Procedure*, vol. 1, 2e suppl., Part 25, Practice Direction — Interim Injunctions. London : Sweet & Maxwell, 2005.
Sharpe, Robert J. *Injunctions and Specific Performance*, loose-leaf ed. Aurora, Ont. : Canada Law Book, 1998 (updated 2005, release 13).

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Abella, Moldaver et Goudge) (2004), 73 O.R. (3d) 64, 244 D.L.R. (4th) 33, 190 O.A.C. 329, 1 C.P.C. (6th) 254, [2004] O.J. No. 3983 (QL), qui a infirmé une décision de la Cour divisionnaire (les juges MacFarland, Macdonald et Campbell) (2004), 69 O.R. (3d) 632, 237 D.L.R. (4th) 516, 183 O.A.C. 296, 46 C.P.C. (5th) 285, [2004] O.J. No. 372 (QL), qui avait infirmé une décision du juge Nordheimer (2003), 69 O.R. (3d) 618, [2003] O.J. No. 4211 (QL). Pourvoi accueilli.

Robert B. Bell, *Douglas M. Worndl* et *Benjamin T. Glustein*, pour les appelants.

Gavin MacKenzie et *Michelle Vaillancourt*, pour l'intimée Celanese Canada Inc.

Alan J. Lenczner, pour l'intimée Celanese Ltd.

C. Clifford Lax, *c.r.*, et *M. Paul Michell*, pour l'intervenante Advocates' Society.

Mahmud Jamal et *Derek Leschinsky*, pour l'intervenante l'Association du Barreau canadien.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'ordonnance *Anton Piller* ressemble étrangement à un mandat de perquisition privé. Aucun préavis n'est donné à la partie qu'elle vise. En fait, les défendeurs n'en prennent normalement connaissance qu'au moment de sa signification et de son exécution, sans avoir eu la possibilité de la contester ou de contester la preuve sur laquelle elle repose. Il se peut même que le défendeur ignore complètement qu'une instance est en cours. Aucune autorité publique ne se voit confier l'exécution de l'ordonnance, laquelle autorise plutôt une partie privée à exiger que la partie adverse la laisse entrer dans ses locaux pour qu'elle puisse y

in a private dispute. The only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* case and can demonstrate that on the facts, absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear. The protection of the party against whom an *Anton Piller* order is issued ought to be threefold: a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; a vigilant court-appointed supervising solicitor who is independent of the parties; and a sense of responsible self-restraint on the part of those executing the order. In this case, unfortunately, none of these protections proved to be adequate to protect against the disclosure of relevant solicitor-client confidences. Inadequate protections had been written into the order. Those which had been provided were not properly respected. The vigilance of the supervising solicitor appears to have fallen short. Celanese's solicitors in the aftermath of the search seem to have lost sight of the fact that the limited purpose of the order was to *preserve* evidence not to rush to exploit it. In the result, the party searched (Canadian Bearings) now seeks the removal of Celanese's solicitors (Cassels Brock & Blackwell LLP ("Cassels Brock")) and to bar Celanese from making further use of their U.S. counsel (Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz")).

2 This appeal thus presents a clash between two competing values — solicitor-client privilege and the right to select counsel of one's choice. The conflict must be resolved, it seems to me, on the basis that no one has the right to be represented by counsel who has had access to relevant solicitor-client confidences in circumstances where such access ought to have been anticipated and, without great difficulty, avoided and where such counsel has failed to rebut the presumption of a resulting risk

effectuer une perquisition-surprise destinée à lui permettre de saisir et de conserver des éléments de preuve susceptibles d'étayer ses allégations dans un litige privé. Ce recours extraordinaire n'est justifié que dans le cas où le demandeur dispose d'une preuve *prima facie* solide et peut démontrer que, selon les faits, il y a tout lieu de croire qu'à défaut de cette ordonnance des éléments de preuve pertinents risquent d'être détruits ou supprimés de quelque autre manière. La partie visée par une ordonnance *Anton Piller* devrait bénéficier d'une triple protection : une ordonnance soigneusement rédigée décrivant les documents à saisir et énonçant les garanties applicables notamment au traitement de documents privilégiés; un avocat superviseur vigilant et indépendant des parties, nommé par le tribunal; un sens de la mesure de la part des personnes qui exécutent l'ordonnance. En l'espèce, malheureusement, aucune de ces mesures de protection ne s'est révélée suffisante pour empêcher la divulgation de communications pertinentes effectuées à titre confidentiel entre un avocat et son client. Les mesures de protection prescrites par l'ordonnance étaient insuffisantes et n'ont pas été appliquées correctement. L'avocat superviseur semble avoir manqué de vigilance. Au lendemain de la perquisition, les avocats de Celanese semblent avoir oublié que l'ordonnance avait uniquement pour but de *conserver* des éléments de preuve, et non d'en permettre l'utilisation précipitée. En définitive, la partie ayant fait l'objet de la perquisition (Canadian Bearings) demande maintenant que les avocats de Celanese (Cassels Brock & Blackwell LLP (« Cassels Brock ») soient déclarés inhabiles à occuper et que Celanese se voie interdire de continuer à consulter ses avocats américains (Kasowitz, Benson, Torres & Friedman LLP (« Kasowitz »)).

Il est donc question, en l'espèce, d'un conflit entre deux valeurs opposées : le privilège avocat-client et le droit à l'avocat de son choix. J'estime que, pour résoudre ce conflit, il faut tenir pour acquis que le droit d'être représenté par un avocat ayant eu accès à des communications pertinentes effectuées à titre confidentiel entre un avocat et son client n'existe pas dans le cas où cet accès aurait dû être prévu et être sans trop de peine évité et où l'avocat en question n'a pas réfuté la présomption

of prejudice to the party against whom the *Anton Piller* order was made.

This Court's decision in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, makes it clear that prejudice will be presumed to flow from an opponent's access to relevant solicitor-client confidences. The major difference between the minority and majority in that case is that while the majority considered the presumption of risk of prejudice open to rebuttal in some circumstances (pp. 1260-61), the minority would not have permitted even the opportunity of rebuttal (p. 1266). In the *MacDonald Estate* situation, the difficulty of dealing with the moving solicitor was compounded by the fact the precise extent of solicitor-client confidences she acquired over a period of years, was unknown, possibly unknowable, and in any event not something that in fairness to her former client should be revealed. Thus Sopinka J. wrote that "once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge" (p. 1260).

The *Anton Piller* situation is somewhat different because the searching solicitors ought to have a record of exactly what was seized and what material, for which confidentiality is claimed, they subsequently looked at. Here again, rebuttal should be permitted, but the rebuttal evidence should require the party who obtained access to disclose to the court what has been learned and the measures taken to avoid the presumed resulting prejudice. While all solicitor confidences are not of the same order of importance, the party who obtained the wrongful access is not entitled to have the court assume in its favour that such disclosure carried no risk of prejudice to its opponent, and therefore does not justify the removal of the solicitors. For

de risque de préjudice en résultant pour la partie visée par l'ordonnance *Anton Piller.*

3 L'arrêt de notre Cour *Succession MacDonald c. Martin*, [1990] 3 R.C.S. 1235, établit clairement qu'il y a présomption de préjudice lorsqu'une partie adverse a accès à des communications pertinentes effectuées à titre confidentiel entre un avocat et son client. Dans cet arrêt, la principale différence entre les opinions minoritaire et majoritaire tient au fait que les juges majoritaires considéraient que la présomption de risque de préjudice est réfutable dans certaines circonstances (p. 1260-1261), alors que les juges minoritaires n'auraient même pas donné la possibilité de réfuter cette présomption (p. 1266). Dans l'affaire *Succession MacDonald*, la difficulté de traiter avec l'avocate qui avait changé de cabinet était accentuée par le fait que l'ampleur exacte des renseignements confidentiels que son ancien client lui avait communiqués pendant un certain nombre d'années était inconnue, voire impossible à connaître, et était, de toute façon, quelque chose qui ne devait pas être divulgué par souci d'équité pour lui. En conséquence, le juge Sopinka a écrit que « dès que le client a prouvé l'existence d'un lien antérieur dont la connexité avec le mandat dont on veut priver l'avocat est suffisante, la Cour doit en inférer que des renseignements confidentiels ont été transmis, sauf si l'avocat convainc la Cour qu'aucun renseignement pertinent n'a été communiqué. C'est un fardeau de preuve dont il aura bien de la difficulté à s'acquitter » (p. 1260).

4 La situation de type *Anton Piller* est quelque peu différente du fait que les avocats qui ont procédé à la perquisition devaient établir un compte rendu exact de ce qui a été saisi et des documents — dont la confidentialité est invoquée — qu'ils ont examinés par la suite. Là encore, la réfutation devrait être permise, mais pour l'effectuer, la partie ayant eu accès devrait communiquer au tribunal ce qu'elle a appris et ce qu'elle a fait pour éviter le préjudice qui est présumé découler. Bien que les renseignements confidentiels communiqués à un avocat n'aient pas tous la même importance, la partie qui eu accès de façon illicite à de tels renseignements n'a pas le droit de laisser le tribunal présumer en sa faveur que leur divulgation ne comportait aucun risque de

the reasons that follow, I conclude, contrary to the view taken by the Court of Appeal, with respect, that Celanese and its lawyers *did* have the onus to rebut the presumption of a risk of prejudice and they failed to do so. Accordingly, the appeal is allowed, the order of the Ontario Court of Appeal is set aside and the order of the Divisional Court is restored removing Cassels Brock as solicitors for Celanese and precluding the latter from continuing to seek the advice of Kasowitz, in connection with any Canadian litigation arising out of the facts alleged in the amended statement of claim.

préjudice pour la partie adverse et qu'elle ne justifie donc pas que les avocats soient déclarés inhabiles à occuper. Pour les raisons qui suivent, je conclus, en toute déférence pour le point de vue contraire adopté par la Cour d'appel, que Celanese et ses avocats avaient *effectivement* l'obligation de réfuter la présomption de risque de préjudice et qu'ils ne l'ont pas fait. Le pourvoi est donc accueilli, l'ordonnance de la Cour d'appel de l'Ontario est annulée, et l'ordonnance de la Cour divisionnaire déclarant Cassels Brock inhabile à occuper pour Celanese et interdisant à cette dernière de continuer de consulter Kasowitz relativement à toute instance canadienne découlant des faits allégués dans la déclaration modifiée, est rétablie.

I. Facts

I. Les faits

5 The underlying litigation in this case, which does not directly affect the disposition of this appeal, involves alleged industrial espionage. Celanese operated a plant for the production of vinyl acetate in Edmonton. It decided for business reasons to demolish the facility rather than sell it. Celanese eventually retained the defendant, Murray Demolition, to undertake the demolition. Precautions were put in place to prevent the unauthorized disclosure during demolition of valuable proprietary information evident in the plant's design and processes. Celanese discovered in April 2003 that certain of the defendants, including Canadian Bearings, were engaged in what appeared to be an attempt, under the cover of the demolition, to copy in various ways proprietary processes and equipment. As a consequence, Canadian Bearings and others who had been given access to the site by Murray Demolition, were ordered off the property. Celanese is now suing Canadian Bearings, among others, for allegedly stealing technology discovered during the demolition and making unauthorized use of it in the construction of a vinyl acetate facility in Iran.

Le litige fondamental en l'espèce, qui n'a aucune incidence directe sur l'issue du présent pourvoi, concerne une allégation d'espionnage industriel. Celanese exploitait une usine de production d'acétate de vinyle à Edmonton. Elle a décidé, pour des raisons commerciales, de démolir l'installation au lieu de la vendre. Celanese a, par la suite, confié les travaux de démolition à la défenderesse, Murray Demolition. Au cours de ces travaux de démolition, des précautions ont été prises pour empêcher la divulgation non autorisée de renseignements exclusifs de grande valeur que révéleraient l'aménagement et les procédés de l'usine. En avril 2003, Celanese a découvert que certains défendeurs, dont Canadian Bearings, profitaient des travaux de démolition pour se livrer à ce qui semblait être une tentative de copier de différentes façons des procédés et un équipement exclusifs. Canadian Bearings et les autres à qui Murray Demolition avait donné accès au chantier se sont donc vu ordonner de quitter les lieux. Celanese poursuit maintenant Canadian Bearings, notamment, en l'accusant d'avoir volé une technologie découverte pendant les travaux de démolition et de l'avoir utilisée sans autorisation pour construire une usine de fabrication d'acétate de vinyle en Iran.

6 On June 19, 2003, the motions judge granted Celanese's *ex parte* application for an *Anton Piller* order against Canadian Bearings and others. The

Le 19 juin 2003, le juge des requêtes a accueilli la demande *ex parte* de Celanese visant à obtenir une ordonnance *Anton Piller* contre Canadian

issue of how to deal with privileged documents was not considered in the draft order placed before the motions judge and his formal order did not contain such a provision. Nevertheless, all parties recognize that an *Anton Piller* order provides no authority whatsoever for access to a defendant's privileged documents.

The order was executed on June 20 and 21, 2003, in the presence of two police officers by an independent accounting firm, BDO Hayes Smith ("BDO"), and was overseen by an independent supervising solicitor, Bernard Eastman, Q.C. At the outset, Mr. Eastman spoke at the search site with a senior executive of Canadian Bearings. He gave the executive a copy of the order and related documents, and explained its terms. Mr. Eastman advised the executive that, pursuant to the terms of the order, he would have one hour to seek legal advice. Shortly thereafter, the solicitors for Canadian Bearings, Borden Ladner Gervais LLP ("BLG"), arrived at the scene. The search was conducted over a period of 18 hours in circumstances that could be described as mildly chaotic. Cassels Brock was not present at the search, but members of the firm were in frequent telephone communication with Mr. Eastman.

In the course of the search, privilege was claimed for certain paper documents which were then placed in a sealed folder in the custody of BDO until the merits of the claim could be resolved. The issue of privilege arises at this stage only in connection with the electronic documents seized.

When it became apparent that some of the electronic documents might be subject to solicitor-client privilege, the BDO representative enlisted the help of BLG lawyers to facilitate their identification. The process was rushed. Given the volume of electronic materials and the pace at which the search proceeded, BLG lawyers later complained that they were not given time to review the material adequately. Frequently, entire folders would be

Bearings et autres. La question de la façon de traiter des documents privilégiés n'a pas été abordée dans le projet d'ordonnance soumis au juge des requêtes et aucune disposition de son ordonnance formelle ne porte sur cette question. Néanmoins, les parties reconnaissent toutes qu'une ordonnance *Anton Piller* n'autorise aucunement l'accès aux documents privilégiés d'un défendeur.

7 L'ordonnance a été exécutée les 20 et 21 juin 2003 par un cabinet comptable indépendant, BDO Hayes Smith (« BDO »), en présence de deux policiers et sous la supervision d'un avocat indépendant, Bernard Eastman, c.r. À son arrivée sur les lieux de la perquisition, M^e^ Eastman s'est entretenu avec un cadre supérieur de Canadian Bearings. Il lui a remis une copie de l'ordonnance et des documents connexes, et lui en a expliqué les modalités. M^e^ Eastman a informé le cadre supérieur que l'ordonnance lui accordait une heure pour solliciter une opinion juridique. Peu après, les avocats de Canadian Bearings, Borden Ladner Gervais LLP (« BLG »), sont arrivés sur les lieux. La perquisition, qui a duré 18 heures, s'est déroulée dans un climat qui pourrait être qualifié de légèrement chaotique. Pendant la perquisition, des membres du cabinet Cassels Brock ont eu des conversations téléphoniques fréquentes avec M^e^ Eastman, mais aucun d'eux n'était présent sur les lieux.

8 Au cours de la perquisition, certains documents papier ayant fait l'objet d'une revendication de privilège ont été placés dans une enveloppe scellée dont la garde a été confiée à BDO jusqu'à ce qu'il soit statué sur le bien-fondé de la revendication en question. À ce stade-ci, la question du privilège ne se pose qu'à l'égard des documents électroniques saisis.

9 Lorsqu'il est devenu évident que certains documents électroniques pourraient être assujettis au privilège avocat-client, le représentant de BDO a demandé l'aide des avocats de BLG pour en faciliter l'identification. Cette tâche a été expédiée. En raison de la taille des documents électroniques et du rythme auquel s'est déroulée la perquisition, les avocats de BLG se sont plaints, par la suite, de ne pas avoir disposé du temps nécessaire pour

copied electronically without examination of individual documents. However, material that could be identified as potentially privileged was segregated into an electronic folder which was labelled "Borden Ladner Gervais".

10 In the course of the search, approximately 1,400 electronic documents thought to be relevant, but not as yet effectively screened for potential solicitor-client privilege claims, were downloaded by BDO onto a portable hard drive and "burned" onto CD-ROMs. These were placed in a plastic envelope and sealed. The seal was initialled by a BLG lawyer and by Mr. Eastman. The envelope was given to BDO. Contrary to the express provision in the *Anton Piller* order, no complete list of the seized records was made prior to their removal from the searched premises.

11 On June 23, 2003, lawyers from Cassels Brock and Kasowitz went to BDO to retrieve the seized documents. The Cassels Brock lawyer called the supervising solicitor, Mr. Eastman, to enquire about the sealed envelope containing the hard drive and CD-ROMs. Apparently satisfied there was no agreement that Cassels Brock would have to deal directly with BLG on the issue, he opened the envelope and directed BDO to copy the contents. After some delay, a CD containing copies of various e-mails was copied onto Cassels Brock's computer. A copy of the CD was not sent to BLG. Subsequently, a Cassels Brock lawyer e-mailed colleagues: "On June 24, 2003 representatives of Celanese, counsel from Kasowitz . . . and I attended at the offices of BDO . . . and reviewed all of the electronic documents seized from all of the defendants."

12 The CD turned out to contain privileged communications. The Cassels Brock lawyer admitted to having reviewed "a few dozen e-mail[s] in full", but

examiner convenablement les documents. À maintes reprises, une copie électronique de dossiers complets a été effectuée sans que l'on vérifie le contenu de chaque document. Toutefois, des documents pouvant être décrits comme étant potentiellement privilégiés ont été placés séparément dans un dossier électronique nommé « Borden Ladner Gervais ».

Durant la perquisition, BDO a téléchargé sur un disque dur portable et « gravé » sur des cédéroms environ 1 400 documents électroniques jugés pertinents qui n'avaient cependant pas encore été étudiés afin de déterminer s'ils pouvaient faire l'objet d'une revendication de privilège avocat-client. Ils ont été placés dans une enveloppe de plastique et mis sous scellés. Un avocat de BLG et M^e^ Eastman ont apposé leurs initiales sur le scellé. L'enveloppe a été remise à BDO. Contrairement à ce que prévoyait explicitement l'ordonnance *Anton Piller*, aucune liste complète des documents saisis n'a été dressée avant qu'ils soient retirés des lieux de la perquisition.

Le 23 juin 2003, des avocats de Cassels Brock et Kasowitz se sont présentés chez BDO pour récupérer les documents saisis. L'avocat de Cassels Brock a téléphoné à l'avocat superviseur, M^e^ Eastman, pour lui poser des questions au sujet de l'enveloppe scellée contenant le disque dur et les cédéroms. Manifestement convaincu qu'aucune entente n'obligeait Cassels Brock à traiter directement avec BLG à ce sujet, il a ouvert l'enveloppe et a demandé à BDO d'en copier le contenu. Au bout d'un certain temps, divers courriels stockés sur un CD ont été copiés dans l'ordinateur de Cassels Brock. Aucune copie du CD n'a été envoyée à BLG. Par la suite, un avocat de Cassels Brock a fait parvenir le courriel suivant à des collègues : [TRADUCTION] « Le 24 juin 2003, des représentants de Celanese, un avocat de Kasowitz [. . .] et moi-même nous sommes présentés au bureau de BDO [. . .] et avons examiné l'ensemble des documents électroniques saisis chez chacune des parties défenderesses. »

Il s'est avéré que le CD contenait des communications privilégiées. L'avocat de Cassels Brock a admis avoir examiné [TRADUCTION] « au complet

said he did not recall reviewing "any e-mail that originated from or were sent to BLG".

A copy of the CD was also provided to Kasowitz and was reviewed by Todd Colvard, a Kasowitz lawyer based in Houston. He was directed to classify the electronic documents as "Relevant, Irrelevant, Proprietary, and Hot". Colvard noticed that some of the e-mails were addressed to or from BLG, and so saved these in a separate fifth electronic folder which he marked "Privileged". He later found additional privileged documents in the folder marked "Relevant", thus evidencing a measure of misclassification. Other than for purposes of segregation, Colvard says he did not review "the substance of those messages".

When BLG discovered, on June 24, 2003, that the sealed envelope had been opened, some heated correspondence ensued. Cassels Brock declined to provide BLG with copies of the seized Canadian Bearings electronic documents until late Friday, June 27, 2003, after the motions judge so ordered.

On July 11 or 12, 2003, BLG became aware that privileged documents had been transferred to Cassels Brock and Kasowitz. BLG dispatched a letter dated July 14, 2003, enclosing a list of some 82 "privileged documents which were among those documents removed from my clients' computer system and deleted from my clients' computer system by those individuals executing the order of [Nordheimer J.] dated June 19, 2003" (emphasis added) and requesting the immediate return of the privileged documents "whether in print form or electronic" and identification of all individuals who may have reviewed them.

Eventually, Cassels Brock and Kasowitz, rather than returning the privileged electronic material as requested, advised BLG that the documents had been deleted from their respective systems. The

quelques dizaines de courriels », mais il a ajouté qu'il ne se rappelait pas d'avoir examiné « quelque courriel dont BLG était l'expéditeur ou le destinataire ».

13 Kasowitz a également obtenu une copie du CD, qui a été examinée par l'un de ses avocats du bureau de Houston, Todd Colvard. Celui-ci a été chargé de classer les documents électroniques comme étant [TRADUCTION] « pertinents, non pertinents, exclusifs ou très pertinents ». Remarquant que certains courriels avaient BLG pour expéditeur ou destinataire, M^e^ Colvard les a sauvegardés séparément dans un cinquième dossier électronique qu'il a nommé « privilégié ». Par la suite, il a trouvé d'autres documents privilégiés dans le dossier nommé « pertinent », ce qui prouve que certains documents avaient été mal classés. M^e^ Colvard affirme que c'est uniquement dans le but de trier les messages qu'il en a examiné la « teneur ».

14 Lorsque BLG a découvert, le 24 juin 2003, que l'enveloppe scellée avait été ouverte, un échange de correspondance très vif a eu lieu. Ce n'est que tard le vendredi 27 juin 2003, après que le juge des requêtes lui eut ordonné de le faire, que Cassels Brock a accepté de remettre à BLG une copie des documents électroniques saisis chez Canadian Bearings.

15 Le 11 ou le 12 juillet 2003, BLG a appris que des documents privilégiés avaient été transmis à Cassels Brock et à Kasowitz. Dans une lettre datée du 14 juillet 2003, à laquelle était jointe une liste de quelques 82 [TRADUCTION] « documents privilégiés figurant parmi ceux qui ont été retirés et supprimés du système informatique de mes clientes par les personnes ayant exécuté l'ordonnance rendue le 19 juin 2003 par [M. le juge Nordheimer] » (je souligne), BLG a demandé la restitution immédiate de ces documents « papier ou électroniques », ainsi que le nom de toutes les personnes qui pouvaient les avoir examinés.

16 En fin de compte, au lieu de restituer les documents électroniques privilégiés demandés, Cassels Brock et Kasowitz ont informé BLG que ces documents avaient été supprimés de leurs systèmes

Court of Appeal noted that "it is common ground that 13 lawyers, 3 clerks and 2 law students from Cassels [Brock] and 12 lawyers from Kasowitz would have been able to access the privileged electronic documents in the two to three week period that they remained in the possession of the law firms following the search".

17 Canadian Bearings brought a motion to disqualify Cassels Brock and Kasowitz from continuing to act for Celanese, which was dismissed by the motions judge. Canadian Bearings appealed to the Divisional Court, which allowed the appeal and ordered that Cassels Brock and Kasowitz be removed. Celanese, Cassels Brock and Kasowitz appealed to the Ontario Court of Appeal, which allowed the appeal, finding that neither of the courts below had applied the correct test for removal and remitted the matter back to the motions judge to be reconsidered on the basis of the appeal court's reasons. The appeal thus comes to this Court to determine the proper test and, in particular, which of the parties bears the onus to show (or rebut) the prejudice arising from disclosure of solicitor and client privileged documents.

II. Judicial History

A. *Superior Court of Justice* (2003), 69 O.R. (3d) 618

18 The motions judge concluded that Cassels Brock had acted inappropriately in failing to obtain the consent of Canadian Bearings' counsel before opening the sealed envelope. He was also critical of the supervising solicitor for failing to fulfill his "important responsibility regarding this extraordinary remedy", a responsibility which continues beyond the actual removal of documents from the defendant's premises. Finally, he found that there had been no pressing need to examine the documents in advance of sorting out the privilege claims, since the order's purpose of preserving the evidence had been fulfilled.

respectifs. La Cour d'appel a souligné que [TRADUCTION] « nul ne conteste que 13 avocats, 3 stagiaires et 2 étudiants en droit de Cassels [Brock] et 12 avocats de Kasowitz auraient pu avoir accès aux documents électroniques privilégiés pendant les deux ou trois semaines au cours desquelles ces cabinets les ont eu en leur possession après la perquisition ».

Le juge des requêtes a rejeté une requête de Canadian Bearings visant à faire déclarer Cassels Brock et Kasowitz inhabiles à continuer d'occuper pour Celanese. Canadian Bearings a interjeté appel devant la Cour divisionnaire, qui a accueilli l'appel et ordonné à Cassels Brock et à Kasowitz de cesser d'occuper. Celanese, Cassels Brock et Kasowitz ont interjeté appel devant la Cour d'appel de l'Ontario qui, accueillant l'appel, a statué que ni l'une ni l'autre des instances inférieures n'avait appliqué le bon critère pour décider si une déclaration d'inhabilité à occuper s'imposait, et a renvoyé l'affaire au juge des requêtes pour qu'il la réexamine à la lumière des motifs de la Cour d'appel. Nous sommes donc appelés, dans le présent pourvoi, à déterminer le critère applicable et à décider plus particulièrement quelle partie a l'obligation d'établir (ou de réfuter) l'existence du préjudice découlant de la communication de documents assujettis au privilège avocat-client.

II. Historique des procédures judiciaires

A. *Cour supérieure de justice* (2003), 69 O.R. (3d) 618

Le juge des requêtes a décidé que Cassels Brock avait mal agi en ouvrant l'enveloppe scellée sans avoir préalablement obtenu le consentement de l'avocat de Canadian Bearings. Il a également reproché à l'avocat superviseur de ne pas s'être acquitté de son [TRADUCTION] « importante responsabilité à l'égard de ce recours extraordinaire », laquelle subsiste même après que les documents aient effectivement été retirés des locaux de la défenderesse. Enfin, il a conclu qu'il n'y avait aucun besoin urgent d'examiner les documents avant que la question des revendications de privilège ait été résolue, étant donné que l'objectif de conservation de la preuve visé par l'ordonnance avait été atteint.

Nordheimer J. held that while the documents were "forced" out of Canadian Bearings' hands through the execution of the *Anton Piller* order, Cassels Brock's possession of privileged documents nevertheless was "unintended and inadvertent". The failure of the formal order to contain a provision regarding how claims of privilege were to be dealt with was a "defect".

As to the remedy of disqualification, Nordheimer J. held that an affidavit from one of Canadian Bearings' solicitors "deposing to the nature and significance of the privileged material and its potential for prejudice" was necessary. He rejected the submission that disclosure of privileged material was itself sufficient to remove Cassels Brock and Kasowitz as counsel for Celanese. Although acknowledging the "dilemma" faced by the moving party being obliged to reveal the very information sought to be protected in order to fulfill the affidavit requirement, the motions judge countered that

> [n]evertheless, given the impact of the remedy sought, and the fact that the motion is based on the contention that such information has already found its way into the possession, and by implication the knowledge, of the responding parties, it does not strike me as [an] unfair burden to place on the moving parties. [para. 29]

Given his finding that the "serious mishandling" of the sealed envelope was not "done deliberately to get at privileged documents" and "absent evidence . . . [of] . . . a pressing and substantial prejudice", Nordheimer J. concluded that removal of Cassels Brock and Kasowitz was not warranted.

B. *Divisional Court (MacFarland J. (now J.A.), Macdonald and Campbell JJ.)* (2004), 69 O.R. (3d) 632

The Divisional Court held that it was unnecessary for Canadian Bearings to present evidence regarding the nature of the privileged material disclosed. Here, "it is clear on the record that

19 Selon le juge Nordheimer, bien que l'exécution de l'ordonnance *Anton Piller* ait permis de « soutirer » les documents à Canadian Bearings, c'est néanmoins [TRADUCTION] « involontairement et par inadvertance » que Cassels Brock s'est retrouvé en possession de documents privilégiés. L'absence dans l'ordonnance formelle d'une disposition concernant la façon de traiter des revendications de privilège était une « lacune ».

20 En ce qui concerne la réparation constituée d'une déclaration d'inhabilité à occuper, le juge Nordheimer a conclu qu'il était nécessaire que l'un des avocats de Canadian Bearings produise un affidavit [TRADUCTION] « indiquant la nature et l'importance des documents privilégiés et le risque de préjudice qu'ils présentent ». Il a rejeté l'argument selon lequel la communication des documents privilégiés suffisait en soi pour que Cassels Brock et Kasowitz soient déclarés inhabiles à occuper pour Celanese. Tout en reconnaissant le « dilemme » devant lequel l'obligation de produire un affidavit placerait la partie requérante en la forçant à révéler les renseignements mêmes qu'elle cherche à protéger, le juge des requêtes a ajouté que

> [TRADUCTION] [n]éanmoins, compte tenu de l'incidence de la réparation demandée et du fait que la requête repose sur l'affirmation que les parties intimées sont déjà en possession des renseignements et en ont implicitement pris connaissance, cette obligation imposée aux parties requérantes ne me paraît pas inéquitable. [par. 29]

21 Vu sa conclusion que la [TRADUCTION] « grave erreur de traitement » de l'enveloppe scellée n'a pas été « commise délibérément pour mettre la main sur des documents privilégiés » et vu « l'absence de preuve de l'existence [. . .] d'un préjudice réel imminent », le juge Nordheimer a décidé qu'il n'était pas justifié de déclarer Cassels Brock et Kasowitz inhabiles à occuper.

B. *Cour divisionnaire (les juges MacFarland (maintenant juge à la Cour d'appel), Macdonald et Campbell)* (2004), 69 O.R. (3d) 632

22 La Cour divisionnaire a jugé qu'il n'était pas nécessaire que Canadian Bearings produise des éléments de preuve concernant la nature des documents privilégiés communiqués. En l'espèce,

relevant privileged solicitor and client documents were accessed, copied and reviewed" by lawyers at Cassels Brock and Kasowitz. Counsel who obtain *Anton Piller* orders for their clients "are obliged in all circumstances relating to such an order to conduct themselves in a manner that is beyond reproach" and "[w]hen they do not, the court must act swiftly and decisively where the terms and spirit of its order have not been complied with". The Divisional Court concluded that "where it is clear that documents are relevant and privileged and they have been reviewed by counsel and others, opposite prejudice should be assumed". Citing *MacDonald Estate*, the Divisional Court held that it would be inappropriate to require the moving party to demonstrate prejudice, since this would defeat entirely the purpose of the privilege.

[TRADUCTION] « il ressort clairement du dossier que des documents pertinents assujettis au privilège avocat-client ont été consultés, copiés et examinés » par des avocats de Cassels Brock et de Kasowitz. Les avocats qui obtiennent des ordonnances *Anton Piller* pour leurs clients [TRADUCTION] « sont tenus dans toutes les circonstances liées à ces ordonnances de se conduire d'une manière irréprochable » et « [s]'ils ne le font pas, le tribunal doit agir rapidement et de façon décisive lorsque les modalités et l'esprit de son ordonnance ne sont pas respectés ». La Cour divisionnaire a conclu que [TRADUCTION] « lorsqu'il est clair que des documents sont pertinents et privilégiés et qu'ils ont été examinés par un avocat et d'autres personnes, il y a lieu de présumer qu'un préjudice a été causé à la partie adverse ». Citant l'arrêt *Succession MacDonald*, la Cour divisionnaire a décidé qu'il ne conviendrait pas d'obliger la partie requérante à démontrer l'existence d'un préjudice, étant donné que le privilège perdrait alors tout son sens.

23 Noting that the lawsuit was in its early stages, and in light of Cassels Brock's concession that in terms of the potential for prejudice to Celanese, "other counsel could do the work", the Divisional Court concluded that, in the circumstances, the right to choose counsel had to yield, and the "only appropriate remedy" was the removal of Cassels Brock and Kasowitz. Otherwise, the "reasonable perception of the integrity of the administration of justice would be adversely affected".

Soulignant que la poursuite judiciaire en était à sa phase initiale, et compte tenu du fait que, sur la question du risque de préjudice auquel était exposée Celanese, Cassels Brock avait concédé que [TRADUCTION] « d'autres avocats pouvaient faire le travail », la Cour divisionnaire a estimé que, dans les circonstances, le droit à l'avocat de son choix devait céder le pas et que la [TRADUCTION] « seule réparation convenable » consistait à déclarer Cassels Brock et Kasowitz inhabiles à occuper. Sans cette réparation, [TRADUCTION] « la perception raisonnable de l'intégrité de l'administration de la justice serait compromise ».

C. *Court of Appeal (Abella, Moldaver and Goudge JJ.A.)* (2004), 73 O.R. (3d) 64

C. *Cour d'appel (les juges Abella, Moldaver et Goudge)* (2004), 73 O.R. (3d) 64

24 The Court of Appeal described the key difference between the decisions of the motions judge and the Divisional Court as a disagreement about which party bears the onus of establishing relevance and prejudice. In its opinion, the correct test is whether "upon consideration of the whole of the evidence, the moving party satisfies the court that there is a real risk that opposing counsel will use

Selon la Cour d'appel, la principale différence entre la décision du juge des requêtes et celle de la Cour divisionnaire tient à un désaccord au sujet de la partie qui a la charge d'établir la pertinence et l'existence du préjudice. À son avis, le critère applicable est de savoir si, [TRADUCTION] « compte tenu de l'ensemble de la preuve, la partie requérante peut convaincre le tribunal qu'il existe un risque réel que

information obtained from privileged documents to the prejudice of the moving party and the prejudice cannot realistically be overcome by a remedy short of disqualification".

Given the motions judge's finding that the material at issue came into the possession of Cassels Brock and Kasowitz through "inadvertence", Moldaver J.A. stated that the risk of prejudice must be "real", i.e. there must be a "realistic possibility" that the information will be used to the moving party's prejudice or "detriment". The onus is on the moving party to establish: (i) that opposing counsel received confidential information protected by solicitor-client privilege; (ii) that the information is relevant to the matter at hand; and (iii) that it is potentially prejudicial. Once these requirements have been established, the onus shifts to the opposing side to rebut.

Moldaver J.A. found that the motions judge had erred in finding that the moving party had failed to show that the information was relevant and potentially prejudicial, since it would have had to meet a relevance test to fall within the scope of the *Anton Piller* order. He also disagreed with the motions judge's view that the conduct of Cassels Brock and the supervising solicitor "evidence[d] a lack of concern" to protect the confidentiality interests of Canadian Bearings. In Moldaver J.A.'s view, on the contrary, "the evidence shows that [Cassels Brock and Kasowitz] were mindful of [Canadian Bearings'] confidentiality rights and concerned throughout that they be respected". Moldaver J.A. held that the motions judge had failed to make the necessary findings with respect to whether the privileged documents had been reviewed and if so, to what extent.

Moldaver J.A. also disagreed with the approach adopted by the Divisional Court. First, he noted that the court appeared unwilling to accept

l'avocat de la partie adverse utilise à son préjudice les renseignements provenant de documents privilégiés, et que la déclaration d'inhabilité à occuper représente le seul moyen réaliste d'écarter ce risque de préjudice ».

25 Compte tenu de la conclusion du juge des requêtes que c'est par « inadvertance » que Cassels Brock et Kasowitz sont entrés en possession des documents en cause, le juge Moldaver a affirmé que le risque de préjudice doit être « réel » en ce sens qu'il doit exister une « possibilité réaliste » que les renseignements soient utilisés au préjudice ou au « détriment » de la partie requérante. Il incombe à la partie requérante d'établir (i) que l'avocat de la partie adverse a obtenu des renseignements confidentiels protégés par le privilège avocat-client, (ii) que les renseignements concernent l'objet du litige et (iii) qu'ils sont potentiellement préjudiciables. Dès qu'il est établi que ces conditions sont remplies, il appartient alors à la partie adverse de réfuter cette preuve.

26 Selon le juge Moldaver, le juge des requêtes a eu tort de conclure que la partie requérante n'avait pas prouvé que les renseignements étaient pertinents et potentiellement préjudiciables, étant donné que ces renseignements devaient satisfaire à un critère de pertinence pour pouvoir être visés par l'ordonnance *Anton Piller*. Il a également rejeté le point de vue du juge des requêtes selon lequel la conduite de Cassels Brock et de l'avocat superviseur [TRADUCTION] « démontr[ait] une insouciance » à l'égard de la protection du droit à la confidentialité de Canadian Bearings. Le juge Moldaver estimait, au contraire, que [TRADUCTION] « la preuve démontre que [Cassels Brock et Kasowitz] étaient soucieux du droit à la confidentialité de [Canadian Bearings] et qu'ils tenaient en tout temps à ce que ce droit soit respecté ». Le juge Moldaver a conclu que le juge des requêtes n'avait pas tiré les conclusions nécessaires quant à savoir si les documents privilégiés avaient été examinés et, dans l'affirmative, jusqu'à quel point ils l'avaient été.

27 Le juge Moldaver a aussi rejeté la démarche adoptée par la Cour divisionnaire. Premièrement, il a fait remarquer que la cour ne semblait

Nordheimer J.'s finding that the documents came into Celanese's counsel's possession through inadvertence, and that this led it to introduce a "punitive element" into the test. Second, he disagreed with the Divisional Court's statement that the extent of any review of the documents was irrelevant. Third, unlike the Divisional Court, it considered the risk of prejudice would be greatly alleviated if appropriate steps were taken to ensure that Colvard did not taint others. In the result the appeal was allowed and the matter remitted to the motions judge to make the additional factual determinations and to apply the test laid down by the Court of Appeal.

pas disposée à accepter la conclusion du juge Nordheimer voulant que les avocats de Celanese soient entrés en possession des documents par inadvertance, ce qui l'a incitée à inclure un « élément punitif » dans le critère. Deuxièmement, il n'a pas souscrit à l'affirmation de la Cour divisionnaire que la mesure dans laquelle les documents pouvaient avoir été examinés n'était pas pertinente. Troisièmement, contrairement à la Cour divisionnaire, il a estimé que le risque de préjudice serait grandement atténué si des mesures appropriées étaient prises pour assurer que M^e^ Colvard ne compromette personne d'autre. En définitive, l'appel a été accueilli et l'affaire a été renvoyée au juge des requêtes pour qu'il se prononce sur les autres questions de fait et applique le critère formulé par la Cour d'appel.

III. Analysis

III. Analyse

28 *Anton Piller* orders have been available in Canada for close to 30 years. Unlike a search warrant they do not authorize forcible entry, but expose the target to contempt proceedings unless permission to enter is given. To the ordinary citizen faced on his or her doorstep with an *Anton Piller* order this may be seen as a distinction without a meaningful difference.

Au Canada, il est possible d'obtenir des ordonnances *Anton Piller* depuis près de 30 ans. Contrairement au mandat de perquisition, une telle ordonnance ne permet pas d'entrer par la force, mais la personne qu'elle vise s'expose à des procédures pour outrage si elle refuse de donner accès aux lieux. Pour le citoyen ordinaire qui se voit présenter à sa porte une ordonnance *Anton Piller*, cela peut représenter une distinction vide de sens.

29 Originally developed as an "exceptional remedy" in the context of trade secrets and intellectual property disputes, such orders are now fairly routinely issued in ordinary civil disputes, *Grenzservice Speditions Ges.m.b.H. v. Jans* (1995), 15 B.C.L.R. (3d) 370 (S.C.), in employment law, *Ridgewood Electric Ltd. (1990) v. Robbie* (2005), 74 O.R. (3d) 514 (S.C.J.), and *Netbored Inc. v. Avery Holdings Inc.* (2005), 48 C.P.R. (4th) 240, 2005 FC 1405, and even in matrimonial litigation, *Neumeyer v. Neumeyer* (2005), 47 B.C.L.R. (4th) 162, 2005 BCSC 1259. In one egregious case, a designated search team attempted to execute an *Anton Piller* order on the 10-year-old son of the defendant at a time when his parents were not at home: *Ridgewood Electric*.

D'abord conçues comme un « recours extraordinaire » dans le contexte de litiges en matière de secrets commerciaux et de propriété intellectuelle, ces ordonnances sont désormais assez courantes dans des litiges civils ordinaires, *Grenzservice Speditions Ges.m.b.H. c. Jans* (1995), 15 B.C.L.R. (3d) 370 (C.S.), en droit du travail, *Ridgewood Electric Ltd. (1990) c. Robbie* (2005), 74 O.R. (3d) 514 (C.S.J.), et *Netbored Inc. c. Avery Holdings Inc.*, [2005] A.C.F. n^o^ 1723 (QL), 2005 CF 1405, et même en matière matrimoniale, *Neumeyer c. Neumeyer* (2005), 47 B.C.L.R. (4th) 162, 2005 BCSC 1259. Dans un cas extrême, une équipe chargée d'effectuer une perquisition a tenté d'exécuter une ordonnance *Anton Piller* en s'adressant au fils du défendeur, alors âgé de 10 ans, au moment où ses parents n'étaient pas à la maison : *Ridgewood Electric*.

With easier access to such orders, there has emerged a tendency on the part of some counsel to take too lightly the very serious responsibilities imposed by such a draconian order. It should truly be exceptional for a court to authorize the massive intrusion, without advance notice, of a privately orchestrated search on the privacy of a business competitor or other target party. As it was put by Lord Denning, M.R., in the original *Anton Piller* case:

We are prepared, therefore, to sanction its continuance [i.e. of the order], but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed. [Emphasis added.]

(*Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), at p. 61)

Anton Piller orders, obtained *ex parte*, now regularly permit searches and seizures not only from places of business but from residential premises. While most *Anton Piller* orders are executed properly, they are capable of giving rise to serious abuse, as in *Ridgewood Electric*, mentioned earlier, where Corbett J. of the Ontario Superior Court of Justice protested the unacceptable conduct of those executing the order:

Nigel Robbie arrived home on April 14, 2004, to find a neighbour barricading his front door. His ten-year-old son had been taken to another neighbour's house, distraught. The neighbourhood was in an uproar. A cadre in suits stood at the front of his house brandishing a thick wad of papers, demanding to be let in.

. . .

While everyone is taken to know the law, the Robbies and their neighbours might be excused for not knowing about *Anton Piller* orders. And so the Robbies and their neighbours were left to wonder what kind of country we live in, where one's former employer, acting secretly,

30

Au fur et à mesure qu'il est devenu plus facile d'obtenir de telles ordonnances, certains avocats ont commencé à prendre trop à la légère les très lourdes responsabilités qu'impose une ordonnance aussi draconienne. Ce n'est que dans des cas véritablement exceptionnels qu'un tribunal devrait permettre que la vie privée d'un concurrent ou d'une autre partie fasse inopinément l'objet de l'atteinte massive résultant d'une perquisition organisée par des particuliers. Comme l'a expliqué le maître des rôles lord Denning dans la première affaire *Anton Piller* :

[TRADUCTION] Nous sommes donc disposés à en autoriser le maintien [c'est-à-dire de l'ordonnance] mais -uniquement dans le cas extrême où il existe un grave danger que des biens disparaissent clandestinement ou que des éléments de preuve cruciaux soient détruits. [Je souligne.]

(*Anton Piller KG c. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), p. 61)

Les ordonnances *ex parte* de type *Anton Piller* autorisent désormais régulièrement des perquisitions et saisies non seulement dans des lieux commerciaux, mais encore dans des résidences. Bien que la plupart des ordonnances *Anton Piller* soient exécutées correctement, elles peuvent donner lieu à de graves abus, comme dans l'affaire *Ridgewood Electric* mentionnée précédemment, où le juge Corbett de la Cour supérieure de justice de l'Ontario s'est élevé contre la conduite inacceptable de ceux qui avaient exécuté l'ordonnance :

[TRADUCTION] À son arrivée chez lui le 14 avril 2004, Nigel Robbie a trouvé un voisin en train de barricader la porte d'entrée de sa résidence. Désemparé, son fils de dix ans avait été conduit chez un autre voisin. Le voisinage était en émoi. Devant sa résidence, des individus en tenue de ville brandissant une épaisse pile de documents exigeaient qu'on les laisse entrer.

. . .

Bien que nul ne soit censé ignorer la loi, les Robbie et leurs voisins pourraient être excusés de ne pas être au courant des ordonnances *Anton Piller.* Les Robbie et leurs voisins en ont été réduits à se demander dans quel genre de pays vivent-ils si un ancien employeur

may obtain a court order and then enter and search one's private residence. [paras. 1 and 4]

As Sharpe J.A., writing in a scholarly mode, has pointed out, "excessive zeal in this area is apt to attract criticism which will impair the ability of the courts to use injunctions in innovative ways in other areas" (R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 2:1300).

31 The search in the present case was conducted by reputable and responsible people, under the supervision of a senior member of the Ontario bar. The disclosure of solicitor-client confidences came about not by egregious misconduct, but through a combination of carelessness, overzealousness, a lack of appreciation of the potential dangers of an *Anton Piller* order and a failure to focus on its limited purpose, namely the *preservation* of relevant evidence.

32 Experience has shown that despite their draconian nature, there is a proper role for *Anton Piller* orders to ensure that unscrupulous defendants are not able to circumvent the court's processes by, on being forewarned, making relevant evidence disappear. Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The utility of this equitable tool in the correct circumstances should not be diminished. However, such orders should only be granted in the clear recognition of their exceptional and highly intrusive character and, where granted, the terms should be carefully spelled out and limited to what the circumstances show to be necessary. Those responsible for their implementation should conform to a very high standard of professional diligence. Otherwise, the moving party, not its target, may have to shoulder the consequences of a botched search.

33 Much of the argument before us about privileged documents turned on a supposed "spectrum" of situations. At one end of the spectrum, it was said, lie the "inadvertent disclosure" cases, where one party's counsel receives a privileged document

peut secrètement obtenir une ordonnance judiciaire et ensuite entrer et perquisitionner dans une résidence privée. [par. 1 et 4]

Comme l'a souligné le juge Sharpe, alors professeur, [TRADUCTION] « les excès de zèle dans ce domaine risquent de faire l'objet de critiques qui nuiront à la capacité des tribunaux d'utiliser des injonctions de façon novatrice dans d'autres domaines » (R. J. Sharpe, *Injunctions and Specific Performance* (éd. feuilles mobiles), par. 2:1300).

En l'espèce, la perquisition a été effectuée par des gens honorables et responsables, sous la supervision d'un avocat ontarien chevronné. La divulgation de communications avocat-client confidentielles résulte non pas d'une conduite inacceptable, mais d'un mélange d'incurie, d'excès de zèle, d'omission d'apprécier les risques que peut comporter une ordonnance *Anton Piller* et de défaut de mettre l'accent sur son objet précis, c'est-à-dire la *conservation* d'éléments de preuve pertinents.

L'expérience démontre que, malgré leur nature draconienne, les ordonnances *Anton Piller* jouent un rôle important en empêchant des défendeurs sans scrupules de profiter d'un préavis pour déjouer le processus judiciaire en faisant disparaître des éléments de preuve pertinents. Elles sont particulièrement utiles en cette ère de forte dépendance à l'informatique, où les documents peuvent facilement être supprimés, déplacés ou détruits. Il ne faut pas sous-estimer l'utilité de cet outil d'equity dans les circonstances indiquées. Toutefois, la délivrance de ces ordonnances doit clairement tenir compte de leur nature extraordinaire et très attentatoire et les ordonnances délivrées doivent être soigneusement formulées et limitées à ce que dictent les circonstances. Les personnes responsables de leur exécution doivent se conformer à une norme de diligence professionnelle très élevée, sinon la partie requérante, et non la partie visée, risquera de subir les conséquences d'une perquisition bâclée.

Une bonne partie de l'argumentation qui nous a été présentée au sujet des documents privilégiés concernait un prétendu « éventail » de situations. À une extrémité de cet éventail, a-t-on dit, se trouvent les cas de [TRADUCTION] « divulgation par

due to an error of opposing counsel, for example a letter is faxed or e-mailed to the wrong party. In such cases, the remedy is often limited to an order requiring the document, which is clearly identified, to be deleted or returned and a direction that no use is to be made of it. At the other end of the spectrum is said to be the "moving solicitor" or "merging firm" cases, where counsel who has acted for a client ends up at a law firm that is acting for an opposing party — as in *MacDonald Estate* itself. In the latter cases, the precise confidences seen or heard by the moving solicitor may not be readily determined. Unless adequate measures have been taken (usually in advance) to avoid "tainting" the new firm, the remedy is frequently disqualification. I agree with the intervener Advocates' Society that the emphasis on "inadvertence" is overly simplistic. As the Society submits:

> The notion of "inadvertence" is also analytically unhelpful because it conflates two questions that should be distinct: (a) how did the documents come into the possession of [Celanese] or its counsel; and (b) what did [Celanese] and its counsel do upon recognition that the documents were potentially subject to solicitor-client privilege.

Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands. Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. The defendant's witnesses ought not to have to worry in the course of being cross-examined that the cross-examiner's questions are prompted by information that had earlier been passed in

inadvertance », où l'avocat d'une partie reçoit un document privilégié à cause d'une erreur de l'avocat de la partie adverse, par exemple, lorsqu'une lettre est expédiée par télécopieur ou par courrier électronique à la mauvaise partie. En pareils cas, la réparation se limite souvent à une ordonnance enjoignant de supprimer ou de restituer le document clairement identifié, et interdisant d'en faire quelque usage que ce soit. À l'autre extrémité de l'éventail, a-t-on ajouté, se trouvent les cas d'« avocats qui changent de cabinet » ou de « fusion de cabinets », où l'avocat qui a agi pour le compte d'un client se retrouve dans un cabinet d'avocats qui occupe pour la partie adverse — exactement comme dans l'affaire *Succession MacDonald*. Dans ces derniers cas, il peut éventuellement se révéler difficile de déterminer exactement les communications confidentielles que l'avocat qui a changé de cabinet a vues ou entendues. À moins que des mesures suffisantes n'aient été prises (généralement d'avance) pour éviter de « compromettre » le nouveau cabinet, la réparation souvent accordée est la déclaration d'inhabilité à occuper. Je conviens avec l'intervenante Advocates' Society que l'accent mis sur l'« inadvertance » est trop simpliste. Comme le fait valoir la Society :

> [TRADUCTION] La notion d'« inadvertance » est également inutile sur le plan analytique parce qu'elle confond deux questions qui devraient être distinctes : a) Comment [Celanese] ou son avocat sont-ils entrés en possession des documents? b) Qu'est-ce que [Celanese] et son avocat ont fait lorsqu'ils se sont rendu compte que les documents étaient potentiellement assujettis au privilège avocat-client?

34

Le problème est que, peu importe que ce soit consciemment ou par inadvertance, des renseignements échangés entre un avocat et son client se sont retrouvés dans les mauvaises mains. Même en admettant que les renseignements confidentiels protégés par le privilège avocat-client n'ont pas tous la même importance et le même caractère crucial, la possession de tels renseignements par la partie adverse compromet l'intégrité de l'administration de la justice. Des parties doivent être libres de soumettre leurs différends aux tribunaux sans craindre que leur adversaire ait pris injustement connaissance des secrets qu'elles ont confiés à leurs conseillers juridiques. Les témoins de la

confidence to the defendant's solicitors. Such a possibility destroys the level playing field and creates a serious risk to the integrity of the administration of justice. To prevent such a danger from arising, the courts must act "swiftly and decisively" as the Divisional Court emphasized. Remedial action in cases such as this is intended to be curative not punitive.

A. *Requirements for an Anton Piller Order*

35 There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work: *Nintendo of America, Inc. v. Coinex Video Games Inc.*, [1983] 2 F.C. 189 (C.A.), at pp. 197-99; *Indian Manufacturing Ltd. v. Lo* (1997), 75 C.P.R. (3d) 338 (F.C.A.), at pp. 341-42; *Netsmart Inc. v. Poelzer*, [2003] 1 W.W.R. 698, 2002 ABQB 800, at para. 16; *Anton Piller KG*, at pp. 58-61; *Ridgewood Electric*, at para. 27; *Grenzservice*, at para. 39; *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.* (1996), 67 C.P.R. (3d) 202 (Man. C.A.), at p. 208; *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539 (S.C.J.), at para. 9; *Proctor & Gamble Inc. v. John Doe (c.o.b. Clarion Trading International)*, [2000] F.C.J. No. 61 (QL) (T.D.), at para. 45; *Netbored*, at para. 39; *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, [1999] 3 F.C. 621 (T.D.), at para. 35.

36 Both the strength and the weakness of an *Anton Piller* order is that it is made *ex parte* and interlocutory: there is thus no cross-examination on the

défenderesse ne devraient pas craindre, au cours de leur contre-interrogatoire, que les questions du contre-interrogateur soient motivées par des renseignements qui ont été transmis à titre confidentiel aux avocats de la défenderesse. Une telle possibilité supprime l'égalité des chances et risque sérieusement de compromettre l'intégrité de l'administration de la justice. Pour éviter ce danger, les tribunaux doivent agir [TRADUCTION] « rapidement et de façon décisive », comme l'a souligné la Cour divisionnaire. Dans un cas comme la présente affaire, la mesure corrective est censée être réparatrice et non punitive.

A. *Conditions applicables à une ordonnance Anton Piller*

Quatre conditions doivent être remplies pour donner ouverture à une ordonnance *Anton Piller*. Premièrement, le demandeur doit présenter une preuve *prima facie* solide. Deuxièmement, le préjudice causé ou risquant d'être causé au demandeur par l'inconduite présumée du défendeur doit être très grave. Troisièmement, il doit y avoir une preuve convaincante que le défendeur a en sa possession des documents ou des objets incriminants, et quatrièmement, il faut démontrer qu'il est réellement possible que le défendeur détruise ces pièces avant que le processus de communication préalable puisse être amorcé : *Nintendo of America, Inc. c. Coinex Video Games Inc.*, [1983] 2 C.F. 189 (C.A.), p. 197-199; *Indian Manufacturing Ltd. c. Lo*, [1997] A.C.F. nº 906 (QL), par. 5; *Netsmart Inc. c. Poelzer*, [2003] 1 W.W.R. 698, 2002 ABQB 800, par. 16; *Anton Piller KG*, p. 58-61; *Ridgewood Electric*, par. 27; *Grenzservice*, par. 39; *Pulse Microsystems Ltd. c. SafeSoft Systems Inc.* (1996), 67 C.P.R. (3d) 202 (C.A. Man.), p. 208; *Ontario Realty Corp. c. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539 (C.S.J.), par. 9; *Proctor & Gamble Inc. c. M. Untel (f.a.s. Clarion Trading International)*, [2000] A.C.F. nº 61 (QL) (1re inst.), par. 45; *Netbored*, par. 39; *Adobe Systems Inc. c. KLJ Computer Solutions Inc.*, [1999] 3 C.F. 621 (1re inst.), par. 35.

La force et la faiblesse d'une ordonnance *Anton Piller* tiennent toutes deux au fait qu'elle est une ordonnance *ex parte* interlocutoire : aucun

supporting affidavits. The motions judge necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms. We are advised that such orders are not available in the United States (Transcript, at p. 70).

37 A troubling example in Canada is the *Adobe Systems* case, where a computer software company was tipped off that a small advertising firm in Halifax was using unlicensed versions of some of its software. The affiant swore that, in his opinion, the firm was likely to destroy its unlicensed copies of the software if it became aware of the pending litigation against it. The target firm was well established and its principals had an excellent reputation in the community. On subsequent cross-examination it was revealed that the source of the informant's opinion that the defendant was likely to destroy unlicensed copies was his "observation of human nature" and not any observation of that particular defendant. Upon a review of the order, Richard A.C.J. (now C.J. of the Federal Court of Appeal) found that the plaintiffs had not made sufficient inquiries of the facts before obtaining the order. Citing *Adobe Systems*, the Federal Court recently reiterated that "[i]n all proceedings taken *ex parte*, and particularly in *Anton Piller* situations, there is a heavy obligation upon the moving party to make full and frank disclosure of all relevant facts to the Court" (*Netbored*, at para. 41).

38 At this stage, the challenge to the decision of Nordheimer J. to grant the *Anton Piller* order is not before the Court.

B. *Terms of the Anton Piller Order*

39 In *Grenzservice*, a case which dealt with an application to remove counsel who had seen privileged documents in the course of an *Anton Piller*

contre-interrogatoire ne porte donc sur le contenu des affidavits produits au soutien de la requête. Le juge des requêtes compte nécessairement sur une divulgation fidèle et complète de la part des déposants, et tout autant, sinon plus, sur le professionnalisme des avocats qui participent à l'exécution de l'ordonnance. On nous informe qu'il n'est pas possible d'obtenir de telles ordonnances aux États-Unis (transcription, p. 70).

Un exemple inquiétant au Canada est l'affaire *Adobe Systems*, dans laquelle une société spécialisée dans des logiciels a été informée qu'une petite agence de publicité de Halifax utilisait des versions non autorisées de certains de ses logiciels. Le déposant a affirmé sous serment qu'à son avis l'agence détruirait vraisemblablement ses copies non autorisées des logiciels si elle apprenait qu'elle faisait l'objet de poursuites. L'agence visée était bien établie et ses dirigeants jouissaient d'une excellente réputation au sein de la collectivité. Au cours d'un contre-interrogatoire subséquent, il s'est avéré que l'opinion du dénonciateur, selon laquelle la défenderesse détruirait vraisemblablement les copies non autorisées, était fondée sur son « observation de la nature humaine » et non sur quelque observation de cette défenderesse en particulier. Lors de l'examen de l'ordonnance, le juge en chef adjoint Richard (maintenant Juge en chef de la Cour d'appel fédérale) a conclu que les demanderesses n'avaient pas fait une enquête suffisamment approfondie sur les faits avant d'obtenir l'ordonnance. Citant la décision *Adobe Systems*, la Cour fédérale a réitéré récemment que « [d]ans toutes les procédures *ex parte* et, en particulier, dans des cas semblables à celui d'*Anton Piller*, le demandeur a la lourde obligation de faire une divulgation fidèle et complète de tous les faits pertinents à la Cour » (*Netbored*, par. 41).

À ce stade-ci, la Cour n'est pas saisie d'une contestation de la décision du juge Nordheimer de rendre l'ordonnance *Anton Piller*.

B. *Modalités de l'ordonnance Anton Piller*

Dans l'affaire *Grenzservice* où il était question d'une demande visant à faire déclarer inhabile à occuper un avocat qui avait vu des documents

execution, Huddart J. (later J.A.) observed: "This case suggests that safeguards cannot remain implicit in the supervision order. They must be specified" (para. 84). I agree. In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, Arbour J. for the majority set out at para. 49 a number of relevant concerns in the criminal law context, which may have some application by analogy. Notwithstanding the general recognition of the need for standard terms, many safeguards which one would expect to have become customary (such as a provision dealing with claims of privilege) are frequently omitted. Corbett J. commented in *Ridgewood Electric* that the *Anton Piller* order "has been with us for nearly 30 years, [yet] its 'standard terms' still vary considerably across the province" (para. 3). In the United Kingdom, a set of standardized rules and a model order have been developed. In Australia, Order 25B of the *Federal Court Rules* and Practice Note No. 24 (May 5, 2006) set out a number of standard safeguards for *Anton Piller* orders. See also *Thermax Ltd. v. Schott Industrial Glass Ltd.*, [1981] F.S.R. 289 (Ch. D.).

40 *Anton Piller* orders are often conceived of, obtained and implemented in circumstances of urgency. They are generally time-limited (e.g., 10 days in Ontario under Rule 40.02 (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194) and 14 days in the Federal Court, under Rule 374(1) (*Federal Courts Rules*, SOR/98-106)). Despite the urgency, the more detailed and standardized the terms of the order the less opportunity there will be for misunderstandings or mischief. As noted by Lamer J. in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 889:

> Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled.

privilégiés pendant l'exécution d'une ordonnance *Anton Piller*, la juge Huddart (plus tard juge à la Cour d'appel) a fait observer : [TRADUCTION] « La présente affaire indique que les garanties ne peuvent pas rester implicites dans l'ordonnance de supervision. Elles doivent être précisées » (par. 84). Je suis d'accord. Dans l'arrêt *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, [2002] 3 R.C.S. 209, 2002 CSC 61, la juge Arbour, s'exprimant au nom des juges majoritaires, a formulé, au par. 49, un certain nombre de préoccupations pertinentes dans le contexte du droit criminel, qui, dans une certaine mesure, sont applicables par analogie. En dépit de la reconnaissance générale de la nécessité de modalités uniformes, maintes garanties censées être devenues courantes (telle une disposition portant sur les revendications de privilège) sont souvent omises. Dans la décision *Ridgewood Electric*, le juge Corbett a fait observer que l'ordonnance *Anton Piller* [TRADUCTION] « existe depuis près de 30 ans, [pourtant] ses "modalités uniformes" varient encore considérablement dans la province » (par. 3). Au Royaume-Uni, on a conçu un ensemble de règles uniformes et une ordonnance type. En Australie, l'ordonnance 25B des *Federal Court Rules* et l'avis de pratique n^{o} 24 (5 mai 2006) énoncent un certain nombre de garanties uniformes applicables aux ordonnances *Anton Piller.* Voir également la décision *Thermax Ltd. c. Schott Industrial Glass Ltd.*, [1981] F.S.R. 289 (Ch. D.).

Les ordonnances *Anton Piller* sont souvent conçues, obtenues et exécutées dans une situation d'urgence. Elles sont généralement temporaires (par exemple, 10 jours en Ontario selon la règle 40.02 des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, et 14 jours en Cour fédérale selon le par. 374(1) des *Règles des Cours fédérales*, DORS/98-106). Malgré l'urgence, plus les modalités de l'ordonnance sont détaillées et uniformes, moins grand est le risque de malentendu ou de préjudice. Comme le juge Lamer l'a fait remarquer dans l'arrêt *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, p. 889 :

> La perquisition est une exception aux principes les plus anciens et les plus fondamentaux de la *common law* et le pouvoir de perquisition doit être contrôlé strictement.

Unless and until model orders are developed by legislation or recommended by law societies pursuant to their responsibility for professional conduct, the following guidelines for preparation and execution of an *Anton Piller* order may be helpful, depending on the circumstances:

(1) Basic Protection for the Rights of the Parties

(i) The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the Anton Piller order, and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved" (para. 20). He or she is "an officer of the court charged with a very important responsibility regarding this extraordinary remedy" (para. 20). See also *Grenzservice*, at para. 85.

(ii) Absent unusual circumstances the plaintiff should be required to provide an undertaking and/or security to pay damages in the event that the order turns out to be unwarranted or wrongfully executed. See *Ontario Realty*, at para. 40; *Adobe Systems*, at para. 43; *Nintendo of America*, at pp. 201-2; *Grenzservice*, at para. 85; *Havana House Cigar & Tobacco Merchants Ltd. v. Jane Doe* (2000), 199 F.T.R. 12, aff'd (2002), 288 N.R. 198, 2002 FCA 75.

(iii) The scope of the order should be no wider than necessary and no material shall be removed from the site unless clearly covered by the terms of the order. See *Columbia Picture Industries Inc. v. Robinson*, [1987] Ch. 38.

Tant et aussi longtemps que des ordonnances types n'auront pas été conçues par voie législative ou recommandées par des barreaux conformément à leur responsabilité en matière de déontologie professionnelle, les lignes directrices suivantes applicables à la préparation et à l'exécution d'une ordonnance *Anton Piller* pourront être utiles, selon les circonstances :

(1) Protection fondamentale des droits des parties

(i) L'ordonnance devrait désigner un avocat superviseur qui soit indépendant du demandeur ou de ses avocats et qui assistera à la perquisition afin d'en assurer l'intégrité. En l'espèce, le juge des requêtes a fait remarquer que le rôle essentiel de l'avocat superviseur indépendant consiste à [TRADUCTION] « veiller à ce que l'exécution de l'ordonnance Anton Piller et de tout ce qui s'y rattache, soit effectuée avec le plus grand soin possible et en tenant dûment compte des droits et intérêts de toutes les parties concernées » (par. 20). C'est [TRADUCTION] « un officier de justice qui est investi d'une très importante responsabilité à l'égard de ce recours extraordinaire » (par. 20). Voir également la décision *Grenzservice*, par. 85.

(ii) Sauf dans des circonstances exceptionnelles, le demandeur devrait être tenu de s'engager à payer des dommages-intérêts au cas où l'ordonnance se révélerait injustifiée ou mal exécutée, ou de fournir un cautionnement à cet égard, ou les deux à la fois. Voir *Ontario Realty*, par. 40; *Adobe Systems*, par. 43; *Nintendo of America*, p. 201-202; *Grenzservice*, par. 85; *Havana House Cigar & Tobacco Merchants Ltd. c. Madame Unetelle*, [2000] A.C.F. n^{o} 1827 (QL) (1re inst.), conf. par [2002] A.C.F. n^{o} 285 (QL), 2002 CAF 75.

(iii) L'ordonnance ne devrait pas avoir une portée plus grande que nécessaire et aucun document ne doit être retiré des lieux à moins d'être clairement visé par les modalités de l'ordonnance. Voir *Columbia Picture Industries Inc. c. Robinson*, [1987] Ch. 38.

(iv) A term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise. See *Grenzservice*, at para. 85; *Ontario Realty*, at para. 40. Procedures developed for use in connection with search warrants under the *Criminal Code*, R.S.C. 1985, c. C-46, may provide helpful guidance. The U.K. practice direction on this point provides as follows:

> Before permitting entry to the premises by any person other than the Supervising Solicitor, the Respondent may, for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period) — (a) gather together any documents he [or she] believes may be . . . privileged; and (b) hand them to the Supervising Solicitor for [an assessment of] whether they are . . . privileged as claimed.
>
> If the Supervising Solicitor decides that . . . any of the documents [may be] privileged or [is in any doubt as to their status, he or she] will exclude them from the search . . . and retain [them] . . . pending further order of the court [(if in doubt as to whether they are privileged), or return them to the Respondent and retain a list of the documents (if the documents are privileged)].
>
> [A] Respondent [wishing] to take legal advice and gather documents as permitted . . . must first inform the Supervising Solicitor and keep him [or her] informed of the steps being taken.
>
> (*Civil Procedure*, vol. 1 (2nd Supp. 2005), Part 25, Practice Direction — Interim Injunctions, p. 43, at paras. 11-12)

Experience has shown that in general this is a workable procedure. Counsel supporting the appellants suggested the basic "two-hour" collection period permitted in the U.K. is too short. This is a matter to be determined by the judge making the order, but it must be kept

(iv) Une modalité énonçant la procédure applicable aux documents protégés par le privilège avocat-client ou aux autres documents de nature confidentielle devrait être incluse afin de permettre aux défendeurs d'invoquer la confidentialité de documents avant que le demandeur ou son avocat en prennent possession, ou de régler les différends qui surgissent. Voir *Grenzservice*, par. 85; *Ontario Realty*, par. 40. La procédure qui doit être suivie dans le cas des mandats de perquisition prévus par le *Code criminel*, L.R.C. 1985, ch. C-46, peut fournir des indications utiles. La directive en matière de pratique du Royaume-Uni sur ce point se lit ainsi :

> [TRADUCTION] Avant de permettre à une personne autre que l'avocat superviseur de pénétrer dans les lieux, l'intimé peut, pendant une courte période (ne dépassant pas deux heures, à moins que l'avocat superviseur n'accepte une prolongation) — a) réunir les documents qu'il croit être [. . .] privilégiés et b) les remettre à l'avocat superviseur pour que celui-ci [vérifie] s'il s'agit effectivement de documents [. . .] privilégiés.
>
> Si l'avocat superviseur conclut que [. . .] des documents [peuvent être] privilégiés ou [s'il a des doutes à leur sujet,] il les soustrait à la perquisition [. . .] et [les] garde [. . .] jusqu'à ce que la cour prononce une ordonnance [(s'il n'est pas certain qu'ils sont privilégiés), ou il les restitue à l'intimé et garde une liste de ces documents (si ce sont des documents privilégiés)].
>
> [Un] intimé [qui souhaite] obtenir des conseils juridiques et réunir des documents de la manière autorisée [. . .] doit préalablement en informer l'avocat superviseur et le tenir au courant des mesures prises.
>
> (*Civil Procedure*, vol. 1 (2e suppl. 2005), Part 25, Practice Direction — Interim Injunctions, p. 43, par. 11-12)

L'expérience démontre que cette façon de procéder est généralement efficace. Les avocats qui défendent les appelants ont qualifié de trop court le délai de base de « deux heures » autorisé au Royaume-Uni pour recueillir les documents. Il appartient au

in mind that unnecessary delay may open the door to mischief. In general, the search should proceed as expeditiously as circumstances permit.

(v) The order should contain a limited use clause (i.e., items seized may only be used for the purposes of the pending litigation). See *Ontario Realty*, at para. 40; *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85.

(vi) The order should state explicitly that the defendant is entitled to return to court on short notice to (a) discharge the order; or (b) vary the amount of security. See *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Nintendo of America*, at pp. 201-2.

(vii) The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable.

(2) The Conduct of the Search

(i) In general the order should provide that the search should be commenced during normal business hours when counsel for the party about to be searched is more likely to be available for consultation. See *Grenzservice*, at para. 85; *Universal Thermosensors Ltd. v. Hibben*, [1992] 1 W.L.R. 840 (Ch. D.).

(ii) The premises should not be searched or items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant.

(iii) The persons who may conduct the search and seize evidence should be specified in the order or should specifically be limited in number. See *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Nintendo of America*, at pp. 201-2.

juge qui rend l'ordonnance de trancher cette question, mais il faut se rappeler qu'un délai inutile risque de causer un préjudice. En général, la perquisition devrait être effectuée aussi rapidement que la situation le permet.

(v) L'ordonnance devrait comporter une clause prescrivant un usage restreint (c'est-à-dire que les objets saisis ne peuvent être utilisés que pour les besoins du litige en cours). Voir *Ontario Realty*, par. 40; *Adobe Systems*, par. 43; *Grenzservice*, par. 85.

(vi) L'ordonnance devrait prévoir explicitement que, moyennant un court préavis, le défendeur aura le droit de retourner devant le tribunal pour a) faire annuler l'ordonnance ou b) faire modifier le montant du cautionnement. Voir *Adobe Systems*, par. 43; *Grenzservice*, par. 85; *Nintendo of America*, p. 201-202.

(vii) L'ordonnance devrait prévoir que les documents saisis seront restitués aux défendeurs ou à leurs avocats dès que possible.

(2) L'exécution de la perquisition

(i) En général, l'ordonnance devrait prévoir que la perquisition commencera pendant les heures d'ouverture normales, au moment où la partie chez qui la perquisition est sur le point d'être effectuée est vraisemblablement plus en mesure de consulter son avocat. Voir *Grenzservice*, par. 85; *Universal Thermosensors Ltd. c. Hibben*, [1992] 1 W.L.R. 840 (Ch. D.).

(ii) La perquisition ne devrait être effectuée et les objets ne devraient être retirés qu'en présence du défendeur ou d'une personne qui paraît être un employé responsable du défendeur.

(iii) L'ordonnance devrait préciser qui peut effectuer la perquisition et saisir des éléments de preuve, ou limiter expressément le nombre des personnes ainsi autorisées. Voir *Adobe Systems*, par. 43; *Grenzservice*, par. 85; *Nintendo of America*, p. 201-202.

(iv) On attending at the site of the authorized search, plaintiff's counsel (or the supervising solicitor), acting as officers of the court should serve a copy of the statement of claim and the order and supporting affidavits and explain to the defendant or responsible corporate officer or employee in plain language the nature and effect of the order. See *Ontario Realty*, at para. 40.

(v) The defendant or its representatives should be given a reasonable time to consult with counsel prior to permitting entry to the premises. See *Ontario Realty*, at para. 40; *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Sulpher Experts Inc. v. O'Connell* (2000), 279 A.R. 246, 2000 ABQB 875.

(vi) A detailed list of all evidence seized should be made and the supervising solicitor should provide this list to the defendant for inspection and verification at the end of the search and before materials are removed from the site. See *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Ridgewood Electric*, at para. 25.

(vii) Where this is not practicable, documents seized should be placed in the custody of the independent supervising solicitor, and defendant's counsel should be given a reasonable opportunity to review them to advance solicitor-client privilege claims prior to release of the documents to the plaintiff.

(viii) Where ownership of material is disputed, it should be provided for safekeeping to the supervising solicitor or to the defendant's solicitors.

(3) Procedure Following the Search

(i) The order should make it clear that the responsibilities of the supervising solicitor continue

(iv) Lorsqu'ils sont présents sur les lieux de la perquisition qui a été autorisée, les avocats du demandeur (ou l'avocat superviseur) devraient, en tant qu'officiers de justice, signifier une copie de la déclaration, de l'ordonnance et des affidavits produits au soutien de la requête et expliquer clairement au défendeur ou au dirigeant ou à l'employé responsable de l'entreprise la nature et l'incidence de l'ordonnance. Voir *Ontario Realty*, par. 40.

(v) Avant de permettre l'entrée dans ses locaux, le défendeur ou ses représentants devraient bénéficier d'un délai raisonnable pour consulter un avocat. Voir *Ontario Realty*, par. 40; *Adobe Systems*, par. 43; *Grenzservice*, par. 85; *Sulphur Experts Inc. c. O'Connell* (2000), 279 A.R. 246, 2000 ABQB 875.

(vi) Une liste détaillée de tous les éléments de preuve saisis devrait être dressée et l'avocat superviseur devrait, à la fin de la perquisition et avant que les documents saisis soient retirés des lieux, remettre cette liste au défendeur pour qu'il l'examine et la vérifie. Voir *Adobe Systems*, par. 43; *Grenzservice*, par. 85; *Ridgewood Electric*, par. 25.

(vii) Si une liste ne peut être dressée, la garde des documents saisis devrait être confiée à l'avocat superviseur indépendant, et les avocats du défendeur devraient avoir la possibilité raisonnable d'examiner ces documents de manière à pouvoir invoquer le privilège avocat-client avant qu'ils soient remis au demandeur.

(viii) Si la propriété d'un document est contestée, la garde de ce document devrait être confiée à l'avocat superviseur ou aux avocats du défendeur.

(3) Procédure à suivre après la perquisition

(i) L'ordonnance devrait prévoir clairement que les responsabilités de l'avocat

beyond the search itself to deal with matters arising out of the search, subject of course to any party wishing to take a matter back to the court for resolution.

(ii) The supervising solicitor should be required to file a report with the court within a set time limit describing the execution, who was present and what was seized. See *Grenzservice*, at para. 85.

(iii) The court may wish to require the plaintiff to file and serve a motion for review of the execution of the search returnable within a set time limit such as 14 days to ensure that the court automatically reviews the supervising solicitor's report and the implementation of its order even if the defendant does not request such a review. See *Grenszervice*, at para. 85.

See also: *Civil Procedure Act 1997* (U.K.), 1997, c. 12, s. 7; *Civil Procedure Rules 1998*, S.I. 1998/3132, r. 25.1(1)(h), and Part 25, Practice Direction — Interim Injunctions; Sharpe, at paras. 2:1100 *et seq.*

It is evident that the draft order placed before the motions judge in this case was deficient in many respects. At issue here is the absence of any provision to deal with solicitor-client confidences. The absence of specific terms in the *Anton Piller* order does not relieve the searching solicitors from the consequences of gaining inappropriate access. Such consequences may include removal. A precisely drawn and clearly thought out order therefore will not only protect the defendant's right to solicitor-client privilege, but also protect the plaintiff's right to continue to be represented by counsel of choice by helping to ensure that such counsel do not stumble into possession of privileged information.

superviseur subsistent au-delà de la perquisition elle-même et s'étendent à l'examen des questions que soulève la perquisition, à moins évidemment qu'une partie ne souhaite renvoyer une question auprès du tribunal pour qu'il la tranche.

(ii) L'avocat superviseur devrait être tenu de déposer auprès du tribunal, dans un délai fixe, un rapport décrivant l'exécution de la perquisition, les personnes présentes et les objets saisis. Voir *Grenzservice*, par. 85.

(iii) Le tribunal peut vouloir obliger le demandeur à produire et à signifier une requête en examen de l'exécution de la perquisition dans un délai fixe, de 14 jours par exemple, afin d'assurer que le tribunal examine automatiquement le rapport de l'avocat superviseur et l'exécution de son ordonnance même si le défendeur ne sollicite pas cet examen. Voir *Grenszervice*, par. 85.

Voir également : *Civil Procedure Act 1997* (R.-U.), 1997, ch. 12, art. 7; *Civil Procedure Rules 1998*, S.I. 1998/3132, al. 25.1(1)h), et Part 25, Practice Direction — Interim Injunctions; Sharpe, par. 2:1100 et suiv.

41 Dans la présente affaire, il est évident que le projet d'ordonnance présenté au juge des requêtes comportait de nombreuses lacunes. Il est question ici de l'absence d'une disposition concernant le traitement des communications avocat-client confidentielles. L'absence de modalités précises dans l'ordonnance *Anton Piller* ne soustrait pas les avocats qui exécutent la perquisition aux conséquences d'un accès inopportun. La déclaration d'inhabilité à occuper peut constituer l'une de ces conséquences. Par conséquent, une ordonnance bien rédigée et soigneusement réfléchie protégera non seulement le droit du défendeur d'invoquer le privilège avocat-client, mais également celui du demandeur de continuer d'être représenté par les avocats de son choix, en contribuant à assurer que ces avocats ne tombent pas en possession de renseignements privilégiés.

C. *The Governing Authority for Removal of Counsel for Possession of Confidential Information Is MacDonald Estate*

42 In *MacDonald Estate*, the Court held, in the context of a moving solicitor, that once the opposing firm of solicitors is shown to have received "confidential information attributable to a solicitor and client relationship relevant to the matter at hand" (p. 1260), the court will infer "that lawyers who work together share confidences" (p. 1262) and that this will result in a *risk* that such confidences will be used to the prejudice of the client, unless the receiving solicitors can show "that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (p. 1260). Only where there is "clear and convincing evidence" (p. 1262) to the contrary will the presumption be rebutted. Thus "[*a*] *fortiori* undertakings and conclusory statements in affidavits without more" (p. 1263) will not suffice to rebut the presumption of dissemination. For the purposes of the present case, it is important to note that Sopinka J. imposed no onus on the moving party to adduce any further evidence as to the nature of the confidential information beyond that which was needed to establish that the receiving lawyer had obtained confidential information attributable to a solicitor and client relationship which was relevant to the matter at hand.

43 There is no doubt Canadian Bearings has discharged this onus. The motions judge noted "the admission by [Celanese] that some privileged material found its way into the possession of both the Cassels Brock and Kasowitz firms" (para. 3). The material must be taken to be relevant to the pending claim, otherwise it would not have been within the scope of the seizure laid down in the *Anton Piller* order.

44 We do not know, and the courts below were not told, the nature of the privileged information. On this point, the motions judge stated:

C. *L'arrêt qui s'applique pour décider s'il y a lieu de déclarer un avocat inhabile à occuper en raison de la possession de renseignements confidentiels est Succession MacDonald*

Dans l'arrêt *Succession MacDonald*, la Cour a statué que, dans le cas d'un avocat qui change de cabinet, dès qu'il est démontré que le cabinet d'avocats agissant pour la partie adverse a appris « des faits confidentiels, grâce à des rapports antérieurs d'avocat à client, qui concernent l'objet du litige » (p. 1260), le tribunal présumera « que les avocats qui travaillent ensemble échangent des renseignements confidentiels » (p. 1262) et qu'il y a alors un *risque* que ces renseignements soient utilisés au préjudice du client, à moins que les avocats qui les ont obtenus ne puissent démontrer que « le public, c'est-à-dire une personne raisonnablement informée, [serait convaincu] qu'il ne sera fait aucun usage de renseignements confidentiels » (p. 1260). La présomption n'est réfutée que s'il existe une « preuv[e] [contraire] clair[e] et convaincant[e] » (p. 1262). Donc, « [a] fortiori, les simples engagements et affirmations catégoriques contenus dans des affidavits » (p. 1263) ne sont pas suffisants pour réfuter la présomption de diffusion. Pour les besoins de la présente affaire, il importe de souligner que le juge Sopinka n'a pas imposé à la partie requérante l'obligation de produire d'autres éléments de preuve concernant la nature des renseignements confidentiels en plus de ce qui est nécessaire pour établir que, grâce à des rapports antérieurs d'avocat à client, l'avocat en cause a appris des faits confidentiels qui concernaient l'objet du litige.

Il ne fait aucun doute que Canadian Bearings s'est acquittée de cette obligation. Le juge des requêtes a fait remarquer que [TRADUCTION] « [Celanese a] admis que les cabinets Cassels Brock et Kasowitz étaient tous deux entrés en possession de certains documents privilégiés » (par. 3). Les documents doivent être considérés comme concernant l'objet du litige, sinon ils n'auraient pas été visés par la saisie autorisée dans l'ordonnance *Anton Piller.*

Nous ne connaissons pas la nature des renseignements privilégiés, qui n'a pas non plus été révélée aux tribunaux d'instance inférieure. À ce propos, le juge des requêtes a affirmé ce qui suit :

The privileged information that found its way into the hands of the two firms here might be mundane, or may even be irrelevant to the underlying issues. Conversely, of course, it might also be crucial to the defence of the claim. I have no way of knowing. [Emphasis added; para. 28.]

[TRADUCTION] Il se pourrait que les renseignements privilégiés qui, en l'espèce, se sont retrouvés entre les mains des deux cabinets soient anodins, ou il se peut même qu'ils soient dénués de pertinence à l'égard des questions fondamentales. À l'inverse, ils pourraient certes être cruciaux pour la défense. Il m'est impossible de le savoir. [Je souligne; par. 28.]

The courts below seemingly agreed that if the privileged confidences were "crucial to the defence of the claim" removal of the searching solicitors would be called for. They also agreed (as I do) that on this record, as the motions judge said, we "have no way of knowing". The appeal, therefore, turns on whether Celanese had the onus of rebutting a presumption of prejudice (as *MacDonald Estate* held) or the onus should be shifted to Canadian Bearings to establish "a real risk of prejudice" (as required in this case by the Court of Appeal).

45 Les tribunaux d'instance inférieure s'accordaient apparemment pour dire que si ces renseignements confidentiels privilégiés étaient [TRADUCTION] « cruciaux pour la défense », il conviendrait de déclarer inhabiles à occuper les avocats ayant effectué la perquisition. Ils étaient également d'accord (comme je le suis) pour dire qu'au vu du dossier il « est impossible de le savoir », pour reprendre l'expression du juge des requêtes. Il s'agit donc, en l'espèce, de savoir si Celanese a l'obligation de réfuter la présomption de préjudice (comme la Cour l'a décidé dans l'arrêt *Succession MacDonald*) ou s'il devrait plutôt incomber à Canadian Bearings d'établir l'existence d'un « risque réel de préjudice » (comme la Cour d'appel l'a exigé en l'espèce).

Kasowitz submits that "[t]he facts of this case do not raise the concerns whatsoever addressed by the Court in *MacDonald Estate* [because] Kasowitz had no relationship whatsoever with the Appellants." I do not agree. The relevant elements of the *MacDonald Estate* analysis do not depend on a pre-existing solicitor-client relationship. The gravamen of the problem here is the possession by opposing solicitors of relevant and confidential information attributable to a solicitor-client relationship to which they have no claim of right whatsoever.

46 Kasowitz prétend que [TRADUCTION] « [l]es faits de la présente affaire ne soulèvent aucune des questions que la Cour a examinées dans l'arrêt *Succession MacDonald* [du fait que] Kasowitz [. . .] n'a aucun lien avec les appelantes. » Je ne suis pas de cet avis. Les éléments pertinents de l'analyse effectuée dans l'arrêt *Succession MacDonald* ne sont pas tributaires de l'existence préalable de rapports d'avocat à client. En l'espèce, le fond du problème est que les avocats de la partie adverse sont en possession de renseignements confidentiels pertinents qui ont été obtenus grâce à des rapports antérieurs d'avocat à client et à l'égard desquels ils ne peuvent invoquer aucun droit.

D. *The Court of Appeal Erred in Placing the Onus of Proof on Canadian Bearings*

D. *La Cour d'appel a eu tort d'imposer le fardeau de la preuve à Canadian Bearings*

Moldaver J.A. and his colleagues took the view that *MacDonald Estate* must be read in the context of a moving solicitor who clearly had substantial exposure to important solicitor-client confidences, whereas the present context, in their view, can raise no such inference. The privileged documents, while relevant, *could* be of such negligible

47 D'après le juge Moldaver et ses collègues, il faut interpréter l'arrêt *Succession MacDonald* dans le contexte d'un avocat qui a changé de cabinet et qui a eu amplement accès à d'importantes communications effectuées à titre confidentiel entre un avocat et son client, alors que le présent contexte ne permet pas, selon eux, de faire une

significance that there is no real risk such privileged material could be used to the detriment of Canadian Bearings.

48 I accept, as mentioned earlier, that a distinction may be drawn between the moving solicitor situations and the inadvertent disclosure situation on the basis that in the latter cases, but not the former, the content and extent of the confidential information at issue is (or ought to be) identifiable. I do not agree that this distinction switches the onus to the defendant to prove the risk of significant prejudice, rather than leave the onus with Celanese to rebut a presumption of prejudice.

49 Firstly, in an *Anton Piller* situation, as in *MacDonald Estate*, to "require the very confidential information for which protection is sought to be revealed . . . would have the effect of defeating the whole purpose of the application" (p. 1260). Placing the onus on Celanese accords with the usual practice that the party best equipped to discharge a burden is generally required to do so. Celanese's lawyers know what they looked at. Canadian Bearings' lawyers do not. The latter should not have to reveal the universe of potential confidences to the former who, at this point, refuse (or have rendered themselves unable) to identify precisely what they have seen.

50 Secondly, putting the onus on the party in receipt of the confidential information rather than on the party being searched, increases the incentive on its part to take care to ensure that privileged information is not reviewed in the first place.

51 Thirdly, it seems to me procedurally unfair not only to subject the defendant to the intrusion of a surprise search under an exceptional order in the course of which its solicitor-client confidences are disclosed to its opponent, but then to throw on it the onus of clearing up the problem created by the

telle inférence. Les documents privilégiés, quoique pertinents, *pourraient* avoir si peu d'importance qu'il n'y aurait aucun risque réel qu'ils soient utilisés au détriment de Canadian Bearings.

Comme je l'ai déjà mentionné, je reconnais que le cas de l'avocat qui change de cabinet peut être distingué du cas de la divulgation par inadvertance en ce sens que ce n'est que dans le dernier cas qu'il est (ou devrait être) possible de connaître la teneur et l'ampleur des renseignements confidentiels en cause. Je ne suis pas d'accord pour dire que cette distinction a pour effet d'obliger la défenderesse à prouver l'existence du risque de préjudice important, au lieu de laisser à Celanese l'obligation de réfuter une présomption de préjudice.

Premièrement, dans une situation de type *Anton Piller*, comme dans l'affaire *Succession MacDonald*, s'il était « nécessaire [. . .] de révéler les renseignements confidentiels que l'on cherche justement à protéger [. . .] [l]a requête perdrait alors tout [son] sens » (p. 1260). Imposer le fardeau de la preuve à Celanese est conforme à la pratique habituelle selon laquelle la partie la plus apte à s'acquitter d'une obligation est généralement tenue de le faire. Les avocats de Celanese savent ce qu'ils ont examiné. Les avocats de Canadian Bearings ignorent ce que ceux de Celanese ont examiné. Les avocats de Canadian Bearings ne devraient pas être tenus de divulguer l'ensemble des renseignements potentiellement confidentiels aux avocats de Celanese qui, à ce stade, refusent (ou se sont rendus incapables) de dire exactement ce qu'ils ont vu.

Deuxièmement, imposer le fardeau de la preuve à la partie qui obtient les renseignements confidentiels plutôt qu'à la partie qui fait l'objet de la perquisition l'incite davantage à prendre soin d'éviter que des renseignements privilégiés soient examinés au départ.

Troisièmement, il m'apparaît inéquitable sur le plan procédural de faire subir à la défenderesse l'atteinte que représente une perquisition-surprise effectuée en vertu d'une ordonnance extraordinaire et au cours de laquelle des communications avocat-client confidentielles sont divulguées à la partie

plaintiff's carelessness. The principal source of the present difficulty lies in the post-search conduct of Celanese's solicitors. Having created the problem, the searching party should bear the burden of resolving it.

Celanese and its solicitors argue that they are ill-equipped to rebut any such presumption of prejudice. If that is so they have only themselves to blame. Under a properly executed *Anton Piller* order, the searching solicitors should be able to show with some precision what they have seized, what they have seen, who has seen it and the steps taken to contain the wrongful disclosure of confidences. If Celanese's solicitors, who were in frequent telephone contact with the supervising solicitor during the search, had insisted on a proper listing at the site of all the materials seized, the universe of potential confidences would as a starting point have been established. The motions judge found this was not done. Nevertheless, the parties sensibly isolated the hard drive and CD-ROMs containing the now disputed electronic documents in a sealed bag and gave it into the custody of BDO. A complete listing could therefore have been made in the days following the search with BLG counsel present (as BLG had been present at the search site). This too was foreclosed by the precipitous and unilateral conduct of Cassels Brock. It is apparent, as the motions judge found, that "[t]here can be only one reason for seals to be applied to a container and signed by parties opposite in interest and that is to ensure that the container will not be opened except in the presence of both parties or, at a minimum, with the consent of both parties" (para. 19). The motions judge also expressed his view, which goes to the heart of the appeal, that

> [t]here was also no pressing need to open the envelopes such as would have justified the rather precipitous

adverse, pour ensuite la contraindre à résoudre le problème causé par l'incurie de la demanderesse. La présente difficulté découle principalement de la conduite adoptée par les avocats de Celanese après la perquisition. Comme elle est à l'origine du problème, il devrait appartenir à la partie ayant sollicité la perquisition de le résoudre.

52

Celanese et ses avocats prétendent qu'ils ne sont pas en mesure de réfuter une telle présomption de préjudice. Le cas échéant, ils n'ont qu'à s'en prendre à eux-mêmes. Lorsqu'une ordonnance *Anton Piller* est exécutée correctement, les avocats qui effectuent la perquisition doivent être en mesure d'établir avec une certaine précision ce qui a été saisi, ce qu'ils ont vu et qui l'a vu, et quelles mesures ont été prises pour empêcher la communication abusive de renseignements confidentiels. Si les avocats de Celanese, qui, au cours de la perquisition, ont eu des conversations téléphoniques fréquentes avec l'avocat superviseur, avaient insisté pour qu'une liste en bonne et due forme de tous les documents saisis soit dressée sur les lieux de la perquisition, l'ensemble des documents potentiellement confidentiels aurait été connu au départ. Le juge des requêtes a conclu que cela n'avait pas été fait. Néanmoins, les parties ont eu la sagesse de placer le disque dur et les cédéroms contenant les documents électroniques maintenant en cause dans un sac scellé dont ils ont confié la garde à BDO. Dans les jours qui ont suivi la perquisition, il aurait donc été possible de dresser une liste complète en présence d'un avocat de BLG (étant donné que BLG avait été présent sur les lieux de la perquisition). Cela n'a pas pu se faire non plus en raison de la conduite précipitée et unilatérale de Cassels Brock. Il appert, comme l'a conclu le juge des requêtes, qu'[TRADUCTION] « [u]ne seule raison peut justifier l'apposition sur un contenant d'un scellé paraphé par des parties ayant des intérêts opposés, et cette raison est de veiller à ce que le contenant ne soit ouvert qu'en présence des deux parties ou, à tout le moins, qu'avec le consentement des deux parties » (par. 19). Le juge des requêtes a également exprimé son point de vue, qui est crucial en l'espèce :

> [TRADUCTION] En outre, aucun besoin pressant ne justifiait l'ouverture plutôt précipitée des enveloppes

action which [Cassels Brock] directed be taken. The fundamental purpose of an Anton Piller order is to preserve evidence, not to use it. The material was in the safekeeping of BDO and was going to be available to [Celanese] in the fullness of time. There was therefore no reason to rush to deal with the documents as opposed to taking a careful and considered approach to them. In other words, there was plenty of time for inquiries to be made of Mr. Hendell, or others within Borden Ladner, regarding the handling of this material. Had that cautious approach been taken, it is likely that the issue which I must resolve would never have arisen. [para. 21]

ordonnée par [Cassels Brock]. L'ordonnance Anton Piller a pour objectif fondamental la conservation de la preuve et non son utilisation. BDO avait la garde des documents, auxquels [Celanese] pourra[it] avoir accès en temps et lieu. Il n'y avait donc aucune raison de s'empresser d'examiner les documents au lieu de les traiter de façon minutieuse et réfléchie. En d'autres termes, on avait amplement le temps de s'enquérir auprès de M^e^ Hendell, ou d'autres avocats du cabinet Borden Ladner, de la façon de traiter ces documents. Si on avait agi prudemment, il est probable que la question que je dois trancher aujourd'hui ne se serait jamais posée. [par. 21]

53 It is quite possible that if Cassels Brock and Kasowitz had been able to show the court what privileged material they had seen, such material might on the face of it have appeared to the court mundane or insignificant. A privileged document, for example, could be a lawyer's letter to his or her own client simply enclosing a draft contract in terms virtually the same as a contract subsequently executed and publicly available. Disclosure of the lawyer's communication, while privileged, would in that case not likely be capable of creating prejudice. Where the significance of the privileged documents accessed by the searching solicitors is more difficult to evaluate, the motions judge might properly call on the defendant (in the absence of the lawyers for the searching party if appropriate) to explain why such material could lead to significant prejudice. That cannot be done, of course, unless the searching solicitors can indicate with some precision what they have looked at. Because of the way the search was conducted in this case, Celanese's solicitors could not do so and that stage was never reached.

Il est fort possible que, si Cassels Brock et Kasowitz avaient été en mesure d'expliquer au tribunal quels documents privilégiés ils avaient vus, le tribunal aurait pu considérer qu'il s'agissait à première vue de documents anodins et sans importance. Par exemple, le document privilégié pourrait être une lettre qu'un avocat a envoyée à son client et à laquelle est simplement joint un avant-projet de contrat dont les clauses sont pratiquement les mêmes que celles d'un contrat qui a été conclu par la suite et auquel le public a accès. La communication du document de l'avocat, quoique privilégiée, ne serait vraisemblablement pas susceptible de causer un préjudice dans ce cas. Lorsqu'il est plus difficile d'évaluer l'importance des documents privilégiés auxquels ont eu accès les avocats qui ont effectué la perquisition, le juge des requêtes pourrait à bon droit demander au défendeur (s'il y a lieu, en l'absence des avocats de la partie ayant sollicité la perquisition) d'expliquer pourquoi ces documents risqueraient de causer un préjudice important. Il est évident que cela ne peut se faire que si les avocats ayant effectué la perquisition peuvent indiquer avec une certaine précision ce qu'ils ont examiné. En raison de la façon dont la perquisition a été effectuée en l'espèce, les avocats de Celanese ne pouvaient pas le faire, de sorte qu'on n'en est jamais arrivé à ce stade.

54 In my view, the present proceeding should not be seen as punitive in any way. I accept, as did the courts below, that neither Cassels Brock nor Kasowitz set out to obtain access to, or to gain some advantage from privileged material. Their problem stems from carelessness and an excessively

À mon avis, la présente instance ne doit d'aucune façon être perçue comme étant punitive. Je reconnais, comme l'ont fait les tribunaux d'instance inférieure, que ni Cassels Brock ni Kasowitz n'a tenté d'avoir accès aux documents privilégiés ou d'en tirer quelque avantage. Leur problème découle

adversarial approach in circumstances that called for careful restraint in recognition of the exceptional position of responsibility imposed by the unilateral and intrusive nature of an *Anton Piller* order. The protection of solicitor-client confidences is a matter of high importance. On the present state of the record, Canadian Bearings can have no confidence that the privileged material to which Cassels Brock and Kasowitz obtained access will not be used to their prejudice.

In summary, I agree with the Divisional Court that lawyers who undertake a search under the authority of an *Anton Piller* order and thereby take possession of relevant confidential information attributable to a solicitor-client relationship, bear the onus of showing there is no real risk such confidences will be used to the prejudice of the defendant. Difficulties of proof compounded by errors in the conduct of the search and its aftermath should fall on the heads of those responsible for the search, not of the party being searched. The onus was not met by the respondents in this case.

E. *The Appropriate Remedy*

I agree with the courts below that if a remedy short of removing the searching solicitors will cure the problem, it should be considered. As the intervener Canadian Bar Association ("CBA") puts it in its factum, the task "is to determine whether the integrity of the justice system, viewed objectively, requires removal of counsel in order to address the violation of privilege, or whether a less drastic remedy would be effective". The right of the plaintiff to continue to be represented by counsel of its choice is an important element of our adversarial system of litigation. In modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made. There is no such thing, in these circumstances, as automatic disqualification.

d'une incurie et d'une attitude trop agressive dans des circonstances qui commandaient la modération en reconnaissance de la situation de responsabilité exceptionnelle qu'impose la nature unilatérale et attentatoire d'une ordonnance *Anton Piller*. La protection des communications avocat-client confidentielles revêt une grande importance. Selon l'état actuel du dossier, rien ne permet à Canadian Bearings de croire que les documents privilégiés auxquels Cassels Brock et Kasowitz ont eu accès ne seront pas utilisés à son préjudice.

55 En résumé, je suis d'accord avec la Cour divisionnaire pour dire que les avocats qui effectuent une perquisition en vertu d'une ordonnance *Anton Piller* et qui, de ce fait, entrent en possession de renseignements confidentiels pertinents qui ont été obtenus grâce à des rapports antérieurs d'avocat à client ont l'obligation de démontrer qu'il n'y a aucun risque réel que ces renseignements soient utilisés au préjudice du défendeur. Les problèmes de preuve auxquels s'ajoutent les erreurs commises pendant et après la perquisition doivent être résolus par les gens qui sont responsables de la perquisition, et non par la partie qui en a fait l'objet. En l'espèce, les intimées ne se sont pas acquittées de ce fardeau.

E. *La réparation convenable*

56 Je suis d'accord avec les tribunaux d'instance inférieure pour dire que, s'il est possible de remédier au problème sans avoir à déclarer inhabiles à occuper les avocats ayant effectué la perquisition, il faut examiner cette possibilité. Comme l'affirme dans son mémoire l'intervenante l'Association du Barreau canadien (« ABC »), il s'agit de [TRADUCTION] « déterminer si, objectivement, l'intégrité du système de justice exige de déclarer les avocats inhabiles à occuper afin de remédier à la violation de privilège, ou si une réparation moins draconienne permettrait de le faire ». Le droit de la demanderesse de continuer à être représentée par les avocats de son choix constitue un élément important de notre système de justice accusatoire. Dans les litiges commerciaux modernes, il y a parfois un échange important de documents. Des erreurs sont commises. Dans ces circonstances, il n'est pas question d'inhabilité automatique à occuper.

57 Nordheimer J. cited a number of inadvertent disclosure cases which, in his view, leaned against removal. The first, *Tilley v. Hails* (1993), 12 O.R. (3d) 306 (Gen. Div.), was not a motion to remove counsel, but rather an application for an injunction enjoining the respondents from using an inadvertently disclosed privileged document. Similarly, *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000), 9 B.L.R. (3d) 99 (Ont. S.C.J.), was a motion to expunge from the record various privileged documents inadvertently faxed to the plaintiffs' counsel, which the plaintiffs' counsel attempted to use and of which copies were made and retained. The documents were expunged from the record. *Coulombe v. Beard* (1993), 16 O.R. (3d) 627 (Gen. Div.), was also relied on by Nordheimer J. for the "reluctance" of courts to impose the "drastic" remedy of removal where the nature of the privileged material inadvertently disclosed is not significant. In that case, Salhany J. had access to the letter disclosed and so was able to make an assessment of its significance. In all of these cases, the court knew with precision what the opposing lawyer had seen and what had been done about it. What the *Coulombe* case shows is that even where a confidential document is inflicted on a surprised opponent, the court will still take care to review the document to assess the risk of prejudice (as well, no doubt, as to assess whether the apparently inadvertent disclosure was a tactical gambit). In these cases, counsel avoid disqualification by demonstrating both that they were blameless in receiving the material, and that they did the "right thing" upon recognition that the material was potentially privileged. See also *Nova Growth Corp. v. Kepinski*, [2001] O.J. No. 5993 (QL) (S.C.J.), at paras. 13 and 18, leave to appeal refused, [2002] O.J. No. 2522 (QL) (Div. Ct.), leave to appeal refused, [2003] 1 S.C.R. xiv.

Le juge Nordheimer a cité un certain nombre de cas de divulgation par inadvertance qui, à son avis, militent contre la déclaration d'inhabilité à occuper. Dans le premier cas, *Tilley c. Hails* (1993), 12 O.R. (3d) 306 (Div. gén.), il était question non pas d'une requête visant à faire déclarer un avocat inhabile à occuper, mais d'une demande d'injonction interdisant aux intimés d'utiliser un document privilégié communiqué par inadvertance. De même, dans l'affaire *Aviaco International Leasing Inc. c. Boeing Canada Inc.* (2000), 9 B.L.R. (3d) 99 (C.S.J. Ont.), il était question d'une requête visant à faire retirer du dossier divers documents privilégiés télécopiés par inadvertance aux avocats des demanderesses; ces derniers avaient alors tenté d'utiliser ces documents et en avaient fait et gardé des copies. Les documents ont été retirés du dossier. Le juge Nordheimer s'est également fondé sur la décision *Coulombe c. Beard* (1993), 16 O.R. (3d) 627 (Div. gén.), pour faire remarquer que les tribunaux [TRADUCTION] « hésitent » à imposer la réparation « draconienne » qu'est la déclaration d'inhabilité à occuper dans les cas où les documents privilégiés communiqués par inadvertance ne sont pas importants. Dans cette affaire, le juge Salhany a pu examiner la lettre communiquée, ce qui lui a permis d'en évaluer l'importance. Dans tous ces cas, le tribunal savait exactement ce qu'avait vu l'avocat de la partie adverse et quelles mesures avaient été prises à cet égard. La décision *Coulombe* montre que, même dans le cas où la partie adverse a la surprise de recevoir un document confidentiel, le tribunal doit tout de même prendre soin d'examiner le document pour évaluer le risque de préjudice (et sans doute également pour déterminer si la communication apparemment effectuée par inadvertance était un stratagème). Dans ces cas, les avocats évitent d'être déclarés inhabiles à occuper en démontrant qu'on ne peut pas les blâmer d'avoir reçu le document en question, et qu'ils ont fait ce qu'il fallait faire lorsqu'ils ont constaté que les documents étaient potentiellement privilégiés. Voir aussi *Nova Growth Corp. c. Kepinski*, [2001] O.J. No. 5993 (QL) (C.S.J.), par. 13 et 18, autorisation d'appel refusée, [2002] O.J. No. 2522 (QL) (C. div.), autorisation d'appel refusée, [2003] 1 R.C.S. xiv.

Both Nordheimer J. and Moldaver J.A. distinguished the present case from *Grenzservice* which removed from the record solicitors who had botched execution of a *Mareva* injunction with elements of an *Anton Piller* order. In that case, it was held that counsel had behaved "egregiously". While Huddart J. (now J.A.) did make that finding, she also relied upon the principles laid down in *MacDonald Estate* as the governing authority. I would certainly not describe the conduct of the solicitors here as "egregious", but as *MacDonald Estate* itself shows, a violation of privilege that is not the result of "egregious" misconduct may nonetheless give rise to disqualification.

58 Les juges Nordheimer et Moldaver ont tous deux établi une distinction entre la présente affaire et l'affaire *Grenzservice* dans laquelle les avocats qui avaient bâclé l'exécution d'une injonction *Mareva* comportant des éléments d'une ordonnance *Anton Piller* avaient été déclarés inhabiles à occuper. Dans cette affaire, le tribunal a jugé que les avocats avaient agi [TRADUCTION] « de manière inacceptable ». La juge Huddart (maintenant juge à la Cour d'appel) est arrivée à cette conclusion, mais en se fondant également sur les principes énoncés dans l'arrêt *Succession MacDonald* qui fait autorité à cet égard. Je ne qualifierais certainement pas d'« inacceptable » la conduite des avocats en l'espèce, mais comme le démontre l'arrêt *Succession MacDonald* lui-même, la violation d'un privilège qui n'est pas due à une conduite « inacceptable » peut néanmoins donner lieu à une déclaration d'inhabilité à occuper.

In helpful submissions, the interveners Advocates' Society and the CBA suggest a number of factors to be considered in determining whether solicitors should be removed: (i) how the documents came into the possession of the plaintiff or its counsel; (ii) what the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege; (iii) the extent of review made of the privileged material; (iv) the contents of the solicitor-client communications and the degree to which they are prejudicial; (v) the stage of the litigation; (vi) the potential effectiveness of a firewall or other precautionary steps to avoid mischief. Other factors may, of course, present themselves in different cases, but I agree that the foregoing list of factors is appropriate and seems to me sufficient to dispose of the present appeal.

59 Dans leur argumentation utile, les intervenantes Advocates' Society et l'ABC recommandent de prendre en considération un certain nombre de facteurs pour décider s'il y a lieu de déclarer des avocats inhabiles à occuper : (i) la manière dont le demandeur ou ses avocats sont entrés en possession des documents; (ii) les mesures que le demandeur et ses avocats ont prises lorsqu'ils ont constaté que les documents étaient potentiellement assujettis au privilège avocat-client; (iii) la mesure dans laquelle les documents privilégiés ont été examinés; (iv) la teneur des communications avocat-client et la mesure dans laquelle elles sont préjudiciables; (v) l'étape de l'instance; (vi) l'efficacité potentielle d'une mesure de protection ou d'autres précautions destinées à éviter un préjudice. Il va sans dire que d'autres facteurs peuvent intervenir dans des affaires différentes, mais je reconnais que la liste de facteurs qui précède est appropriée et me paraît suffisante pour trancher le présent pourvoi.

As to the first factor, the privileged documents came into the hands of Cassels Brock and Kasowitz under the exceptional *Anton Piller* order in a way that was unintended but avoidable. Inadequate precautions were taken. Those who fail to take precautions must bear the responsibility. As

60 Quant au premier facteur, Cassels Brock et Kasowitz ont mis la main, d'une façon non intentionnelle mais évitable, sur les documents privilégiés grâce à une ordonnance extraordinaire de type *Anton Piller*. Des précautions insuffisantes ont été prises. Ceux qui ne prennent pas de

mentioned earlier, Mr. Colvard testified that quite apart from the as yet unclassified electronic documents he segregated into a "Privileged" file, he found other potentially privileged documents in reviewing material earlier classified as "Relevant". Those, at least, Mr. Colvard agreed he "reviewed in some detail in order to decide where to put them". We do not know the contents of even these documents.

61 As to the second factor, Cassels Brock failed to have the electronic documents listed at the search site as required by the order and thereafter ignored the obvious significance of BLG's initials on the sealed envelope containing the electronic documents and then declined to return the material over which privilege was claimed to BLG "whether in print form or electronic" as requested. Cassels Brock did take steps, as did Kasowitz, to contain the resulting damage, but as a result of their errors the Court does not know (and Canadian Bearings cannot know) the potential scale of that damage.

62 As to the third factor, the CBA submits that the plaintiff's counsel should not only promptly return the inadvertently disclosed privileged materials, but also "advise the adversary of the extent to which those materials have been reviewed". I agree. Here, Cassels Brock and Kasowitz deny any "substantive review", but the review must have been sufficiently thorough to classify documents as "Relevant, Irrelevant, Proprietary, and Hot". How could anyone classify a document as "Hot" or "Relevant" without reading it? And, to repeat, some of the documents initially read and classified as "Relevant" turned out (on a second reading) to be potentially subject to a claim of privilege. In the absence of knowing what Celanese's solicitors and counsel looked at we are left in the

précautions doivent en subir les conséquences. Comme nous l'avons vu, M^e^ Colvard a témoigné qu'indépendamment des documents électroniques non encore classés qu'il avait placés séparément dans un dossier « privilégié », il a trouvé d'autres documents potentiellement privilégiés en examinant des documents qui avaient été auparavant classés comme étant « pertinents ». M^e^ Colvard a tout le moins admis qu'il avait [TRADUCTION] « procédé à un examen assez approfondi [de ces documents] pour décider où les placer ». Même en ce qui concerne ces documents, nous n'en connaissons pas le contenu.

En ce qui concerne le deuxième facteur, Cassels Brock n'a pas dressé la liste des documents électroniques sur les lieux de la perquisition comme l'exigeait l'ordonnance et, par la suite, il n'a pas tenu compte de l'importance manifeste des initiales de BLG apposées sur l'enveloppe scellée contenant les documents électroniques; enfin, il a refusé de restituer à BLG les documents [TRADUCTION] « papier ou électroniques » demandés qui étaient visés par une revendication de privilège. Cassels Brock a effectivement pris des mesures, tout comme Kasowitz, pour limiter le préjudice ayant résulté, mais à cause de leurs erreurs, la Cour ne connaît pas (et Canadian Bearings n'est pas en mesure de connaître) l'ampleur potentielle de ce préjudice.

Quant au troisième facteur, l'ABC soutient que les avocats de la demanderesse devraient non seulement restituer sans délai les documents privilégiés communiqués par inadvertance, mais également [TRADUCTION] « informer la partie adverse de la mesure dans laquelle ces documents ont été examinés ». Je suis d'accord. À cet égard, Cassels Brock et Kasowitz nient avoir procédé à un « examen approfondi », mais ils doivent avoir effectué un examen assez minutieux pour pouvoir classer les documents comme étant [TRADUCTION] « pertinents, non pertinents, exclusifs ou très pertinents ». Comment peut-on classer un document comme étant « très pertinent » ou « pertinent » sans l'avoir lu? Et, je le répète, certains documents lus et classés au départ comme étant « pertinents » se sont

dilemma anticipated by Sopinka J. in *MacDonald Estate*, at p. 1263:

> . . . conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not.

As to the fourth factor, Cassels Brock and Kasowitz failed to discharge the onus of identifying the contents of the solicitor-client communications which they accessed in the course of classifying the material. It is therefore not possible to determine "the degree to which they are prejudicial". As stated, Celanese's solicitors and counsel created this problem by their failure to proceed with prudence and they and Celanese will now have to shoulder the consequences.

As to the fifth factor, the litigation is at an early stage. At advanced stages of complex litigation, an order removing counsel can be "extreme" and may have a "devastating" effet on the party whose counsel is removed (*Michel v. Lafrentz* (1992), 12 C.P.C. (3d) 119 (Alta. C.A.), at para. 4). That is not the case here. No doubt substantial costs have been incurred by all parties, but BLG advised Cassels Brock by letter dated July 15, 2003, i.e. within less than a month after commencement of the litigation, and a few days after learning of the privilege controversy, that "[t]his is a most serious matter and we intend to bring it to the attention of the Court at the earliest opportunity." The removal motion was launched July 24, 2003. There was therefore ample early notice that removal was being sought.

révélés (après une deuxième lecture) susceptibles de faire l'objet d'une revendication de privilège. Si nous ignorons ce que les avocats de Celanese ont examiné, nous sommes devant le dilemme prévu par le juge Sopinka à la p. 1263 de l'arrêt *Succession MacDonald* :

> . . . les simples [. . .] affirmations catégoriques contenu[e]s dans des affidavits ne sont pas acceptables. On ne peut s'attendre à les trouver dans toute affaire de cette nature qui est soumise aux tribunaux. Cela revient à une invitation de l'avocat à lui faire confiance. Le tribunal a alors la tâche ingrate de décider quels avocats sont dignes de confiance et lesquels ne le sont pas.

63 En ce qui a trait au quatrième facteur, Cassels Brock et Kasowitz ne se sont pas acquittés de l'obligation de décrire la teneur des communications avocat-client dont ils ont pris connaissance en classant les documents. Il n'est donc pas possible de déterminer « la mesure dans laquelle elles sont préjudiciables ». Comme nous l'avons vu, les avocats de Celanese ont créé ce problème en omettant d'agir avec prudence et ils doivent maintenant, tout comme Celanese, en subir les conséquences.

64 Quant au cinquième facteur, l'instance ne fait que débuter. À une étape avancée d'une instance complexe, une ordonnance déclarant un avocat inhabile à occuper peut être [TRADUCTION] « extrême » et avoir un effet « dévastateur » sur la partie dont l'avocat est déclaré inhabile à occuper (*Michel c. Lafrentz* (1992), 12 C.P.C. (3d) 119 (C.A. Alb.), par. 4). Ce n'est pas le cas en l'espèce. Il n'y a pas de doute que les parties ont toutes engagé des frais considérables, mais dans une lettre datée du 15 juillet 2003, soit moins d'un mois après le début de l'instance et quelques jours après avoir pris connaissance de la controverse relative au privilège, BLG a informé Cassels Brock que [TRADUCTION] « [c]'est une question très grave et nous avons l'intention d'en faire part au tribunal à la première occasion. » La requête en déclaration d'inhabilité à occuper a été déposée le 24 juillet 2003. Un préavis amplement suffisant a donc été donné au sujet de la demande de déclaration d'inhabilité à occuper.

65 Sixth, and finally, with respect to "the potential effectiveness of a firewall or other precautionary steps", Cassels Brock advised the court of a number of measures taken (although, in the defendant's view, too little and too late). The motions judge held that "an affidavit from the attorney in charge of this matter for the Kasowitz firm ought to have been filed confirming that such [privileged] material had been deleted and that no one at that firm had accessed the information prior to such deletion (with the obvious exception of Mr. Colvard, who has been isolated from the case)" (para. 30). I agree. In a matter of such sensitivity the court and the defendant are entitled to the best available evidence. It seems apparent that appropriate firewalls were not in place prior to the occurrence of the mischief.

66 In view of all the circumstances, I agree with the Divisional Court that Cassels Brock and Kasowitz have not produced sufficient evidence to satisfy the *MacDonald Estate* test, namely "that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (p. 1260).

67 I also agree with the Divisional Court that the right of Celanese to choose counsel yields to what occurred in the execution of the *Anton Piller* order in this case and its aftermath, and that "the reasonable perception of the integrity of the administration of justice would be adversely affected were Cassels, Brock . . . permitted to remain solicitors of record for [Celanese]" (para. 42). As to future role of Kasowitz however, I think the Divisional Court went too far in holding that "[Celanese] should be precluded in this litigation or any related proceeding from receiving advice or information directly and/or indirectly from the firm" (para. 40 (emphasis added)). Celanese has worldwide interests and Kasowitz is its primary legal advisor. As the vinyl acetate plant is to be built in Iran, there may well be related litigation outside Canada. I think Canadian Bearings will be sufficiently protected if Celanese is ordered not to seek or receive

Sixièmement et pour terminer, en ce qui concerne « l'efficacité potentielle d'une mesure de protection ou d'autres précautions », Cassels Brock a mentionné au tribunal un certain nombre de mesures qui ont été prises (même si, selon la défenderesse, c'était trop peu, trop tard). Le juge des requêtes a conclu qu'[TRADUCTION] « il aurait fallu produire un affidavit dans lequel l'avocat responsable du dossier pour le cabinet Kasowitz aurait confirmé qu'un tel document [privilégié] avait été supprimé et qu'aucun autre membre du cabinet n'avait eu accès aux renseignements avant que le document soit supprimé (à l'exception, il va sans dire, de M^e^ Colvard qui a été écarté du dossier) » (par. 30). Je partage cette opinion. Dans une affaire aussi délicate, le tribunal et le défendeur ont droit à la meilleure preuve possible. Il semble évident qu'aucune mesure de protection suffisante n'avait été prise avant que le préjudice soit causé.

En tout état de cause, je suis d'accord avec la Cour divisionnaire pour dire que Cassels Brock et Kasowitz n'ont pas produit suffisamment d'éléments de preuve pour satisfaire au critère de l'arrêt *Succession MacDonald*, c'est-à-dire pour « convaincre le public, c'est-à-dire une personne raisonnablement informée, qu'il ne sera[it] fait aucun usage de renseignements confidentiels » (p. 1260).

Je suis également d'accord avec la Cour divisionnaire pour dire que le droit de Celanese à l'avocat de son choix cède le pas à ce qui s'est produit, en l'espèce, pendant et après l'exécution de l'ordonnance *Anton Piller*, et que [TRADUCTION] « la perception raisonnable de l'intégrité de l'administration de la justice serait compromise si Cassels, Brock [. . .] pouvait continuer d'occuper pour [Celanese] » (par. 42). Toutefois, pour ce qui est du rôle de Kasowitz à l'avenir, j'estime que la Cour divisionnaire est allée trop loin en décidant qu'[TRADUCTION] « en l'espèce ou dans toute autre procédure connexe, il devrait être interdit [à Celanese] d'obtenir des conseils ou des renseignements directement ou indirectement auprès de ce cabinet » (par. 40 (je souligne)). Celanese est une entreprise d'envergure mondiale et Kasowitz est son principal conseiller juridique. Comme l'usine de fabrication d'acétate de vinyle doit être construite en Iran, il se peut bien que des

advice or information directly or indirectly from Kasowitz in connection with any litigation *in Canada* arising out of the matters referred to in the amended statement of claim, or related thereto, provided Kasowitz files affidavit(s) satisfactory to the case management judge confirming that the firewalls it had undertaken to install were and are in place, and sworn confirmation that all of the material for which privilege is claimed that came into Kasowitz's possession as a result of the *Anton Piller* order has been returned or destroyed.

IV. Disposition

The appeal is allowed with costs in this Court. Cassels Brock are removed as solicitors of record for the respondents in these proceedings. They are not to act for or advise the respondents, directly or indirectly, with respect to this proceeding or with respect to any related proceedings arising out of the facts pleaded in the amended statement of claim.

Neither the respondents nor anyone on their behalf is to communicate with or receive advice or information directly or indirectly, from Kasowitz with respect to this proceeding or any related proceedings in Canada arising out of or related to the facts pleaded in the amended statement of claim.

Any and all materials subject to the claim of privilege still in the possession of the respondents, Cassels Brock or Kasowitz seized from the premises of Canadian Bearings on June 20 and 21, 2003, pursuant to the *Anton Piller* order shall be returned forthwith to Canadian Bearings without retention of copies whether printed, electronic or of any other type.

Kasowitz is to file affidavits satisfactory to the case management judge confirming the existence

procédures connexes soient engagées à l'extérieur du Canada. J'estime que Canadian Bearings sera suffisamment protégée si on interdit à Celanese de demander ou d'obtenir des conseils ou des renseignements directement ou indirectement auprès de Kasowitz relativement à toute instance *au Canada* découlant des questions mentionnées dans la déclaration modifiée, ou liée à celles-ci, pourvu que Kasowitz produise, à la satisfaction du juge responsable de la gestion de l'instance, un affidavit ou des affidavits confirmant que les mesures de protection qu'il s'était engagé à prendre existaient et existent encore, et une confirmation sous serment que tous les documents faisant l'objet d'une revendication de privilège qui se sont retrouvés en sa possession par suite de l'ordonnance *Anton Piller* ont été restitués ou détruits.

IV. Dispositif

68 Le pourvoi est accueilli avec dépens devant notre Cour. Cassels Brock est déclaré inhabile à occuper pour les intimées en l'espèce. Il ne doit ni représenter ni conseiller les intimées, directement ou indirectement, relativement à la présente instance ou à toute autre procédure connexe découlant des faits allégués dans la déclaration modifiée.

69 Les intimées ou quiconque agissant en leur nom ne doivent ni communiquer avec Kasowitz, ni obtenir des conseils ou des renseignements directement ou indirectement, auprès de ce cabinet, relativement à la présente instance ou à toute autre procédure connexe au Canada découlant des faits allégués dans la déclaration modifiée, ou liée à ceux-ci.

70 Tous les documents visés par la revendication de privilège qui, les 20 et 21 juin 2003, ont été saisis dans les locaux de Canadian Bearings conformément à l'ordonnance *Anton Piller* et qui sont encore en la possession des intimées, de Cassels Brock ou de Kasowitz doivent être restitués immédiatement à Canadian Bearings et aucune copie papier, électronique ou autre de ces documents ne doit être conservée.

71 Kasowitz devra déposer, à la satisfaction du juge responsable de la gestion de l'instance, des

of adequate firewalls and the destruction or return of all allegedly privileged material that came into its possession as a result of the *Anton Piller* order made in this case.

Appeal allowed with costs.

Solicitors for the appellants: Borden Ladner Gervais, Toronto.

Solicitors for the respondent Celanese Canada Inc.: Heenan Blaikie, Toronto.

Solicitors for the respondent Celanese Ltd.: Lenczner Slaght Royce Smith Griffin, Toronto.

Solicitors for the intervener Advocates' Society: Lax O'Sullivan Scott, Toronto.

Solicitors for the intervener Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

affidavits confirmant l'existence de mesures de protection suffisantes, ainsi que la destruction ou la restitution de tous les prétendus documents privilégiés qui se sont retrouvés en sa possession par suite de l'ordonnance *Anton Piller* rendue en l'espèce.

Pourvoi accueilli avec dépens.

Procureurs des appelants : Borden Ladner Gervais, Toronto.

Procureurs de l'intimée Celanese Canada Inc. : Heenan Blaikie, Toronto.

Procureurs de l'intimée Celanese Ltd. : Lenczner Slaght Royce Smith Griffin, Toronto.

Procureurs de l'intervenante Advocates' Society : Lax O'Sullivan Scott, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Osler, Hoskin & Harcourt, Toronto.

a criminal offence. It follows that, in my opinion, the course adopted by Stable J. in *Rex* v. *Bramley* was wrong.

Appeal dismissed.

Solicitors: *Scott, Clarke & Co.; Director of Public Prosecutions.*

F. C.

[HOUSE OF LORDS]

NORWICH PHARMACAL CO. AND OTHERS . . APPELLANTS

AND

CUSTOMS AND EXCISE COMMISSIONERS . . RESPONDENTS

1972 May 11, 12, 15; June 13, 14, 15, 16; July 25 — Lord Denning M.R., Buckley and Roskill L.JJ.

1973 Feb. 26, 27, 28; March 1, 5, 6, 7, 12, 13, 14, 15, 19, 20, 21; June 26 — Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Cross of Chelsea and Lord Kilbrandon

Practice—Discovery—Action for—Action for discovery against Customs and Excise Commissioners—Confidential information concerning third parties obtained under statutory powers—Discovery of information sought—Whether any action for discovery per se

Crown—Privilege—Objection to produce documents—Infringement of patent by unknown importers—Disclosure of names of importers sought from Customs and Excise Commissioners—Whether in public interest to order discovery

The appellants were the owners and licensees of a patent for a chemical compound known as furazolidone. It appeared that the patent was being infringed by illicit importations of furazolidone manufactured abroad. In order to obtain the names and addresses of the importers the appellants brought actions against the Commissioners of Customs and Excise alleging infringement of the patent and seeking orders for the disclosure of the relevant information. On a summons for inspection of documents, the commissioners claiming privilege against production of the relevant documents, Graham J. ordered discovery of the names and addresses of the importers.

On appeal, the Court of Appeal reversed that decision. The appellants appealed. At the hearing of the appeal the appellants abandoned the contention that they had a cause of action for infringement by the commissioners themselves and the appeal proceeded on the basis that the case was and always had been an action solely for discovery:—

Held, allowing the appeal, (1) that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information

by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a duty statutory or otherwise; and that, accordingly, prima facie the respondents were under a duty to disclose the information sought (post, pp. 175B–E, 187F—188E, 195B–G, 197B–G, 203F—204D).

Upmann v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130; *Orr* v. *Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23 and *Post* v. *Toledo, Cincinnati and St. Louis Railroad Co.* (1887) 11 N.E.Rep. 540 applied.

Queen of Portugal v. *Glyn* (1840) 7 Cl. & F. 466, H.L.(E.) considered.

(2) That in the circumstances there was no head of public policy nor statutory provision which precluded the making of an order for discovery.

Decision of the Court of Appeal, post, p. 137c; [1972] 3 W.L.R. 870; [1972] 3 All E.R. 813 reversed.

The following cases are referred to in their Lordships' opinions:

Angel v. *Angel* (1822) 1 L.J.O.S.Ch. 6.
Butterworth v. *Bailey* (1808) 15 Ves.Jun. 358.
Colonial Government v. *Tatham* (1902) 23 Natal L.R. 153.
Dixon v. *Enoch* (1872) L.R. 13 Eq. 394.
Fenton v. *Hughes* (1802) 7 Ves.Jun. 287.
Hart v. *Stone* (1883) 1 Buch.App.Cas. 309.
Hunt v. *Maniere* (1864) 34 Beav. 157.
London (Mayor and Commonalty and Citizens of) v. *Levy* (1803) 8 Ves.Jun. 398.
Moodalay v. *Morton* (1785) 1 Bro.C.C. 469; 2 Dick. 652.
Orr v. *Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23; 46 L.J.Ch. 41; 35 L.T. 468.
Plummer v. *May* (1750) 1 Ves.Sen. 426.
Portugal (Queen of) v. *Glyn* (1840) 7 Cl. & F. 466, H.L.(E.).
Post v. *Toledo, Cincinnati and St. Louis Railroad Co.* (1887) 11 N.E.Rep. 540.
Rowell v. *Pratt* [1938] A.C. 101; [1937] 3 All E.R. 660, H.L.(E.).
Upmann v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130.
Upmann v. *Forester* (1883) 24 Ch.D. 231.

The following additional cases were cited in argument in the House of Lords:

Barnard v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113, C.A.
Bass v. *Board of Customs*, February 20, 1818, F.C.
Bovill v. *Cowan* (1867) 15 W.R. 608.
Brown v. *McDonald* (1905) 133 F. 897.
Burchard v. *MacFarlane* [1891] 2 Q.B. 241, C.A.
Carver v. *Pinto Leite* (1871) 7 Ch.App. 90.
Coca-Cola Co. v. *City of Atlanta* (1922) 110 S.E. 730.
Conway v. *Rimmer* [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.).
Cowan v. *Stanhill Estates Pty. Ltd.* [1966] V.R 604.
Dummer v. *Chippenham Corporation* (1807) 14 Ves.Jun. 245.
Hancocks & Co. v. *Lablache* (1878) 3 C.P.D. 197.
Heathcote v. *Fleete* (1702) 2 Vern. 442.

Hillman's Airways Ltd. v. *Société Anonyme d'Éditions Aéronautiques Internationales* [1934] 2 K.B. 356.
Leven v. *Board of Excise*, March 3, 1814, F.C.
McDade v. *Glasgow Corporation*, 1966 S.L.T.(Notes) 4.
March v. *Keith* (1860) 30 L.J.Ch. 127.
Metropolitan Asylum District v. *Hill* (1881) 6 App.Cas. 193, H.L.(E.).
Morse v. *Buckworth* (1703) 2 Vern. 443.
Murillo, The (1873) 28 L.T. 374.
Nobel's Explosives Co. v. *Jones, Scott & Co.* (1881) 17 Ch.D. 721, C.A.; (1882) 8 App.Cas. 5, H.L.(E.).
Plymouth Mutual Co-operative and Industrial Society Ltd. v. *Traders' Publishing Association Ltd.* [1906] 1 K.B. 403, C.A.
Pressed Steel Car Co. v. *Union Pacific Railway Co.* (1917) 240 F. 135.
Reg. v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).
Reg. v. *Lord Leigh* [1897] 1 Q.B. 132, C.A.
Reg. v. *Snider* [1953] 2 D.L.R. 9.
Saltman Engineering Co. Ltd. v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, C.A.
Sinclair Refining Co. v. *Jenkins Petroleum Process Co.* (1933) 53 S.Ct. 736.
Spokes v. *Grosvenor and West End Railway Terminus Hotel Co. Ltd.* [1897] 2 Q.B. 124, C.A.
Stuart v. *Ismail*, 1942 A.D. 327.
Tetley v. *Easton* (1856) 18 C.B. 643.
Utterson v. *Mair* (1793) 4 Bro.C.C. 270.
Uzielli, In re, Ponsardin v. *Peto* (1863) 33 L.J.Ch. 371.
Vass v. *Board of Customs*, Feb. 20, 1818, F.C.
Walker v. *Pennsylvanian Railway Co.* (1944) 36 A. 2d 597.
Washburn and Moen Manufacturing Co. v. *Cunard Steamship Co.* (1889) 6 R.P.C. 398.
Weld-Blundell v. *Stephens* [1920] A.C. 956, H.L.(E.).
Zachariassen v. *The Commonwealth* (1917) 24 C.L.R. 166.

The following cases are referred to in the judgments of the Court of Appeal:

Attorney-General v. *Mulholland; Attorney-General* v. *Foster* [1963] 2 Q.B. 477; [1963] 2 W.L.R. 658; [1963] 1 All E.R. 767, C.A.
Conway v. *Rimmer* [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.).
Fraser v. *Evans* [1969] 1 Q.B. 349; [1968] 3 W.L.R. 1172; [1969] 1 All E.R. 8, C.A.
Gartside v. *Outram* (1856) 26 L.J.Ch. 113.
Hubbard v. *Vosper* [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.
Hunt v. *Maniere* (1864) 34 Beav. 157.
Initial Services Ltd. v. *Putterill* [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.
Murray v. *Clayton* (1872) L.R. 15 Eq. 115.
Nobel's Explosives Co. v. *Jones, Scott & Co.* (1881) 17 Ch.D. 721, C.A.; (1882) 8 App.Cas. 5, H.L.(E.).
Orr v. *Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23; 46 L.J.Ch. 41; 35 L.T. 468.
Reg. v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).

Saccharin Corporation v. *Chemicals and Drugs Co.* [1900] 2 Ch. 556; 17 R.P.C. 612, C.A.

Tournier v. *National Provincial and Union Bank of England* [1924] 1 K.B. 461, C.A.

Upmann v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130.

Upmann v. *Forester* (1883) 24 Ch.D. 231.

Weld-Blundell v. *Stephens* [1920] A.C. 956, H.L.(E.).

The following additional cases were cited in argument in the Court of Appeal:

British United Shoe Machinery Co. Ltd. v. *Simon Collier Ltd.* (1910) 27 R.P.C. 567, H.L.(E.).

Clayton v. *Earl of Glengall* (1837) Cr. & Dix Ab.Ca. 70.

Crompton (Alfred) Amusement Machines Ltd. v. *Customs and Excise Commissioners (No. 2)* [1972] 2 Q.B. 102; [1972] 2 W.L.R. 835; [1972] 2 All E.R. 353, C.A.

Dixon v. *Enoch* (1871) L.R. 13 Eq. 394.

Grosvenor Hotel, London, In re [1964] Ch. 464; [1964] 2 W.L.R. 184; [1964] 1 All E.R. 92, C.A.

Hargreaves (Joseph) Ltd., In re [1900] 1 Ch. 347, C.A.

Heathcote v. *Fleete* (1702) 2 Vern. 442.

Henderson v. *M'Gown*, 1916 S.C. 821.

Hillman's Airways Ltd. v. *Société Anonyme d'Éditions Aéronautiques Internationales* [1934] 2 K.B. 356.

International General Electric Co. of New York Ltd. v. *Customs and Excise Commissioners* [1962] Ch. 784; [1962] 3 W.L.R. 20; [1962] 2 All E.R. 398; [1962] R.P.C. 235, C.A.

McDade v. *Glasgow Corporation*, 1966 S.L.T.(Notes) 4.

Morse v. *Buckworth* (1703) 2 Vern. 443.

Panthalu v. *Ramnord Research Laboratories Ltd.* [1966] 2 Q.B. 173; [1965] 3 W.L.R. 682; [1965] 2 All E.R. 921, C.A.

Pfizer Corporation v. *Ministry of Health* [1965] A.C. 512; [1965] 2 W.L.R. 387; [1965] 1 All E.R. 450, H.L.(E.).

Pinder v. *Spurr* (unreported), February 14, 1972, Lawton L.J.

Reg. v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1972] 1 Q.B. 232; [1971] 2 W.L.R. 1466; [1971] 2 All E.R. 1126, D.C.

Shaw v. *Kay* (1904) 5 T.C. 74.

Upmann v. *Currey* (1885) 29 S.J. 735.

Washburn and Moen Manufacturing Co. v. *Cunard Steamship Co.* (1889) 6 R.P.C. 398.

APPEAL from the Court of Appeal, post, p. 137c.

This was an appeal, brought by leave of the House of Lords, by the appellants, Norwich Pharmacal Co. (now known as Morton-Norwich Products Inc.), Smith Kline and French Laboratories Ltd. and Norwich Pharmacal Co., the plaintiffs in consolidated actions, from an order of the Court of Appeal (Lord Denning M.R., Buckley and Roskill L.JJ.) dated July 25, 1972, allowing an appeal of the respondents, the Commissioners of Customs and Excise, defendants to the actions, from the order of Graham J. [1972] Ch. 566 dated March 14, 1972, requiring them to disclose

to the appellants the names and addresses of the persons who were infringing the appellants' patent.

The facts are stated in their Lordships' opinions, post, p. 173A.

Sydney Templeman Q.C., J. P. Warner and *W. Bruce Spalding* for the appellant commissioners in the Court of Appeal.

Anthony Walton Q.C. and *Robin Jacob* for the respondent plaintiffs in the Court of Appeal.

The main submissions of counsel in the Court of Appeal were similar to those made later before the House of Lords, post, pp. 152F—172H, where the plaintiffs abandoned the contention that they had a cause of action for infringement.

Cur. adv. vult.

July 25, 1972. The following judgments were read.

LORD DENNING M.R. The Norwich Pharmacal Co. is an American corporation which owns a patent. Smith Kline and French Laboratories Ltd. are an English subsidiary and licensee of the patent. I will call them "the plaintiffs." They have letters patent for a chemical compound. In the specification it is designated by a very long name. I will not write it or repeat it. It is claim 2. It has 36 letters and five figures. The plaintiffs have given it a shortened name which I can both write and repeat. It is "furazolidone." This substance is useful for putting into poultry food because it gives the birds some protection against infection by microbes. Very little of it goes a very long way. The plaintiffs mix it with chalk in the proportion of about one-quarter of furazolidone to three-quarters of chalk. This I will call the furazolidone mixture. This goes even further. Only half a pound of the mixture goes into one ton of feeding stuff. Some large poultry farms buy pure furazolidone themselves, or the mixture of chalk and furazolidone, and put it themselves into the feeding stuff. But smaller farms buy the final feeding stuff from merchants who have previously injected the furazolidone mixture into it. The plaintiffs make the furazolidone in this country, and mix it with chalk here, and sell the mixture here. They have a strong belief, however, that a lot of "pirate" furazolidone is being imported into this country from abroad. Sometimes it is brought in by big farmers. At other times it is brought in by merchants who put it into poultry food which they sell. The plaintiffs want to put a stop to these "pirate" importations. But they do not know who are the people who are importing it. They have no means, they say, of finding out: because the final foodstuff contains only a small amount of furazolidone. "It is," says the manager of their legal department, "for practical purposes impossible to show that this furazolidone is not lawful material originating with my company or its associates."

In these circumstances the plaintiffs seek to discover from the customs authorities the names of the importers. It appears that in the United States there is a law which enables patentees to get such names from the customs authorities. The plaintiffs seek to do the same here by means of this action. It appears that the customs authorities here publish statistics

showing the total amount of goods imported under the name of furazolidone, but none of the details. The plaintiffs seek to get the customs to disclose the names of the people who imported these quantities of furazolidone. If they can get the names, they intend to sue them for infringement of their patent. This will, they say, enable them to stop the "pirate" importations to a large extent. But it will not be "fool-proof." The goods are sometimes imported as "medicament" without a name: so it will not appear in the statistics as furazolidone.

The customs authorities have in their possession the names of the importers; because, whenever goods are imported, the importer has to fill in the form of entry giving the name of the importers, the description of the goods, and so forth: see section 28 of the Customs and Excise Act 1952. The customs authorities regard this information as confidential. They do not publish it at all. They only publish the statistics showing total quantities imported in the year, but no names or addresses.

This confidence is strongly confirmed in the Finance Act 1967. Section 3 authorises the commissioners to disclose some of the information to others if it is in the national interest, or rather, if the Secretary of State is satisfied that it is in the national interest. But very significantly the section says that the commissioners are not to disclose "the price of the goods or the name of the importer of the goods." Those matters are so sacrosanct that not even the Secretary of State can require them to be disclosed—not even when it is in the national interest.

Yet the judge has held that the commissioners must disclose the names of the importers to the plaintiffs. The commissioners appeal to this court. Let me get one point out of the way at the very first. It was suggested that the commissioners were themselves guilty of infringing the plaintiffs' patents—not whilst they were ignorant, but as soon as they were told that the goods infringed the plaintiffs' patent. I cannot accept this suggestion. The commissioners do not have possession of the goods. All they do is ask the importers to pay the customs duty. They have power, of course, to prevent importation until the duty has been paid. The goods must stay in an approved warehouse till the duty is paid. None of this makes the commissioners guilty of infringement of patents: see *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1881) 17 Ch.D. 721; (1882) 8 App.Cas. 5. They do not infringe the monopoly. All that the Royal Grant gives to the patentee and his licensees is the right to "make use exercise and vend the said invention within the United Kingdom." The commissioners do none of those things. They do not make, use, exercise or vend it. They only collect duty on it.

But the plaintiffs suggest that the commissioners infringe in another way. The plaintiffs rely on the provision in the Royal Grant which gives them "the whole profit and advantage" accruing by reason of the said invention; and they say that, by taking the duty, the commissioners take some of that profit and advantage. That is quite untenable. The profit is taken by the importer, not by the commissioners. The commissioners charge duty on it, just as the revenue authorities charge tax on profits. But that does not make them participators in it.

Finally, on this part of the case the plaintiffs suggest that, when goods are imported which infringe their patent, they are prohibited goods and

A are liable to forfeiture under section 44 (*b*) of the Customs and Excise Act 1952: and, therefore, the commissioners are in a position to make use of them. But that prohibition of imports is only available when the prohibition is imposed "under or by virtue of an enactment": as, for instance, when injurious drugs are prohibited. It does not apply to goods which infringe a patent. By no stretch of the imagination could the commissioners be expected to "police" imports so as to see that patents are not B infringed. Not even if the monopolist asks them, can the commissioners be expected to do it.

I find myself, therefore, in entire agreement with the judge on this part of the case. There is no conceivable cause of action against the commissioners for infringement of patent.

Now I turn to the question whether there can be discovery against the commissioners—so as to compel them to give information as to the C names of the importers. The cases warrant two propositions. First, discovery can be granted in aid of any reasonable action which the plaintiff has brought or is intending to bring, or is capable of bringing, against the defendant. Thus, where the defendant has been found guilty of infringing a patent, he can be ordered to give the names and addresses of persons to whom he has sold the goods, both in aid of damages: see D *Murray* v. *Clayton* (1872) L.R. 15 Eq. 115; or of an account of profits: see *Saccharin Corporation* v. *Chemicals and Drugs Co.* [1900] 2 Ch. 556. But that is only in aid of an existing or future action against the defendant.

Secondly, in general, "no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged, or who is in the position of a mere witness." It was so held by the judge, who gives many cases to support this proposition: [1972] Ch. 566, E 582–584. This proposition is founded on good reason. It would be intolerable if an innocent person—without any interest in a case—were to be subjected to an action in Chancery simply to get papers or information out of him. The only permissible course is to issue a subpoena for him to come as a witness or to produce the documents to the court.

But Mr. Walton urges—and the judge has so held—that there is an F exception to this second proposition—an exception, it is said, in aid of the administration of justice. Mr. Walton says that, when it is clear that there has been wrongdoing, and the plaintiff is unable to find out the wrongdoers but a third party knows the names, then the court can order discovery from the third party to find out the names, even though there is no reasonable cause of action against him. In support of this pro- G position Mr. Walton quotes cases of trade marks or passing off, and in particular *Hunt* v. *Maniere* (1864) 34 Beav. 157; *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140; *Orr* v. *Diaper* (1876) 4 Ch.D. 92, but much more fully and better reported in 25 W.R. 23. Those were cases of wharfingers, forwarding agents or shippers who were importing or exporting spurious goods. They handled champagne, cigars and sewing cotton which were dressed up so as to deceive purchasers. They did not know of H the fraud at first, but later on were given notice of it. The courts held that, on getting to know of the fraud, the wharfingers, forwarding agents or shippers ought not to part with the spurious champagne, cigars or sewing cotton. They ought to give to the aggrieved party such information

as he might reasonably require so as to track down the fraud and sue the culprits. They ought to give the names of the consignors who shipped the goods with the counterfeit marks upon them; or the consignees who were importing them.

In each of those cases the wharfinger, forwarding agent or shipper had possession or control of the goods. As soon as the injured party complained, it was pretty clear that the goods were spurious and deceptively marked. If the wharfinger, forwarding agent or shipper had parted with the goods after notice, he would be aiding and abetting a fraud. As soon as notice was given, the injured party could have obtained an injunction to restrain the wharfinger, forwarding agent or shipper from parting with them. Even without giving him notice, the injured party could have moved for an injunction; for otherwise the notice might merely serve to put the defendant on his guard and he might get rid of the goods: see *Upmann* v. *Forester* (1883) 24 Ch.D. 231, 236. Seeing that that cause of action existed, the cases come within the first proposition that the court can order discovery in aid of a reasonable action which the plaintiff is intending to bring or is capable of bringing.

But this case is very different. It falls within the second proposition. The plaintiffs have no reasonable cause of action which they can conceivably bring against the commissioners. They cannot, therefore, bring an action against them merely for the purpose of discovering from them the names of importers.

Even if the plaintiffs could overcome that hurdle, they are faced with another. It is that the names of the importers were given to the commissioners in confidence—for a limited and restricted purpose—and the courts ought not to compel them to break that confidence. That principle was stated by Lord Reid in *Conway* v. *Rimmer* [1968] A.C. 910, 946: " If the state insists on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes."

The law about confidential information has developed much of recent years. The cases show that the public interest has two sides to it. On the one hand it is usually in the public interest that when information is received in confidence—for a limited and restricted purpose, as it always is—it should not be used for other purposes. In such cases confidences will be held sacrosanct. Thus the courts have held in these cases that confidences should be kept and not broken: where the disclosure would involve the writer in a libel action, *Weld-Blundell* v. *Stephens* [1920] A.C. 956; where a banker was asked to disclose the state of a customer's account, *Tournier* v. *National Provincial and Union Bank of England* [1924] 1 K.B. 461; and where the Gaming Board were asked to disclose information obtained about an applicant, *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388. On the other hand, confidences will sometimes be overcome by a higher public interest, such as the interest of justice itself, the prevention of wrongdoing, or the security of the state. Thus the courts have held that confidences cannot be used so as to cover up wrongdoing: see *Gartside* v. *Outram* (1856) 26 L.J.Ch. 113; *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, nor to prevent disclosure of practices, which might be dangerous

to mental health, see *Hubbard* v. *Vosper* [1972] 2 Q.B. 84; nor to hamper an investigation into breaches of security, see *Attorney-General* v. *Mulholland*; *Attorney-General* v. *Foster* [1963] 2 Q.B. 477, 488, 489; nor in affairs of general concern where the public interest requires disclosure, see *Fraser* v. *Evans* [1969] 1 Q.B. 349, 367. So in every case it is a question of weighing the public interest. The courts must consider the relationship, and rule upon it as and when it comes before them.

In the present case I am quite clear that the public interest demands that the commissioners should keep secret the names of importers. Parliament emphasised it in section 3 of the Finance Act 1967. It would, no doubt, be a great convenience to the plaintiffs to get the names of importers. It would enable them to assert their monopoly and get an injunction and damages against infringers. This financial gain would, no doubt, be of private benefit to them. And it would help to stop wrongdoing. But it is as nothing compared to the importance of keeping the information secret.

Another aspect of the public interest (often referred to in the cases on Crown privilege) is the interest in ensuring candour. If there was ever a case in which it was in the public interest to ensure candour, it is this very case. If importers thought that the commissioners would disclose their names and addresses, they would soon find ways to circumvent this disclosure. They would use the names of nominees. They would conceal the description of the goods, by giving them a false or invented description, or by making it so general as to be untraceable—such as "medicament." They might resort to forgery. All these things have happened we are told, in the United States where the customs do disclose information. Rather than give scope to those evils, it is better to insist on keeping their names and addresses secret.

I would like to say that I have benefited much from the judgment of Graham J. But, whilst agreeing with much that he says, I am afraid that I cannot agree with his decision. I would allow the appeal and dismiss the application.

BUCKLEY L.J. I would like to associate myself with what Lord Denning M.R. has said of the very clear and careful judgment of Graham J.

I will deal first with the plaintiffs' cross-appeal. This asserts that the Commissioners of Customs and Excise have infringed the plaintiffs' patent. This is put on two grounds: (1) that the commissioners by allowing imported furazolidone to be brought into this country with knowledge of the plaintiffs' claim that this commodity infringes their patent aid and abet the infringement, and (2) that by exacting payment of customs duty on the imported furazolidone the commissioners obtain a profit in breach of the grant to the first plaintiff in the letters patent of the full profit of the invention.

It is true that the commissioners were informed by the plaintiffs in 1967 of the claim that the material imported under the name furazolidone infringed the patent, but it is not, in my opinion, a duty or a function of the commissioners to verify the truth of such an assertion. The importation might not be an infringement for a number of reasons. The patent might be invalid, although in the present case its validity is as a matter

of pleading admitted. The importation or the manufacture of the goods might have been licensed. The goods, though described as furazolidone, might not in fact infringe the patent. The plaintiffs would, of course, deny any such suggestions, but it would I think be strange if the commissioners were bound either to accept the plaintiffs' claim without question on the one hand, or to satisfy themselves by inquiry as to its validity on the other. The importation of infringing goods will give rise to a cause of action for damages for infringement against the importers, but it is not illegal. Such goods are not, in my opinion, prohibited goods for the purposes of section 44 (*b*) of the Customs and Excise Act 1952. Their importation is not prohibited or restricted under or by virtue of any enactment. The Patents Act 1949 cannot, I think, be said to contain any such prohibition. It is true that the grant of the patent in the form prescribed under section 21 (3) of that Act contains a command that no one shall " make use or put in practice the said invention nor in anywise imitate the same without the consent of the patentee," but this prohibition, in my opinion, derives its force from the act of the Crown in making the grant and not under or by virtue of the Act of Parliament. In any case, I do not consider that it is a prohibition of importation. Importation of infringing goods is an infringement of the private rights of a patentee; it is not an infraction of any general law of the land forbidding such importation. The commissioners are, I think, under no obligation to police the plaintiffs' immunity from infringement of the patent and would not, it seems to me, have any justification on that ground for forfeiting the goods or otherwise preventing their importation. The goods are not in the possession or under the control of the commissioners. The commissioners cannot, in my judgment, be accurately said to aid or abet any infringement.

Nor do I think that, by demanding and receiving payment of customs duty in pursuance of their statutory duty, the commissioners participate in any profit of the invention. The liability for duty is a debt due to the Crown by the importer arising out of the act of importation. It is a personal obligation, a debt, just as income tax is a debt. It is, in my judgment, no more a part of the profit of the invention than income tax is a part of the profits in respect of which it is assessed. The whole of the profit on the imported goods is the importer's, notwithstanding that by reason of the importation he has incurred a liability to pay the duty.

In my judgment the cross-appeal fails. So the question whether the plaintiffs can maintain the action against the commissioners for discovery of the names of the importers must be considered upon the basis that the plaintiffs have no cause of action against the commissioners for infringement.

Mr. Walton referred us to certain cases in which defendants, in whose possession or custody infringing goods were, were restrained from parting with them or held to be under a duty to retain them and give information relating to them pending determination of the question of infringement. These are not, I think, relevant to the present case in which, as I have already said, the imported goods are not, and indeed have never been, in the possession of the commissioners, nor have they been in their custody or under their control save in so far as their statutory powers, conferred for purposes exclusively connected with levying customs duties, confer control.

Mr. Walton has contended that a plaintiff can bring an action

against a defendant for the sole purpose of extracting information from that defendant which will enable the plaintiff to sue a third party in other proceedings for an admitted wrong. The necessary conditions, he says, are (1) that a wrong has been done to the plaintiff, (2) that he does not know whom to sue, (3) that the defendant knows the identity of the wrongdoer, (4) that the plaintiff knows this, (5) that he has no other way of discovering that information, (6) that the plaintiff can get relief against no one other than that wrongdoer in respect of the wrong, and (possibly) (7) that the defendant is more than a mere witness, in the sense that he has an interest in the outcome of the prospective action by the plaintiff against the wrongdoer.

Mr. Templeman says that no authority can be found supporting this proposition and that no one against whom the plaintiff has no reasonable cause of action can be sued merely for discovery.

On this part of the case Mr. Walton relied mainly on two cases: *Orr* v. *Diaper*, 4 Ch.D. 92; 25 W.R. 23 and *Upmann* v. *Elkan*, L.R. 12 Eq. 140; 7 Ch.App. 130. Graham J., after discussing these and other cases, stated his conclusion thus [1972] Ch. 566, 584:

> "Having given these cases careful consideration, they seem to me to show that in general it is correct that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged or who is in the position of a mere witness in the strict sense. This is the normal rule but there is nothing in them which shows that the rule is invariable and is to be understood as excluding cases such as *Orr* v. *Diaper* or *Upmann* v. *Elkan* or indeed *Panthalu* v. *Ramnord Research Laboratories Ltd.* [1966] 2 Q.B. 173 where it can properly be said that the evidence may be relevant to an issue in the main action."

I will refer first to *Upmann* v. *Elkan* L.R. 12 Eq. 140, which is the earlier of these cases in date. A case containing boxes of cigars, some of which were alleged to bear a spurious imitation of the plaintiff's trade mark, had been shipped to St. Katharine's Dock, for importation to this country, to the order of Messrs. Elkan, a firm of forwarding agents carrying on business in London. Messrs. Elkan were in possession of forwarding instructions from the consignors directing distribution of the contents of the case to various persons resident in England, whose names and addresses were stated in those instructions. The plaintiff filed a bill against Messrs. Elkan and the dock company for an injunction to restrain Messrs. Elkan from removing the boxes of cigars bearing the spurious mark from St. Katharine's Dock and from infringing the plaintiff's mark, for an account and for damages. The plaintiff obtained an interim injunction, first ex parte and subsequently inter partes. Before the bill was filed Messrs. Elkan offered to tell the plaintiff the names of the consignors and of the persons to whom the cigars were to be delivered and gave the plaintiff this information seven days after the filing of the bill. No relief was asked against the dock company. It was not established that Messrs. Elkan had been privy to the infringement. In the course of his judgment Lord Romilly M.R. (who was later affirmed on appeal by Lord Hatherley L.C., 7 Ch.App. 130, 132) said, L.R. 12 Eq. 140, 146:

"It does not, in my opinion, make any difference whether the goods are sent to a person who does not deal in the article consigned, and whose duty is simply to distribute the goods to other persons, or whether the goods are sent to him as consignee for his own purposes. In either case they are sent to the dock to be at his disposal, and without his signature the goods cannot be disposed of. It will not do for him to say, as he does in this case, 'I know nothing about the goods sent. I do not know whether they have any, or, if any, what brand on them, or whose it is.' It is his duty to know this, and if he receives notice that they bear a fraudulent imitation of another man's brand, he ought to ascertain this as speedily as possible after such notice, and to take the proper and necessary steps to prevent their being disposed of in that state."

And he said of the dock company, at p. 147:

"In fact, in many respects the position of the dock company does not differ from his. For all acts done in ignorance they are excusable, but as soon as they receive notice of the fraud, and either by bill filed or by plaintiff's indemnity the dock company is protected, they must retain the goods until the question is determined, . . ."

It is plain that that case is not authority for the proposition that a suit may be brought for discovery only against a party against whom no other relief can properly be sought. Not only was an injunction sought against Messrs. Elkan, but in an interim form it was obtained. In the event no final order was made against Messrs. Elkan for costs or otherwise, but they recovered no costs and were required to give an undertaking. The cigars, which seem to have been in the possession of the dock company, were at the disposal of Messrs. Elkan. Lord Romilly M.R. held that, upon being informed of the fraud, they were in duty bound to give the information required and to undertake that the goods should not be removed or dealt with until the offending mark had been removed. It was doubtless on this basis that the injunction was granted.

In *Orr* v. *Diaper*, 4 Ch.D. 92; 25 W.R. 23 the plaintiffs were manufacturers of sewing cotton and thread, and their product was packed and ticketed in a distinctive way. They discovered that inferior sewing cotton and thread, similarly packed and ticketed, was being shipped to Valparaiso by Messrs. Diaper, a firm of shippers at Liverpool. The plaintiffs asked Messrs. Diaper from whom they had received these goods and on whose behalf they were shipped. They received no answer and commenced proceedings in which they alleged, inter alia, that Messrs. Diaper were still shipping the goods. The relief claimed was discovery of the names and addresses of the consignors of the goods to the defendants and particulars of the shipments in aid of proceedings contemplated by the plaintiffs. These proceedings, it is evident, were to be against the consignors. The defendants demurred.

The only report of the case to which the judge's attention was drawn seems to have been that at 4 Ch.D. 92; but it is more fully and better reported at 25 W.R. 23. From that report it appears that counsel for the defendants cited the following passage from *Mitford on Pleading*, 4th ed. (1827), p. 191:

A "If therefore the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays relief, or does not show a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or liable to be so, and does not also show that the discovery which he prays is material to enable him to support or defend a suit, he shows no title to the discovery, and consequently a demurrer will hold."

B It will be noted that the effect of this statement is that a bill would not lie for discovery unless the plaintiff was seeking other relief in the Court of Chancery, or was suing or entitled to sue the defendant in some other court. Hall V.-C. felt strongly that the plaintiff ought to have the information he sought. "Nothing," he said, 25 W.R. 23, 24, "but 'absolute necessity' will compel me to allow this demurrer." Having expressed the opinion that C the position of the defendants in shipping the goods was one which might subject them to proceedings by way of injunction to restrain them from continuing to ship the goods, Hall V.-C. said, at p. 25:

"But it is said that the defendants are in the position of witnesses, and you cannot have a bill of discovery brought against a witness. But I think that the position of the defendants is different from that of a D mere witness and the rule that a mere witness cannot be made a party to obtain discovery has no application to this case. That view of the case seems to me to bring it within the rule as stated in *Mitford*. The plaintiffs do show a right to sue the defendants in some other court, which expression, since the change made by the Judicature Acts, must mean this court, in some other proceeding."

E That part of this passage which starts with the words "That view of the case" is represented in the report in 4 Ch.D. 92, 96, only by the sentence: "I think that the plaintiffs do show a title to sue." I am inclined to think that the judge may have read this equivocal statement as meaning that in the view of Hall V.-C. the plaintiffs were entitled to sue Messrs. Diaper merely for discovery. The fuller report shows that Hall V.-C. was carefully bringing himself within the rule in *Mitford*—that is, F he was basing himself on the circumstance that the plaintiffs were in a position to seek not merely discovery but substantive relief against Messrs. Diaper. The case is not, as the judge thought, an exception to the general rule (see *Bray on Discovery* (1885), p. 40) that no person without an interest (such that a decree could be made against him or that he might be affected by the decree) could be made a defendant to a bill in Chancery G for the purpose of discovery. Messrs. Diaper had an interest, for in consequence of the prospective proceedings by the plaintiffs against the consignor of the goods, Messrs. Diaper were exposed to the risk of being restrained by injunction from continuing to ship the goods. Properly understood the decision in *Orr* v. *Diaper*, 25 W.R. 23 is, in my judgment, not in Mr. Walton's favour, but against him.

H The reason why Messrs. Diaper were exposed to the risk of an injunction was, I think, similar to the reason why Messrs. Elkan were in fact restrained by injunction from parting with control of the cigars. If a man has in his possession or control goods the dissemination of which, whether in the way

of trade or, possibly, merely by way of gifts (see *Upmann* v. *Forester*, 24 Ch.D. 231) will infringe another's patent or trade mark, he becomes, as soon as he is aware of this fact, subject to a duty, an equitable duty, not to allow those goods to pass out of his possession or control at any rate in circumstances in which the proprietor of the patent or mark might be injured by infringement ensuing. The man having the goods in his possession or control must not aid the infringement by letting the goods get into the hands of those who may use them or deal with them in a way which will invade the proprietor's rights. Even though by doing so he might not himself infringe the patent or trade mark, he would be in dereliction of his duty to the proprietor. This duty is one which will, if necessary, be enforced in equity by way of injunction: see *Upmann* v. *Elkan*, L.R. 12 Eq. 140; 7 Ch.App 130. The man having possession or control may also be under a duty to give information in relation to the goods to the proprietor of the patent or mark: *Upmann* v. *Elkan*.

The commissioners are not, in my opinion, and never have been, in this position in respect of the imported furazolidone. It has never been in their possession, and the only powers of control which they have ever had in respect of it have been statutory powers conferred upon them for a particular purpose, viz. the collection of customs duty, and only for that purpose. In my judgment, they have never come under any such duty to the plaintiffs as was held to have arisen in *Upmann* v. *Elkan*. The plaintiffs could, in my opinion, never have obtained substantive relief of any kind against the commissioners.

I think that it remains the law that no action for discovery can be brought against a party against whom no other relief is or could be sought, that is to say, against whom the plaintiff has no reasonable cause of action. In this case the plaintiffs disclose no reasonable cause of action against the commissioners, who are on this ground, in my judgment, entitled to have the action dismissed.

This, if right, disposes of this appeal, but I will add that I agree with Lord Denning M.R. in thinking that in this case the balance of public interest is in favour of preserving confidentiality in respect of the information disclosed by the importers to the commissioners, and of avoiding inhibiting candour on the part of importers in respect of the information they are required to give to the commissioners. I also would allow the appeal.

ROSKILL L.J. The issue for decision in this appeal arises out of a summons for inspection of documents dated March 3, 1971, and issued by the plaintiffs in actions, now consolidated, brought by them against the commissioners. The commissioners delivered lists of documents in each action. They properly included all relevant documents in those lists, but claimed privilege against the production of those documents named in part 3 of schedule 1 to each list on the grounds both that they were precluded by law from producing them and that their production would be injurious to the public interest because they contained confidential information about the affairs of persons other than the plaintiffs furnished to the commissioners by such persons pursuant to sections 26, 28 and 29 of the Customs and Excise Act 1952. That objection to production was overruled by Graham J. in circumstances which I will later relate. But both before him and on

appeal to this court the objection was maintained not only on these two grounds but on the wider ground that in truth these actions were but actions for discovery and that the pleaded allegations against the defendants of infringement of the plaintiffs' patents were no more than unsupported and unsupportable allegations made by the plaintiffs against the commissioners in an effort to circumvent the well-established rule that the court will not in general permit actions for discovery when no other relief is or can properly be sought.

It is a remarkable fact that when one looks at the writs and statements of claim in these actions one finds that the first two paragraphs of each writ allege infringement, as do the first seven paragraphs of each statement of claim, whereas only the third paragraph of each writ and the last three paragraphs of each statement of claim relate to the issue of discovery.

Thus the essential question this court has to decide has been heavily though skilfully disguised under allegations of infringement which, like my Lords and the trial judge, I regard as unfounded in fact and unsupportable in law for reasons I will give later. When therefore this disguise is stripped off, as stripped off it must be, one is left with a prayer in each writ for discovery of the documents to the production of which exception is taken, supported by allegations of fact in the last three paragraphs of each statement of claim. The plaintiffs wish to sue those by whom the goods allegedly infringing their patents have been and are being imported into this country. They do not know the names of these alleged infringers. The commissioners know the names. The plaintiffs cannot sue without the information which they say they cannot otherwise obtain. The commissioners have that information but refuse to supply it. Therefore the plaintiffs seek to extract this information from them by legal process. The question is whether the law allows them to do so. The plaintiffs say that the interests of justice require the disclosure of this information by the defendants. Otherwise rights accorded them under patents given under the Royal Prerogative and by statute are denied them. No other consideration can be allowed to prevail against the interests of justice which in this case they say coincides with their own interests, least of all those considerations which have led the commissioners to refuse production. Forensic cries for relief claimed to be in the interests of justice against the restrictive doctrines of what was until the very recent decision of the House of Lords in *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388 still called Crown privilege, of confidentiality and of the remnants of the now extinct Chancery bill of discovery should find a sympathetic hearing from any court. But the crucial question remains whether those interests shall prevail against other and perhaps wider interests, also public or national in character, which are relied upon by the commissioners as outweighing the interests on which the plaintiffs rely and as tipping the scale against the plaintiffs.

I have had the advantage of reading in advance the judgments which have been delivered. I would not add to them were it not that we are differing from the careful and helpful judgment of the judge from which like my Lords I have derived much benefit.

Mr. Walton frankly admitted that the claim for alleged infringement was but a peg upon which to hang his clients' claim for discovery. Wisely he

argued this point last preferring to rest his main submission upon what he contended were stronger points. He boldly sought to argue that goods imported into this country which he claimed infringed the plaintiffs' patents were " prohibited goods " for the purposes of the Customs and Excise Act 1952, and should be forfeited, and that the commissioners by levying duty upon such goods, even in pursuance of a statutory power and duty so to do, were infringing those patents because they were taking a profit from those goods whereas the plaintiffs were entitled to the entire profit upon them by virtue of those patents. Mr. Walton even went so far—under some pressure from the court—to submit that the Commissioners of Inland Revenue would be in like position were they to levy taxes upon the profits earned from such importation. Alternatively, he contended that the commissioners and their officers were aiding and abetting infringement because by collecting duty and permitting the import of these goods they were sufficiently connected with the principal offenders as to be equal parties to the infringement with those principal offenders.

With respect I find these propositions almost unarguable. The phrase " prohibited goods " is nowhere defined in the Act of 1952. But it plainly means, when one looks at the various sections which deal, inter alia, with prohibited goods, goods the import or export of which is prohibited or restricted by reason of some statutory enactment currently in force: see, for example, sections 44, 45, 56 and 304. The fact that goods may be imported which infringe a patent does not make them " prohibited goods " or liable to forfeiture. One may ask the questions: " How are the commissioners to know if particular goods do infringe a patent? " " Are they to investigate every consignment? " " Are they to investigate every patent and consider possible challenges to its validity? " I can find nothing in the Act of 1952 which makes such goods prohibited goods or which would justify the commissioners in refusing clearance once the duty upon them was paid. Moreover the suggestion that the commissioners and their officers by permitting the import of these allegedly infringing goods are permitting the import of prohibited goods seemingly involves that each and all are guilty of offences against section 304 of the Act of 1952. It is indeed a curious argument which involves that the commissioners and their officers performing their statutory duty of collecting duty, which in the circumstances of these cases rarely if ever involves them acquiring actual or constructive possession of the goods, should simultaneously when performing that duty be guilty of a serious criminal offence.

As to the allegation of aiding and abetting, it is of the essence of aiding and abetting that the offender in some way should knowingly further the principal offender in his criminal activities. A person cannot be convicted of aiding and abetting if he does not know of the essential matters which constitute the offence by the principal offender. I again ask: are the commissioners to investigate every consignment and each patent? Though I agree with Mr. Walton that in the present case it is unlikely to be so, any patent may be open to challenge as invalid. The particular goods imported may in fact have been licensed. They may in fact not infringe the patent for they may be of different chemical composition even though wrongly described as furazolidone.

Nor can I accept the argument that by levying duty upon imported goods in pursuance of their statutory duty so to do, the commissioners are infringing or are aiding and abetting any infringement of the patents. They are not thereby participating in the profits of the invention. The importer by importing incurs by statute a liability to pay duty to the Crown. As Buckley L.J. has said, he incurs a personal obligation and a debt to the Crown, independent of all questions of patents.

I would only add on this branch of the case that the decision of this court in *Nobel's Explosives Co.* v. *Jones, Scott & Co.*, 17 Ch.D. 721, approved by the House of Lords, 8 App.Cas. 5, is inconsistent with Mr. Walton's submissions: see especially the judgment of James L.J., 17 Ch.D. 721, 741–743 and the speeches of Lord Selborne L.C. and of Lord Blackburn, 8 App.Cas. 5, 10–12. I therefore unhesitatingly reject the plaintiffs' alternative claim in their cross-notice to support the judge's judgment on the ground, rejected by the judge, that the commissioners have infringed their patents. If the claim for discovery is to succeed it must succeed in its own right and independently of any question of infringement.

Mr. Walton claimed that even in 1972 there was a cause of action for what has sometimes been called "mere discovery." He accepted that the circumstances when such an action could be brought were very rare because, as he put it, the necessary facts rarely combine together to justify the bringing of such an action. Here he claimed all the necessary facts to be present and thus that the plaintiffs' present action could properly be maintained. The first prerequisite was that a plain and manifest wrong had been done to the plaintiffs; the second, that the plaintiffs did not know who were the authors of their misfortune or whom to sue; third, that the defendants in the action for discovery must be more than what has been called in some of the cases "a mere witness"—he must have an interest in the proceedings; the fourth, that it must be in everyone's interest that justice should be done; the fifth, that the defendants in the intended action for discovery must know the name of the person or persons whom the plaintiffs wished to sue; and the sixth, that the plaintiffs had no alternative means of obtaining that name or those names.

The judge [1972] Ch. 566, 583 clearly accepted the existence of what might be called the basic rule, that there is no independent action for discovery against a party against whom no reasonable cause of action existed or who was in the position of a mere witness. But he also accepted from Mr. Walton a submission based on cases such as *Orr* v. *Diaper*, 4 Ch.D. 92; 25 W.R. 23 and *Upmann* v. *Elkan*, L.R. 12 Eq. 140 that the rule was not invariable and that those cases supported the existence of an exception (seemingly at least in cases of alleged infringement of patents, copyrights and trade marks, if in no others) where the facts of which discovery was sought could be said to be relevant to an issue in the action which it was desired to bring once the essential facts had been elicited by the process of discovery. I can readily see the attraction of this view where a plaintiff has been granted a monopoly and yet is deprived by lack of essential knowledge possessed by another of the full benefits of that monopoly. But it is not easy to see the logical reason why if the general rule exists, as the judge accepted that it did exist, the suggested

exception should be a limited exception operating only in favour of monopolists such as the plaintiffs. It is true that proof of the existence of such a limited exception will suffice the present plaintiffs. But if such an exception should be made for them, others, in fields far removed from patent, copyright or trade mark law, may equally seek to claim that the interests of justice in their cases too demand the right to obtain information in the possession of third parties who are unwilling to disclose it. If this be correct it is surprising that no case exists in the books where a litigant or indeed an authority charged with law enforcement has sought this means of supplying deficiencies of proof in civil or indeed in criminal proceedings.

I therefore turn to consider whether authority compels acceptance of Mr. Walton's main submission, for if it be right I see no logic in confining the exception for which he contends to cases of alleged infringement of patents, copyright or trade marks, though for obvious reasons he did not seek to suggest that the exception was of any wider application.

Buckley L.J. has related the facts in *Upmann* v. *Elkan*, L.R. 12 Eq. 140 and I need not repeat them. There are two important facts to be observed. First, the defendants Elkan were forwarding agents to whom were entrusted by goods owners the business of receiving, forwarding and delivering goods. Secondly, the defendants St. Katharine's Dock Co. had physical possession of the infringing cigars, holding them to Elkan's order. Thus the dock company as bailees could not lawfully dispose of the goods without the instructions and authority of their bailors, Elkan. Together these two defendants could put these infringing cigars into circulation and thus damage the plaintiffs' rights deriving from their trade marks. The common law courts could not at that date assist for there was no injury to the plaintiffs' title to or right to possession of the goods for they had none. But equity would and did intervene to prevent injury to the plaintiffs' trade marks by stopping persons such as the defendants, who were in a position to injure those trade marks by using their ability as bailors and bailees of the infringing goods to put them into circulation to the detriment of the plaintiffs' rights of which the defendants had been put upon notice, from so doing. The defendants in that case were willing to give the necessary discovery in the action showing how the infringing cigars had come into their respective possession and control. The plaintiffs' action was not an action for discovery only. It was also initially an action for an injunction which was obtained in the first instance. I find nothing in the judgments of Lord Romilly M.R. at first instance and of Lord Hatherley L.C. on appeal supporting the view that the action was one for discovery only. It quite plainly was not.

The earlier decision of Lord Romilly M.R. in *Hunt* v. *Maniere*, 34 Beav. 157 was concerned with spurious Veuve Cliquot champagne and is similarly explicable. The plaintiffs were the warehousemen. The defendant was the indorsee of the dock warrants issued by the plaintiffs. The plaintiffs had been given notice by Veuve Cliquot of the alleged infringement of their rights. They were also sued at common law by the defendant who as the bailor of the champagne had claimed delivery of the champagne from the plaintiffs as his bailees. The common law courts at that date would have been bound to give effect to the defendant's

claim. So the plaintiffs successfully sought to restrain the defendant's action at common law and succeeded in so doing since they were in peril of proceedings in equity by Veuve Cliquot if once the plaintiffs knowingly put infringing goods into circulation.

If regard be had only to the report of *Orr* v. *Diaper* in 4 Ch.D. 92, some support can be found for Mr. Walton's basic proposition. The judge was referred only to that single report, from which it might be deduced that the contention of the defendants that their demurrer should be upheld on the ground that the action was one for discovery only, had been overruled. But the industry of counsel during the argument of this appeal brought to light no less than three other reports of this case, one in 25 W.R. 23, a second in 35 L.T. 468, and a third (1877) 46 L.J.Ch. 41. It is clear from the perusal of the report in 25 W.R. that the report in the Law Reports is regrettably defective, quite apart from the fact that the headnote is inaccurate in describing the defendants as shipowners which on the facts stated they manifestly were not. They were either shippers or forwarding agents or both.

Buckley L.J. has quoted the relevant passages from the report in 25 W.R. and in particular the citation by counsel for the defence from *Mitford on Pleading*, 4th ed. (1827), p. 191. Hall V.-C. clearly accepted that a plaintiff was not entitled to sue a defendant merely for discovery. But he regarded the case as one in which the plaintiffs were entitled to seek substantive relief from the defendants. The reason for this conclusion is not far to seek when one looks at the facts stated in the fuller reports. The defendants had shipped in the past and were still shipping goods which infringed the plaintiffs' trade marks. The defendants were on notice of that fact. They as such shippers or forwarding agents were in a position to control the disposal of these infringing goods, disposal of which would damage the plaintiffs' rights. This the court was not prepared to allow. As I read the decision in *Orr* v. *Diaper*, 25 W.R. 23 it is an illustration of the general rule, not of any exception to it. It is entirely consistent with *Upmann* v. *Elkan*, L.R. 12 Eq. 140. The case being after the passing of the Judicature Acts, the procedural complications which arose in *Hunt* v. *Maniere*, 34 Beav. 157 were happily no more—hence the statement of Hall V.-C., 25 W.R. 23, 25: "The plaintiffs do show a right to sue the defendants in some other court, which expression, since the change made by the Judicature Acts, must mean this court, in some other proceeding."

I therefore agree that *Orr* v. *Diaper* is no support for Mr. Walton's main submission. On the contrary, properly understood it is against that submission.

The principle to be derived from these cases and others referred to during the argument is not that there is any exception in favour of the proprietors of patents, trade marks and copyrights to the general rule that the courts will not permit an action for discovery unlinked with any sustainable claim for substantive relief, even where the avowed object of such an action is to obtain discovery of the names of alleged infringers. The true principle is that stated by Buckley L.J. towards the end of his judgment. I respectfully agree with and adopt that statement of principle. Since the commissioners are not and never have been in possession of this imported furazolidone and their only powers of control are those accorded to them

by statute for the purpose of fulfilling the statutory obligation laid upon them by Parliament to levy duty upon these goods when imported, the commissioners do not come within this principle. At no time could the plaintiffs ever obtain substantive relief against the commissioners. Accordingly, in my judgment, this is an action for " mere discovery " within the meaning given to that phrase in the authorities. On the authorities such an action clearly cannot be permitted. Accordingly, I find myself unable to agree with the judge. I would allow the appeal and dismiss the summons for inspection. It was agreed that the effect of dismissing the summons was to dismiss the action as if the application had been an application to strike out the action as disclosing no cause of action, though as a matter of convenience no summons to this effect was ever issued.

This conclusion makes it unnecessary to deal with the other issues, namely, whether the balance of public interest is in favour of withholding inspection on grounds of confidentiality attaching to information disclosed to the defendants by the importers and also of avoiding want of candour in respect of information supplied by them to the defendants. But since both these matters were fully argued during the appeal, I think it right to say that I, like Buckley L.J., entirely agree with what has fallen from Lord Denning M.R. on these issues and I have nothing to add to that part of my Lord's judgment. I would allow the appeal accordingly and dismiss the summons.

Appeal allowed with costs.
Action dismissed with costs.
Certificate for three counsel refused.
Leave to appeal refused.

Solicitors: *Solicitor, Commissioners of Customs and Excise; Allen & Overy.*

C. N.

November 7. The Appeal Committee of the House of Lords (Lord Morris of Borth-y-Gest, Lord Simon of Glaisdale and Lord Cross of Chelsea) allowed a petition by the plaintiffs for leave to appeal.

Anthony Walton Q.C., Robin Jacob and *Peter Prescott* for the appellants.

[LORD REID said that their Lordships desired first to hear argument on whether the appellants could establish a prima facie right to the discovery sought.]

The appellants seek from the commissioners and seek only the names of the importers into this country of the chemical compound furazolidone, of which the appellants are the owners and licensees of the patent relating thereto. They seek discovery of no documents. This is the distinction between the present case and numerous cases on discovery. The reported decisions on discovery merely afford guidance. It is conceded that as a general rule one cannot obtain discovery from a witness. The question arises: are there exceptions to that rule? There is a duty in certain circumstances on any member of the public who has knowledge of the commission of a tort to communicate such information that he may possess to

any person who has suffered damage in consequence of its commission. If asked, he has a duty to disclose. The rules of discovery were invented by equity for the purpose of furthering the due administration of justice: see *Holdsworth's History of English Law*, 3rd ed., vol. 5 (1947), pp. 281, 282, 332, n. 8.

The respondents are liable to give the limited discovery sought in the present circumstances, namely, the identity of the parties proper to be sued, because they would before the Judicature Acts have been liable to give discovery thereof in a suit by bill for discovery. The Court of Appeal wrongly dealt with this issue by applying the mere witness rule.

The respondents contended that there were only "two animals," mere witnesses and infringers, and that there was no "third animal." This is plainly incorrect and entirely overlooks the protective jurisdiction of equity. The appellants rely on the statement of principle by Buckley L.J., ante, pp. 145H—146B, citing *Upmann* v. *Forester*, 24 Ch.D. 231.

The first and principal case on which the appellants rely to characterise the defendant as someone other than an infringer is *Orr* v. *Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23. That case has been reported in several reports, and the Court of Appeal had before them the report in the Weekly Reporter which they preferred as being fuller than the authorised Law Report which was the only report before Graham J. Their Lordships held that this fuller report threw a further light on the decision to that thrown by the Law Report, but they insufficiently analysed that further light.

The facts in that case were that the defendants were shippers, that is, carriers who were acting on behalf of unknown exporters. The plaintiffs discovered that spuriously marked goods were being exported from the United Kingdom to their foreign markets, and that they had been shipped by the defendants. They accordingly sought the names of the exporters on whose behalf they were shipped. That is why in that case the names sought were those of the exporters rather than the importers. It is of importance in understanding the nature of the decision, however reported, that all the shipments in respect of which discovery was sought were shipments which were past (some of them by as much as two years) at the date of the proceedings. It follows that the defendants had parted (or at the lowest could freely part, since no injunction was sought) with all the goods in respect of which discovery was sought. No doubt an injunction could have been obtained in respect of any future shipments, and then the true owners would have had to come forward and reveal themselves if they wanted their goods. But the discovery sought of past shipments could not have been relevant to an injunction to restrain future ones.

Against the background of the whole case it is plain that Hall V.-C. can have held only one of two things, either sufficient for the appellants' purpose, namely, either (i) it is possible to have discovery against persons against whom no suit for any relief (other than discovery) could be brought (this is the ratio that appears from the Law Report which is the revised report and the one most likely to reflect the true views of the judge), or (ii) that it is possible to have discovery against persons in the position of the defendants, because against them some relief other than relief in respect

of infringement could be obtained, even in the case where no such other relief was prayed. A

The Court of Appeal rejected the first of the two possible views of Hall V.-C. In so doing, they misunderstood the effect of *Mitford on Pleadings*, 4th ed. (1827), p. 191, of which they considered only an extract devoid of its context. All *Mitford* is stating in the part of his treatise relied on against the appellants (Part V) is that no action for discovery can be brought where the information to be gained is irrelevant for the purposes B of an actual or intended litigation. Even where he deals with the "mere witness" rule (Part III) he is only stating that no discovery can be sought of evidence which would be inadmissible. The Court of Appeal moreover failed to realise that the appellant should also succeed on the alternative view of Hall V.-C.'s decision, since they failed to appreciate the implications with respect to the respondents of the cause of action they found to exist against Diaper. In effect, the Court of Appeal held that there was C a "third animal" who, not being himself an infringer was nevertheless liable to equitable relief, explaining *Orr* v. *Diaper* on this basis but failing to appreciate that this cause of action also existed against the respondents. In this action the appellants rely on the observations of Buckley L.J. quoted above. In the present case the Court of Appeal did not follow this principle.

Where a person is not a party to proceedings and discovery is required D against him, he is made a respondent to the bill of discovery and entitled to his costs: see *Beames on Costs*, 2nd ed. (1840), section IV, p. 17, and *Bray on Discovery* (1885), p. 618. The importance of this is to answer the query "why should a person be put to expense in answering proceedings of this kind?" The answer is that he is not. It is akin to the position of witnesses who are called on subpoena who also obtain their E costs.

The reasons given in the old cases for holding that one cannot obtain discovery against a mere witness because for example, if evidence were obtained before the trial a counter-story might be concocted, and because a bill of discovery put a stay to proceedings at law, do not apply to where all that is required are the names of tortfeasors.

It is conceded that *Orr* v. *Diaper*, 4 Ch.D. 92 has not been commented F upon in any subsequent reported case, but it is pertinent to observe that the standard textbooks support the appellant's proposition: see *Story's Equity Jurisprudence*, 2nd Engl. ed. (1892), p. 1011, para. 1483 and paras. 1486, 1499, 1500, 1501; *Bray on Discovery*, pp. 609, 612; *Halsbury's Laws of England*, 3rd ed., vol. 12 (1955), p. 10, para. 11; *Ross on Discovery* (1912), pp. 10, 11; *Sichel & Chance, Interrogatories and Discovery* (1883), G p. 180; *Snell's Equity*, 1st ed. (1874), p. 516.

As to the authorities, in *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140 there were two defendants, Messrs. Elkan who were forwarding agents, and the London & St. Katharine's Dock Company who were warehousemen in possession of the spuriously marked imported goods. Neither of these parties was guilty of infringement and neither was held guilty of H infringement. Yet Lord Romilly M.R. said, at p. 145, that after such an innocent person was given notice of the fact that the goods bore spurious marks and was requested to give all information respecting them: "It is

his duty at once to give all the information required," and on appeal, 7 Ch.App. 130, 133, Lord Hatherley L.C. said in relation to Messrs. Elkan: "I hold them to be innocent of any part of this contrivance on the part of the consignor; but still it was their duty, from the first moment, to give all the information they possibly could." Lord Hatherley L.C.'s observation is entirely consistent with *Orr* v. *Diaper*, 4 Ch.D. 92. Further, Lord Romilly M.R.'s statement shows that the innocence or guilt of the "third animal" is not a relevant factor. Moreover, *Hunt* v. *Maniere* (1864) 34 Beav. 157 shows that when a person has physical possession of goods whose dissemination would infringe another's patent or trade mark, the proprietor of the patent or mark has a right to proceed in equity to prevent the person in whose custody the goods in question are from parting with them, and that the custodian of the goods is protected from actions at law by the rightful owners, whose rights are thus overriden. See also the observations of Stirling J. in *Washburn and Moen Manufacturing Co.* v. *Cunard Steamship Co.* (1889) 6 R.P.C. 398 on the practice of the old Court of Chancery in the exercise of its protective jurisdiction.

There is a line of English cases which illustrates the proposition that the obtaining of the name of a prospective party to proceedings is an exception to the rule that discovery cannot be obtained against a witness: *Heathcote* v. *Fleete* (1702) 2 Vern. 442; *Morse* v. *Buckworth* (1703) 2 Vern. 443; *Moodalay* v. *Morton* (1785) 1 Bro.C.C. 469; *Angel* v. *Angel* (1822) 1 L.J.O.S.Ch. 6; *The Murillo* (1873) 28 L.T. 374; *Tetley* v. *Easton* (1856) 18 C.B. 643; *Bovill* v. *Cowan* (1867) 15 W.R. 608; *Hancocks & Co.* v. *Lablache* (1878) 3 C.P.D. 197; *Spokes* v. *Grosvenor and West End Railway Terminus Hotel Co. Ltd.* [1897] 2 Q.B. 124; *Hillman's Airways Ltd.* v. *Société Anonyme d'Éditions Aéronautiques Internationales* [1934] 2 K.B. 356.

The Law of Scotland. By means of the accessory action of exhibitio ad probandum it has long been possible to enforce production of documents in the hands of third parties where they are required in evidence in a principal action which it is desired to bring: see *Maclaren, Court of Session Practice* (1861) 644. But it has been largely superseded by the modern procedure of motion for diligence against havers, now available under the Rules of the Court of Session, II, 95–97. The haver need not himself be liable in any way. Examples of such third party havers include: *Leven* v. *Board of Excise*, March 3, 1814, F.C.; *Vass* v. *Board of Customs*, Feb. 20, 1818, F.C.; *McDade* v. *Glasgow Corporation*, 1966 S.L.T. (Notes) 4.

Under Scots law, therefore, a plaintiff is entitled to discovery of names against persons participating in infringement of trade marks, patents, passing off and copyright. This proposition covers innocent participation.

South African law. This is based on the English law of discovery, although as pointed out by Bale C.J. in *Colonial Government* v. *Tatham* (1902) 23 Natal L.R. 153 the latter was itself probably adapted from the Roman law. The applicants must have "a bona fide claim against some person or persons whose names he seeks to discover, and whose name can be supplied by the respondent, and that he has no other appropriate remedy" (p. 157). See also *Stuart* v. *Ismail*, 1942 A.D. 327. The South African cases are put on the basis that it would be a denial of justice not to grant the relief sought.

American Law. A number of cases have held that "the jurisdiction of this court to entertain a bill in equity for discovery . . . will still be exercised even in aid of an action at law, if the plaintiff cannot without it find out whom he should sue": *per* Judge Learned Hand in *Pressed Steel Car Co.* v. *Union Pacific Railway Co.* (1917) 240 F. 135, 136. See also the observations of Cardozo J. in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.* (1933) 53 S.Ct. 736. For examples of an application of the principle, see *Brown* v. *McDonald* (1905) 133 F. 897 and *Coca-Cola Co.* v. *City of Atlanta* (1922) 110 S.E. 730.

Position of the Customs. It is common ground that the Customs never had possession of the infringing goods in this case. The fact that even if they had had possession, an injunction could not have been granted against them, they being the Crown, ought not to make any difference to the exercise of the jurisdiction to grant discovery, if they had sufficient control to bring them within the scope of the protective equitable jurisdiction. They plainly did have such control.

The powers of the Customs derive in the first instance from the Customs and Excise Act 1952 and Regulations made thereunder. When goods are imported, they are automatically by operation of law placed into what the Act describes as "Customs charge." This term is not defined, but under section 294 (5) "If any imported goods . . . are without the authority of the proper officer removed from customs charge before they have been examined, those goods shall be liable to forfeiture." It is also an offence to remove any imported goods from Customs charge before they have been examined. In the case of goods imported by sea, they may not be "unloaded, landed or removed from the place of landing or from a transit shed . . . without the authority of the proper officer": see the Ship's Report, Importation and Exportation by Sea Regulations 1965, S.I. No. 1993, regulation 6. Other relevant provisions are sections 22, 26, 33, 34, 38, 44 and 70.

In the light of the above, it is plain that the charge that the Customs have over goods entering into this country amounts to that control which brings the principle in *Upmann* v. *Elkan*, L.R. 12 Eq. 140 into operation.

There is no statutory right of an importer to receive a clearance through the Customs. Any duty on the part of the Customs, if satisfied that the law has been complied with, to grant a clearance comes from the common law. An arbitrary refusal, or one based on unjustifiable grounds would be a denial of that right: see *Zachariassen* v. *The Commonwealth* (1917) 24 C.L.R. 166. In the case of importation of infringing goods, however, their refusal to allow the goods to enter would not be arbitrary, nor could the importers obtain any relief in court in respect of such refusal in order to further their wrongdoing.

The Court of Appeal erred in viewing the matter in the light of the assumption that the Customs were being asked to assume to themselves a positive power to stop the importation, rather than being asked negatively to refuse unreasonably to exercise their powers to allow the importation. The Court of Appeal also erred in holding that the Customs' powers were conferred only for the purpose of collecting revenue and did not exist for any other purpose.

In fine, the cases on discovery do not support the decision of the Court

of Appeal. It is sufficient if the plaintiff can show that the Customs are in some way mixed up with the goods and it is not necessary for the plaintiff to show that he must be able to sue the Customs before he can establish any right to ask the court to exercise its discretion in his favour for relief.

If it be said that the Customs are using their powers for the purpose not contemplated by the statute, then reliance is placed on the observations of Lord Watson in *Metropolitan Asylum District* v. *Hill* (1881) 6 App.Cas. 193, 213.

Robin Jacob followed.

Peter Oliver Q.C., Peter Gibson and *W. Bruce Spalding* for the respondent commissioners. (1) This is an action solely for discovery and must be approached in the same way as, before 1873, the Court of Chancery would have approached a bill for discovery. (2) Discovery is an example of the equitable auxiliary jurisdiction and consists of the extraction on oath, whether by answering interrogatories or identifying and producing documents, of information material to a pending (or, in rare cases, an anticipated) proceeding. (3) In general, it is not and never has been available against anyone except a party to the pending or anticipated proceedings and it has always been held to be improper to join as a party a person against whom nothing can be alleged except that he is in possession of the relevant documents or information simply for the purpose of obtaining discovery against him, even in cases where that person may have an indirect financial or other interest in the proceedings. (4) Exceptions to this rule have been made in the case of: (i) officers or members of corporations and similar bodies in actions contemplated or pending against the body; (ii) attorneys alleged to be implicated in fraudulent transactions for improperly detaining documents; (iii) auctioneers, agents for sale and possibly other agents, in actions against their principals; (iv) arbitrators in cases where it is sought to satisfy an award on the ground of fraud. In these cases, discovery has been ordered although the officer, attorney, agent or arbitrator is not himself and (in some cases) cannot properly be a party to the proceedings. (5) A further exception arises where the person against whom the discovery is sought has a direct interest in the pending or contemplated action, and for this purpose a "direct interest" means either (i) that a decree can be made against him in respect of some part which he is playing or has played in the matters in issue in the pending or contemplated proceedings or (ii) that any decree made is going directly to affect him so that he could properly be joined as a party: *e.g.*, an administration order will affect directly beneficiaries under a trust; an order in respect of a first mortgage may affect a second mortgagee. (6) There is no further relevant exception. In particular it is not and never has been sufficient, in order for A to obtain discovery from B, for him to allege nothing more than that he needs certain information to enable him to commence or proceed with an action, that B has that information, and that he cannot get that information from any other source.

The respondents in this case do not fall within any relevant exception. In particular, nothing that they do, have done, or can lawfully do, renders them, in relation to any matter with which the appellants' proposed proceedings are concerned, liable to a decree, nor would anything that they do

have done, or can lawfully do, render them liable to a decree independently of the provisions of the Crown Proceedings Act 1947. A

In so far as any duty to give information arises as a matter of law from the possession or control of goods and in so far as such duty is enforceable by an action for discovery simpliciter, the respondents do not have and never have had any such control as is capable of giving rise to such duty.

Discovery, like all equitable remedies, is a discretionary remedy, but that does not mean that it is an arbitrary remedy: and over the past 300 years B the courts have resolved distinct and clear rules as to the circumstances in which orders for interrogatories or production and inspection of documents can be made, including what has been referred to as the "mere witness" rule. There were two ways in which it could be obtained before the Judicature Act. One was by a bill in equity praying for relief; in which event one would get as part of the process that discovery which was relevant to the relief which was claimed. The other was by a bill, referred to C as a bill of discovery, not claiming any relief but asking for the defendant to the bill to answer certain interrogatories, disclose documents or both.

By the mid-18th century, the courts had evolved the rule that the procedure could not be used to interrogate before trial (either by making an additional defendant to a bill for relief or by launching a bill for discovery against him) one who had no interest in the suit, but who was a D mere witness.

The rule was applied as early as 1749 in *Plummer* v. *May* (1750) 1 Ves.Sen. 426 where there is found a clear differentiation drawn between a mere witness and a party interested. A number of exceptions were made —perhaps not wholly logically. One was the officer or book-keeper of a corporation—an exception subsequently extended to a member. Others were attorneys, arbitrators and agents. The agency exception seems to E have been confined at first to auctioneers holding deposits, but later became extended to other agents: see *Fenton* v. *Hughes* (1802) 7 Ves.Jun. 287 where there is a rationalisation of *Plummer* v. *May*.

The rule was accepted by the appellants, but it is claimed (in their case) that it only applies where the plaintiff has his action and not when he has not got his action, but desires the information to enable him to F start it. That this clearly is not or was not the law appears from Lord Eldon L.C.'s decision in *Mayor and Commonalty and Citizens of London* v. *Levy* (1803) 8 Ves.Jun. 398.

In paragraph 95 of the appellants' printed case, it is said that the rule was excluded whenever the defendant had an interest in the proposed action sufficient to be recognised by equity as excluding the rule. This is true so far as it goes, but it tells us nothing at all about the type of interest G recognised. It is evident from *Fenton* v. *Hughes*, 7 Ves.Jun. 287 that a mere interest in the outcome, even though the action be brought by the plaintiff at law as agent for the defendant in equity, is not sufficient. This was recognised and adopted by this House in *Queen of Portugal* v. *Glyn* (1840) 7 Cl. & F. 466 where Lord Cottenham L.C. reviews the authorities and emphasises the rule. This case is of particular importance, not only because H it is a decision of this House, but because it decisively rejected once and for all the very principle for which the appellants contend—namely, that there is some general equity to obtain discovery whenever the needs of

justice require it. The House rejected the observations of Lord Abinger C.B. in the court below. There was a clear recognition by this House of the mere witness rule. The rule was stated by Wickens V.-C., in *Dixon* v. *Enoch*, L.R. 13 Eq. 394, 399 in 1872 as being that a bill "can only be maintained against a person who is, or is to be, a party to the record at law, and not against a witness whose evidence may go to charge some third person." See also *Burchard* v. *MacFarlane* [1891] 2 Q.B. 241 where it is restated, thus showing that it survived the Judicature Act.

The appellants, however, contend that there is a further exception to the rule beyond those recognised exceptions in *Fenton* v. *Hughes*, 7 Ves.Jun. 287. But the submission rests in the ultimate analysis on *Orr* v. *Diaper*, 4 Ch.D. 92 and nothing but *Orr* v. *Diaper*.

The principles are conveniently summarised in *Bray on Discovery*. It is conceded that *Orr* v. *Diaper* is treated by *Bray* as an additional exception, but this is wrong. It was not an additional exception at all. It was a case where an agent, who was himself actively engaged in infringing the plaintiff's rights by participating with knowledge in passing off goods as those of the plaintiffs, was properly stopped by injunction and made to disclose, as part of the relevant discovery in aid of that cause of action, the details of his wrongdoing. For the comparable position of one who has in his hands goods bearing a false trade mark: see *Upmann* v. *Forester*, 24 Ch.D. 231.

In effect, three propositions are based on *Orr* v. *Diaper*, 4 Ch.D. 92. First, it is said that Diaper was not a person who had any "interest" in the proposed action in the sense that a decree could be made against him. An alternative way of putting it is that, even if there was an interest (in the sense of a liability to a decree arising out of the matter for which the proposed action was concerned), this was not treated by Hall V.-C. as of any materiality. Therefore, it is said, this is a case where the ratio of the decision was that Diaper was not a mere witness because (i) Orr did not know who the consignors were; (ii) Diaper did know; (iii) Orr could not obtain the information he needed from anywhere else. The proposition is sought to be supported thus: it is true, it is said, that Diaper might (consistently with the authorities) have been enjoined under what has been referred to as "the protective jurisdiction of equity" from parting with the goods: and, in that context, the discovery of the names of the consignors of those goods which had been shipped after notice might be material. But it is said the discovery actually ordered was discovery of the particulars of the consignments right back to 1874 when the defendants were wholly innocent. No cause of action could be established in relation to that period. Therefore, what was in the Vice-Chancellor's mind was not cause of action at all. This, it is said, is demonstrated by the reference to *Mitford on Pleading*. What counsel and the judge were discussing was materiality, not cause of action.

There is an unproven assumption underlying this, namely, that the discovery ordered did go back to 1874. The whole of the proposition, however, even on that assumption, is based upon two complete fallacies. The first is that the case was one in which the only relief claimable against the defendants was an injunction under the "protective jurisdiction of equity" (whatever that may mean—if it means anything beyond the right of equity

to injunct a wrongdoer or a threatening or intending wrongdoer). This was a case of actual infringement by the defendants for two reasons: (a) This was a demurrer and it therefore admitted every allegation in the statement of claim. By admitting this the defendants admitted that they themselves had been deliberately assisting in the passing off of spurious goods, that is, that they were actual wrongdoers. Whether they were acting as principals or agents is wholly immaterial. (b) Secondly, quite apart from knowledge, the fraudulent goods had been exported by the defendants. The decision in *Upmann* v. *Forester*, 24 Ch.D. 231 shows that guilt or innocence is immaterial. A person may be perfectly innocent, but he can still be sued for an injunction to restrain passing off. The defendant in *Orr* v. *Diaper*, 4 Ch.D. 92 had not only rendered himself liable to an injunction, but, by admission, to an account of profits or damages, the usual relief in a passing off action where knowledge is established. The discovery back to 1874 was clearly material to this claim if the plaintiff had sought to pursue it. Here is a man who says: "I admit for the past two years I have been acting as agent in helping another person to pass off his goods as yours and have caused you damage." It is self-evident that the identity of his principal or principals is material: but in any event the courts are not too tender of the susceptibilities of wrongdoers, nor when discovery is a matter of indifference to the defendant will the court weigh in golden scales the question of materiality or immateriality: see *Carver* v. *Pinto Leite* (1871) 7 Ch.App. 90.

The second fallacy is that the Vice-Chancellor was considering only the question of materiality. Whatever the passage in *Mitford* was directed to by its author, both counsel and judge were quite clearly considering it in the context of whether there was any claim for relief which could be made against the defendant, and the interjection of the Vice-Chancellor in the report in the Law Reports shows that he was not prepared to allow the case to go off on the point that the plaintiffs did not say in their statement of claim that they were going to join the defendant as parties to the proposed action. The Court of Appeal's analysis of this case was entirely correct, once it is appreciated that it was a case of a wrongdoer caught red-handed and knowingly in the act of wrongdoing (which was what was admitted for the purposes of the demurrer); it then becomes apparent that it is an example of, and not an exception from, the rule. True, *Bray* treats *Orr* v. *Diaper*, 4 Ch.D. 92 as if it were an exception, but in so doing he was wrong. In the hundred-odd years which have passed since *Orr* v. *Diaper* there does not appear to be any recorded case in England of a claim like the present one having been made.

As to the reconciliation of *Orr* v. *Diaper* with *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466, *Queen of Portugal* v. *Glyn* was concerned with the bill of discovery, not a bill of relief. In the case of a bill of relief, one could obtain discovery from a defendant against whom one claimed relief and also against a person who though not joined for relief, was "interested" in the sense that a decree could be made against him. In dealing with the pure bill of discovery, one must either have a pending proceeding in which the defendant to the bill is a party or one must aver that one intends to bring an action against him. But in a bill of relief, one can join as defendant for discovery a person who is "interested in the suit"

in the sense that a decree can be made against him. Now all this is swept away by the Judicature Acts, and in *Orr* v. *Diaper*, Hall V.-C. is applying not the rule applicable to a bill of discovery, but the rule applicable to a bill of relief, where the test is: can the court make a decree?

It is accepted that *Orr* v. *Diaper*, 4 Ch.D. 92 went further than was warranted by previous cases in the sense that it was the first and only case in which discovery was accorded to a person against whom the plaintiff disclaimed the intention of seeking any relief either at law or in equity. The interesting question is why it went further. There are three possible explanations: (1) Hall V.-C. was simply wrong; (2) the rule had developed and changed since 1840 when *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466 was decided; (3) the Vice-Chancellor was applying a totally different principle. The difficulty in relation to both situations (2) and (3) is that there is no warrant from the reports for saying that the rule had changed or developed and that Hall V.-C.'s judgment is based on the predicate that he was in fact applying the rule. The inference is therefore that he was, if not wrong, at least a pioneer and the reason why he became a pioneer was that he fell into the self-same error as did Lord Wynford in *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466 in failing to make the distinction between a bill of relief and a bill of discovery. The distinction was clearly drawn in the cases which have been referred to. The distinction is clearly drawn in *Bray on Discovery*: see pp. 19, 20, 40. A litigant or prospective litigant might want discovery in aid of an action at law or of relief in equity. If the former, he had to bring a bill of discovery simpliciter; and to support it, he had to show not that the defendant was "mixed up" in the thing, but that the defendant actually was a party or intended to be a party to the record at law. Otherwise, he was met with the answer that he could obtain his evidence in the ordinary way. If what he desired was relief in equity, he brought a bill of relief and joined the person from whom he sought discovery as a defendant to the bill. The question was, then, was he properly joined: had he a sufficient interest in the suit to keep him there: and "interest" came to be defined in terms of the possibility of a decree being made (apart from a decree for discovery merely). What he could not do was to join a defendant for the purpose of discovery for some suit at law to which he did not intend to make him a party. With this in mind, it is interesting to peruse the report of the argument in *Orr* v. *Diaper*, to be found in 25 W.R. 23, 24. The logic of Hall V.-C.'s position is that where one has detected one malefactor who knows the name of his confederate or associate, one does not let him resort to the rather technical rule relating to discovery before the Judicature Act in order to escape giving the name of his confederate. But that is no ground for extending the notion beyond the rule which equity applied even in the case for a bill of relief.

The two further propositions based on *Orr* v. *Diaper*, 4 Ch.D. 92 are these: (1) if, the appellants say, they are wrong about the necessity to show a claim for relief against the person from whom information is sought, then they contend that there is such a claim in the instant case against the respondents because wherever a civil wrong is being committed and a third person has a power to prevent it being committed or perfected, equity will interfere in the course of its "protective jurisdiction," at any

rate where the wrong is concerned with goods and the goods are capable of being held back by the third person concerned exercising a control which he has in this situation. (2) either cumulatively or alternatively, it is contended there is a general duty on one who has controlling powers over goods or who is, as it is put, "mixed up" with them to give all information about the goods to one who claims that their release or delivery or further transmission would constitute an infringement of his private rights. The authority for these two propositions comes from three cases: first, *Hunt* v. *Maniere*, 34 Beav. 157, the case of the wharfinger. There is nothing very special about this case. All that it decides is that a person who is in possession of goods as an agent for another and who may subject himself to action if he delivers them up to his principal for purposes which he knows to be tortious has a defence in equity to an action in detinue by the principal if he declines to deliver them. Secondly, *Upmann* v. *Elkan*, L.R. 12 Eq. 140 on which a great deal has been made to turn, but which is in essence a very simple case. It has nothing whatever to do with discovery and the only questions were: (i) should the court grant an injunction in the circumstances; (ii) the defendants not having opposed the claim, but submitted to act as the court directed, whether they ought properly be made to pay the costs. It is in this context of this that Lord Romilly's judgment has to be read. The case went to appeal (7 Ch.App. 130) where one finds the Lord Chancellor emphasising in terms that the defendants, albeit perhaps unwittingly, were wrongdoers against whom the plaintiffs had a right to an injunction. Accordingly, all that can be deduced from this decision is that if one finds a man actively and voluntarily engaged in importing spurious goods, one can obtain an injunction against him as a wrongdoer and if he wants to avoid that result and avoid paying the costs, he must give the plaintiff information which will enable him to put a stop to the matters complained of before the bill is filed. It does not establish any right of action or duty arising simply from the fact of the defendant having a power to stop the goods from proceeding further, and certainly it establishes no such duty in the case of the person who has not voluntarily engaged in the transaction. Thirdly, *Washburn and Moen Manufacturing Co.* v. *Cunard Steamship Co.*, 6 R.P.C. 398, a clear case of infringement by an agent who had control of the goods in question, which does not assist the appellants, for the respondents are in the same position as were the defendants in *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1882) 8 App.Cas. 5, where it was held that the mere facilitating of the passage of infringing material by lodging documents was not an involvement in the importation which would subject a Customs House agent to an injunction.

If (contrary to the respondents' submissions) there is a duty arising from possession or control of goods, and if equity will interfere to stop the goods against anyone who has possession or control, do the respondents have, in any relevant sense "control" of goods unloaded at a port or airport? What has to be postulated in the context of this particular proposition advanced by the appellants is: (a) that the commissioners have a power which they can lawfully use for the purpose solely of preventing goods from getting into the hands of a consignee; (b) that the respondents have a duty to exercise that power for that purpose; (c) that a court of

A equity can and will issue a decree that will (for effective purposes) result in the exercise of that power.

If the powers conferred by the Customs and Excise Act 1952 be examined, two things become apparent. The first is that the powers conferred at no stage enable the respondents themselves either to take possession of the goods (except in the case of goods liable to forfeiture) or to influence their final destination: and the second is that the powers—all the powers B —are conferred solely for the purpose of the statutory functions of collecting the proper duty or such other functions as may, by statute, be vested in the respondents. [Reference was made to sections 28 and 34 of the Act.] In *Reg.* v. *Lord Leigh* [1897] 1 Q.B. 132 it was held that the police authorities could not use a statutory power conferred upon them for a collateral purpose.

It was said that Buckley L.J. put the appellants' argument in its widest C form. The way it is put in the appellants' printed case is that the mere witness rule applies only where the plaintiff is seeking to obtain evidence. When what is required is simply a sworn statement from the defendant of a name of another person, the rule does not apply. If this be right, it must be because the mere possession of knowledge in circumstances in which the prospective plaintiff does not have it and cannot obtain it from D anywhere else (which is not accepted in the present case) gives rise to a duty in the person having the knowledge to give the information and a right in the injured person not having the knowledge to receive it. This must be so, because courts of law or equity do not interfere merely for convenience. It is a necessary prerequisite to obtaining relief that the plaintiff seeking it should establish a duty in the defendant to accord that relief. The concept of such a duty is not an easy one to envisage in the present E circumstances. Although there is no authority for the proposition in English law, which may be deemed fortunate because the implications are far reaching, the duty, if it exists, must be one which arises regardless of the circumstances in which the information was obtained.

As to the older cases which it is said support the appellants' first proposition and *Bray's* treatment of *Orr* v. *Diaper*, 4 Ch.D. 92 as an additional F exception to the "mere witness" rule, *Moodalay* v. *Morton*, 1 Bro.C.C. 469 is of no assistance. There the plaintiff was seeking to sue the company and was seeking discovery in relation to that suit, that is, it was a bill for discovery against a wrongdoer. The plaintiff knew who had done him wrong: he was merely endeavouring to find out the status of the actual wrongdoers: it is interesting to observe that in both reports of the case it appears that the bill was supported by a distinct allegation G that the company had done wrong—presumably because the pleader thought this a necessary allegation. Accordingly, it is merely an example of the auxiliary jurisdiction of equity at work in aid of an action at law.

Angel v. *Angel*, 1 L.J.O.S.Ch. 6 is of no importance except for its reference to *Moodalay* v. *Morton*. *Heathcote* v. *Fleete*, 2 Vern. 442 and *Morse* v. *Buckworth*, 2 Vern. 443 seem to be merely examples of a well-H known exception to the mere witness rule—(a) the defendants were themselves persons against whom relief was to be sought and (b) they were agents for a wrongdoing principal. *The Murillo*, 28 L.T. 374 depended upon the special rule relating to discovery in the Admiralty Court. *Tetley*

v. *Easton*, 18 C.B. 643 was an example of an action against a wrongdoer. *Bovill* v. *Cowan*, 15 W.R. 608 is of no assistance for there the plaintiff required names from a defendant who was already before the court. *Hancocks & Co.* v. *Lablache*, 3 C.P.D. 197 is even more remote. There is no doubt whatsoever that the defendant was liable. There was a demurrer on the ground of misjoiner. Leave was given to amend by joining the husband, and interrogatories were ordered to enable this to be done. *March* v. *Keith* (1860) 30 L.J.Ch. 127 is simply a decision where the inquiry is as to whether there are other persons, in addition to those already joined, whose interest may be affected by the decree.

The Scottish Cases. Leven v. *Board of Excise*, March 3, 1814, and *Vass* v. *Board of Customs*, Feb. 20, 1818, F.C. were both cases of diligence in an existing action where the question was one of Crown privilege. *McDade* v. *Glasgow Corporation*, 1966 S.L.T. (Notes) 4 was also a case of diligence in an existing action for the production of documents which would, it was hoped, prove that the defendants were (as they were allegedly) the persons responsible for the accident.

The South African Cases. Colonial Government v. *Tatham*, 23 Natal L.R. 153 was the case of an agent for a syndicate, and the court assumed that at the material time he himself was a member and therefore liable on the contract. It is interesting to observe that the Chief Justice thought that there was no difference in principle between discovery of names of parties and any other discovery. *Stuart* v. *Ismail*, 1942 A.D. 327 is an even clearer case. There the person from whom the names were required was himself a defendant in the action.

The United States Cases. Sinclair Refining Co. v. *Jenkins Petroleum Process Co.*, 53 S.Ct. 736 and *Pressed Steel Car Co.* v. *Union Pacific Railway Co.*, 240 F. 135 are relevant simply for their statements of general principle. The respondents concede that *Walker* v. *Pennsylvanian Railway Co.* (1944) 36 A. 2d 597, goes further than any English case and it does so in reliance, at any rate in part, on the older English cases. But the statement at p. 601 shows that the approach of the courts of New Jersey had by 1944 become that a man is not a "mere witness" unless the evidence which he has to give is evidence which can be useful at the trial. That is a gloss for which the English cases give no support at all. In *Brown* v. *McDonald*, 133 F. 897 it is true, there is a reference to *Orr* v. *Diaper*, 4 Ch.D. 92 but merely in the context of there being no pending action; there was a specific finding that the defendants were not mere witnesses. *Coca-Cola Co.* v. *City of Atlanta*, 110 S.E. 730 is plainly distinguishable, for it proceeded on the view that the civil code showed a policy to reveal the property of debtors. In the *Walker* case, 36 A. 2d 597 reliance was placed on *Post* v. *Toledo, Cincinnati and St. Louis Railroad Co.*, 11 N.E.Rep. 540. There there was an action to compel a corporation to disclose the names of its stockholders in order that the plaintiff could institute a suit against the corporation and its stockholders. There is really nothing peculiar about the decision which is in fact in accordance with principle. It is strongly in favour of the respondents. It distinguishes the respondents' position from that of the wharfinger. Further, the court had a full citation of the relevant authorities in that case.

It is plain that there is no general principle that merely because a per-

son has information that discovery can be obtained against him. Such a principle cannot stand in view of the libel cases: see, for example, *Plymouth Mutual Co-operative and Industrial Society Ltd.* v. *Traders' Publishing Association Ltd.* [1906] 1 K.B. 403.

The respondents' case may be summarised as follows: (1) The appellants' case rests on *Orr* v. *Diaper*, 4 Ch.D. 92 alone. (2) That case was wrongly decided at the time. But assuming that it is a sound proposition, and it has become the law by being adopted and cited by textbook writers here and in common law jurisdictions outside England, it is authority only for this: where one finds a wrongdoer one can obtain discovery from him of the names of his associates in the wrongdoing without the necessity either of suing him personally for other relief, or by averring that one means to do so. (3) The respondents are not wrongdoers and are therefore in any event outside the proposition for which *Orr* v. *Diaper* is authority. (4) If it is to be said that *Orr* v. *Diaper* is authority for a wider proposition, namely, that one can apply to a bill of discovery the rule previously applicable to a bill of relief, namely, that one can obtain discovery against a person "interested" in the action (in the sense that a decree can be made against him) then the respondents are not such persons. (5) They are not such persons because although equity will interfere by injunction to restrain a wrongdoer or, quia timet, one who is going to be a wrongdoer if an injunction is not granted, it will not interfere against one who has no voluntary connection at all with the wrong, but who simply has the ability, by activity or inactivity, to prevent or delay other persons from doing wrong. No authority whatever has been cited for the proposition that one can obtain an order against such a person. All the cases cited are cases of persons who: (a) are agents of, or, bailees for, wrongdoers; (b) have voluntarily assumed that position; and (c) have either possession or the power to say finally what shall be done with the goods; and (d) are actively assisting, or (unless restrained) will actively assist, in the wrongdoing. There is no third animal. One is either an infringer or a threatened infringer or one is nothing: *Nobel's* case, 8 App.Cas. 5. (6) If it is said that there is some duty to give information arising from the mere existence of the statutory powers conferred on the respondents for the fulfilment of their functions (because this is "control" of the goods), these powers do not constitute "control" in any relevant sense. "Control" must mean possession either actual or constructive in the sense of having someone else possessing on one's behalf to whom one can give directions at to the final disposition of the goods. (7) The appellant's own formulation involved, as a necessary ingredient of discovery in the postulated circumstances, the inability of the plaintiff to get the action on foot without the information he seeks. The respondents do not accept that he is so able. Their evidence is that obtaining the information from the respondents would be the most direct method and (b) that it is difficult to obtain it in any other way. (8) The innovation which the appellants seek would cause manifest inconvenience to the citizens of this country whose only fault is that they happen to have some information that the plaintiff wants—no doubt a popular conception in these egalitarian days, but not an innovation to which this House should lend its assistance.

Walton Q.C. in reply. This House is only concerned with rights and

duties. It is not a court of morals. There is a general duty on persons to give evidence: see *Wigmore on Evidence*, 1st ed. vol. IV (1905), sect. 2192; " . . . there is a general duty to give what testimony one is capable of giving, and . . . any exemptions which may exist are distinctly exceptional . . ." That statement represents the truth. What difference is there in the present proceedings, provided the court has full control and the witness obtains his expenses? If the appellants have a right, then there must be a method of enforcing that right. The appellants only need names, and this is all that they will obtain for the court will only give minimum relief. This is an application of what is called " judicial parismony ": see *per* Judge Learned Hand in the *Pressed Steel* case, 240 F. 135.

The Plymouth Mutual Co-operative case [1906] 1 K.B. 403 is also an example of application of judicial parsimony for there the plaintiff had a defendant and why should the plaintiff have his damages twice? There is an historical explanation for the attitude taken by the courts in libel cases. Defamation was originally a crime. Equity refused to aid the obtaining of evidence in relation to criminal proceedings or evidence which would result in self-incrimination.

The reasons for the mere witness rule must be one or more of the following: (1) because one does not want litigants " fishing " into the other side's evidence in advance, since they would be tempted to concoct contrary evidence; (ii) because any evidence thus obtained would be hearsay evidence; (iii) because otherwise before the Judicature Act it would have enabled defendants to bring actions for discovery against persons who were unwilling to comply, with the object of delaying their own substantive proceedings indefinitely, which is the real explanation of *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466; (iv) because it would subject innocent persons having nothing to do with the litigation to trouble and expense. The first three reasons cannot apply here.

In *Dummer* v. *Chippenham Corporation* (1807) 14 Ves.Jun. 245 Lord Eldon L.C. gives failure of justice as the reason for the exception to the mere witness rule in relation to corporations.

In *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466 it is important to observe that discovery was sought by the defendant and not the plaintiff. It is suggested that the reason for the delay in delivering judgment in that case was that a conflict arose between giving a hard decision in that case and making a bad law. Because if discovery were given to the defendant in that case, discovery would be sought by a defendant in every case of a bill of exchange and this would hold up proceedings on the bill. Nevertheless the House of Lords recognised at p. 486 that there are exceptions to the mere witness rule.

There are three reasons for granting discovery here: (1) the case forms an exception to the mere witness rule; (2) the respondents are so mixed up in the relevant transaction, to use the words of Lord Romilly, as to entitle the appellants to discovery; (3) the appellants could bring an action against the respondents. A person is mixed up in the transaction if innocently or not he facilitates the commission of the wrong complained of. A test of whether a person is mixed up in a transaction is to see whether if that person had not acted as he did the tort would not have been committed.

A It was said that the respondents were not volunteers, but neither are dock companies. In *In re Uzielli* (1863) 33 L.J.Ch. 371 an injunction was granted against persons who were acting involuntarily under statutory duties. Dock companies are no more volunteers than are the Customs. *Orr* v. *Diaper,* 4 Ch.D. 92 was a case of the defendant being mixed up in the transaction in question, which also applies to *Brown* v. *McDonald,* 133 F. 897. The Customs are mixed up in these transactions. They play B a vital role. The court could order the respondents to stop these goods leaving the docks, which shows that the Customs have sufficient control both for enabling the mixed-up principle to be invoked and also for the purpose of the appellants obtaining a declaration under the equitable protective jurisdiction of the court. [Reference was made to sections 44 and 261 of the Customs and Excise Act 1952.]

C *The protective jurisdiction of equity.* It was said: (1) that this jurisdiction never existed; (2) that the protective jurisdiction was abolished by *Nobel's Explosives Co.* v. *Jones, Scott & Co.,* 8 App.Cas. 5; (3) if the jurisdiction still exists, it extends only to agents and bailees. As to (1), for this to succeed, it would be necessary to show that all the defendants in the relevant cases were infringers. In other words, for example, that Diaper was an infringer and that the Cunard Company were infringers. But a D carrier, like a shipper, is never an infringer unless he is particeps criminis. In *Orr* v. *Diaper,* 4 Ch.D. 92, the defendant could be enjoined against, but damages could not be obtained against him. Even if Diaper knew all about the transactions, damages could not be obtained against him, but merely an injunction. He was not a tortfeasor at law but a wrongdoer in equity and an injunction could be granted against him under the equitable protective jurisdiction: see also the observations of Stirling J. in *Wash-*E *burn and Moen Manufacturing Co.* v. *Cunard S.S. Co.,* 6 R.P.C. 398. As to (2), it is almost impossible to differentiate between the defendants in *Upmann* v. *Elkan,* L.R. 12 Eq. 140 and *Nobel's Explosives Co.* v. *Jones, Scott & Co.,* 8 App.Cas. 5 where there was no attempt by a side wind to abolish the equitable protective jurisdiction. The question of innocence is irrelevant in relation to the equitable protective jurisdiction. All that F matters is whether the defendant has the goods under his possession or control.

In *Washburn's* case, 6 R.P.C. 398, Stirling J. put the basis of jurisdiction on power or control. There is no case where it has been put on the basis of the defendant being an agent or carrier. Accordingly, there is no foundation for proposition (3) above.

It is relevant to ascertain whether a declaration could be obtained against G the respondents because if an injunction could be obtained under the equitable protective jurisdiction, then a declaration could be obtained and a declaration is sufficient to enable a party to obtain discovery: see *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18.

Moodalay v. *Morton,* 1 Bro.C.C. 469 is similar to *Orr* v. *Diaper,* 4 Ch.D. 92. The report of *Moodalay* in 2 Dick. 652 makes plainer than H does the report in Brown that it was the case of obtaining names in order to know whom to sue and it was so understood by *Story* in the edition that came out before *Orr* v. *Diaper* and was so understood also in the first edition of *Snell. Mayor of London* v. *Levy,* 8 Ves.Jun. 398 unlike *Moodalay*

v. *Morton* was a pure "fishing" case. In *Fenton* v. *Hughes*, 7 Ves.Jun. 287 the facts were not sufficient to warrant making an exception to the rule. *Burchard* v. *MacFarlane* [1891] 2 Q.B. 241 states the general rule. There was no full citation of authority. *Post* v. *Toledo, Cincinnati and St. Louis Railroad Co.*, 11 N.E.Rep. 540 assists the appellants, for there discovery was obtainable against someone who had some relation to the property. Similarly the respondents have some relation to the goods in question here. *Bovill* v. *Cowan*, 15 W.R. 608 involved a defence association and the persons in question were not co-infringers. There was no conspiracy to infringe. There were merely persons who had a common interest.

[Their Lordships conferred. Lord Reid intimated that their Lordships desired to hear argument on the other issues raised in the appeal.]

The appellants have made out a prima facie case for the information they seek. This information involves a contempt of the Crown and is a serious tort. The information required is contained in documents which are mundane. Ship owners and ships masters and dock and harbour authorities and even stevedores handle them. Thus it can be seen that a wide class of persons are in possession of the required information. Without there being an express or implied obligation not to divulge, there is no question of general confidentiality in this case.

As to the respondents' contention on candour, the consignors are required by law to disclose the identity of the product under threat of a penalty. This is factual information that is sought and not what is a mere matter of opinion: contrast *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388.

The reliance placed by the Court of Appeal upon the fact that documents might be forged or that the importations might be in the names of nominees does not stand up to examination. Forgery merely at the moment of entry could not be effective and, further, in so far as the importers might give the names of nominees, it is not understood how this could constitute an evil of any kind or lead to evasion of Customs dues. Importers may well be nominees at present. It is conceded that there may be an importation which is licensed. The respondents should give all the names because the possibility that importation of this substance being lawful is a remote possibility.

The respondents rely on this branch of the case on section 3 of the Finance Act 1967. This statutory prohibition is over-ridden by the principle that it is not to be so construed as to hinder the due administration of justice. It is an enabling section, directed to promiscuous publication. That is why it contains safeguards of honest men's secrets.

The Court of Appeal took a wrong approach in that it failed altogether to appreciate that the appellants came before them clothed in a very high public interest. Lord Denning M.R. weighed the matter as primarily one between the appellants' private benefit by way of financial gain, and the public benefit of keeping the information secret. But that fails to appreciate that behind the private rights of any individual litigant there always stands the extremely important public interest that justice must be done. That is an over-riding interest: see *Conway* v. *Rimmer* [1968] A.C. 910. The cases show that not all functions of public departments

are to be treated in the same way, that is, they do not all have the same weight. There is a very strong public interest that the affairs of taxpayers should not be disclosed and, therefore, it would need a very strong case indeed before a court would order the disclosure of a taxpayer's income tax return. In the present case, the public interest against disclosure of these names to the court is minimal. The principle on which the appellants rely is, namely, that the disclosure of wrongdoing is more essential to public justice than the fact that the Crown Revenue might suffer from the future failure of the wrongdoers to share the proceeds of their wrongdoing with the Government: see *Reg.* v. *Snider* [1953] 2 D.L.R. 9, 36.

As to the over-riding power of the court, the authority in this House is *Rowell* v. *Pratt* [1938] A.C. 101 which shows that there is no presumption either way, but that the court considers the individual statutory provision in each case. In *Cowan* v. *Stanhill Estates Pty. Ltd.* [1966] V.R. 604 there is a review of the English authorities.

In conclusion, the House should decide that "court" is not a person in these circumstances, particularly in a section like section 3 which is not a prohibiting section at all, but an enabling section. Strong reliance on this part of the case is placed on *Conway* v. *Rimmer* [1968] A.C. 910.

Oliver Q.C. Confidence in the present context is a head of public policy. Where information is furnished to a government department (i) for a particular purpose or (ii) under the compulsion (or possible compulsion) of a statute, then in the absence of express statutory power is there a bar upon the use of that information for other than the statutory purpose and, in particular, upon its disclosure either (a) to other government departments or (b) to other persons? To express the issue thus is to put it much more widely than it was put by the respondents below and much more widely than is necessary for the purposes of the present case. For present purposes, it is sufficient to rely on specific statutory provision. But on the wide issue, there are three classes of statutes: (1) An Act requiring the furnishing of information, but not containing any prohibition, express or by necessary implication, on disclosure by the recipient, e.g. the Customs and Excise Act 1952, s. 65; (2) an Act containing power to require information and a specific prohibition on disclosure either absolute or with specific exception, e.g. the Agricultural Marketing Act 1931, s. 17; (3) an Act containing power to require information but with an express provision authorising disclosure in limited cases or to a limited extent and thereby by implication prohibiting disclosure in other cases, e.g. the Finance Act 1967, s. 3.

To the question "is there an absolute bar on the disclosure of information collected pursuant to statutory powers?" the answer is "No." The respondents do not claim this as a general principle. The appellants accept that there is a general obligation of confidence, but it is said that this is subject to the general principle, that it will yield to a strong case of public interest (*Conway* v. *Rimmer* [1968] A.C. 910). This is not disputed subject to this qualification that if there is a statutory prohibition, either express or implied, on the disclosure of information or on the disclosure of information except in particular circumstances, then the statutory prohibition prevails.

Rowell v. *Pratt* [1938] A.C. 101 is a case of an express prohibition

and the following principles are deducible from it: (i) there is no rule of construction which imposes a limitation on a statutory prohibition to the effect that it is only to apply unless a court in legal proceedings otherwise orders; (ii) prohibition may be implied, for example, by imposing a criminal penalty on disclosure; (iii) where there is a statutory prohibition, the court will not over-ride it on the footing that it is transcended by the requirements of the administration of justice. Examples of express prohibitions are: section 11 of the Parliamentary Commissioner Act 1967; section 111 of the Companies Act 1967; and section 21 of the Agriculture Act 1970.

It is conceded that the Customs and Excise Act 1952 contains no express prohibition regarding the disclosure of information gathered under the Act. Prima facie, therefore, the position would be that applicable to any other statutorally gathered information, that is, it is non-disclosable except in the event of the court finding a balance of public interest in favour of disclosure. The difficulties about accepting this, however, arise principally from the provisions of section 3 of the Finance Act 1967. As to this section, it is to be noted: (a) it is permissive, so that it recognises by implication the general confidential nature of the information to which it relates; (b) the disclosure authorised is "to persons other than the Commissioners" so that the implication is that apart from this power there is no power to disclose to any other person (and prima facie) that would include a party to litigation before the court; and (c) the information which can be disclosed is strictly limited in nature, and even the power to increase the ambit of disclosable information cannot be extended to name and price. As to (c), the fact that there is an express prohibition in relation to the factors of name and price shows a very strong public policy against disclosure. If it be said that the information required here is disclosed to many persons, it is information to persons concerned with the transmission of the goods in question. They cannot use it for any other purpose. In relation to the question of confidentiality, it is important to consider section 127 of the Finance Act 1972 which shows that there is nothing very strange in imposing an increasingly strict policy in relation to confidentiality. Further, section 16 (9) of the Agriculture Act 1970 underlines the practice of confidentiality. It indicates the confidentiality of statutory information. A perusal of the relevant statutory provisions shows a thread running through them, that information required to be disclosed to a statutory body is to be deemed confidential. The respondents concede, however, that despite the language of section 3 of the Finance Act 1967, the public interest may over-ride the provisions of the section in certain circumstances, for example, where the information is required in prosecuting a charge of serious crime or in preparing a defence of a charge to serious crime.

For there to be disclosure the factor in favour of disclosure must be very weighty. In the respondents' submission the disclosure of names for the prosecution of private rights is not a sufficient factor. Public policy has two aspects: there is the moral aspect in that a person is entitled to believe that his private affairs will not be disclosed. Secondly, there is the expediency aspect, for it is a relevant consideration what would be the effect of disclosure on the interests of the State.

If it be said that sections 111 and 112 of the National Insurance Act

1965 show a relaxation in the relation of the disclosure of names, the answer is albeit there has been a shift in public policy against the general prohibition of the disclosure of names it is a shift away from that position only in relation to matrimonial proceedings.

The contest in the present case, assuming that it is proper in proceedings where no other relief can be claimed to seek disclosure at all, really comes down to a balancing of interests. One starts from the position that there is a strong public interest in maintaining the confidentiality of information extracted from citizens under statutory compulsion. This is no more than the recognition by the legislature and by the courts that if the individual is to be asked to disclose his private affairs to the organs of the State, it is only right that the information so divulged should be used only for the purpose for which, under the statutory power, it has been called. This is something quite separate and apart from the candour argument. It is in the public interest—it is part of public policy and the policy of the law that private confidences should not be abused—this is a moral policy, not an expediency one. There is always this dual aspect of public policy both facets of which were present in *Rowell* v. *Pratt* [1938] A.C. 101.

The countervailing public interest which it is said over-balances this, is the interest of the private litigant in establishing his individual private rights in a civil action in a court of law. So stated the proposition subjects the obligation of confidence to an exception which would reduce it to a mere shell. "This information should be kept confidential except where its disclosure would assist another person to assert a private right."

If it be said that the appellants' right is more than a private right, it can be equally said that it is in the public interest generally that the rights of individuals should be protected.

To the suggestion that the information required by the appellants is purely mundane information, the answer to this is that this is a meaningless concept. It carries the appellants nowhere. The public interest in confidentiality cannot depend solely or even principally on the content of the information sought divorced from the context in which it was imparted or the consequences of its disclosure. On this test, a great deal of highly secret information is "mundane," for example, the name and telephone number of a police informer.

In summary: (1) Information provided under statutory compulsion is to be treated as confidential, although, in the absence of expressed statutory prohibition, the court may order disclosure if the public interest requires it. (2) Whether the court in any given case will order disclosure depends not on any general rule, but on the individual circumstances. Among other things the following factors will be relevant for consideration: (a) The type of information sought; (b) the degree of confidentiality imposed by the legislature so far as deducible from the statutory provisions; (c) the purposes for which the information is sought—for instance, how far can the Department of Social Security disclose names and addresses for proceedings other than maintenance proceedings? (3) The confidentiality of information statutorily obtained is not affected by the fact that that information may, and often is, imparted to other persons not under statutory compulsion, *e.g.*, the Inland Revenue may obtain details of invoices and

vouchers, etc. which could in fact be obtained from the traders who furnished them in the first instance; (4) Names and addresses of informants in an area to which the legislature has indicated a particular sensitivity. Thus section 3 does not allow the veil to be lifted even in the national interest. (5) It is not in the public interest to foster litigation: *Weld-Blundell* v. *Stephens* [1920] A.C. 956.

Walton Q.C. in reply. The appellants accept as a general proposition that information primarily given for statutory purposes should not be disclosed without a strong case being made out for such disclosure. Such a strong case must necessarily be furnished where disclosure is necessary to ensure justice. Specifically on Crown privilege the onus of showing that this exists is upon the respondents: see *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388. Further, the law of confidence does not apply to guilty secrets. Equity will not protect the guilty secret by whomsoever disclosed.

The appellants concede that the present proceedings are ex parte in so far as the Customs cannot be expected to challenge the validity of the patent. But prima facie evidence of validity has been given amply sufficient to secure the grant of an interlocutory injunction. Interlocutory injunctions have been granted in patent matters only in the last decade, and there have only been about six granted. This answers any suggestion that the granting of the present appeal would open the floodgates for applications of the present character.

If the respondents in any case were to consider that it would be prejudicial to disclose names, they could always refuse and be brought before the court where their costs would have to be paid by the applicant. This procedure protects the Customs. Further, the public interest is served if the discovery is sufficiently discriminate, that is, that it is only granted on the making out of a prima facie case of wrongdoing. *Practice Note* (*Wardship: Summons*) [1973] 1 W.L.R. 60, 63 shows that a number of government departments are prepared to give names and addresses in certain circumstances.

If it be said that the giving of names is the thin end of the wedge and that applicants will require further evidence, the answer is that the principle of judicial parsimony is applicable: the *Pressed Steel* case, 240 F. 135, 137, *per* Judge Learned Hand. If names are sufficient for the purpose, the court will not grant the giving of any further information.

As to the respondent's summary of their argument on this issue: (1) this is not disputed save for a change of onus and emphasis; (2) there is no dispute here, save on the application of the principles; (3) this conflicts with proposition 2 (a). It must help to clarify the question whether information should be disclosed by ascertaining in whose hands the information is. The information here is mundane and is not of that character contemplated by Lord Salmon in *Reg.* v. *Lewes Justices* [1973] A.C. 388 as being immune from disclosure. This information is not like income tax returns; it is information already known to ships masters among others; (4) is not accepted; (5) is stated far too widely.

Their Lordships took time for consideration.

June 26, 1973. LORD REID. My Lords, the appellants own patent no. 735,136 which covers a chemical compound called furazolidone. The validity of the patent is not in dispute. This substance is widely used and matter published by the respondents shows that some 30 consignments of it were imported into the United Kingdom between 1960 and 1970. None of these were licensed by the appellants. Each of these consignments therefore involved a tortious infringement of their right. The appellants have tried, but with little success, to discover the identity of the importers.

When any goods are imported the master of the ship bringing them and the importer have to lodge documents with the Customs which disclose the identity of the importer. It is not disputed that the respondents have in their possession documents showing who imported each of these consignments and the appellants now seek to get from the respondents by way of discovery the names of those who are shown in their records to have imported furazolidone during the last six years in order that the appellants may be able to take proceedings against such importers. The respondents for a number of reasons say that they are not entitled or are not willing to give this information and they assert that the appellants have no right to obtain discovery.

On June 29, 1967, the appellants wrote a long letter to the respondents setting out their contentions and seeking information in respect of the persons responsible for the importation of this substance. On July 25, the respondents replied that they had no authority to give such information. The appellants then issued a writ. They alleged infringement by the respondents and sought wider discovery than they now seek. But they now admit that they have no cause of action against the respondents.

The question therefore now is whether the respondents are in law liable to make discovery of the names of the wrongdoers who imported the patented substance. Graham J. held that they were but his decision was reversed by the Court of Appeal.

Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants. It is not clear to me whether in all these cases the plaintiff had to undertake in some way to proceed against the person from whom he sought discovery if he found on discovery being ordered that it would suit him better to drop his complaint against that person and concentrate on his cause of action against those whose identity was disclosed by the discovery. But I would think that he was entitled to do this if he chose.

But it is argued for the respondents that it was an indispensable condition for the ordering of discovery that the person seeking discovery should have a cause of action against the person from whom it was sought. Otherwise it was said the case would come within the "mere witness" rule.

I think that there has been a good deal of misunderstanding about this rule. It has been clear at least since the time of Lord Hardwicke that information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or on a subpoena duces tecum. Whether the reasons justifying that rule are good or bad it is much too late to inquire: the rule is settled. But the foundation of the rule is the assumption that eventually the testimony will be available either in an action already in progress or in an action which will be brought later. It appears to me to have no application to a case like the present case. Here if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent. So the appellants can never get the information.

To apply the mere witness rule to a case like this would be to divorce it entirely from its proper sphere. Its purpose is not to prevent but to postpone the recovery of the information sought. It may sometimes have been misapplied in the past but I see no reason why we should continue to do so.

But that does not mean, as the appellants contend, that discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. A person injured in a road accident might know that a bystander had taken the number of the car which ran him down and have no other means of tracing the driver. Or a person might know that a particular person is in possession of a libellous letter which he has good reason to believe defames him but the author of which he cannot discover. I am satisfied that it would not be proper in either case to order discovery in order that the person who has suffered damage might be able to find and sue the wrongdoer. Neither authority, principle nor public policy would justify that.

So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference?

On the view which I take of the case I need not set out in detail the powers and duties of the respondents with regard to imported goods. From the moment when they enter the port until the time when the consignee obtains clearance and removes the goods, they are under the control of the Customs in the sense that the Customs authorities can prevent their movement or specify the places where they are to be put, and in the event of their having any suspicions they have full powers to examine or test the goods. When they are satisfied and the appropriate duty has been paid the consignee or his agent is authorised to remove the goods. No doubt the respondents are never in possession of the goods, but they do have considerable control of them during the period from entry into the port until removal by the consignee. And the goods cannot get into the

hands of the consignee until the respondents have taken a number of steps and have released them.

My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.

Apart from public policy the respondents say that they are prevented by law from making this disclosure. I agree with your Lordships that that is not so. If it were they could not even disclose such information in a serious criminal case, but their counsel were, quite rightly, not prepared to press their argument so far as that.

So we have to weigh the requirements of justice to the appellants against the considerations put forward by the respondents as justifying non-disclosure. They are twofold. First it is said that to make such disclosures would or might impair or hamper the efficient conduct of their important statutory duties. And secondly it is said that such disclosure would or might be prejudicial to those whose identity would be disclosed.

There is nothing secret or confidential in the information sought or in the documents which came into the hands of the respondents containing that information. Those documents are ordinary commercial documents which pass through many different hands. But it is said that those who do not wish to have their names disclosed might concoct false documents and thereby hamper the work of the Customs. That would require at least a conspiracy between the foreign consignor and the importer and it seems to me to be in the highest degree improbable. It appears that there are already arrangements in operation by the respondents restricting the disclosure of certain matters if the importers do not wish them to be disclosed. It may be that the knowledge that a court might order discovery in certain cases would cause somewhat greater use to be made of these arrangements.

But it was not suggested in argument that that is a matter of any vital importance. The only other point was that such disclosure might cause resentment and impair good relations with other traders: but I find it impossible to believe that honest traders would resent failure to protect wrongdoers.

Protection of traders from having their names disclosed is a more difficult matter. If we could be sure that those whose names are sought are all tortfeasors, they do not deserve any protection. In the present case the possibility that any are not is so remote that I think it can be neglected. The only possible way in which any of these imports could be legitimate and not an infringement would seem to be that someone might have exported some furazolidone from this country and then whoever owned it abroad might have sent it back here. Then there would be no infringement. But again that seems most unlikely.

But there may be other cases where there is much more doubt. The validity of the patent may be doubtful and there could well be other doubts. If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done.

I would therefore allow this appeal. The respondents were quite right in requiring the matter to be submitted to the court. So they are entitled to their costs down to the date of the judgment of Graham J. Thereafter the appellants caused much extra expense by putting their case much too high. In the circumstances I would award no costs in the Court of Appeal or in this House.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the question which calls for consideration arises in proceedings which by now have shed many of their original features. Two actions were begun. They were later consolidated. The plaintiffs [the appellants] were respectively the registered proprietors of, and the exclusive licensees in the United Kingdom under, letters patent which covered a specific chemical compound called furazolidone. The claims made by the plaintiffs in each action were as follows. First, there was a claim for a declaration that the defendants (the commissioners) had infringed or had caused, enabled or assisted others to infringe the letters patents. Secondly, there was a claim for a declaration that it was the commissioners' statutory duty to forfeit all the imported furazolidone in their possession custody or control which was not licensed for importation by the plaintiffs. Thirdly, there was a claim for an order that the commissioners should:

> "(a) Set forth and disclose to the plaintiffs in the case of each consignment of furazolidone imported without the licence of the plaintiffs or one or other of them the names and addresses of the consignors and consignees thereof, the quantity of furazolidone therein and the date thereof. (b) Give the plaintiffs full and complete discovery of all documents which are or have been in their possession custody or control relating to such imported consignments of furazolidone."

A It was pleaded that third parties whose names were unknown to the plaintiffs had infringed the letters patent by importing furazolidone without the leave and licence of the plaintiffs. Particulars were given setting out dates, quantities, values and countries from which imported. The discovery claimed was sought in aid of proceedings which the plaintiffs wished to bring against others but which they could not initiate without at least knowing the names of the importers.

B After delivery of defences both parties filed lists of documents. In one part of the commissioners' list there were included the following documents: Special Chemical Register: Customs Entries (comprising Forms XS107 and C.105 and supporting documents) delivered by persons other than the plaintiffs relating to the importation of furazolidone: and ships' reports, cargo manifests, correspondence and books of account relating to such importations. The commissioners objected to produce those C documents. The objection was on the following grounds:

> "(a) that the defendants are precluded by law from disclosing them and (b) that their disclosure would be injurious to the public interest, because they contain confidential information about the affairs of persons other than the plaintiffs furnished to the defendants by such persons pursuant to sections 26, 28 and 29 of the Customs and Excise D Act 1952."

The plaintiffs took out a summons by which they asked that the defendants be ordered to produce the documents for inspection. The summons was adjourned into court and was heard by Graham J.

Though the learned judge held that the plaintiffs had no reasonable cause of action against the commissioners he held in a most careful and E illuminating judgment that the court could make an order requiring them to disclose to the plaintiffs the names and addresses of the importers of furazolidone. The commissioners appealed to the Court of Appeal against this order. The plaintiffs persisted in their contention that they had causes of action against the commissioners and by a respondent's notice they contended (a) that the commissioners had infringed (or had caused or F enabled or assisted others to infringe) the letters patent and (b) that the commissioners were in breach of a statutory duty to forfeit all imported furazolidone in their possession custody or control which the plaintiffs had not licensed for importation.

Having lost in the Court of Appeal the plaintiffs by leave appealed to this House. Though by their printed case the plaintiffs set out that to a limited extent they desired to maintain the contention that they had a cause G of action for infringement by the commissioners themselves, that contention was abandoned when the appeal was opened. The case proceeded therefore on the basis (a) that it consisted solely of a claim for limited discovery against the commissioners and (b) that no other relief could be or could have been claimed against the commissioners. It must be approached on the footing that it was and always had been an action solely for discovery. H The claim is now expressly limited so as to relate only to the names and addresses of any persons appearing from the customs entry to be the importers (a) in the case of the last importation referred to in paragraph 2 of the amended particulars of breaches in the first action and (b) in the case

of each importation referred to in paragraph 2 of the particulars of infringements in the second action.

It is important to mention certain matters. (1) The commissioners by their pleadings admitted (for the purposes of this case) the validity of the letters patent. But beyond this there was evidence showing that the validity of the patent (the complete specification of which was published nearly 16 years ago) had never been challenged. Some infringements had been detected and all infringers who had been detected had been sued: the actions had been settled on the basis that there was infringement. (2) The commissioners publish certain monthly statistics of goods imported into the United Kingdom and the importation of furazolidone has been specifically mentioned. The plaintiffs are in a position to assert that the persons who have imported, whoever they are, must have been infringers and therefore wrongdoers. The commissioners know the names and addresses of these people. The plaintiffs wish to sue such people and intend to sue them if they can find out who they are. The plaintiffs say that they are unable to find out who the people are unless the commissioners tell them.

The plaintiffs wrote (in June and July 1967) to the commissioners and asked for the information they sought. The commissioners stated that they were advised that information furnished to them under a requirement of the Customs and Excise Act 1952 should not be disclosed to third parties.

In my view, it would be reasonable, and in a broad sense of the term just, if the desired information could be supplied. The facts are very special. The plaintiffs are fully entitled to protect their interests. Subject always to the emergence of some possible explanation of a nature not at present known, the importers whose names are known to the commissioners are wrongdoers. It will be unfortunate not only from the point of view of the plaintiffs but also of that of the public if the wrongdoers cannot be challenged. In this situation two questions arise: (1) Is it within the power of the court to assist the plaintiffs or is the law powerless? (2) If the court has power to make the desired order—would it be against the public interest to make it?

In the review of very many authorities to which we were referred in painstaking and learned arguments it seemed clear that as a broad and general rule it is true to say that a court will not order discovery against a mere witness. On behalf of the plaintiffs it is not sought to challenge this. A witness is one who may be able to give testimony in either pending or anticipated proceedings. Here there are no pending proceedings and unless the plaintiffs secure the help of the court there are no anticipated proceedings. If the names are given and if the plaintiffs take proceedings it is unlikely that there would be any need to rely on any evidence from the commissioners.

It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information. In all ordinary circumstances there would then be some

proceedings in the course of which the machinery of the court would enable all relevant and admissible evidence to be obtained.

My Lords, the review of numerous authorities undertaken by learned counsel has left me with the impression that unless supplied by the case of *Orr* v. *Diaper* (1876) 4 Ch.D. 92 clear-cut authority is meagre in support of the very limited order now sought by the plaintiffs; equally I am left with the impression that it would be very unfortunate if the law could not come to the aid of the plaintiffs. The commissioners have had public duties to discharge. They have acted with complete propriety. But in the course of their public duties they have come to know, and have been obliged to come to know, the names of those who can reasonably be assumed to be wrongdoers vis-à-vis the plaintiffs. Assuming that only the necessities of the public service (a matter to which I will later refer) have deterred the commissioners from disclosing the names to the plaintiffs, and always assuming that there is no statutory prohibition against such disclosure, is there any reason why the court, in the interests of justice, and in the absence of any real doubt that certain wrongdoers are enjoying a quite fortuitous protection, should not authorise and require the commissioners to disclose the names?

So far as authority goes the sheet anchor of the appellants is the decision in 1876 in *Orr* v. *Diaper*, which is reported in 4 Ch.D. 92 and in other reports. In the much earlier case of *Moodalay* v. *Morton* (1785) 1 Bro.C.C. 469 there was a bill for discovery against the East India Company and against Morton, their secretary. The plaintiffs had had a lease for a period of 10 years from the East India Company of the permission to supply the inhabitants of Madras with tobacco: the plaintiffs alleged that the company, by their servants in India, had dispossessed the plaintiffs and had granted a lease to others: the plaintiffs intended to sue the East India Company but in order to do so they needed the evidence of persons resident in the East Indies: they therefore prayed for a commission for the examination of witnesses and they required the company and the secretary to discover by whom and under what authority the second lease was granted. The plaintiffs wanted to know whether those who had dispossessed them were or were not servants of the company: if they were not they would be liable in their own persons. A demurrer to the bill was overruled. The fact that no action had been brought was no answer.

Moodalay v. *Morton* was much discussed in *Angel* v. *Angel* (1822) 1 L.J.O.S.Ch. 6. It was considered whether it was not exceptional to grant a commission to examine witnesses before an action was begun. Sir John Leach V.-C. said, at p. 9, in reference to *Moodalay* v. *Morton*: "The plaintiff there required a commission, in order to know against whom the action should be brought." While in the present case there is now no suggestion that the commissioners are to be sued the justice of the case would just as much warrant help being given to the plaintiffs as to *Moodalay*.

Numerous cases firmly recognised the rule that a bill of discovery would not lie against a mere witness. *Fenton* v. *Hughes* (1802) 7 Ves.Jun. 287 was but one of many cases which illustrated the rule. Someone who was not being sued and could not be sued would be regarded as a mere witness. The rule was recognised in *Mayor and Commonalty and Citizens of London* v. *Levy* (1803) 8 Ves.Jun. 398, where the demurrer was allowed

because the bill did not allege with sufficient certainty by whom the duties which were claimed were payable. Lord Eldon L.C. said, at p. 404: A

> "But it has never yet been, nor can it be, laid down, that you can file a bill, not venturing to state, who are the persons, against whom the action is to be brought; not stating such circumstances as may enable the court, which must be taken to know the law, and therefore the liabilities of the defendants, to judge; but stating circumstances; and averring, that you have a right to an action against the defendants B or some of them. That of necessity admits, that some of the defendants may be only witnesses; and against them there is no right to file such a bill."

In the present case the appellants are able to say that they have rights which they intend to pursue and rights which as far as can be known must succeed: they know everything except the names and addresses of those C whom they desire and intend to sue: they further know that those names and addresses appear on Customs entries in the possession of the commissioners and of which the commissioners have become possessed in pursuance of their duties. Is there any reason why the court should not sanction and direct discovery?

I do not propose to refer to the majority of the cases which were cited D for our consideration because I agree with the conclusion reached both by the learned judge and by the Court of Appeal that in general the cases support the view that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged or who is in the position of a mere witness in the strict sense. If this is, in general, the conclusion which is reached after a study of numerous decisions how, then, is the decision in *Orr* v. *Diaper*, 4 Ch.D. 92 to be viewed? No less an authority E than Mr. Bray (see *Bray on Discovery* (1885), pp. 40–41) regarded it as a special case. From the broad general rule Graham J. considered that there could be exceptional cases and that, of such, *Orr* v. *Diaper* was an example. We have studied and re-studied that case and it was the subject of very careful analysis in the Court of Appeal and in particular by Buckley L.J., who most helpfully examined the report of the case in 25 W.R. 23. F The conclusion which I for my part have reached, in agreement with the Court of Appeal, is that *Orr* v. *Diaper* perhaps need not on its facts have been regarded as an exception to the broad general rule. Yet I think it was so regarded. Nor I think did Mr. Bray regard the decision as heretical but rather as being an exception from a broad general rule which permitted of certain exceptions being made, and an exception which, in the particular G case, a court in the interests of justice had been warranted in making. To prevent a denial of justice must at all times be the aim of a judge and the concluding words of Hall V.-C., 4 Ch.D. 92, 96 would surely have been regarded as wholly commendable in any court of equity:

> "In this case the plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said H to have abstracted their property. Their proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this court to assist the plaintiffs."

But whatever may be the true view of *Orr* v. *Diaper* I think that it is very significant that it has been quoted as an authority and has not been overruled, with the result that after this lapse of time it may be regarded as furnishing a precedent for a course that justice would seem to demand.

We were referred to *Hunt* v. *Maniere* (1864) 34 Beav. 157, *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140 and *Upmann* v. *Forester* (1883) 24 Ch.D. 231. But the position of the commissioners is not I think to be equated with that of wharfingers or forwarding agents or shippers. The position of the commissioners is rather special. They are not engaged in commercial activities: they differ from those who voluntarily engage in trade for their own profit. In no ordinary sense are the commissioners in possession of goods though they are endowed with certain wide powers which they need to enable them to discharge their statutory duties. But they are not mere outsiders or volunteers or, so to speak, mere bystanders. They become obliged to have active concern with, to acquire positive knowledge of, and to exercise certain powers in respect of, the affairs of traders and the movement of goods.

What, then, was the position of the commissioners when they were asked by the plaintiffs voluntarily to give the names? Were they entitled or obliged to do so? In this connection the words of Lord Romilly M.R. in *Upmann* v. *Elkan*, L.R. 12 Eq. 140 were referred to. (It may here be mentioned that neither in that case nor in *Upmann* v. *Forester*, 24 Ch.D. 231 did the proceedings take the form of a bill of discovery.) Lord Romilly M.R. said, at p. 145:

> "I begin by assuming (which facts are proved here) that the correspondent of a London house sends goods to a London dock company to the order of that London house, and that the goods have on them the spurious trade-mark or brand of a person to whom the goods do not belong, and who has not been concerned in sending them thither. The person whose trade-mark is fraudulently imitated ascertains this fact before the goods leave the dock: he applies to the dock company not to allow them to leave the dock with the spurious trade-mark, and he applies to the persons at whose order they stand, and asks them to give him all information respecting them, and to undertake not to sell or distribute the goods until the spurious brand is removed. I assume, then, in addition, that the person so applied to is innocent and ignorant of the fraud. It is his duty at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose."

In my view, the position of the commissioners differed from that of the forwarding agents in the case cited. I think that the commissioners were at the date of the request to them warranted in declining voluntarily to give the names. It is quite different if the court having considered all aspects of the public interest authorises and requires them to give the names. But the information possessed by the commissioners was information which others had been obliged to give them under statutory compulsion and for some particular purposes. I think that the commissioners were correct in taking the view that they ought to treat the information possessed by them

as confidential. In this respect the provisions of section 3 of the Finance Act 1967 are of importance. The commissioners are given power to disclose some information to some others if the Secretary of State is satisfied that it would be in the national interest, but no power is given to sanction the disclosure of "the price of the goods or the name of the importer of the goods." This shows that the names of importers come within an area indicated by the legislature as being one of special sensitivity: see also section 127 of the Finance Act 1972.

The next step is to consider whether the court should make the desired order and whether it would be in the public interest or against the public interest to make the order. If there was some statutory prohibition (such as that contained in section 17 (2) of the Agricultural Marketing Act 1931: see *Rowell* v. *Pratt* [1938] A.C. 101) then that, of course, would be conclusive. In the absence of any such prohibition it seems to me that in the special circumstances of this case, and with some support from authority, the interests of justice warrant the court in making the desired order unless there are some features of the public interest which are of such weight as to out-balance the public interest of advancing the cause of justice. I can well appreciate the importance of the considerations which were advanced and which undoubtedly carry some weight, but having considered them in relation to the very limited order now sought I am firmly of the view that the balance of the public interest warrants the making of the order as now requested. I consider that the fair order as to costs is that the plaintiffs should pay to the commissioners their costs at first instance and that there should be no order as to costs in the Court of Appeal and in this House.

I would allow the appeal accordingly.

VISCOUNT DILHORNE. My Lords, the appellants hold the patent for a chemical called furazolidone which is used in poultry food. The respondents publish monthly statistics of the goods imported into the United Kingdom. Those statistics revealed that in 32 months between March 1960 and February 1970 furazolidone was imported into this country, but they do not reveal who were the importers. Each importation, the appellants say, constituted an infringement of their patent, though they say that it is conceivable that some of the chemical sold by them was reimported into this country, in which case there would be no infringement. The appellants say that although there must have been infringement in, if not all, at least the majority of these importations, they are unable to take any steps to protect their patent as they do not know and cannot find out, unless successful in these proceedings, the names of the importers, all of which are known to the respondents.

On June 29, 1967, the appellants' solicitors wrote to the respondents asking for the names, not only of the consignees, but also of the consignors of the imported furazolidone and alternatively alleging that they were under a duty to seize and forfeit the imported furazolidone. The respondents in reply said that they were under no such duty and that in the absence of statutory authority it was impossible for them to disclose the names of the importers.

On February 4, 1969, the appellants issued a writ against the respondents in which they claimed a declaration that the respondents were infringing or enabling or assisting others to infringe their patent, an injunction to restrain them from doing so and an injunction to compel them to forfeit the imported furazolidone. The writ was later amended to include a claim for discovery by the respondents of the names and addresses of the consignors and consignees and of all documents which were or had been in their possession relating to the imported consignments.

On August 5, 1970, the appellants issued another writ claiming similar relief in respect of later importations in five months in 1968, 1969 and 1970. The two actions were consolidated and a summons for directions was taken out on March 3, 1971. It was adjourned into court and came before Graham J. After a five day hearing he gave judgment dealing with all the appellants' claims. He rejected the claim that the respondents were themselves infringers of the patent and also the claim that they were under a duty to forfeit the furazolidone.

By their defence the respondents admitted the validity of the letters patent and at the hearing before Graham J. Mr. Walton for the appellants said that if the respondents gave the information asked for it was improbable that the question of infringement would be pressed against them. He agreed that the proceedings could be treated as a pure action for discovery for the production of information as to the identity of the importers. And so although the claims in respect of infringement and forfeiture were not abandoned until the hearing in this House, the proceedings have continued to be treated as those for discovery of the names of the importers alone. Graham J. held that that discovery should be made and made an order in a form agreed between the parties.

In the Court of Appeal his decision was reversed, the court holding that the appellants had no conceivable cause of action against the respondents and that they could not bring an action merely for the purpose of discovering from them the names of the importers. They also held that the information required was received in confidence by the respondents and that the balance of public interest demanded that the respondents should keep the names and addresses of the importers secret.

So there are three questions to be decided. First, on the facts of this case, can the respondents, who are not themselves wrongdoers, be ordered to disclose the names of the importers who, the validity of the patent being admitted, are wrongdoers. Secondly, in the exercise of the discretion vested in the court, should they be ordered to do so; and thirdly, are the respondents in any event prohibited from disclosing that information.

Numerous authorities were referred to on the first question. Few of them I found of much assistance. Many of them are very briefly reported and throw little, if any, light on the principles to be applied. The most recent and the most relevant case on which the appellants relied was decided nearly a hundred years ago, *Orr* v. *Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23.

In that case the plaintiffs were sewing cotton and thread manufacturers. The cottons and threads were made up for sale in different coloured papers and specially designed tickets were used to distinguish them from the cottons and threads of other manufacturers. The defendants were shippers and the plaintiffs discovered that they had for some time been shipping to

Valparaiso and elsewhere cotton thread packed in the same manner as their own and bearing the same tickets. The plaintiffs sought to find out the names and addresses of the parties from whom they had received the cotton for shipment and wrote saying they quite understood that the defendants were innocent of any intention to act prejudicially to them and that if they gave the names and addresses "the necessity for further proceedings would cease." No reply was sent and proceedings were commenced, the statement of claim alleging that the defendants "well knew the tickets and of the injury" and that they ought to give the information that was sought in aid of proceedings in contemplation by the plaintiffs to restrain the piracy of their tickets and that the proceedings contemplated could not be maintained without the discovery sought.

The defendants demurred. There are many differences in the report of the case in the Law Reports and in the Weekly Reporter, both in the report of the arguments advanced on behalf of the defendants, counsel for the plaintiff not being called on, and in the report of the judgment of Hall V.-C.

It appears from the reports of the arguments that the main point taken on demurrer was that discovery was not obtainable from persons who will not be and who are not intended to be parties to an action and that to be granted, "the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted": 4 Ch.D. 92, 94 (*Mitford on Pleading*, 4th ed. (1827), p. 191, 3rd ed. (1814), p. 155) (4 Ch.D., at p. 94); and no relief was sought against the defendants and no other suit instituted or capable of being instituted against them. In the report in the Weekly Reporter, 25 W.R. at p. 24, it is said that it was submitted that "These defendants are merely witnesses, and you cannot make a mere witness a party to obtain discovery" and then it was recognised that there may be circumstances under which discovery may be sought against persons who otherwise would not be parties to the action. Two examples were given: first, the case of a corporation where a person holding a representative position is made a party who otherwise would only be a witness,—that, it was said, was an exception to the rule, —and, secondly, where there is statutory authority compelling discovery: *Dixon* v. *Enoch* (1872) L.R. 13 Eq. 394. In that case Wickens V.-C. said that the object of the Act was to enable the plaintiff to extract from the defendant the name or names of some other person or persons other than himself who might be sued at law. He then said, at p. 400:

> "The supposition that if the plaintiff knows the name of one proprietor he can make him tell the names of all the others, but that, not knowing one name, he cannot get the information from the printer and publisher, who is the agent of the proprietors, and is put forth to stand between them and the public, is one that does not commend itself to one's common sense, and is not to be accepted without absolute necessity."

Hall V.-C. began his judgment with the citation of this passage from Wickens V.-C.'s judgment, saying, 25 W.R. at p. 24: "That is the view I take of this case. Nothing but 'absolute necessity' will compel me to allow this demurrer." He clearly thought that Wickens V.-C.'s observa-

tions, in relation to a case where there was a defendant being sued for libel and a statute provided for the disclosure, were applicable to a case when the person from whom discovery was sought was not in fact a defendant from whom relief was sought.

In the report in the Weekly Reporter, at p. 24, it is said that he expressed the opinion that the position of the defendants in shipping the goods "might subject them to proceedings by way of injunction to restrain them from continuing to ship these goods." He rejected the contention that they were mere witnesses, saying, according to the report of the Law Reports, 4 Ch.D., at p. 96: "their position, they being the actual shippers, is different from that of mere witnesses"; and according to the report in the Weekly Reporter, at p. 25:

> "But I think that the position of the defendants is different from that of a mere witness, . . . That view of the case seems to me to bring it within the rule as stated in *Mitford*."

He ended his judgment by saying according to the Law Reports, 4 Ch.D., at p. 96: ". . . it would be a denial of justice if means could not be found in this court to assist the plaintiffs"; and overruled the demurrer.

As I read the reports of his judgment he based his conclusion on two grounds: first, that the defendants were not mere witnesses and, secondly, on the fact that in his opinion they could themselves have been sued.

Whether he would have overruled the demurrer if he had been of the opinion that the defendants could not have had proceedings brought against them apart from the claim for discovery is not clear, though it would seem probable from Hall V.-C.'s other observations to which I have referred that he would have done all in his power to assist the plaintiffs.

In *Plummer* v. *May* (1750) 1 Ves.Sen. 426 Lord Hardwicke L.C. said that a person could not be made a defendant to a bill

> "who is merely a witness, in order to have a discovery of what he can say to the matter, . . . But as against a party interested, the plaintiff is entitled to have a discovery from him, if he is charged to be concerned in the fraud. . . ."

So the rule that discovery is not obtainable from a mere witness is of very considerable antiquity.

There are some more cases decided before *Orr* v. *Diaper* to which I must now refer. The first of these is *Moodalay* v. *Morton* (1785) 1 Bro.C.C. 469. There discovery was sought from the East India Company in order to discover by what authority the plaintiffs were dispossessed of a lease for supplying the inhabitants of Madras with tobacco. The plaintiffs wanted to find out if the persons who had dispossessed them were acting as servants of the company. If they were, then the plaintiffs intended to sue the company. Lord Kenyon M.R. held that the plaintiffs were entitled to the discovery sought.

It was sought not to ascertain the identity of anyone but whether the company was responsible for the injury the plaintiffs had suffered. I regard the case as an authority for the proposition that discovery can be granted before an action is instituted, but it was information, not names,

that was sought, information to discover whether the company were responsible, not to identify the wrongdoer.

In *Mayor and Commonalty and Citizens of London* v. *Levy* (1803) 8 Ves.Jun. 398 in which *Moodalay* v. *Morton* was not cited, the defendants had refused to discover whose property were certain goods and without which discovery an action of law could not be proceeded with. Lord Eldon L.C., in the course of his judgment, said, at p. 404:

> "That, where the bill avers, that an action is brought, or, where the necessary effect in law of the case stated by the bill appears to be, that the plaintiff has a right to bring an action, he has a right to a discovery, to aid that action, so alleged to be brought, or which he appears to have a right and an intention to bring, cannot be disputed. But it has never yet been, nor can it be, laid down, that you can file a bill, not venturing to state, who are the persons, against whom the action is to be brought; . . . but stating circumstances; and averring, that you have a right to an action against the defendants or some of them. That of necessity admits, that some of the defendants may be only witnesses; and against them there is no right to file such a bill."

Moodalay v. *Morton*, 1 Bro.C.C. 469 was commented on in *Angel* v. *Angel* (1882) 1 L.J.O.S.Ch. 6, 9, where Sir John Leach V.-C. said it was an exception to the general rule

> "for it would be absurd to demand that an action should be brought before the commission is granted, where the purpose of the commission is to ascertain against whom the action ought to be brought."

I do not see that it is possible to reconcile Lord Eldon L.C.'s observations with the decision in *Moodalay* v. *Morton* except upon the narrow ground that in *Moodalay* v. *Morton* the name of the proposed defendant was known and the company would be sued if discovery showed it to be responsible. It would indeed be odd if you could get discovery if you named the party you intended to sue if you could discover his responsibility, but that you could not get discovery though you had suffered an injury if you were not able to name the person who might be responsible.

In *Story on Equity Jurisprudence*, 2nd Eng. ed. (1892), p. 1011, para. 1483, it is stated:

> ". . . in general, it was necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. There were exceptions to this rule, as where the object of discovery was to ascertain who was the proper party against whom the suit should be brought. But these were of rare occurrence."

A similar passage appears in the first edition and in a footnote to it *Moodalay* v. *Morton*, *Angel* v. *Angel* and *City of London* v. *Levy* are cited. *Story* thus does not appear to have thought that the right to discovery of the proper party against whom the suit should be brought depended upon the ability of the plaintiff to give his name.

In *Queen of Portugal* v. *Glyn* (1840) 7 Cl. & F. 466, the majority in this House, Lord Cottenham L.C., Lord Lyndhurst and Lord Brougham,

Lord Wynford dissenting, held that a bill of discovery could not be granted against the Queen of Portugal who was not a party to an action brought against Glyns, the bankers, but who was clearly an interested party in that action as it was brought by her agent, Lord Cottenham L.C. holding that it was a long established rule that discovery on a bill would only be granted against a party to the action. *Moodalay* v. *Morton*, 1 Bro.C.C. 469 and *Angel* v. *Angel*, 1 L.J.O.S.Ch. 6 were not cited and I do not consider that the decisions in those cases, *Moodalay* v. *Morton* being regarded as an exception to the general rule, are to be regarded as inferentially overruled by this decision of this House.

Hunt v. *Maniere* (1864) 34 Beav. 157 and *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140 were neither of them cases on discovery. In *Hunt* v. *Maniere* the question was whether wharfingers had rightly refused to deliver up wine with a false label to the consignee. I do not think that this case assists. In *Upmann* v. *Elkan*, L.R. 12 Eq. 140 though the dispute was about costs there were observations by Lord Romilly M.R. at first instance and, by Lord Hatherley L.C. on appeal (7 Ch.App. 130), which are of interest.

There a bill had been filed praying an injunction to restrain Elkans, who were forwarding agents and the consignees, from removing boxes of cigars marked falsely with the plaintiffs' brand from St. Katharine's Docks. With regard to the St. Katharine Dock Company who were also joined as defendants, Lord Romilly M.R. said that there was not the least pretence for making them parties to the suit and, at p. 145, that it was the duty of the consignees, despite their innocence and ignorance of the fraud " at once to give all the information required," and to undertake that the goods should not be removed from their possession. Before the bill was filed the defendants had disclosed the names of the consignors and ultimate consignees. In the Court of Appeal (1871) 7 Ch.App. 130 it was held, affirming the decision of Lord Romilly M.R., that the fact that Elkans were agents and merely carriers was no defence to the suit, and Lord Hatherley L.C., at p. 133, said it was the business of Elkans, once the complaint was made, to give all proper information.

This case, while it states the duties of consignees of goods where complaint is made that they are spurious, does not decide that discovery could have been ordered against Elkans.

From these decisions it is apparent that little support is given to the decision in *Orr* v. *Diaper*, 4 Ch.D. 92. The most helpful case is *Moodalay* v. *Morton*, 1 Bro.C.C. 469. However, *Orr* v. *Diaper* has not so far as I am aware, ever been questioned or criticised in any subsequent case or in any textbook and the principle it enunciates has been followed on several occasions in other countries. In the textbooks, in addition to the observations of Story J. in his book on *Equity Jurisprudence* to which I have referred, there are statements to a similar effect in *Bray on Discovery* (1885), p. 40, in *Sichel & Chance, Interrogatories and Discovery* (1883), p. 180, and in *Ross on the Law of Discovery* (1912), p. 11, and it is not without interest to note that in the third edition of *Snell's Equity* published in 1874 before the decision in *Orr* v. *Diaper*, it is said, at p. 516, that there are exceptions to the general rule that to maintain a bill of discovery an action should have been commenced in another court: " as where the object of

discovery is to ascertain who is the proper party against whom the suit should be brought. But these are of rare occurrence." A

In these circumstances it is, in my opinion, far too late to challenge that decision. What exactly did it decide? In my view, that a discovery can be granted against a person who is not a mere witness to discover, the fact of some wrongdoing being established, who was responsible for it. The "mere witness" rule has lost a great deal of its importance since the Common Law Procedure Act removed the bar to persons interested giving evidence, B but it still has significance. Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. In *Orr* v. *Diaper* Diapers were involved, so were Elkans in *Upmann* v. *Elkan*, L.R. 12 Eq. 140, so was the East India Company in *Moodalay* v. *Morton*, 1 Bro.C.C. 469 and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing. C

Are the respondents to be regarded as so involved in this case? I think the answer is yes. They were not, it is true, involved of their own volition. They were involved in the performance of their statutory duty. The furazolidone was in Customs charge until cleared and the commissioners could control its movement until cleared (Customs and Excise Act 1952, s. 22 (1)). I do not see how it can be said that they were not involved in D the importation of this chemical.

So for these reasons in my opinion the answer to the first question I formulated, can the respondents be ordered to disclose the names of the importers? is in the affirmative. As to the second question, should they be ordered to do so? I think that the answer is also yes, unless in consequence of their special position the answer to the third question is in the negative. Subject to the public interest in protecting the confidentiality of information E given to Customs, in my opinion it is clearly in the public interest and right for the protection of patent holders, where the validity of the patent is accepted and the infringement of it not disputed, that they should be able to obtain by discovery the names and addresses of the wrongdoers from someone involved but not a party to the wrongdoing.

I now turn to the third question. In their list of documents the F respondents asserted that they were precluded by law from disclosing the names of the importers and that that disclosure would be injurious to the public interest. In their notice of appeal to the Court of Appeal they gave notice that the grounds of appeal were:

> "Information about a taxpayer or his affairs furnished to a revenue collecting department of the Crown pursuant to the requirements of a G statute is confidential and, in circumstances in which its disclosure is not authorised by statute, exceptionally strong reasons must exist to permit its disclosure to persons outside that department."

In their case they contend that discovery should not be ordered because disclosure would be contrary to the public interest on two grounds (1) that the information is given to the respondents and their officers in confidence H and under compulsion in order that the respondents may perform their statutory duties. "The informant" it is said "is entitled to assume that information for this purpose will not be disclosed to others for a different

purpose": and (2) that it is essential that the confidence of importers should be respected in order to ensure that full and candid information continues to be given by them. "The furnishing of the information" they submit "would inhibit importers from making full and frank disclosure." The affidavit of Sir Louis Petch, the Chairman of the Commissioners of Customs and Excise, sets out these contentions more fully.

The respondents were unable to point to any statutory provision prohibiting them from disclosing the names of the importers. I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure, but I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure. But not all information given to a government department, whether voluntarily or under compulsion is of this confidential character and the question is whether the names of the importers of the furazolidone were given in confidence. I do not think that that is established. The names and addresses of the importers had to be given to the master of the ship and made known to all those taking part in securing the transit of the chemicals. Presumably the parcels of furazolidone had on them the names and addresses of the consignees for all to see, though they may, I do not know, have not disclosed that the contents of the parcels were furazolidone. The documents completed for the transit of the chemicals and for Customs which show the names of the consignees and the contents of the parcels do not seem to me more confidential than consignment notes completed for British Railways and British Road Services.

I do not doubt that a great deal of the information obtained by Customs is of a highly confidential character which it would be most improper for them to disclose but I do not consider that this information, even if it be of a confidential character, was of a highly confidential nature.

I do not forget that by section 127 of the Finance Act 1972, it is provided that no obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise is to prevent the communication of information by the Commissioners of Inland Revenue to the Commissioners of Customs and Excise and vice versa, or that the disclosure of information obtained by one from the other is prohibited by section 127 (2), save for the purposes there specified, and I do not forget that by section 3 of the Finance Act 1967, power is given to the commissioners to disclose, on it being notified to them by the Secretary of State that it is in the national interest, that certain information about imported goods should be given, and that, though by order the Secretary of State can add to the description of information which can be disclosed, he is expressly debarred from authorising the disclosure of the price of the goods or the name of the importer.

I can well understand that Customs, taking the view that they are prohibited by law from disclosing information obtained by them, would require a provision expressly authorising disclosure to be included in these

Acts. The reasons for the prohibition in section 3 of the Act of 1967 of the Secretary of State requiring information to be given as to the name of an importer are not apparent from the section. It may have been, I do not know, on account of the "candour" argument of Customs and Excise.

The inclusion of these provisions in these two recent Acts does not appear to me to lead to the conclusion that the assumption that Customs and Excise are prohibited by law from disclosing all information obtained by them is well based. Much of the information they obtain is no doubt of such a character that it is implicit that it is not to be used or disclosed for any purpose other than that for which it is given. The question here is whether the names of importers of furazolidone in infringement of the patent are of that character.

For the reasons I have given I do not think they are. If any degree of confidentiality is attached to them I think it must be a low degree. I must confess that I am not in the least impressed by the "candour" argument. I really cannot conceive it to be realistic to suggest that the vast majority of importers who do not infringe patents or do other wrongs, will be in the least deterred from giving proper information to Customs by the knowledge that pursuant to an order of the court the names of the wrongdoers are disclosed by Customs.

Having said this, I want to make it clear that in my opinion Customs and Excise have acted perfectly properly throughout these proceedings. Applications for discovery by persons who are not sued and who have done no wrong were a rare occurrence in the last century and are even rarer in this. Customs are right to be solicitous for the interests of those who give them information. They were right initially to refuse the appellants' request. Indeed I think that it may well be that in cases which are not absolutely on all fours with this, they would be right in future to refuse disclosure except on the order of the court.

And the question is, should the court now order it? If a degree of confidentiality does attach to the names and addresses of the importers, I think that on the balance of national interest the interests of justice in this case far outweigh any interest there may be in non-disclosure.

The appellants now only seek discovery of the names and addresses of the consignees of the imported furazolidone in the last six years and, in my opinion, that discovery should be ordered in the form which has been agreed between the parties.

As to costs, I agree with the order proposed by my noble and learned friend, Lord Reid.

For the reasons I have stated, in my opinion this appeal should be allowed.

LORD CROSS OF CHELSEA. My Lords, on the appellants' summons for inspection Graham J. held that the respondents had not infringed the patent and that the goods were not liable to forfeiture under section 44 of the Customs and Excise Act 1952, as "prohibited goods"; but that nevertheless they were bound to disclose the names for which the appellants were asking. His order dated December 8, 1971, which gave effect to this decision was technically an interlocutory order but in reality it disposed of all the issues raised in the consolidated actions. The respondents

appealed to the Court of Appeal which by a judgment given on March 27, 1972, agreed with the judge on the question of infringement and on the construction of section 44; but held that, even apart from the question of privilege, the respondents, not being infringers, were under no obligation to disclose the names of the importers; and that in any case it would have been contrary to the public interest to have ordered them to disclose them. On their appeal to this House the appellants abandoned the contention that the respondents had infringed the patent. They did not, as I understood, abandon their contention that goods imported in infringement of a patent are goods "imported contrary to a prohibition in force with respect thereto under or by virtue of an enactment" within the meaning of section 44; but—in common I think with all your Lordships—I have no doubt that Graham J. and the Court of Appeal were right in rejecting this contention. The action falls, therefore, to be treated as a pure action for discovery and the questions to be decided are (A) whether in the circumstances the respondents, although not themselves infringers, would be bound—apart from any question of privilege—to make the discovery asked and (B) whether, if so, it would be contrary to the public interest to order them to make it. For the purpose of answering these questions one must make three assumptions in favour of the appellants, *first* that the patent is valid; *secondly*, that the patent has been infringed by importers whose names are known to the respondents; and *thirdly*, that the appellants cannot discover the identity of the infringers unless the respondents disclose it to them.

The most recent English authority to which the appellants could refer us in support of the proposition that the court can entertain an action by A against B in which the only relief asked is that B disclose to A the identity of someone who has to his knowledge infringed A's rights, in order to enable A to bring an action against him is the case of *Orr* v. *Diaper* decided by Hall V.-C. in 1876 and reported in 4 Ch.D. 92 and, more fully, in 25 W.R. 23. Unfortunately, however, in order to understand the argument and the judgment in that case it is necessary to plunge still further into the past and consider the practice of the Court of Chancery with regard to bills of discovery. I say "unfortunately" because the lawyer of today can at best have only a superficial understanding of a procedure developed when law and equity were administered in separate courts and the parties to common law actions were not permitted to give evidence. A further source of difficulty is that the Chancery reports before the time of Lord Eldon L.C. often take the form of brief notes, which may have been useful to those for whose benefit they were published but mean very little to the modern reader. I am, therefore, far from confident that what I am about to say is an accurate summary of the position. One starts with the distinction which came to be drawn by equity lawyers between a bill of relief and a bill of discovery. Since the ordinary Chancery bill asking for relief in equity always included a request that the defendant be ordered to answer on oath a number of interrogatories framed to elicit admissions which would help the petitioner to prove the case set out earlier in the bill it can be said that every Chancery bill was in a sense a bill of discovery. But a bill of discovery properly so called was a bill which simply asked for the disclosure of facts known to the defendant or of documents in his possession to aid the

petitioner in prosecuting or defending other proceedings and asked no other equitable relief save, if the petitioner was the defendant to an action at law, an injunction staying that action until the discovery was given. A defendant from whom discovery was sought either by a bill of relief or by a bill of discovery might object to giving the discovery on the ground that he had no "interest" in the proceedings but was "a mere witness" and ought not to be compelled to give his evidence before the hearing. To this rule exceptions were allowed in the interests of justice but by the end of the 18th century the list of exceptions was closed. Further, what constituted an "interest" for the purpose of the rule came to be defined. In the case of a bill of relief it was such an interest as that a decree could be made against him or that he would be affected by the decree. As to a bill of discovery it was finally decided by this House in the *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466 that such a bill could not be maintained against a person who was not a party to the record in the action in aid of which the discovery was sought even though he was deeply interested in its success. It is, incidentally, not without interest to observe that whereas in earlier days, in particular at the time of the disputes between Lord Ellesmere L.C. and Coke C.J., the common lawyers had bitterly resented the granting of injunctions by the Chancellor staying proceedings at law where the defendant could make out a prima facie case of fraud on the part of the plaintiff with which the common law was unable to deal, in the case of the *Queen of Portugal* v. *Glyn* it was common lawyers—Lord Abinger C.B. and Lord Wynford—who thought that an injunction could and should be granted to stay an action by an agent of the Queen on bills of exchange to which, if the allegations in the bill were true, she was not "in conscience" entitled, whereas it was the equity lawyer, Lord Cottenham L.C., who gave the leading speech upholding the demurrer to the bill of discovery on the ground that the Queen was not a party to the record at law and could in theory have been called as a witness by the defendant. But the "mere witness" rule has in principle nothing to do with the question whether or not a defendant to a bill should be obliged to disclose the identity of someone against whom the plaintiff wishes to claim relief. In such cases there can be no question of calling the defendant to give the evidence at the hearing since without the disclosure of the name proceedings cannot be brought at all. In this field it was settled that if a party was properly made a defendant to a bill of relief the petitioner was entitled to discovery from him of the existence or whereabouts of other persons not parties in order that they might be made parties; but whether one could bring a bill of discovery in order to find out whom to sue in proceedings which you had not yet brought was not entirely clear. On one side reliance could be placed on *Moodalay* v. *Morton*, 1 Bro.C.C. 469; 2 Dick. 652 decided in 1785 by Lord Kenyon M.R. There the plaintiff who said that the East India Company had granted him the right to supply the inhabitants of Madras with tobacco for a term of years and that persons who were servants of the company had dispossessed him and purported to grant a lease of the right to someone else filed a bill of discovery against the company and Morton their secretary asking them to disclose by whom and under what authority the second lease had been made so that he might know how to frame the action at law which he wished to bring in respect of the injury done to him. Obviously it was material for that purpose for him to

discover whether those who had dispossessed him were acting by the authority of the company or not. That case differs from the present case in that there the discovery might well have shown that the proper defendant to the proposed action was in fact the person—the East India Company—from whom discovery was sought; but that does not seem a very substantial distinction. Further in *Angel* v. *Angel* (1822) 1 L.J.O.S.Ch. 6 Sir John Leach V.-C. appears to have regarded *Moodalay* v. *Morton*, 1 Bro.C.C. 469, as an authority showing that a "would be" plaintiff at law could bring a bill of discovery in equity to discover against whom the action should be brought. On the other side reliance could be placed on some language used by Lord Eldon L.C. in his judgment in *Mayor and Commonalty and Citizens of London* v. *Levy*, 8 Ves.Jr. 398, 402, 404—though *Moodalay* v. *Morton* was not referred to in that case and the decision can be justified on the ground that the bill was a "fishing enquiry" by plaintiffs who were trying to find out whether their rights had in fact been infringed. It is noteworthy that Story in his *Equity Jurisprudence*, 2nd ed. (1839), para. 1483, states on the authority of *Moodalay* v. *Morton* and *Angel* v. *Angel* that a bill of discovery may be brought when the object of the discovery is to ascertain who is the proper party against whom a suit should be brought and that as his note also contains a reference to the *Mayor of London* v. *Levy* he presumably did not consider that anything which Lord Eldon L.C. said in that case cast any doubt on the general principle.

With this by way of introduction one can now turn to *Orr* v. *Diaper*, 4 Ch.D. 92—though it is not irrelevant to bear in mind that since 1851 the parties to civil actions at law had been able to give evidence and that by the Judicature Act a single court had been established in place of the separate courts of law and equity in which both law and equity could be administered concurrently with the proviso that in case of conflict the rules of equity should prevail.

Orr v. *Diaper* was argued on demurrer. The facts alleged in the statement of claim which must be taken to have been true were that the plaintiffs were manufacturers of sewing cotton which they packed in a distinctive way and which was sold abroad in—among other countries—Chile; that sewing cotton of an inferior quality packed according to their style and bearing counterfeit tickets had been sold in Chile for the past few years and that in April 1876 they discovered that the defendants who were shippers in Liverpool had been for some years and were still "shipping" these goods to Valparaiso. On April 10, 1876, the plaintiffs' solicitors asked the defendants to give them the names of the consignors and, on their refusal to do so, started an action on April 25 asking for discovery of the names and addresses of the consignors of the goods bearing the counterfeit tickets—"in aid of proceedings now in contemplation by the plaintiffs to restrain the piracy of the said tickets" which could not, as they said, be maintained without the discovery sought. There is no doubt that if these allegations were established—and the demurrer of course proceeded on the footing that they were established—the plaintiff could have obtained an injunction against Messrs. Diaper, in proceedings framed for that purpose, to restrain them from continuing to ship goods which were being "passed off" as the plaintiffs' goods. This appears from *Upmann* v. *Elkan*, L.R.

12 Eq. 140; 7 Ch.App. 130. The relevant facts there were that on June 14, 1869, Messrs. Elkan who were continental forwarding agents carrying on business in London received a letter from a firm in Hamburg saying that they had shipped to them a case of cigars containing cigars of various brands, requesting them to pay the duty thereon and to forward the contents to various persons resident in England whose names and addresses were given. The case duly arrived and was warehoused with the St. Katharine's Dock Company. The plaintiffs who were cigar manufacturers discovered—somehow or other—that the cigars which were not of their manufacture were packed in boxes bearing an imitation of their brand and on June 19 their solicitors told Messrs. Elkan, who said that up to that time they had no reason to suspect that anything was wrong, that the cigars consigned to them bore a forged brand. After, as they said, verifying that this was indeed the fact, Messrs. Elkan offered to give the plaintiffs the names of the consignors and actually gave them the names on July 8. Meanwhile, on July 1, the plaintiffs filed a bill against Messrs. Elkan and the dock company asking for an injunction to restrain Messrs. Elkan from removing the cigars from the docks and from infringing their mark and asking for damages. They obtained an ex parte injunction on July 2. A motion for interim injunction was made on July 8 which stood over until July 15 on Messrs. Elkan giving an undertaking, and on July 15 the injunction was granted—Messrs. Elkan expressing their willingness to act as the court should direct but saying that they preferred to have an injunction granted against them to simply continuing their undertaking. When the suit came on the court held that Messrs. Elkan were not privy to the infringement of the mark and the dispute became a dispute as to costs—but to resolve it the court had to decide what were the rights and duties of the parties on the footing that Messrs. Elkan had no knowledge of the fraud before the plaintiffs' solicitors told them of it. Lord Romilly M.R., at p. 145, expressed the view that as soon as Messrs. Elkan were told of the fraud it was their duty to give the plaintiffs the information as to the identity of the consignors for which they were asking and to undertake that the goods should not be taken from the warehouse until the spurious brand had been removed. He added that persons in the position of Messrs. Elkan could not reasonably complain if proceedings were started against them before they gave the information. It was their misfortune that they had dishonest correspondents. In the result on Messrs. Elkan undertaking that if any fresh cigars should be sent to them bearing the plaintiffs' brand they would at once give the plaintiffs notice, he made no order as to costs as between the plaintiffs and Messrs. Elkan—leaving each side to pay its own. That decision was affirmed on appeal by Lord Hatherley L.C. who agreed with what Lord Romilly M.R. had said as to the duty of Messrs. Elkan on hearing of the fraud.

To return now to *Orr* v. *Diaper*, 4 Ch.D. 92—counsel for the defendant pointed out that the action was a pure action for discovery, that no relief was asked against his clients beyond the disclosure of names to enable the plaintiff to bring proceedings against the consignors, and he submitted that the "mere witness" rule applied. When Hall V.-C. asked whether the plaintiff could not add to his suit a claim for relief in equity against the defendant counsel referred to the rule (laid down by Lord Eldon L.C. in

Butterworth v. *Bailey* (1808) 15 Ves.Jun. 358) that a bill of discovery could not be turned by amendment into a bill for relief. The Vice-Chancellor—perhaps unfortunately—did not call on counsel for the plaintiff. If he had done so it may be that counsel would have pointed out that the " mere witness " rule could have no application to a case where all that was being asked for was the identity of a wrongdoer whom the plaintiff would be unable to sue unless the defendant gave it to him. As it was the judge overruled the demurrer on the ground that the defendant was not a " mere witness " because on the facts taken to be admitted the plaintiff could have obtained an injunction against him if he had chosen to apply for one. To make the right of a plaintiff to obtain the sort of discovery which was being sought in *Orr* v. *Diaper* and is being sought in the present case dependent on whether or not the plaintiff could have obtained some relief against the defendant if he had chosen to ask for it is to my mind utterly illogical. Suppose that Diaper after having innocently and unwittingly shipped infringing goods for some consignor for several years had gone out of business shortly before the plaintiff asked him for the consignor's name. In such a state of facts the plaintiff could not have obtained any relief against him since he was not continuing to ship infringing goods nor was there any danger that he would do so in the future. Yet if Lord Romilly M.R. and Lord Hatherley L.C. were right in saying that a man who has become innocently mixed up in fraudulent trading is under a duty to disclose the name of the wrongdoer to the injured party in order to enable him to bring his action that duty must be just the same in a case where because, for example, some infringing goods are still in his possession an injunction could be obtained against him and a case such as I have supposed where it could not. Bray, in his well-known work on *Discovery* published in 1885 treats *Orr* v. *Diaper*, 4 Ch.D. 92 as a modern example of what he regards as the old principle that a bill of discovery might be filed against a person in order to discover the names of other persons for the purpose of bringing an action against them although no proceedings were to be brought against the defendant to the bill—and makes no reference to the fact that in *Orr* v. *Diaper* it so happened that such proceedings could have been brought—see the note on p. 40. On p. 614 he suggests that the language used by Lord Eldon in *Mayor of London* v. *Levy*, 8 Ves.Jun. 398 " perhaps requires some little qualification." The same view of *Orr* v. *Diaper* was taken in 1887 by the Supreme Court of Massachusetts in *Post* v. *Toledo, Cincinnati and St. Louis Railroad Co.* (1887) 11 N.E.Rep. 540. There an Ohio corporation had recovered judgment in Ohio against another Ohio corporation under whose statutes its stockholders were personally responsible for its debts. The business of the debtor corporation was conducted in Massachusetts and the creditor corporation brought a bill of discovery in the court of that state against the debtor corporation and its officers who were resident in Massachusetts for discovery of the names of its stockholders so that the creditor corporation could take proceedings against them in Ohio. Although the debtor corporation was made a defendant it was not served with the bill since there was no way in which effectual service could be made on it. So in substance the only defendants to the bill were the officers of the corporation against whom no relief was or could be claimed. They demurred to the bill. In support of the demurrer it was argued that Lord Eldon's

decision in *Mayor of London* v. *Levy*, 8 Ves.Jun. 398 was inconsistent with the badly reported earlier cases such as *Moodalay* v. *Morton*, 1 Bro.C.C. 469 that Hall V.-C. could not have meant to overrule a decision of Lord Eldon universally accepted for 75 years and that *Orr* v. *Diaper*, 4 Ch.D. 92 should be treated as a special case not to be followed unless the facts were exactly the same. On the other side it was said that if a plaintiff could obtain from a person whom he had properly made defendant to a bill for relief discovery of the names of other parties necessary to be made defendants to the suit, why should he not be able to bring a bill of discovery against persons against whom he could claim no relief in order to obtain the names of defendants to a proposed action which he could not bring unless he knew the names?—*Orr* v. *Diaper* was cited in support of that argument.

In overruling the demurrer the court said, 11 N.E.Rep. 540, 547:

> "The present case must be determined by the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them, or to their property, in order to discover who the persons are against whom he may proceed for relief. . . . It is settled that a bill of discovery may be maintained to aid the plaintiff in a suit which he intends immediately to bring, as well as in a suit already brought, if the bill discloses a cause of action; and the difficult question is under what circumstances may such a bill be maintained for the purpose of ascertaining the proper parties against whom the suit should be brought."

The court then pointed out that the facts in *Mayor of London* v. *Levy*, 8 Ves.Jun. 398 were not such as required Lord Eldon to overrule *Moodalay* v. *Morton*, 1 Bro.C.C. 469 and that in fact no reference is made to that case in his judgment and they quote *Orr* v. *Diaper*, 4 Ch.D. 92 for the proposition that under some circumstances discovery may be had for the purpose of ascertaining the persons against whom the plaintiff may bring a suit although he does not allege that he has a cause of action against or intends to sue the persons who are the defendants in the proceedings for discovery. They then state their conclusion on the facts in the case before them as follows, at p. 547:

> "It is clear that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses; and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant. . . . But when a plaintiff has a cause of action against persons who are defined either by statute, or by their relations to property or a business by the management of which the plaintiff has suffered injury, and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons from their agents in charge of the property or business; and the decisions recognise that this may sometimes be done. In the present case it is the duty of the corporation to pay

the plaintiff's judgment if it have sufficient assets. A part of its assets for that purpose is the liability of its stockholders. The corporation acts only through its directors and other principal officers; and it is necessary that the plaintiff, in order to enforce the liability of the stockholders, and thus obtain satisfaction of its judgment, should bring suit against the corporation and all its stockholders; and the plaintiff, except by discovery, cannot ascertain who these stockholders are."

I find that case of great assistance in the solution of the problem before us in this case. The court which decided it was of high standing; it was decided in the light of the old English Chancery authorities which as the case was decided as long ago as 1887 the judges were probably in a better position to understand than we are; and it lays down a reasonable principle by which to judge whether a plaintiff should have this sort of discovery. To make his right depend on whether or not he could obtain some other relief against the defendant is to my mind quite irrational. The court in *Post's* case, 11 N.E.Rep. 540 makes it depend on the nature of the relation which subsists or subsisted between the defendant to the action for discovery and the persons the disclosure of whose names is sought. In that case the relation was that of agents in charge of the undertaking of which the persons whose names were sought were in effect the owners. In cases such as *Upmann* v. *Elkan*, L.R. 12 Eq. 140 and *Orr* v. *Diaper*, 4 Ch.D. 92 the relation was that of persons engaged by the tortfeasor to deal with the goods in question and who in the course of doing so unwittingly facilitated the commission of the tort. In my judgment no sensible distinction can be drawn in applying the *Post* case principle between the position of the respondent commissioners and the position of Diaper or Messrs. Elkan or the St. Katharine's Dock Company. It is true that Messrs. Elkan were under no obligation to enter into the business relations with the dishonest consignors which made them unwitting facilitators of a fraud whereas the commissioners were under a statutory duty to bring under their control for the purpose of exacting duty these infringing imports of furazolidone. But the fact remains that these goods passed through their hands and—assuming that they cannot claim privilege on the grounds of public interest—I cannot see any reason why they should not be under the same duty to disclose the names as the dock company who owned the transit shed in which the imports were stored under the surveillance of customs officers. The dock company would certainly have been bound to give discovery of the names if the plaintiffs discovered the furazolidone was in a particular transit shed and that the dock company who were in possession of it knew the names of the importers. If so, why not the commissioners who had effective control of the goods?

That being my conclusion on this part of the case I do not find it necessary to express any opinion on a point to which a good deal of argument was devoted—namely, whether the appellants could have obtained against the commissioners the equivalent of an injunction in the shape of a declaration that they ought not to give clearance to imports of furazolidone without giving the appellants the name of the importers.

This brings me to the claim of privilege. In his affidavit sworn on April 28, 1971, Sir Louis Petch put the claim on two grounds; first, that the

commissioners were not entitled to disclose the information requested even if they wished to do so and, secondly, that assuming that they had the power to give it the disclosure would be contrary to the public interest. Mr. Oliver in his able and candid argument wisely did not seek to support the first ground. Of course a statute may provide that information of a certain character shall not be disclosed even for purpose of legal proceedings. An example of such a prohibition is section 17 (2) of the Agricultural Marketing Act 1931, which was considered in *Rowell* v. *Pratt* [1938] A.C. 101. But the commissioners are not prohibited by statute from disclosing the names of importers. No doubt the commissioners consider very properly that they ought to treat as confidential and not voluntarily to disclose even to another government department information which comes to them as a result of the exercise of the powers given to them by the Customs and Excise Act 1952, for the purpose of enabling them to collect the revenues of customs and excise. Section 3 of the Finance Act 1967, and section 16 (9) of the Agriculture Act 1970, to which Sir Louis refers—and also section 127 of the Finance Act 1972, passed after he had sworn his affidavit, were enacted in order to make it clear that the obligation of secrecy which the commissioners very properly consider to be binding on them as a general rule is not to apply in the cases there specified. But this has nothing to do with disclosure under an order of the court for the purpose of legal proceedings —whether criminal or civil, for outside the field of legal professional privilege the fact that information has been imparted confidentially is not—in the absence of an express statutory prohibition—any bar to the court ordering its disclosure. Then is it contrary to the public interest that this information should be disclosed? This problem falls to be considered under two heads—first, from the point of view of the individuals who have supplied the information; secondly, from the point of view of the efficiency of the Customs. Now on the admitted facts in this case the great majority of those whose names will be disclosed have infringed the appellants' patent and it does not lie in their mouths to complain that their identity is revealed. It is no doubt conceivable—though most unlikely—that some persons who bought furazolidone from the appellants and exported it for sale abroad have re-imported it. Such people, if they exist, might possibly dislike their identity being disclosed—but in this connection we should bear in mind that the information in question is given to many others besides the commissioners. The shippers, the master of the ship and the employees of the owners of the transit sheds or warehouses in which the goods are stored will all know or have means of getting to know the names of the importers. This information accordingly cannot fairly be regarded as highly confidential information in the hands of the commissioners. I turn now to the effect of the disclosure on the efficient working of the Customs service. Sir Louis says that he is afraid that the good relations and mutual confidence which usually exist between the officers of the Customs and traders would be seriously impaired if it became known that any information of a confidential character obtained from traders under statutory powers might have to be disclosed by the commissioners otherwise than under the provisions of a statute enabling them to disclose it. The traders whose good relations with the Customs Sir Louis is anxious to maintain are, presumably, honest traders. Any honest trader who was disturbed at the

thought that a court could order the disclosure of importers' names in circumstances such as exist here would be a most unreasonable man and I cannot believe that there would be many such. No doubt dishonest traders might be disturbed by the knowledge that such disclosure could be ordered, and Sir Louis gives it as a further ground for the claim of privilege that dishonest traders who now tell the Customs the truth with regard to the character of the goods and the identity of the importers may be driven to giving false information. An argument that one should not try to stop one form of wrongdoing out of fear that some of the wrongdoers may take to committing yet further offences in order to be able to maintain their original course of wrongdoing is not very attractive. But in any case I think that Sir Louis' fears on this head are exaggerated. On the question of public interest I agree with Graham J. and disagree with the Court of Appeal. I would therefore allow the appeal and I agree that the costs should be dealt with in the manner proposed by my noble and learned friend, Lord Reid.

In the course of the argument fears were expressed that to order disclosure of names in circumstances such as exist in this case might be the "thin end of the wedge," that we might be opening the door to "fishing requests" by would-be plaintiffs who want to collect evidence or the requests for names made to persons who had no relevant connection with the person to be sued or with the events giving rise to the alleged cause of action but just happened to know the name. I think that these fears are groundless. In the first place, there is a clear distinction between simply asking for the name of a person whom you wish to make a defendant and asking for evidence. This case has nothing to do with the collection of evidence. Secondly, although in any case which was on all fours with this case or any subsequent case which may be decided the commissioners or any other person who was asked for a name would no doubt give it without putting the applicant to the expense of obtaining an order of the court; in any case in which there was the least doubt as to whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have to decide whether in all the circumstances it was right to make an order. In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant.

LORD KILBRANDON. My Lords, the facts which are basic to the question of law arising in this appeal lie in very narrow compass. Between May 1967, and February 1970, there were in six individual months importations into the United Kingdom of furazolidone, a chemical substance of which the first appellants are patentees in U.S.A., and the second appellants (whom I shall refer to as "the appellants"), are exclusive licensees in the

United Kingdom. While it is possible, it is commercially very improbable, that some of these importations may have included importations or re-importations of the patented article manufactured by or under licence from the appellants. In spite of some unhappy ambiguities in the appellants' pleadings, it is right that the appeal should be decided on the footing that the importers of these parcels of furazolidone are by their use of the substance infringers in the United Kingdom of the appellants' patent right, could be restrained by law from future infringement, and are liable in law for the pecuniary consequences of their past infringements.

The appellants have come to know of these infringements through the publication by the respondents, the Commissioners of Customs and Excise, of monthly Special Chemical Returns prepared by them and made available by them to the chemical industry. The name of the importer, otherwise " infringer," does not appear in the return. I do not think it is necessary to go into the details of the compilation of, and the sources of information for, the respondents' published statistics. Nor do I need to refer, except in the broadest way, to the procedures governing the passage of imported goods through customs. In the present context, that is the disclosure of names of importers, it is enough to say that, on the arrival of a ship (or aircraft) at a customs port, the master has to prepare, sign and deliver to customs a " report " of his ship and her lading, which report contains a description of each purchase of goods and the name of the consignee thereof, while the importer or his agent must prepare, sign and deliver to customs a form of " entry " specifying the description, quantity, tariff code number and value of goods consigned to him. No goods can be released out of customs' charge until these forms have been presented, and the appropriate duty paid.

The case has been conducted on the footing that it is impossible for the appellants to find out the names of the infringers of their patent unless the respondents disclose them. The respondents refuse to do so, and the present action, as it is now maintained, is like the old bill of discovery in as much as it prays for no relief, but seeks an order for discovery only. This is not by any means the extent of the claim against the respondents which was before the courts below. Until the appeal was opened in your Lordships' House, the appellants were claiming a declaration that the respondents had infringed, or caused, enabled or assisted others to infringe their patent, a declaration that it was the respondents' duty to forfeit the imported furazolidone, and an order that they make a complete discovery of documents relating to the importations.

It will be convenient to consider first whether such an application as this would succeed against a person not in the position of a department of State, that is, treating as a separate and subsequent question whether any special considerations of public policy apply to such bodies as the Commissioners of Customs and Excise. It is easy to envisage a dock authority, probably operating under powers conferred in a local Act within the framework of the Harbours Clauses Act 1847: the authority is empowered to demand sight of a ship's manifest, or otherwise obtain a detailed account of her cargo, broken down into quite narrow categories, in order that the dock charges appropriate to each category of goods can be calculated and imposed. There will be some provision for the detention of goods in the dock area until dues are paid, and the authority will necessarily be aware

of the names of the consignees. The dock authority is apprised that the importation of certain goods which passed through the port infringed a patent conceded to be valid—as the respondents concede for the purposes of the present case—and the patentee can get no remedy unless the dock authority disclose the names of the patentee. To make the comparison completely valid, and with an eye to some of the precedents to which it will be necessary to refer, it must also be predicated not only that the patentee has no intention of bringing suit against the dock authority for any relief other than discovery, but also that he has no ground in law or equity for doing so. That would, I apprehend, be the situation if the goods were no longer in the control of the authority, and if there were no grounds which would support an application for an injunction against them at the instance of the patentees in respect of future importations.

Among the large number of cases cited to us, I believe it is not possible to find a precedent for the granting of an application for discovery in the precise circumstances I have figured. Indeed, I think I can greatly shorten what I have to say on this topic, which is of a technical character involving an expert knowledge of English legal history in the nature of things denied to me, by saying that I respectfully agree with the analysis made in the Court of Appeal by Buckley L.J. of the cases of *Upmann* v. *Elkan*, L.R. 12 Eq. 140 and *Orr* v. *Diaper*, 4 Ch.D. 92; 25 W.R. 23. These seem to be generally regarded as the root cases on the subject, especially perhaps the latter since it post-dates the Judicature Act 1873, and are widely cited as leading cases in the foreign jurisdictions to which we were copiously referred. In both cases the plaintiff claimed to have a right of action against the defendant arising out of the import or export of goods masquerading as his own; in *Upmann*, too, the defendant had refused, wrongly as Lord Hatherley L.C. held, to disclose the names of the twenty consignees. In *Orr* v. *Diaper*, while the plaintiff had no intention of suing the defendant, he alleged in his statement of claim that the defendants "had been for some time and were still shipping" the offending goods; this statement was made after the defendants had acquired knowledge of the offences. This is no doubt the foundation for Hall V.C.'s observation that the plaintiffs showed a right to sue the defendants at law, "which expression, since the change made by the Judicature Acts, must mean this court, in some other proceeding (25 W.R. 23, 25)."

In *Moodalay* v. *Morton*, 1 Bro.C.C. 469, as I read it, the plaintiff had an action not only against the person who had infringed his right of property by purporting to give it to another, but also against the East India Company if that person turned out to be their servant or agent. With special reference to that case, I would heartily agree with some remarks made by the Vice-Chancellor in *Angel* v. *Angel* (1823) 1 L.J.O.S.Ch. 6, 8. (Presumably the reference in the quotation is to *Mitford's Chancery Pleadings*):

> "In the several cases to be found in the reporters, the expressions are for the most part indistinct and confused; and Lord Redesdale, adhering to the language of these authorities, has, with their words, adopted in some measure their inaccuracies and obscurities."

We were offered two reports of the judgment in *Moodalay*, one by Brown,

which was criticised by the Vice-Chancellor in *Angel*, 1 L.J.O.S.Ch. 6, 9, and the other by Dickens; they are entirely different from one another. Both cannot be authentic, so I suppose it is possible that neither of them is. We were shown at least three versions of the judgment in *Orr* v. *Diaper*; the Court of Appeal made a point of preferring that in the Weekly Reporter to that in the Law Reports. The former is certainly fuller and easier to follow, but for all I know it was deliberately altered by the learned judge on revision. These considerations made one reluctant to rely on the old cases except in so far as they deal with the actual subject matter arising for decision in them. To erect on them a structure of principles which should guide a modern court in the administration of justice seems to me to be building on quicksands. If, without the positive assistance of the ancient precedents, it seems possible to identify principles prima facie acceptable, the only limitation to their adoption might be to see whether these principles had ever been authoritatively negatived.

A case which gives rise to some difficulty is *Queen of Portugal* v. *Glyn* (1840) 7 Cl. & F. 466. One Soares sued Glyns to recover the proceeds of certain bills. Glyns filed a bill of discovery against Soares and the Queen, alleging that Soares was a mere agent for the Queen. The Queen demurred; in the demurrer Glyns' averments had to be accepted pro veritate. The House, reversing the decision of Lord Abinger C.B., Lord Wynford dissenting, sustained the demurrer, on the ground that since the Queen was not a party to the record in the action at law, she could not be made respondent in the bill of discovery in equity. The case exhibits some curious features. The appeal was heard in 1837; judgment was given more than 3 years later, after an unusually controversial debate. The case is ignored by Bray (1885), by Story (1892) and by Snell in his first edition (1868), being the only one published before the Judicature Acts. The sole reference to it in *Halsbury's Laws of England*, 3rd ed., vol. 1 (1952), para. 528, n. (i), is under "Agency," not "Discovery." Two decisions (1892 and 1906) of the Court of Appeal are there cited in support of the proposition,

> "In any action brought by an agent, the defendant is entitled to discovery from the principal as fully as if he were the plaintiff on the record, even though he is a foreign principal."

The footnote concludes, "But see *Queen of Portugal* v. *Glyn*," which certainly appears to decide the contrary.

The case was not included in the extensive citation before the Court of Appeal. Since much of the rather acrimonious discussion in this House related to the technical requirements of bills in Chancery, the opinion may be ventured that the case, at least since 1873, has not been regarded as authoritative; in any event it does not deal with the problem of discovery for the purpose of finding the name of a proposed defendant. This point is made in *Bray on Discovery* (1885), note to p. 40, contrasting *Queen of Portugal* with *Orr* v. *Diaper*, 4 Ch.D. 92.

Assuming that there are some characteristics attaching to a defendant in such an issue, which will be decisive of the question whether he can be called on to make discovery in order to enable the plaintiff in that issue to maintain a just cause of action against a third party, it seems to me incredible that one of those characteristics should be the defendant's

vulnerability in an action brought against him by the plaintiff. Why should A be bound to disclose to B the information which he must have before he can sue C if, and only if, B could, if he wished, also have sued A, although he has no intention of doing so? There is no rational distinction observable here.

This may be the place to dispose of the "mere witness" rule. It is settled, rightly or wrongly, that you cannot get discovery against someone who has no connection with the litigious matters other than that he might be called as a witness either to testify or to produce documents at the trial. We are not here in that territory. The defendant is not a mere witness, or any kind of witness, because the whole basis of the application is that, until the defendant has disclosed what he knows, there can be no litigation in which he could give evidence. Furthermore, if he were to disclose, either voluntarily or under compulsion, the names of the third parties whom the plaintiff desires to pursue, even then he might well not be a witness in the ensuing litigation. He might have no evidence to give; what he knew would not necessarily be required post litem motam.

The most attractive way to state an acceptable principle, intellectually at least, may be as follows. The dispute between the plaintiff and the defendants is of a peculiar character. The plaintiff is demanding what he conceives to be his right, but that right in so far as it has patrimonial substance is not truly opposed to any interest of the defendants; he is demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage. If he is successful, the defendants will not be the losers, except in so far as they may have been put to a little clerical trouble. If it be objected that their disclosures under pressure may discourage future customers, the answer is that they should be having no business with wrongdoers. Nor is their position easily distinguishable from that of the recipient of a subpoena, which, in total disregard of his probable loss of time and money, forces him to attend the court for the very same purpose as that for which discovery is ordered, namely, to assist a private citizen to justify a claim in law. The policy of the administration of justice demands this service from him.

But it is not necessary, in such a case as is being figured, to go as far as this. The defendants are not mere bystanders—although even if they be such they could in due time be called on to give oral evidence. The position in which they find themselves has been described in several ways; in a rather different context Lord Romilly M.R. in *Upmann* v. *Elkan*, L.R. 12 Eq. 140, 147 said of the importer that he was "mixed up with the transaction," and, of the dock company who were mere warehousemen, that "in many respects the position of the dock company does not differ from his [the importer's]." Again, the case of *Post* v. *Toledo, Cincinnati and St. Louis Railroad Co.* (1887) 11 N.E.Rep. 540, in which the Supreme Judicial Court of Massachusetts reviewed all the earlier English authorities, was concerned to state at p. 547

> ". . . the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them, or to their property, in order to discover who the persons are against whom he may proceed for relief."

These words appear to me to provide an apt, and by no means too wide, classification of those against whom discovery may in such circumstances be obtained, though I think the court, perhaps misled by the fact that they had available only the report at 4 Ch.D. 92, may have been wrong in saying that in *Orr* v. *Diaper* the plaintiffs neither alleged that they had a cause of action nor intended to sue the defendants. But the state of the reports does not make this clear.

Turning, then, from the imaginary dock authority we have been considering to the Commissioners of Customs, do they stand in some relation to the goods which makes the commissioners bound to disclose, on an order of the court, the names of the persons who imported them in prejudice of the plaintiffs' rights, in order to enable them to sue? In my opinion they do. The goods are at the order of the commissioners from the time they enter the customs port until they go out of customs charge. The goods are reported to them in detail, are directed by them to a particular transit shed, and are constructively in their possession and control in the sense of being removable only on their authority; the commissioners have the goods under their control so that they can exact in respect of them the duties authorised by the legislature. The importation of these goods infringes the plaintiffs' property right, and the functions which they perform must I think place the commissioners in a relation with the importers which entitles the plaintiffs to demand from them the names of the infringers.

As I have said, I do not know of any direct authority which will support such an entitlement. But the proposition seems to be not inconsistent with the ratio of the judgments in *Upmann*, L.R. 12 Eq. 140, *Post*, 11 N.E.Rep. 540, and *Hunt* v. *Maniere*, 34 Beav. 157. What is more important, if one is searching for principles rather than collating decisions, is that there are broad statements to be found in authoritative sources which are in harmony with the spirit of the decisions, and do not seem to depend on any seemingly extraneous fact, such as the liability of the defendant in discovery to be sued, which, as I have said, has in my view no bearing on the liability to discover in a suit proposed to be brought against a third party. *Bray on Discovery* (1885), at p. 612 says (of the old Chancery practice, with which the present action is said to be on all fours),

> "A party might file a bill of discovery before he commenced his action, where he required discovery in order to ascertain what form of action to bring: or in order to ascertain the proper person against whom to bring the action:"

he cites inter alia *Orr* v. *Diaper*, 4 Ch.D. 92, *Angel* v. *Angel*, 1 L.J.O.S. Ch. 6, and *Moodalay* v. *Morton*, 1 Bro.C.C. 469. Story J., in his *Commentaries on Equity Jurisprudence*, 2nd Eng. ed. (1892), at p. 1011 says:

> "in general, it was necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. There were exceptions to this rule, as where the object of discovery was to ascertain who was the proper party against whom the suit should be brought."

After citing, among other cases, *Moodalay* v. *Morton*, the learned editor of this edition (W. E. Grigsby) goes on to explain the effect on that exception of the Judicature Act 1873, as exemplified by *Orr* v. *Diaper*. The

first edition of this work was published in 1838, and Snell (whose 1st edition is dated 1868) appears to adopt Story freely: his account is very similar.

In another jurisdiction a similar principle has been applied. In *Colonial Government* v. *Tatham* (1902) 23 Natal L.R. 153, while the familiar relationship of agency could perhaps have been said to make the defendants liable in discovery, the basis is put much more broadly, first by Bale C.J. and Finnemore J. After quoting *Orr* v. *Diaper* they say at p. 157:

> "Before granting such an application we must be satisfied that the applicant believes that he has a bona fide claim against some person or persons whose names he seeks to discover, and whose name can be supplied by the respondent, and that he has no other appropriate remedy. We are satisfied upon these points":

agency does not seem to have been founded on. Beaumont A.J. refers to the passages in Story to which I have adverted, and says, at p. 158:

> "The principle which underlies the jurisdiction which the law gives to courts of equity in cases of this nature, is that where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction."

I observe that here the duty is said to lie rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff. In *Hart* v. *Stone* (1883) 1 Buch. App.Cas. 309, 314, de Villiers C.J. had cited *Voet* as authority for saying that "the judges had very large powers of ordering a disclosure of facts where justice would be defeated without such a disclosure." And in another civil law system, though the example is rather on the margin of relevance, Erskine, in his *Institute of the Law of Scotland* (1838 ed.), at III, Tit. VIII, 54, 55, after pointing out that Scots law had borrowed from Rome the doctrine that the heir is entitled, on succeeding, to deliberate whether his heriditas is to be damnosa or lucrosa (for he will be liable, unless he renounce the succession, for his ancestor's debts), says (56) that the heir has

> "a privilege to pursue for exhibition ad deliberandum, against all possessors, or havers, of writings, whether granted in favour of the ancestor, or by him in favour of others;"

There is no suggestion that in so doing he is pretending to exercise any right of relief against the discoverers.

In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the goods imported, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants bona fide believe to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to any special right of exception which the respondents may qualify in respect of their position as a department of state. It has to be conceded that there is no direct precedent for the granting of such an application in the precise

circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. That exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been "mixed up with the transaction," to use Lord Romilly's words, or "stands in some relation" to the goods, within the meaning of the decision in *Post*, 11 N.E.Rep. 540, is that that is the way in which judicial discretion ought to be exercised.

I will now turn to an aspect of that public policy which, exceptionally, protects from disclosure, either by discovery or testimony, communications which public policy decrees shall be held confidential. The commonest example arises from the relationship between attorney and client. The aspect relied on by the respondents in the present appeal is that usually but not very happily called "Crown privilege."

The defendants base their claim to refuse discovery on two broad grounds. First, they say they are not permitted by law to disclose matters which they have acquired in the course of the exercise of their statutory functions and have no statutory authority to disclose. They found on section 3 of the Finance Act 1967, as authorising limited disclosure, and impliedly by therefore forbidding wider disclosure. But we are here considering the power of the court to make an order. *Rowell* v. *Pratt* [1938] A.C. 101 provides an instance of a statute which authorises the gathering of information, and also limits disclosure of it so as to prevent the court from exercising such a power. This is not such a case. It was conceded that, for example, the information here called for would in practice be disclosed by the respondents on their own responsibility if that course were shown to be necessary for the prosecution of, or the defence in, criminal proceedings of a grave character, even other than customs prosecutions. If that be so, the court must, in my opinion, be entitled to call for the same sort of information in order to make possible the prevention of a civil wrong.

The other objections were, if I may say so, of a rather stereotyped and unconvincing character. It was said that disclosure of names would, as it were, drive future infringements underground, giving rise to falsehoods, frauds, forgeries and circumventions, so that, as experience in the U.S.A. has shown, the last state of matters would be worse than the first. Even if this plea involved no element of exaggeration, I would not favour refusing to stop one glaring fraud lest another be substituted for it. Lastly came the "candour" point—that if the persons now under statutory obligation to make disclosure to customs in the course of their business come to appreciate that, in certain circumstances, the names of importers may have to be disclosed to the court, the good relations which now exist between them and the defendants would be endangered, and they might not give the information required by statute with their customary candour. Some such argument is generally accepted as convincing when the confidential relationship between the tax-payer and the Inland Revenue is in question. The information here sought is, however, to be found in documents very different from income tax returns. It exists in bills of lading, ships' manifests, masters' "reports," and the records of the keepers of transit sheds, quite apart from "entries" made by importers. This is not a

A conclusive factor, but it is in my opinion an important factor which the court should take into account in exercising its judgment as to whether public policy demands that this information be treated, exceptionally, as confidential and immune from disclosure on an order of the court. In my opinion, public policy does not so demand.

I agree with the judgment of Graham J., and would accordingly allow this appeal. I also agree with the order as to costs proposed by my noble B and learned friend on the Woolsack.

Appeal allowed.

Solicitors: *Allen & Overy; Solicitor, Customs and Excise.*

J. A. G.

C

[HOUSE OF LORDS]

D DAVIES (A.P.) (SUING AS WIDOW AND ADMINISTRATRIX OF THE ESTATE OF KENNETH STANLEY DAVIES, DECD.) . APPELLANT

AND

TAYLOR . . . . . RESPONDENT

1972 June 27, 28, 29; Oct. 25

Lord Reid, Lord Morris of Borth-y-Gest, E Viscount Dilhorne, Lord Simon of Glaisdale, Lord Cross of Chelsea

Fatal Accidents Acts—Damages—Assessment—Widow's desertion of deceased husband five weeks before death—Deceased's instructions to institute divorce proceedings—Reconciliation not probable—Widow's possible dependency—Standard of proof

F The plaintiff's husband died in a road accident caused by the defendant's negligence. They had been married for more than 13 years, had no children and no complaint had been made of him as a husband. She had unknown to him while they were living together committed adultery with a fellow-employee. She deserted her husband five weeks before his death and after her desertion he had learnt of her adultery. He was nevertheless most anxious for a reconciliation and at G several meetings with her after she had left him he asked her to resume cohabitation, but she did not accept his offer. Shortly before his death he instructed his solicitor to institute divorce proceedings and an inquiry agent on the solicitor's instructions had obtained a confession statement from the fellow-employee. She had refused to make a statement to the inquiry agent.

In an action by the plaintiff as widow and administratrix of H the estate under the Fatal Accidents Acts 1846–1959 and the Law Reform (Miscellaneous Provisions) Act 1934, Bridge J. awarded the plaintiff £556 damages under the Act of 1934, but dismissed the claim under the Fatal Accidents Acts 1846–1959 on the ground that she had not shown that a

GEA Group AG v. Ventra Group Co. et al.

[Indexed as: GEA Group AG v. Ventra Group Co.]

96 O.R. (3d) 481

Court of Appeal for Ontario,
Weiler, Cronk and Blair JJ.A.
August 21, 2009

Civil procedure -- Discovery -- Pre-action discovery -- Applicant for Norwich order required to demonstrate that pre-action discovery is necessary in order for prospective action to proceed -- Applicant not required to show that Norwich order is necessary in order for it to plead -- Norwich order set aside on appeal where applicant already had all facts it required in order to commence action.

GEA and FNG entered into a sale and purchase agreement ("SPA") for the purchase by FNG of a GEA subsidiary. The transaction failed to close, and GEA commenced arbitration proceedings in Germany. K, the President of FNG and the beneficial owner of Ventra, testified in the arbitration proceedings that Ventra was a sister corporation of FNG, which conflicted with FNG's representation in offers made to GEA that Ventra was a wholly-owned FNG subsidiary. The arbitral tribunal found that FNG had breached the SPA. G was a director of Ventra and Ontario counsel to FNG, Ventra and K. GEA claimed that in settlement discussions with GEA's German counsel, G suggested that steps had been taken to make FNG judgment-proof. GEA applied to the Ontario Superior Court of Justice for ex parte relief in the nature of a Norwich order for pre-action discovery against Ventra and G. The relief was granted. Ventra and G moved to set aside the Norwich order and, in advance of that motion, sought to vary a confidentiality provision in that

order to allow disclosure of the Norwich proceeding and the Norwich order to FNG. That variation was granted (the "September order"), subject to certain conditions. FNG then moved to set aside the conditions in the Norwich order and the Norwich order itself, and GEA moved for an order continuing and increasing the scope of the Norwich order. The motion judge dismissed the motions of Ventra, G and FNG, and granted GEA's motion. Ventra, G and FNG appealed.

Held, the appeal should be allowed in part.

On the main ground of appeal raised by the appellants, namely, whether the motion judge misapprehended and misapplied the test for a Norwich order, the standard of review was correctness.

The motion judge failed to properly consider whether the disclosure sought was necessary in all the circumstances to permit GEA to pursue its rights against FNG. Necessity is not a stand-alone requirement for the granting of a Norwich order; nor is the party seeking a Norwich order required to demonstrate that the order is necessary in order to plead a cause of action. But it is incumbent on the applicant for a Norwich order to demonstrate that the discovery sought is required to permit a prospective action to proceed. That requirement may be satisfied in various ways. The information sought may be needed to obtain the identity of a wrongdoer, to evaluate whether a cause of action exists, to plead a known cause of action, to trace assets, or to preserve evidence or property. A Norwich order was not required in this case for any of those purposes. On the materials before the motion judge, two potential types of fraud by FNG and/or K were identified: fraudulent conveyances and fraudulent misrepresentations. The motion judge found that the evidentiary record suggested that G and Ventra might be fraudulently involved in the transfer of assets from FNG or that G was a participant in fraudulent misrepresentations made to GEA. Many of the critical facts necessary to advance those causes of action were in GEA's possession. While full particulars [page482] of the mechanics of the potential fraud or frauds were unknown to GEA, the nature, timing and apparent purpose of the frauds were known,

as was the identity of the suspected wrongdoer or wrongdoers. GEA was positioned to formulate a pleading against FNG and/or K if it elected to do so. If an action was commenced, discovery of the circumstances of the alleged frauds would be available to GEA under the normal discovery practice mandated by the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, and information from Ventra and G regarding the asserted frauds would be available to GEA under the Ontario rules. The Norwich order should be set aside.

There was no basis for setting aside the conditions in the September order.

Cases referred to

B. (A.) v. D. (C.), [2008] A.J. No. 126, 2008 ABCA 51, 85 Alta. L.R. (4th) 18, 50 C.P.C. (6th) 304, 429 A.R. 89, 164 A.C.W.S. (3d) 228, 291 D.L.R. (4th) 359 (C.A.); Glaxo Wellcome plc v. M.N.R., [1998] F.C.J. No. 874, [1998] 4 F.C. 439, 162 D.L.R. (4th) 433, 228 N.R. 164, 7 Admin. L.R. (3d) 147, 20 C.P.C. (4th) 243, 81 C.P.R. (3d) 372, 81 A.C.W.S. (3d) 142 (C.A.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 422]; Isofoton S.A. v. Toronto Dominion Bank (2007), 85 O.R. (3d) 780, [2007] O.J. No. 1701, 282 D.L.R. (4th) 325, 157 A.C.W.S. (3d) 165, 49 C.P.C. (6th) 167 (S.C.J.); Leahy v. B. (A.), [1992] N.S.J. No. 160, 113 N.S.R. (2d) 417, 8 C.P.C. (3d) 260, 32 A.C.W.S. (3d) 1048, 309 A.P.R. 417 (S.C. (T.D.)); Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital, [2006] O.J. No. 5082, 40 C.P.C. (6th) 6, 154 A.C.W.S. (3d) 324 (C.A.); Mitsui & Co. Ltd. v. Nexen Petroleum UK Ltd., [2005] E.W.H.C. 625, [2005] 3 All E.R. 511 (Ch. D.); Nikitin v. Richard Butler LLP, [2007] EWHC 173 (Q.B.); Norwich Pharmacal Co. v. Comrs. of Customs and Excise, [1974] A.C. 133, [1973] 2 All E.R. 943, [1973] 3 W.L.R. 164, [1973] F.S.R. 365, [1974] R.P.C. 101 (H.L.); Straka v. Humber River Regional Hospital (2000), 51 O.R. (3d) 1, [2000] O.J. No. 4212, 193 D.L.R. (4th) 680, 137 O.A.C. 316, 1 C.P.C. (5th) 195, 100 A.C.W.S. (3d) 761 (C.A.), folld

Other cases referred to

A. v. C., [1981] Q.B. 956, [1980] 2 All E.R. 347, [1981] 2

W.L.R. 629 (Q.B.); Alberta (Treasury Branches) v. Leahy, [2002] A.J. No. 524, 2002 ABCA 101, [2002] 8 W.W.R. 606, 51 Alta. L.R. (4th) 94, 303 A.R. 63, 113 A.C.W.S. (3d) 412, affg [2000] A.J. No. 993, 2000 ABQB 575, 270 A.R. 1, 78 C.R.R. (2d) 221, 99 A.C.W.S. (3d) 442 [Leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 235]; Anton Piller K.G. v. Manufacturing Process Ltd. (1975), [1976] Ch. 55, [1976] 1 All E.R. 779, [1976] 2 W.L.R. 162, [1976] R.P.C. 719, [1976] F.S.R. 129 (C.A.); Ashworth Hospital Authority v. MGN Ltd., [2002] UKHL 29, [2002] 4 All E.R. 193, [2002] 1 W.L.R. 2033, 67 B.M.L.R. 175 (H.L.); Bankers Trust Co. v. Shapira, [1980] 3 All E.R. 353, [1980] 1 W.L.R. 1274 (C.A.); British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76, 2003 SCC 71, 233 D.L.R. (4th) 577, 313 N.R. 84, [2004] 2 W.W.R. 252, J.E. 2004-59, 189 B.C.A.C. 161, 21 B.C.L.R. (4th) 209, [2004] 1 C.N.L.R. 7, 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, REJB 2003-51166, 127 A.C.W.S. (3d) 214; British Steel Corp. v. Granada Television Ltd., [1981] 1 All E.R. 417, [1981] A.C. 1096, [1980] 3 W.L.R. 774 (H.L.); Colonial Government v. Tatham (1902), 23 Natal L.R. 153; Diplock v. Wintle, [1948] Ch. 465, [1948] 2 All E.R. 318, [1948] W.N. 304 (C.A.); Johnston (Re), [1980] P.E.I.J. No. 34, 109 D.L.R. (3d) 227, 33 Nfld. & P.E.I.R. 341, 1 A.C.W.S. (2d) 374 (C.A.); Mareva Campania Naviera S.A. v. International Bulkcarriers S.A. (1975), [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (C.A.); P. v. T., [1997] 4 All E.R. 200, [1997] I.C.R. 887 (Ch. D.); R. v. B. (K.G.), [1993] 1 S.C.R. 740, [1993] S.C.J. No. 22, 148 N.R. 241, J.E. 93-466, 61 O.A.C. 1, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1, 18 W.C.B. (2d) 588; R. v. Palmer, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, 106 D.L.R. (3d) 212, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22, 17 C.R. (3d) 34; R. v. Parrott, [2001] 1 S.C.R. 178, [2001] S.C.J. No. 4, 2001 SCC 3, 194 D.L.R. (4th) 427, 265 N.R. 304, J.E. 2001-299, 198 Nfld. & P.E.I.R. 260, 150 C.C.C. (3d) 449, 39 C.R. (5th) 255, 48 W.C.B. (2d) 293; [page483] R. v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048, [2008] All E.R. (D.) 123 (Q.B.D.); Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276, 111 D.L.R. (4th) 19, 69 O.A.C. 312, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 45 A.C.W.S. (3d) 1101

(C.A.)
Statutes referred to
Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)
Rules and regulations referred to
Civil Procedure Rules 1998 (U.K.), SI 1998 No 3132 (L 17), rules 31.16, 31.17, 31.18
Rules of Civil Procedure, R.R.O. 1990, Reg. 194

APPEAL from the order of Cumming J., [2008] O.J. No. 5417, 2008 CanLII 70043 (S.C.J.) dismissing motions to set aside a Norwich order.

Bryan Finlay, Q.C., and Marie-Andre Vermette, for appellant Flex-N-Gate Corporation.

William V. Sasso and Jacqueline A. Horvat, for appellants Ventra Group Co. and Timothy Graham.

Peter F.C. Howard and Samaneh Hosseini, for respondent GEA Group AG.

The judgment of the court was delivered by

[1] CRONK J.A.:-- This appeal involves the equitable remedy of pre-action discovery, sometimes referred to as a "Norwich order" based on the principles articulated in Norwich Pharmacal Co. v. Comrs. of Customs and Excise, [1974] A.C. 133, [1973] 2 All E.R. 943 (H.L.). The main issue concerns the circumstances in which this extraordinary discretionary relief may be obtained in Ontario.

I. Background

(1) The parties

[2] The appellant, Flex-N-Gate Corporation ("FNG"), is a privately held corporation incorporated under the laws of Illinois. It produces and supplies components and systems to original automotive manufacturers. FNG is controlled by its president and the chair of its board of directors, Shahid Khan

("Khan").

[3] The appellant, Ventra Group Co. ("Ventra"), is a Canadian automotive supplier. It was created on the amalgamation in December 2002 of Ventra Group Inc., Ventra International Holdings Inc. and VTA Acquisition Company. Khan is Ventra's ultimate beneficial owner. [page484]

[4] The appellant, Timothy Graham ("Graham"), is a lawyer authorized to practise law in Ontario. He is also a director, officer and employee of Ventra. At the relevant times, he acted as Ontario counsel to FNG, Ventra and Khan.

[5] The respondent, GEA Group AG ("GEA"), is a public corporation incorporated under the laws of Germany. It is a global technology group consisting of more than 250 companies in 50 countries.

(2) The sale and purchase agreement

[6] On December 2, 2003, FNG made a preliminary, non-binding offer to purchase a GEA subsidiary company (referred to by the parties as the "Indicative Offer"). In both the Indicative Offer and a subsequent final offer to purchase made by FNG to GEA on March 17, 2004 (the "Final Offer"), FNG made several statements suggesting that it held substantial assets. These included claims that

(i) FNG's "operating assets remain 100% owned and operated by FNG";

(ii) FNG is a "privately owned manufacturing enterprise . . . which owns and directly controls the operations of: Fifteen (15) facilities in the United States; Ten (10) Canadian businesses; Three (3) Mexican plants; Two (2) operations in Brazil; One (1) plant in Argentina; and Six (6) plants in Spain";

(iii) FNG owned 100 per cent of 37 operating entities, one of which was Ventra;

(iv) "in October 2001 . . . FNG acquired control of 100% of the stock of [Ventra], a publicly traded Tier 1 global automotive supplier";

(v) "FNG subsequently converted Ventra into a private company under applicable Canadian and securities law procedures";

(vi) FNG had several plant locations throughout Ontario; and
(vii) FNG "currently generates an annual EBITDA [earnings before interest, taxes, depreciation and amortization] of approximately USD $200 million".

[7] On May 3, 2004, FNG and GEA entered into a sale and purchase agreement (the "SPA") regarding FNG's purchase of the GEA subsidiary. Graham acted as FNG's Canadian counsel [page485] throughout the negotiations and the parties' subsequent dealings regarding the SPA.

[8] At FNG's request, the closing date for the transaction contemplated by the SPA was postponed twice. Ultimately, FNG failed to close the transaction.

(3) The arbitration

[9] In October 2004, as a result of FNG's failure to close the SPA transaction, GEA commenced arbitration proceedings pursuant to the SPA and under the rules of the German Institute for Arbitration (the "Arbitration"), in which it claimed damages against FNG in an amount in excess of 210 million for alleged breach of contract. FNG, in turn, counterclaimed against GEA for damages for breach of the SPA.

[10] The Arbitration was divided into two phases: the liability phase and the damages phase. On September 15, 2006, the arbitral tribunal ruled in favour of GEA on the issue of liability, holding that FNG had breached the SPA, and dismissed FNG's counterclaim. The tribunal held that GEA was entitled to damages in an amount that would put it in the position it would have enjoyed if FNG had fulfilled its obligations under the SPA.

[11] FNG thereafter applied to a German appellate court to vacate the tribunal's liability decision. The application was denied on the ground of prematurity since the quantum of GEA's damages had yet to be determined. Costs of the application were awarded to GEA in the amount of 228,760. FNG did not appeal this decision.

[12] The damages phase of the Arbitration is now in progress.

(4) Evidence of alleged fraud

[13] Khan testified during the liability phase of the Arbitration. He said that: (i) Ventra has over $1 billion in sales; and (ii) Ventra is a sister corporation of FNG that is owned by him personally through a Nova Scotia LLC. The latter assertion conflicted with FNG's representation, in both the Indicative and Final Offers, that Ventra was a wholly owned FNG subsidiary.

[14] On March 8, 2007, a settlement meeting took place in Germany. FNG was represented at this meeting by Graham and FNG's German trial counsel, Thomas Weimann ("Weimann"). GEA's German trial counsel, Peter Heckel ("Heckel") and Andreas von Oppen ("von Oppen"), also attended the meeting.

[15] The parties dispute certain of the events that transpired at the March 8 meeting. Heckel and von Oppen allege that during the meeting, Graham suggested to GEA's representatives that: (i) GEA should consider a modest settlement of its claims against FNG since FNG, "with the help of a renowned US law [page486] firm", had been restructured so as to make it difficult for GEA to seize its assets; and (ii) FNG's enterprise value was only roughly "60 million".

[16] Weimann and Graham strongly deny that Graham made the statements attributed to him by Heckel and von Oppen. They also allege that the discussions at the March 8 meeting were confidential, a claim denied by Heckel and von Oppen.

[17] The parties are also divided on what was said during a telephone conversation on January 30, 2008 between Heckel and Weimann. Heckel claims that he called Weimann on that date to inquire whether FNG was going to pay the outstanding 228,760 costs award made in favour of GEA by the German appellate court. Heckel maintains that Weimann replied that FNG was not going to pay the costs award and indicated in German that FNG was just "two sheds in the landscape", suggesting that FNG had no substantial assets. Weimann denies having made these statements.

(5) The Norwich order

[18] Based on the foregoing, GEA concluded that sometime after the December 2, 2003 Indicative Offer and before the January 30, 2008 telephone discussion between Weimann and Heckel, FNG transferred all its assets to Khan or other unknown persons in an effort to become judgment-proof, thereby making it impossible for GEA to collect its anticipated damages award in the Arbitration from FNG.

[19] On July 7, 2008, about five months after Heckel and Weimann's telephone conversation, GEA applied to the Superior Court of Justice in Ontario for ex parte relief in the nature of a Norwich order against Ventra and Graham. In its notice of application, GEA alleged that it required evidence from Ventra and Graham concerning "an apparent fraud being perpetuated [sic] by FNG to shield itself from a substantial claim asserted against it by GEA in [the Arbitration]". GEA claimed that the order sought would allow it "to determine the circumstances of and prosecute FNG's wrongdoing in respect of its assets", that Ventra and Graham were "the only practicable source of information available to GEA in order to investigate FNG's fraud and determine its legal remedies", and that the interests of justice favoured granting the relief sought.

[20] In support of its application, GEA relied in part on an affidavit sworn on June 20, 2008 by GEA's legal counsel in Germany, Torsten Kunz-Aue. In that affidavit, Kunz-Aue outlined the nature of the wrongdoing alleged and the purpose of the relief sought by GEA: [page487]

> 3. The Norwich Pharmacal Order would provide GEA with an equitable right of discovery to obtain evidence from [Ventra] and . . . [Graham] relating to an apparent fraud being perpetuated [sic] by FNG and its principals to shield itself from any recovery by GEA. As set forth below, substantial evidence exists that from October 2004 to present FNG has transferred assets to other persons or entities to attempt to make itself judgment proof.
>
> . . . . .
>
> 21. It is thus apparent that transfers of assets were made by

> FNG, including, apparently, the transfer of [Ventra] shares from FNG to a Nova Scotia company controlled by Khan personally in anticipation of GEA obtaining an arbitral award and, for the express purpose of making it difficult or impossible for GEA to collect its expected judgment.
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> . . . . .
>
> 25. It is thus evident that at some point between December 2, 2003, when FNG stated that it was the sole owner of numerous plants and businesses . . . and January 30, 2008, when FNG purported to have virtually no assets, FNG in effect transferred to Khan or other persons as yet unknown all its assets, in an effort to make it impossible for GEA to collect its expected judgment in the Arbitration. Moreover . . . it may be that FNG disposed of some "60 million" in value between those dates alone.

[21] GEA's application for a Norwich order was thus premised on allegations of wholesale fraudulent conveyances by FNG, in particular, FNG's alleged wrongful transfer of its interest in Ventra. GEA therefore sought a widely cast Norwich order that would require:

(i) Ventra to disclose and produce "all documents relating to the transfer of its shares from [FNG] to other persons or entities";

(ii) Graham to attend an examination by GEA to answer questions with respect to "any and all conveyances, transfers or transactions whereby FNG's assets, including those of [Ventra] or its subsidiaries, were transferred from FNG to other entities" (emphasis added); and

(iii) Graham to disclose and produce to GEA all documents relating to the alleged conveyances.

[22] On July 9, 2008, Wilton-Siegel J. granted the requested Norwich relief (the "Norwich Order"). However, contrary to the broad ambit of the order sought by GEA, above-described, the Norwich Order was restricted to "any and all conveyances, transfers or transactions whereby FNG's interest in [Ventra] was transferred from FNG to other entities" (emphasis added).

[23] Under the Norwich Order, among other matters:

(i) Ventra was required "to forthwith disclose and produce to [GEA] all documents relating to the transfer of the interest of [page488] [FNG] in [Ventra] to other persons or entities (the 'Conveyances'), the particulars of which are within [Ventra's] know-ledge" (emphasis added);

(ii) Graham was required "to attend an examination by [GEA] to answer questions with respect to any and all conveyances, transfers or transactions whereby FNG's interest in [Ventra] was transferred from FNG to other entities and to forthwith disclose and produce to [GEA] all documents relating to the Conveyances" (emphasis added);

(iii) Ventra and Graham and "any other party that has or obtains knowledge" of the application or any resulting order were prohibited from disclosing the existence of the application, order, or any act or conduct undertaken in compliance with the order to any other person or party, except for the limited purpose of complying with the order or obtaining legal advice with respect to compliance with the order;

(iv) until further order of the court, the court file was sealed to protect the confidentiality of the application, any resulting order, and the conduct taken in compliance with any order; and

(v) any affected party was authorized to apply for directions in respect of the order or to vary or set aside the order on notice to counsel for GEA.

[24] GEA did not appeal from the application judge's decision to restrict the scope of the Norwich Order.

[25] On July 22, 2008, Ventra and Graham moved to set aside the Norwich Order. In support of their motion, they filed an affidavit sworn by Graham on July 21, 2008 in which he outlined FNG's role in the acquisition of Ventra and the share ownership of the various involved companies. In his affidavit, Graham denied that he had ever been a director of FNG. However, he confirmed that he was a director, employee and officer of Ventra and that he had acted as legal counsel to Ventra, FNG, Khan and other companies within the "FNG Group" from time to time. In the latter capacity, Graham said, "nothing in this affidavit is intended to waive solicitor-client, litigation

work product, or other legal privileges of those entities".

[26] Significantly, Graham also swore in his affidavit that: "FNG has never owned Ventra shares even indirectly"; "No representation (guarantee) was made in the SPA concerning FNG's ownership of Ventra shares"; and "FNG held no ownership interest in Ventra at the time of or at any time following the SPA." [page489]

(6) Variation orders

[27] In advance of the argument of their motion to set aside the Norwich Order, Ventra and Graham sought to vary the confidentiality provision of that order, above-quoted, to allow disclosure of the Norwich proceeding and the Norwich Order to FNG. They claimed that to respond to GEA's Norwich proceeding, they needed evidence from Graham that could only be obtained on disclosure of that proceeding to FNG, in order that Graham, as FNG's counsel, could obtain instructions from FNG.

[28] By order dated September 3, 2008, C. Campbell J. granted the requested variation of the Norwich Order, permitting disclosure to FNG of the Norwich application, the orders made thereunder, and the related proceedings and evidence (the "September Order"). Under paragraph one of the September Order, the variation granted was subject to certain conditions, including:

. . . . .

b) [GEA, Ventra, Graham] and FNG are free to use the information provided, and the documents and transcripts generated in these proceedings in other proceedings that [GEA] may initiate either in Ontario or elsewhere and whether it be in court or in a private dispute resolution proceeding; and

c) notwithstanding paragraph (b) above, no cause of action will be commenced or maintained by any of [Ventra, Graham], FNG and/or any of their shareholders, directors, officers, employees, agents or counsel (including, without limitation, Shahid Khan) with respect to the publication or disclosure of the materials generated, or information disclosed, in this proceeding by [GEA] or any of its directors, officers,

> employees, agents or counsel, including without limitation that any statements made are, under the law of defamation, accorded absolute privilege.

[29] Pursuant to paragraph two of the September Order, the conditions imposed under that order were stated to be without prejudice to FNG's right to move before the court to vary or set aside the conditions.

[30] After the September Order, both the Norwich proceeding and the Norwich Order were disclosed to FNG. At that point, Ventra's and Graham's motion to set aside the Norwich Order remained outstanding. Promptly thereafter, by motions dated September 24, 2008 and October 15, 2008, FNG moved to set aside the conditions in the September Order and the Norwich Order itself.

[31] In addition, on November 7, 2008, GEA moved for various relief, including an order continuing and varying the Norwich Order to permit the discovery of Graham on the issue of the failed 2004 SPA transaction between GEA and FNG. In this variation motion, GEA relied on the same grounds in support of [page490] the Norwich Order as it had advanced before Wilton-Siegel J. However, for the first time, it also alleged that it had been induced to deal with FNG in respect of the SPA based on fraudulent misrepresentations by FNG regarding its assets. GEA argued that the interests of justice favoured allowing it to pursue pre-action discovery with respect to this "different, but equally blameworthy conduct by FNG". It also claimed that:

> [T]he information provided, and the documents and transcripts generated in this proceeding will enable GEA to assess its legal remedies against FNG and/or its principals or employees and initiate proceedings as against them.

(7) Motions judge's decision

[32] The parties' duelling motions were heard together by Cumming J. By order dated December 9, 2008, he dismissed the motions brought by Ventra, Graham and FNG and granted GEA's motion to vary the Norwich Order (the "December Order").

[33] In his reasons, the motions judge expressed the view that, based on the evidential record, "one of two alternative possibilities must logically be the reality" [at paras. 27 and 29]:

> The first possibility is that [Ventra] was in fact a wholly-owned subsidiary of FNG at the time of the SPA but later removed from FNG after the abortive closing through a restructuring by January, 2008 when GEA learned that FNG would not satisfy the costs award. If this is true then GEA may have a cause of action against FNG, [Ventra] and [Khan] for a fraudulent conveyance to defeat GEA as a contingent creditor.
>
> . . . . .
>
> The second possibility is that [Khan] and FNG misled GEA through intentional misrepresentations (as to [Ventra] being a subsidiary of FNG) into entering into the SPA in May 2, 2004, and that [Ventra] was a mere sister or affiliate corporation to FNG by that point in time, both being indirectly owned by [Khan]. Perhaps [Khan] caused FNG to transfer the shares of [Ventra] to a third party at some point after FNG acquired [Ventra] but prior to making the Indicative Offer to GEA. If this is the situation then the evidence suggests [Khan] and FNG may have committed a fraud against GEA through the misrepresentations made to induce GEA to enter into the SPA.

[34] The motions judge continued: "With either possibility, the evidence suggests a possible fraud on the part of [Khan], indirectly the owner of both FNG and [Ventra], against GEA" (at para. 30).

[35] With respect to the need for a Norwich order, the motions judge held [at paras. 35, 38-41]:

> The information sought through the Norwich Order in the situation at hand is necessary to determine whether an action exists in respect of [Ventra], to identify wrongdoers, to find and preserve evidence that may substantiate or support

an action against wrongdoers and to trace and preserve assets. [page491]

. . . . .

The evidentiary record suggests that third parties (i.e. parties beyond FNG and Mr. Khan), being Mr. Graham and [Ventra] may be fraudulently involved in the transfer of assets from FNG or that Mr. Graham was a participant in fraudulent misrepresentations made to GEA.

[Ventra] and Mr. Graham are the only practicable source of information available to GEA in order to investigate and determine its legal remedies. Mr. Graham is an officer and legal counsel of [Ventra]. He has said he is the trustee owner of the shares of the corporation that indirectly controls [Ventra]. The record indicates Mr. Graham has an intimate knowledge of the history of [Ventra] and its relationship to FNG. [Ventra] and Mr. Graham are residents of Canada. The corporate documents of [Ventra] and the financial statements over the period 2003 to 2006 would quite possibly in themselves provide the information sought.

. . . . .

The evidentiary record establishes that GEA quite possibly has suffered a loss because of the unlawful actions of one or more of FNG, Mr. Khan, Mr. Graham and [Ventra]. The objective of a Norwich Order is to ensure that a person who has been wronged will not be prevented from obtaining legitimate redress for that wrong. Taking into account the interests of all the protagonists to the situation at hand, and balancing those interests, the interests of justice favour upholding the Norwich Order.

(Citations omitted)

[36] The following two key paragraphs are contained in the December Order:

3. The Respondents, Ventra and Graham are hereby required to forthwith disclose and produce to the Applicant [GEA] all documents relating to: (i) any and all conveyances, transfers or transactions whereby the interest of FNG in Ventra was

transferred to other persons or entities, and/or the payment of any dividends relating to Ventra by FNG (the "Conveyances"), (ii) the failed transaction between the Applicant [GEA] and FNG in 2004 (the "Transaction"), insofar as they relate to Ventra and its involvement therein, including the statements made by FNG about its assets and financial condition in the possession of Ventra or Graham, (iii) the financial statements of FNG from 2001, and (iv) the ownership and/or control of Ventra from August 2001 to date.

4. The Respondent, Graham, is hereby required to attend an examination by the Applicant [GEA] to answer questions with respect to: (i) the Conveyances, (ii) the Transaction, insofar as they relate to Ventra and its involvement therein, including the statements made by FNG about its assets and financial condition, (iii) the financial statements of FNG from 2001, and (iv) the ownership and/or control of Ventra from August 2001 to date.

[37] In separate appeals, FNG and Ventra and Graham (collectively, the "appellants") appeal from the December Order. They seek to set aside the Norwich Order in its entirety, as well as conditions 1(b) and (c) of the September Order. In the alternative, they seek to narrow the scope of the pre-action discovery permitted by the Norwich Order. [page492]

[38] Pending the determination of the appeals, the Norwich Order was stayed, on consent, by order of this court dated January 16, 2009. The terms of the stay order provided that the parties would enter into a tolling agreement and, subject to further order of this court, that the court files on these appeals would be sealed pending the determination of the appeals. On May 21, 2009, the sealing order was vacated by this court on the application of GEA, without objection by the appellants.

II. Issues

[39] As framed by the appellants, there are five issues on appeal:

(1) What is the appropriate standard of review on appeal from a

Norwich order?

(2) Did the motions judge misapprehend and misapply the test for a Norwich order:

(i) by failing to conclude that the information sought by GEA is not necessary to enable it to plead its case;

(ii) by holding that the interests of justice favour the obtaining of the disclosure sought; and

(iii) by upholding the Norwich Order in the absence of a request for assistance from a foreign court to obtain evidence relevant to proceedings pending in the foreign juris-diction?

(3) Did GEA meet the established requirements for entitlement to a Norwich order?

(4) Should conditions 1(b) and (c) of the September Order be set aside?

(5) If the Norwich Order is sustained, what measures should apply to maintain FNG's solicitor-client privilege and to safeguard the use of the documentation and information obtained by GEA from Ventra and Graham?

III. Analysis

(1) Norwich relief

[40] I begin with consideration of the origins and nature of Norwich relief and the test for the granting of such relief in Ontario. [page493]

[41] The remedy of pre-action discovery derives from the ancient bill of discovery in equity. Contemporary consideration of this type of equitable relief began with the 1974 decision of the House of Lords in Norwich Pharmacal, a case of suspected patent infringement. Norwich Pharmacal holds that, in certain circumstances, an action for discovery may be allowed against an "involved" third party who has information that the claimant alleges would allow it to identify a wrongdoer, so as to enable the claimant to bring an action against the wrongdoer where the claimant would otherwise not be able to do so. In a passage frequently quoted in subsequent authorities, Lord Reid described the basic principle, at p. 175 A.C.:

> [I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-

> doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

[42] In his concurring speech in Norwich Pharmacal, at p. 199 A.C., Lord Cross of Chelsea rejected the suggestion that the recognition of an action for discovery to permit disclosure of the names and addresses of alleged wrongdoers would open the door to meritless "fishing requests" by prospective plaintiffs who sought to collect evidence or information from persons who had no relevant connection with the person to be sued or the events at issue. In so doing, he also identified the following factors as relevant to the determination of whether pre-action discovery of a third party should be allowed in the exercise of the court's discretion:

(i) the strength of the applicant's case against the unknown alleged wrongdoer;
(ii) the relationship between the alleged wrongdoer and the respondent (the person from whom discovery is sought);
(iii) whether the information could be obtained from another source; and
(iv) whether the provision of the information "would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant".

See, also, to substantially the same effect, the speech of Lord Kilbrandon in Norwich Pharmacal, at p. 205 A.C. [page494]

[43] In Norwich Pharmacal, pre-action discovery was sought for a narrow purpose -- to identify suspected wrongdoers where it was known that a wrong had occurred, in order to permit the injured parties to sue for redress. To achieve this focused objective, discovery was allowed against an "innocent" third party against whom the appellants had no direct cause of action.

[44] However, following Norwich Pharmacal, the reach of the equitable action for discovery in England was significantly expanded. In subsequent cases, pre-action discovery was granted where a cause of action against the respondent from whom discovery was sought was asserted on the basis of the respondent's own alleged wrongdoing (see British Steel Corp. v. Granada Television Ltd., [1981] A.C. 1096, [1981] 1 All E.R. 417 (H.L.)), as well as where the object of the relief was to permit the tracing and freezing of assets (see Bankers Trust Co. v. Shapira, [1980] 3 All E.R. 353, [1980] 1 W.L.R. 1274 (C.A.); A. v. C., [1980] 2 All E.R. 347, [1981] Q.B. 956 (Q.B.)). In addition, in P. v. T., [1997] 4 All E.R. 200, [1997] ICR 887 (Ch. D.), Norwich relief was granted to permit an applicant to determine if, in fact, he had a cause of action against a suspected wrongdoer.

[45] Moreover, in Ashworth Hospital Authority v. MGN Ltd., [2002] 4 All E.R. 193, [2002] UKHL 29 (H.L.), it was held, at para. 44, that the "Norwich jurisdiction" was not linked "to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings". In other words, the court in Ashworth accepted that a Norwich order could be obtained in the absence of a settled intention to sue the alleged wrongdoer or the person from whom discovery is sought. (See, also, Norwich Pharmacal, at p. 175 A.C., per Lord Reid.) The rationale for this expansive approach to Norwich relief was explained by Lord Woolf C.J. in Ashworth, at para. 57:

> New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.

[46] The availability of pre-action discovery has also been codified in the applicable rules of court in England. For example, rule 31.16 of the Civil Procedure Rules 1998 (U.K.), SI 1998 No 3132 (L 17), provides that a court may order

disclosure against a respondent who is "likely to be a party to subsequent proceedings" under certain circumstances in order to: "(i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs". Further, under Rule 31.17, an order for disclosure by a person who is not a [page495] party to proceedings may be made by a court where: "(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs". Finally, rule 31.18 provides that rules 31.16 and 31.17 "do not limit any other power which the court may have to order -- (a) disclosure before proceedings have started; and (b) disclosure against a person who is not a party to proceedings".

[47] In contrast, as in most provinces in Canada, the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 make no provision for equitable relief in the nature of a Norwich order. [See Note 1 below] Moreover, Norwich orders have been considered in only a limited number of cases in Canada to date.

[48] In Glaxo Wellcome plc v. M.N.R., [1998] F.C.J. No. 874, [1998] 4 F.C. 439 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 422, on facts similar to those in Norwich Pharmacal, a pharmaceutical patent holder applied to the Minister of National Revenue under the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.) for disclosure of the names of various drug importers who were said to have infringed the applicant's intellectual property rights. As in Norwich Pharmacal, disclosure of the requested information was denied on the ground of confidentiality. The drug company then applied to the Federal Court of Canada for judicial review of that denial and for an order permitting it to examine the Minister on discovery to obtain the importers' identities. Both applications were dismissed. On appeal to the Federal Court of Appeal, the appeal from the dismissal of the judicial review application was dismissed but the appeal from the dismissal of the application for an equitable bill of discovery was allowed.

[49] Following a detailed review of the decision in Norwich

Pharmacal, Stone J.A. held, at p. 461 F.C., that there are two threshold requirements for obtaining the discretionary remedy of an equitable bill of discovery: (i) the applicant must have a bona fide claim against the alleged wrongdoers; and (ii) the applicant [page496] must share some sort of relationship with the respondents. Justice Stone explained that the first requirement is intended to ensure "that actions for a bill of discovery are not brought frivolously or without any justification", while the second requirement reflects the principle that "a bill of discovery may not be issued against a mere witness or disinterested bystander to the alleged misconduct". Justice Stone then identified two additional requirements for granting a bill of discovery: (iii) the person from whom discovery is sought must be the only practicable source of information available to the applicant; and (iv) the public interests both in favour and against disclosure must be taken into account.

[50] A similar approach to Norwich orders has been adopted in Alberta. In Alberta (Treasury Branches) v. Leahy, [2000] A.J. No. 993, 270 A.R. 1 (Q.B.), affd [2002] A.J. No. 524, 303 A.R. 63 (C.A.), leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 235, after an extensive review of the relevant authorities in England and Canada, Mason J. described the variety of situations in which Norwich relief has been granted by the courts (at para. 106):

(i) where the information sought is necessary to identify wrongdoers;

(ii) to find and preserve evidence that may substantiate or support an action against either known or unknown wrongdoers, or even determine whether an action exists; and

(iii) to trace and preserve assets.

[51] Justice Mason then offered the following formulation of the test for a Norwich order (at para. 106):

b. The court will consider the following factors on an application for Norwich relief:

(i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;

(ii) Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;

(iii) Whether the third party is the only practicable source of the information available;

(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some [authorities] refer to the associated expenses of complying with the orders, while others speak of damages; and

(v) Whether the interests of justice favour the obtaining of the disclosure.

[52] In Ontario, this court has held that the equitable action for discovery lies in this jurisdiction and that it co-exists with [page497] the Rules of Civil Procedure: Straka v. Humber River Regional Hospital (2000), 51 O.R. (3d) 1, [2000] O.J. No. 4212 (C.A.), at paras. 27 and 32. In Straka, Morden A.C.J.O. observed, at para. 36: "The real question with respect to an action for discovery is: in what circumstances does it properly lie? We are concerned with an equitable remedy and, accordingly, the exercise of a discretion is involved." Justice Morden went on to accept Stone J.A.'s analysis in Glaxo of the prerequisites to the obtaining of an order for pre-action discovery. [See Note 2 below]

[53] The holding in Straka that the equitable remedy of a bill of discovery is preserved in Ontario law and that it operates in concert with the Rules of Civil Procedure was reaffirmed by this court in Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital, [2006] O.J. No. 5082, 40 C.P.C. (6th) 6 (C.A.), at paras. 3-4 and 9. The remedy was also recently considered in Isofoton S.A. v. Toronto Dominion Bank (2007), 85 O.R. (3d) 780, [2007] O.J. No. 1701 (S.C.J.), in which the court expressly adopted the Leahy test for the granting of Norwich relief.

[54] Thus, many of the general principles applicable in Ontario to the granting of Norwich relief are well-developed.

That said, the following observation by Morden A.C.J.O. in Straka, at para. 51, remains apposite: "[t]he nature and scope of the Norwich Pharmacal principle is far from settled".

[55] Against this brief jurisprudential backdrop, I turn to the issues on these appeals.

(2) Standard of review

[56] The first issue in contention concerns the standard of review applicable on appeal from the motions judge's December Order. FNG, supported by Ventra and Graham on slightly different grounds, argues that the motions judge erred in his appreciation and application of the test for a Norwich order. It therefore contends that the standard of correctness applies. In the alternative, it submits that even if the more stringent and deferential standard of palpable and overriding error is engaged, that standard is met in this case.

[57] In contrast, GEA maintains that as these appeals involve appellate scrutiny of a discretionary and equitable order, and as the December Order involved the application of a legal standard to a set of facts, the operative standard of review is palpable and overriding error. GEA contends that the motions judge's decision is [page498] unassailable on this standard. Alternatively, GEA asserts that if the applicable standard of review is that of correctness, the motions judge's decision is correct.

[58] The recent decision of the Alberta Court of Appeal in B. (A.) v. D. (C.), [2008] A.J. No. 126, 429 A.R. 89 (C.A.) is instructive on this issue. In B. (A.), on appeal from an ex parte decision of a chambers judge denying a Norwich order, the appellant argued that the appeal was a de novo hearing, thus triggering the correctness standard of review. Alternatively, if the hearing was not de novo, the standard of review for pure questions of law was correctness, and for errors of mixed fact and law, palpable and overriding error. In respect of these submissions, the Alberta Court of Appeal indicated, at para. 10:

> Orders involving the exercise of judicial discretion, such

as whether the interests of justice warrant the granting of a Norwich order, are generally evaluated on a standard of reasonableness. Absent a material error in principle, a significant misapprehension or disregard of the evidence, or a decision which is clearly wrong, an appellate court will not interfere with an exercise of discretion . . . In assessing whether a decision is clearly wrong, an error in the interpretation or application of the law to found facts will attract appellate review. A decision though discretionary will be clearly wrong when it involves an erroneous interpretation of the law. In other words, where the exercise of discretion rests first on pre-conditions to the exercise of the discretion which themselves involve points of law, the standard of review of the Chambers Judge's conclusions on those points of law is correctness. That is what the appellant asserts occurred here. However, an appeal court will not interfere merely because it would have exercised the discretion differently.

(Citations omitted)

[59] In my view, these observations accurately reflect the principles of appellate review articulated by LeBel J., writing for the majority of the Supreme Court of Canada, in British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76, at para. 43:

> As I observed in R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in Pelech v. Pelech, [1987] 1 S.C.R. 801, at pp. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

(Emphasis added)

[60] I conclude that on the main ground of appeal raised by the appellants, namely, the issue whether the motions judge

misapprehended and misapplied the test for a Norwich order, the standard of correctness applies. [page499]

(3) Appellants' attack on the December Order

(i) Preliminary observations

[61] I make the following preliminary observations.

[62] First, the appellants accept that equitable relief in the nature of a Norwich order is available in Ontario in a proper case. They also accept that the factors set out in Glaxo and Leahy (Q.B.) govern the determination of whether to grant pre-action discovery. I agree.

[63] The appellants argue, however, that: (i) the test for a Norwich order requires consideration of whether the discovery sought is "necessary" for the applicant to plead -- a requirement that the appellants say is a matter of first impression for this court; (ii) a Norwich order is neither appropriate nor necessary in this case since GEA has more than enough information in its possession to commence proceedings and plead its case without Norwich discovery; and (iii) in the alternative, the Norwich Order is overly broad and open-ended, and should be subject to restrictions.

[64] Second, FNG's position regarding the motions judge's approach to the test for a Norwich order differs from that of Ventra and Graham in two respects.

[65] Before the motions judge, the appellants argued that GEA had failed to demonstrate a bona fide claim sufficient to ground Norwich relief. Ventra and Graham, unlike FNG, renew that argument on appeal. In contrast, FNG focuses on what it terms the "requirement of necessity" for the granting of a Norwich order, the satisfaction of which, it says, is a prerequisite to obtaining Norwich relief. FNG contends that the application judge misapprehended and misapplied the test for a Norwich order by failing to recognize and apply the requirement of necessity to the facts of this case.

[66] In support of this contention and while our decision on these appeals was under reserve, the appellants moved for leave

to introduce fresh evidence of civil proceedings commenced on April 30, 2009 by GEA against FNG and Khan in Illinois. The appellants assert that this evidence conclusively establishes that the information sought by GEA under the Norwich Order is not necessary to enable it to plead its case and that Ventra and Graham are not the only practicable sources of the information sought.

[67] GEA resists the appellants' fresh evidence motion, arguing that:

(i) the fresh evidence is not directed at any of the issues that were before the motions judge and, therefore, that it could [page500] not reasonably be expected to have affected the outcome of the proceedings before the motions judge;

(ii) the fresh evidence is not conclusive of any issue on these appeals; and

(iii) the interests of justice do not favour the admission of the fresh evidence.

[68] We directed that the fresh evidence motion proceed on the basis of written submissions. I will refer to those submissions in the context of the issues on appeal to which they relate.

[69] Finally, I note a second contrast in the positions of FNG and Ventra and Graham on appeal. Ventra and Graham argue that the Norwich Order should not have been granted without a request from the arbitral panel in Germany or a German court for discovery in aid of the Arbitration. I do not understand FNG to join in this submission.

(ii) Alleged misapprehension and misapplication of the test for a Norwich order

[70] In my view, it is sufficient for the disposition of these appeals to consider only the appellants' claim that the motions judge erred by misapprehending and misapplying the test for a Norwich order. For the reasons that follow, it is my opinion that, in the context of the application as presented to him, the motions judge failed to consider properly whether the disclosure sought was a necessary measure in all the circumstances to permit GEA to pursue its rights against FNG.

This was an error in principle, reviewable on the correctness standard.

[71] The motions judge recognized that a Norwich order is a form of equitable relief that, if granted, requires a third party to a potential action to disclose information that is otherwise confidential. He observed [at para. 8], correctly, that the jurisdiction of the courts in Ontario to grant such relief "is grounded in s. 96(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43", which states that "[c]ourts shall administer concurrently all rules of equity and common law".

[72] The motions judge also addressed the rationale for a Norwich order and the approach of Canadian courts to the granting of such relief. Citing Norwich Pharmacal and Isofoton, he stated, at para. 9 of his reasons:

> The fundamental principle underlying such an Order is that the third party against whom the order is sought has an equitable duty to assist the applicant in pursuing its rights . . . The remedy has been extended in Canada such as to allow the Court to grant an order compelling the disclosure [page501] of all information vital to the plaintiff's ability to commence an action from any party involved in the wrongful conduct of the defendant or potential defendant. (Citations omitted)

[73] The motions judge then turned to the test for a Norwich order. He identified and accepted the factors outlined in Isofoton as those that govern the availability of pre-action discovery in Ontario. As I have said, these factors represent the adoption in Ontario of the test for a Norwich order articulated in Leahy (Q.B.). They are also consistent with, although arguably more comprehensive than, the factors set out in Glaxo and Straka.

[74] FNG argues that the list of factors identified by the motions judge is incomplete and incorrect since it fails to include the requirement of necessity. This omission, FNG submits, fatally taints the motions judge's analysis of whether Norwich relief is available and appropriate in this case.

[75] I agree with FNG that an applicant for a Norwich order is obliged to demonstrate that the requested pre-action discovery is "necessary". However, I do not agree that this is a "stand-alone" prerequisite or that it is restricted to the necessity to plead a cause of action.

[76] The notion of the requirement of a showing of necessity for a Norwich order is not a novel proposition. It appears to have been a fundamental element of a bill of discovery in equity from the infancy of that remedy. In Norwich Pharmacal, at p. 205 A.C., when discussing the nature of the equitable remedy of pre-action discovery, Lord Kilbrandon cited the following passage in Colonial Government v. Tatham (1902), 23 Natal L.R. 153, at p. 158:

> The principle which underlies the jurisdiction which the law gives to the Courts of Equity in cases of this nature, is that where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the Court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction.

(Emphasis added)

[77] Both Norwich Pharmacal and post-Norwich Pharmacal jurisprudence in England underscore the importance of a showing of necessity in order to invoke extraordinary equitable relief in the nature of a Norwich order. In Norwich Pharmacal, the court emphasized that if the information sought (the identities and addresses of the wrongdoers) was not made available, no action could ever be brought: see, for example, the comments of Lord Reid, at p. 174 A.C. In Ashworth, at para. 36, Lord Woolf C.J. explained the "Norwich jurisdiction" in this fashion: [page502]

> [T]his is a discretionary jurisdiction which enables the court to be astute to avoid a third party who has become involved innocently in wrongdoing by another from being subjected to a requirement to give disclosure unless this is

established to be a necessary and proportionate response in all the circumstances.
(Citations omitted; emphasis added)

[78] Lord Woolf C.J. continued, at para. 57: "The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised" (emphasis added).

[79] Subsequently, in Mitsui & Co. Ltd. v. Nexen Petroleum UK Ltd., [2005] 3 All E.R. 511, [2005] E.W.H.C. 625 (Ch. D.), at para. 21, Lightman J. described the pre-conditions to a Norwich order in terms that included proof of the need for an order "to enable action to be brought against the ultimate wrongdoer". Citing the above-quoted passage from Ashworth, he said, at para. 24:

> The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information.

[80] Similarly, in Nikitin v. Richard Butler LLP, [2007] EWHC 173 (Q.B.), Langley J. said at paras. 24 and 32:

> The questions are whether such information is vital to a decision to sue or an ability to plead and whether or not, even if it is, it can be obtained from other sources. The purpose of an order is to enable an Applicant to take action which could not otherwise effectively be taken.
>
> . . . . .
>
> [T]he Applicants have wholly failed to establish the relevant necessity to justify the relief they seek.
(Emphasis added)

[81] Mitsui and Nikitin suggest that the "Norwich jurisdiction" may be exercised where the claimant requires disclosure of "crucial" or "vital" information in order to be able to bring its claim or where the claimant "requires a missing piece of the jigsaw". In light, particularly, of the

pre-action discovery provisions of the rules of court in England, above-described, these cases hold that a Norwich order against an innocent third-party is a remedy of "last resort": Mitsui, at para. 24; Nikitin, at para. 30.

[82] This restrictive approach to the availability of a Norwich order was subsequently rejected in R. v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin.), [2008] All E.R. (D.) 123 (Q.B.D.). In that case, the court stated, at para. 94:

> The intrusion into the business of others which the exercise of the Norwich Pharmacal jurisdiction obviously entails means that a court should not, as Lord Woolf in Ashworth made clear, require such information to be provided [page503] unless it is necessary. But in our view, there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort.

(Emphasis added)

[83] The requirement of necessity also finds some support in the applicable Canadian authorities. In B. (A.), supra, at para. 16, the Alberta Court of Appeal referred to Ashworth as an example of a case in which "[t]he investigative capacity of Norwich orders was applied . . . in circumstances of necessity, sufficiency of grounds and proportionality". In the view of the Alberta Court of Appeal, these were "legitimate concerns" to be taken into account in determining whether to grant Norwich relief. In the result, the applicant's failure in B. (A.) to demonstrate that the information sought would not be available in the normal discovery process was fatal to the application for a Norwich order.

[84] On my reading of the authorities in Canada and England, it is unclear whether the requirement of a showing of necessity for pre-action discovery properly forms part of the court's inquiry as to whether the third party from whom discovery is sought is the only practicable source of the information available (as held in Mitsui, at para. 24) or as to whether the

interests of justice favour disclosure or non-disclosure (as argued by FNG before this court). However, there is no suggestion in the established jurisprudence that it is a stand-alone requirement for the granting of a Norwich order. Nor do I regard it as such.

[85] In my opinion, the precise placement of the necessity requirement in the inventory of factors to be considered on a Norwich application is of little moment. The important point is that a Norwich order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution. It is therefore incumbent on the applicant for a Norwich order to demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief.

[86] FNG relies especially on this court's decision in Meuwissen to submit that the requirement of necessity means that the information sought by an applicant for a Norwich order "must be required to plead a case". FNG emphasizes Sharpe J.A.'s comment, at para. 7 of Meuwissen, that: "[t]he motions judge did not find that pre-action production was required to enable the respondents to plead. Moreover, on this record, it would be impossible to make such a finding." [page504]

[87] In my view, FNG's suggested interpretation of the necessity requirement casts the purpose of Norwich orders too narrowly. The developed Norwich jurisprudence does not confine pre-action discovery to only those cases where it is established that the information sought is necessary to plead, or even to those situations where the applicant is determined to sue.

[88] Recall that in Norwich Pharmacal, the appellants knew that their patent had been infringed. But in P. v. T., the applicant obtained an order for pre-action discovery in circumstances where he was uncertain whether a tort had been committed so as to give rise to a cause of action. Similarly, in Straka, the appellant did not know whether he had a cause of

action against the respondents. The appellant therefore sought to determine what facts could have given rise to the wrongdoing alleged "so that he might take steps to clear his name through legal proceedings if this should prove necessary" (at para. 52) (emphasis added). And in Isofoton, pre-action discovery was ordered where its purposes included the obtaining of information required to determine whether a legal proceeding was appropriate (see, in particular, paras. 47, 50 and 59; see, also, Leahy (Q.B.), at para. 106).

[89] It is true that on the facts in Meuwissen, this court held that a Norwich order was inappropriate as the information in the possession of the respondents at the time of the application was sufficient to permit them to formulate and plead their case (at para. 9). That does not mean, however, that where information is required to determine the preliminary question of whether a cause of action even exists, Norwich relief is unavailable. I do not read Meuwissen as holding to the contrary.

[90] The purpose of an action for discovery "is to enable justice to be done": Straka, at para. 36. It would defeat the object of an action for discovery if, other prerequisites to obtaining such relief having been satisfied, a Norwich order is automatically precluded because the applicant seeks to justify the order on grounds other than necessity to plead.

[91] On the contrary, in my opinion, the limits of the necessity criterion for a Norwich order must be established in the context and on the facts of each particular case. [See Note 3 below] While an applicant for [page505] Norwich relief must establish that the discovery sought is needed for a legitimate objective, this requirement may be satisfied in various ways. The information sought may be needed to obtain the identity of a wrongdoer (as in Norwich Pharmacal), to evaluate whether a cause of action exists (as in P. v. T.), to plead a known cause of action, to trace assets (as in Bankers Trust and Leahy), or to preserve evidence or property (as in Leahy). The crucial point is that the necessity for a Norwich order must be established on the facts of the given case to justify the invocation of what is intended to be an exceptional, though flexible, equitable

remedy.

[92] Thus, the critical issue in this case is whether the Norwich Order was required for any of these legitimate purposes. In my view, it was not. I say this for the following reasons.

[93] The motions judge concluded that a Norwich order was "necessary" on four grounds. For convenience, I repeat what he said at para. 35 of his reasons:

> The information sought through the Norwich Order in the situation at hand is necessary to determine whether an action exists in respect of [Ventra], to identify wrongdoers, to find and preserve evidence that may substantiate or support an action against wrongdoers and to trace and preserve assets.

(Citations omitted)

[94] In the first ground cited by him, the motions judge appears to have focused on the issue whether the information sought was required by GEA to investigate whether it had a cause of action against Ventra. But this suggested objective of a Norwich order went beyond the four corners of the relief sought by GEA and lay outside the objects of the requested Norwich relief advanced by it.

[95] Neither in its original notice of application for the Norwich Order, nor in its November 2008 variation motion did GEA identify a possible cause of action against Ventra as a ground for the equitable relief that it sought. Nor did it suggest that one of the purposes of the requested Norwich order was to permit the investigation of whether it had a potential actionable claim against Ventra or other prospective defendants apart from FNG and its principals or agents.

[96] GEA's notice of application instead focused on alleged fraudulent conveyances by FNG and the investigation of "FNG's fraud". GEA claimed that a Norwich order would allow it "to determine the circumstances of and prosecute FNG's wrongdoing in respect of its assets". Similarly, in its notice of motion

for variation of the Norwich Order, GEA maintained that the discovery sought would enable it "to assess its legal remedies against FNG and/or its principals or employees and initiate proceedings as [page506] against them". There was no suggestion of a potential claim as against Ventra or, indeed, as against Graham.

[97] Yet nowhere in his reasons does the motions judge assess whether a Norwich order was required to permit GEA to pursue its rights against FNG, including to permit GEA to plead its case against FNG, the alleged wrongdoer. By failing to consider this question, the motions judge misdirected himself and failed to undertake a key aspect of the requisite necessity inquiry. With respect, this was reversible error.

[98] In my opinion, a Norwich order was not needed for GEA to pursue its rights against FNG. On the materials before the motions judge, two potential types of fraud by FNG and/or Khan were identified: fraudulent conveyances and fraudulent misrepresentations. Many of the critical facts necessary to advance such causes of action were in GEA's possession, at the latest, following the January 30, 2008 telephone call between Heckel and Weimann. By that time, GEA knew of: (i) FNG's statements in the Indicative and Final Offers concerning its assets and financial position; (ii) Khan's admissions under oath regarding the real ownership of Ventra; (iii) Graham's alleged statements about FNG's enterprise value; and (iv) Weimann's alleged statements concerning FNG's worth and asset position.

[99] This information was sufficient to support GEA's assertion that a potential fraud or frauds had been perpetrated on it by FNG and/or Khan. While full particulars of the mechanics of the potential fraud or frauds were unknown to GEA, the nature, timing and apparent purpose of the frauds were known, as was the identity of the suspected wrongdoer or wrongdoers.

[100] In these circumstances, GEA was positioned to formulate a pleading against FNG (and/or Khan) if it elected to do so. If an action had been commenced, discovery of the circumstances of

the alleged frauds would be available to GEA under the normal discovery practice mandated by the Rules of Civil Procedure. Further, once an action was initiated, information from Ventra and Graham regarding the asserted frauds would be available to GEA under the rules in Ontario. If that information warranted an action against Ventra and/or Graham, a motion for the necessary pleadings amendment could be brought.

[101] I note that in his June 20, 2008 affidavit, Kunz-Aue acknowledged that "substantial evidence" existed concerning FNG's alleged fraudulent conveyances. Further, Khan's admissions under oath, Graham's alleged statements to Heckel and von Oppen in March 2007, and Weimann's alleged comments in January 2008, provided a foundation for GEA's assertion of fraudulent misrepresentations. [page507]

[102] I also agree with the appellants that the fresh evidence regarding the civil proceedings commenced by GEA in Illinois strongly undercuts GEA's suggestion that pre-action discovery in Ontario from Ventra and Graham is required in order for GEA to determine and address its legal remedies against FNG and/or Khan. The fresh evidence, which I regard as relevant and admissible under the principles outlined in R. v. Palmer, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126 and Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276 (C.A.), supports the claim that GEA was positioned at the time of the motions before the motions judge to commence proceedings against FNG and/or Khan if so advised. It also suggests that GEA now has access to wide-ranging discovery rights against FNG and Khan in the State of Illinois.

[103] In its complaint filed in the Illinois court, GEA stated, at para. 6:

> This case involves alternative theories of liability . . . At this time, GEA does not know which of these two theories of liability will prove to be the correct theory [fraudulent conveyances or fraudulent misrepresentations], but both theories are actionable and are supported by representations made and/or conduct undertaken by or on behalf of Khan and FNG.

(Emphasis added)
These allegations mirror those advanced by GEA against FNG and Khan in Ontario.

[104]I reiterate that pre-action discovery is rare and extraordinary discretionary relief. It is not intended nor should it be permitted to serve as a substitute for the normal discovery regime mandated by the Rules of Civil Procedure. As noted by the Alberta Court of Appeal in B. (A.), supra, at para. 16: "a Norwich order is not intended as a device to circumvent the normal discovery process which can effectively achieve the same result". I agree.

[105] I recognize that GEA did not seek pre-action discovery merely to plead. GEA's counsel responsibly acknowledged during oral argument that GEA was "not very far away" from being able to plead one or more causes of action arising from FNG's alleged wrongdoing. In fact, this understates the situation. As in Meuwissen, GEA has ample information in hand to formulate and plead its case. Norwich relief is not available simply to assist GEA in perfecting its prospective pleading or to obtain further evidence to aid in proving the facts of the two potential frauds already identified.

[106] I also do not accept GEA's claim that it should be afforded pre-action discovery to ascertain whether FNG or its agents engaged in a third, as yet unknown fraud. The suggestion of a third cause of action in fraud is speculative. To grant a Norwich order for this purpose would countenance an overt "fishing expedition". [page508]

[107] Nor do I agree that the other grounds identified by the motions judge warrant a Norwich order in this case.

[108] This is not a case, like Norwich Pharmacal, where such relief is necessary to identify the suspected wrongdoer. GEA's claims arise from FNG's breach of the SPA and its alleged subsequent actions to defeat GEA's legitimate interests as an anticipated creditor in the Arbitration and as a creditor in respect of the outstanding costs award made in GEA's favour by the German appellate court. The identity of the principal

alleged wrongdoer -- FNG -- is known. An action against it and its agents is already available to GEA.

[109] Similarly, I am not persuaded that a Norwich order is necessary to preserve evidence. There is no indication on this record of the risk of potential destruction of relevant evidence by any of the appellants or by Khan in the absence of a Norwich order or that such destruction has already occurred.

[110] Nor, in my opinion, is this a tracing case. On the record before this court and the motions judge, GEA has no existing proprietary or personal claim or other beneficial entitlement to assets formerly or at present in the possession of any of the appellants or, indeed, Khan. [See Note 4 below] This case is therefore factually distinguishable from the tracing cases relied on by GEA. At most, GEA is an unpaid and unsecured creditor of FNG in respect of its outstanding costs award and a prospective unsecured creditor of FNG in relation to unquantified damages to be awarded in phase two of the Arbitration.

[111] GEA did not argue before this court that pre-action discovery is required in this case in aid of a Mareva injunction or an Anton Piller order. [See Note 5 below] Moreover, in contrast to other cases in which Norwich orders have been sought or obtained, in this case the alleged wrongdoer (FNG) eventually received notice of the Norwich application and participated in the Norwich proceeding. Further, Ventra and Graham are closely connected both to FNG and the wrongdoings alleged by GEA. In that important respect, they are "involved" but scarcely "innocent" third parties. [page509]

[112] I therefore conclude that GEA failed to establish that Norwich relief is required in this case. On this ground alone, the Norwich Order cannot stand. It is therefore unnecessary to address the appellants' remaining grounds of attack on the Norwich Order.

(4) Appellant's challenge to the September Order

[113] It remains to consider the appellants' challenge to the impugned conditions of the September Order. For three reasons,

I would reject that challenge.

[114] First, on the record before this court, Ventra and Graham did not appeal the September Order, although they sought relief concerning it on these appeals.

[115] Second, the September Order was granted on the consent of GEA. The reasons of C. Campbell J. indicate that the conditions imposed were suggested by GEA in its factum on the appellants' motions. Thus, the relief obtained was based on a compromise by GEA that accrued to the direct benefit of Ventra and Graham and, by virtue of the disclosure authorized by the September Order, ultimately to FNG's benefit as well. Fairness therefore dictates that the appellants should not lightly be permitted to disturb the foundation on which GEA's consent was forthcoming.

[116] Finally, only Ventra and Graham attack the condition in para. 1(b) of the September Order, while all the appellants challenge the immunity from suit condition contained in para. 1(c). I see nothing objectionable in the former condition. In respect of the latter condition, the record reveals that FNG has a history of commencing proceedings in relation to the alleged violation of the confidentiality of the Arbitration. The immunity from suit provision of the September Order was designed to foreclose a similar lawsuit by FNG arising from the disclosure in the Norwich proceeding of the facts and the issues in the Arbitration. This was a reasonable precaution in the circumstances and I see no basis to interfere with it.

IV. Disposition

[117] I would therefore allow the appeals in part by setting aside the Norwich Order. I would award FNG the costs of its appeal and of the earlier stay motion before this court, in the total amount of $35,000, inclusive of disbursements and GST. I would also allow Ventra and Graham the costs of their appeal and of the stay motion, in the aggregate amount of $22,000, inclusive of disbursements and GST.

Appeal allowed in part.

Notes

Note 1: Unlike the situation in Ontario, the rules of court in some Canadian jurisdictions authorize pre-action discovery. For example, a right of pre-action discovery has been conferred by a rule of practice in Nova Scotia: see Leahy v. B.(A.), [1992] N.S.J. No. 160, 113 N.S.R. (2d) 417 (S.C. (T.D.)). As well, in Johnston (Re), [1980] P.E.I.J. No. 34, 33 Nfld. & P.E.I.R. 341 (C.A.), the Prince Edward Island Court of Appeal considered the availability of an action for discovery in the context of a rule of court in that province then in effect, that permitted a pre-action examination for discovery on court order.

Note 2: The decision in Leahy (Q.B.), which preceded Straka by some months, does not appear to have been drawn to the court's attention in Straka.

Note 3: This approach to the meaning of "necessity" for Norwich relief is consistent with Canadian authorities on the requirement of "necessity" in other legal contexts. For example, the necessity criterion applicable to the admission at trial of out-of-court statements has been interpreted as requiring "a flexible definition, capable of encompassing diverse situations": see R. v. B.(K.G.), [1993] 1 S.C.R. 740, [1993] S.C.J. No. 22, at p. 726 S.C.R.; R. v. Parrott, [2001] 1 S.C.R. 178, [2001] S.C.J. No. 4, at para. 74.

Note 4: For a discussion of the circumstances in which the right to trace in equity arises, see the seminal case of Diplock v. Wintle, [1948] Ch. 465, [1948] 2 All E.R. 318 (C.A.). See, also, Bankers Trust, supra.

Note 5: See Mareva Campania Naviera S.A. v. International Bulkcarriers S.A. (1975), [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep 509 (C.A.); Anton Piller K.G. v. Manufacturing Process Ltd. (1975), [1976[1 All E.R. 779, [1976] 2 W.L.R. 162 (C.A.).

Brant Investments Ltd. et al. v. KeepRite Inc. et al.
KeepRite Inc. v. Brant Investments Ltd. et al.

Indexed as: Brant Investments Ltd. v. KeepRite Inc. (C.A.)

3 O.R. (3d) 289
[1991] O.J. No. 683
Action No. 837/87

ONTARIO
Court of Appeal for Ontario
Lacourciere, Goodman and McKinlay JJ.A.
May 3, 1991

Corporations -- Oppression -- Scope of duty to minority shareholders -- Majority shareholders owing no fiduciary duty to minority shareholders -- Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 234.

Corporations -- Oppression -- Non-arm's-length transaction -- Function of independent committee of board of directors -- Onus of proof of oppression on dissenting shareholders -- Trial judge in application under s. 234 of CBCA not to substitute his own business judgment for that of managers, directors or committees -- Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 234.

Corporations -- Shares -- Valuation of shares of dissenting shareholders -- Appropriateness of awarding premium for forcible taking -- Whether dissenting shareholders entitled to enhanced value for shares due to synergies anticipated from transaction which gave rise to dissent -- Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 184.

The board of directors of K Inc. proposed to purchase the assets of a subsidiary. An independent committee of the board

(i.e., members of the board who were not officers or directors of the subsidiary) was struck to consider the acquisition. Minority shareholders of K Inc. objected to the transaction and gave notice under s. 184 of the Canada Business Corporations Act (the CBCA) demanding payment of the fair value of their shares. K Inc. applied for an order fixing the fair value of the shares of the dissenting shareholders (the valuation action); the dissenting shareholders subsequently instituted proceedings under s. 234 of the CBCA attacking the transaction as being oppressive or unfairly prejudicial to their interests (the oppression action). The trial judge dismissed the oppression action and fixed the fair value of the dissenting shareholders' shares at $13 per share. The dissenting shareholders appealed.

Held, the appeal should be dismissed.

Majority shareholders owe no fiduciary duty to minority shareholders. The enactment of s. 234 of the CBCA has rendered any argument for a broadening of the categories of fiduciary relationships in the corporate context unnecessary and inappropriate. The acts covered by s. 234, the groups protected, and the powers of the court to grant remedies are all extremely broad. To import the concept of breach of fiduciary duty into that statutory provision would not only complicate its interpretation and application, but could be inimical to the statutory fiduciary duty imposed upon directors in s. 117(1) of the CBCA. That section requires that directors and officers act honestly and in good faith with a view to the best interests of the corporation. Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under s. 234. Because the statutory scheme of s. 234 is so broadly formulated, the evidence necessary to establish a breach of fiduciary duty would be subsumed in the broader range of evidence which would be appropriately adduced on an application under that section.

Evidence of bad faith or want of probity in the actions complained of is unnecessary in an application under s. 234.

The dissenting shareholders argued that once an impugned transaction has been shown to involve benefits to one group of shareholders in which dissenting shareholders do not share, and a corresponding detriment to the dissenting shareholders which the other group of shareholders do not suffer, then the burden of proof rests on the majority shareholders to demonstrate that the impugned transaction is at least as advantageous to the company and to all shareholders as any available alternative transaction; that no undue pressure was applied to the company to accept the impugned transaction; and that the substance of the impugned transaction and the process of decision-making leading to its acceptance were intrinsically fair to the dissenting shareholders. However, in this case, there were no benefits to the company which were not shared by the dissenting shareholders and the dissenting shareholders did not suffer a detriment which was not suffered by the company. That being the case, the onus of proof remained on the dissenting shareholders.

Directors are not required, when entering into a transaction on behalf of the corporation, to consider every available alternative transaction. The extent to which directors should inquire as to alternatives is a business decision which, if made honestly in the best interests of the corporation, should not be interfered with.

The trial judge did not err, as the dissenting shareholders had argued, in suggesting that allegations of oppressive corporate conduct can be disposed of on the basis of judicial deference to the business judgment of corporate officers and directors. On an application under s. 234, the trial judge is required to consider the nature of the impugned acts and the method by which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors or a committee such as the one involved in assessing this transaction; the trial judge simply does not know enough about the surrounding circumstances to make the business decisions required. Moreover, the trial judge stated that business decisions honestly made should not be subjected to microscopic examination, not that they should not be examined at all, and he did, in fact, carefully scrutinize

the transaction in this case and came to the conclusion that it did not offend the provisions of s. 234.

The dissenting shareholders were not "squeezed out"; they simply disagreed with a change in the affairs of the corporation and elected to dissent, with the consequence that they would receive the fair value of their shares. Consequently, even if a premium for "forcible taking" can be awarded in some cases, this was not a case in which such a premium could appropriately constitute an element of "fair value" under s. 184(3) of the CBCA.

In appropriate cases, and particularly where the dissenters are forced out, the trial judge may exercise his discretion so as to give the dissenters an enhanced value for their shares due to the synergies anticipated from the transaction. In this case, the dissenting shareholders, although clearly free to participate in the transaction, declined to do so while claiming entitlement to reap the potential financial benefits of participation. This was not an appropriate case in which to include in the determination of fair value an amount attributable to the transaction involved.

Bovey Hotel Ventures Ltd. (Re), U.K. Ch.D., July 31, 1981; Drew v. R., [1961] S.C.R. 614, 29 D.L.R. 114; Ferguson and Imax Systems Corp. (Re) (1983), 43 O.R. (2d) 128, 150 D.L.R. (3d) 718 (C.A.) [leave to appeal to S.C.C. refused (1983), 52 N.R. 317n, 2 O.A.C. 158n]; Goldex Mines Ltd. v. Revill (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (C.A.), affg [1973] 3 O.R. 869 sub nom. Probe Mines Ltd. v. Goldex Mines Ltd., 38 D.L.R. (3d) 513 (Div. Ct.); Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324, [1958] 3 All E.R. 66, [1958] 3 W.L.R. 404 (H.L.), consd

Domglas Inc. (Re); Domglas Inc. v. Jarislowsky (1980), 13 B.L.R. 135, [1980] C.S. 925 (Que. S.C.), affd (1982), 22 B.L.R. 121, [1982] C.A. 377, 138 D.L.R. (3d) 521 (Que. C.A.); Investissements Mont-Soleil Inc. v. National Drug Ltd. (1982), 22 B.L.R. 139, [1982] C.S. 716 (Que. S.C.), distd

Other cases referred to

A Company (Re) [1989] B.C.L.C. 383 (Ch. D.); Bank of Montreal v. Dome Petroleum Ltd. (1987), 54 Alta. L.R. (2d) 289, 67 C.B.R. (N.S.) 296 (Q.B.); Canadian Tire Corp. (Re) (1987), 35 B.L.R. 56, 10 O.S.C.B. 857 (Securities Commission), affd (1987), 59 O.R. (2d) 79 sub nom. Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission, 23 Admin. L.R. 285, 35 B.L.R. 117, 37 D.L.R. (4th) 94, 21 O.A.C. 216 (Div. Ct.) [leave to appeal to Ont. C.A. refused (1987), 35 B.L.R. xx]; Cumberland Holdings Ltd. v. Washington H. Soul Pattinson & Co. (1977), 13 A.L.R. 561, 2 A.C.L.R. 307 (P.C.); H.J. Rai Ltd. v. Reed Point Marina Ltd., B.C. S.C., Skipp L.J.S.C. in Chambers, May 26, 1981 [summarized at 9 A.C.W.S. (2d) 216]; Keho Holdings Ltd. v. Noble (1987), 52 Alta. L.R. (2d) 195, 78 A.R. 131, 38 D.L.R. (4th) 368 (C.A.); Laskin v. Bache & Co., [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A.); Low v. Ascot Jockey Club (1986), 1 B.C.L.R. (2d) 123 (S.C.); Nocton v. Lord Ashburton, [1914] A.C. 932, [1914-15] All E.R. Rep. 45, 83 L.J. Ch. 784 (H.L.); Nystad v. Harcrest Apartments Ltd. (1986), 3 B.C.L.R. (2d) 39 (S.C.); Ontario (Ontario Securities Commission) v. McLaughlin, Ont. H.C.J., Henry J., December 20, 1987 [summarized at 10 A.C.W.S. (3d) 270]; Palmer v. Carling O'Keefe Breweries of Canada Ltd. (1989), 67 O.R. (2d) 161, 41 B.L.R. 128, 56 D.L.R. (4th) 128, 32 O.A.C. 113 (Div. Ct.); Pizza Pizza Ltd. (Re), Ont. H.C.J., August 14, 1987; R.A. Noble & Sons (Clothing) Ltd. (Re), [1983] B.C.L.C. 273; Sinclair Oil Corp. v. Levien, 280 A.2d 717 (1971)

Statutes referred to

Business Corporations Act, S.A. 1981, c. B-15
Business Corporations Act, 1982, S.O. 1982, c. 4, s. 247, 247(2)
Canada Business Corporations Act, S.C. 1974-75-76, c. 33, ss. 4, 117(1), 184 [am. 1978, c. 9, s. 60; 1980-81-82-83, c. 115, s. 10], 184(3) [rep. & sub. 1978, c. 9, s. 60(2)], 184(15) [rep. & sub. 1978, c. 9, s. 60(4)], 234 [am. 1978, c. 9, s. 74], 234(2), (2)(a), (b), (c)
Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 122(1), 190(3), 190(15), 241, 241(2)

Companies Act, 1948 (U.K., 11 & 12 Geo. 6), c. 38, s. 210, 210(1)
Companies Act, 1980 (U.K.), c. 22, s. 75
Companies Act, 1985 (U.K.), c. 6, s. 459(1)
Company Act, R.S.B.C. 1979, c. 59, s. 224, 224(1)
Expropriation Act, R.S.C. 1985, c. E-21, s. 26(2), (3)(b)(ii)
Securities Act, R.S.O. 1980, c. 466, s. 123

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 20.01, 21.01

Authorities referred to

Challies, The Law of Expropriation (1954), p. 213
Challies, The Law of Expropriation, 2nd ed., p. 223

APPEAL by certain minority shareholders from the judgment of the High Court of Justice (1987), 60 O.R. (2d) 737, 37 B.L.R. 65, 42 D.L.R. (4th) 15 (supplementary reasons (1987), 61 O.R. (2d) 469, 43 D.L.R. (4th) 141) dismissing an application under s. 234 of Canada Business Corporations Act for relief from oppression and from an order fixing the "fair value" of their shares.

S.G. Fisher, Q.C., and J.C. Osborne, for Brant Investments Ltd. et al.

John W. Brown, Q.C., and Susan M. Vella, for ICG Manufacturing Ltd., ICG Energy Products Ltd., Inter-City Gas Corp. and Inter-City Manufacturing Ltd., respondents.

J.M. Roland, Q.C., L.P. Lowenstein and David W. Stratas, for KeepRite Inc., respondent.

The judgment of the court was delivered by

MCKINLAY J.A.:-- These reasons encompass two appeals from

decisions of Anderson J. following two trials of issues heard together in the above-captioned actions. The learned trial judge referred to the first action as the "oppression action" and the second as the "valuation action" -- a convenience which I shall continue.

These disputes raise questions as to the appropriate process for determining the rights of minority shareholders of a corporation which, out of the ordinary course of business, undertakes dealings with another corporation which owns a majority of its shares. It is impossible to grasp the issues without a substantial review of the facts and in setting the scene, I can do no better than quote from the trial judge's reasons. See Re Brant Investments Ltd. and KeepRite Inc. (1987), 60 O.R. (2d) 737, 37 B.L.R. 65, 42 D.L.R. (4th) 15 (supplementary reasons (1987), 61 O.R. (2d) 469, 43 D.L.R. (4th) 141), at pp. 739-43 O.R.:

> The plaintiffs in the first proceeding were minority shareholders of KeepRite Inc. (KeepRite) and, in that proceeding, attack certain actions of KeepRite and its directors under the Canada Business Corporations Act, 1974-75-76 (Can.), c. 33, as amended (the CBCA), as being oppressive or unfairly prejudicial to their interests. KeepRite, as plaintiff in the second proceeding, seeks an order fixing the fair value of the shares of the defendants in that proceeding as dissenting shareholders pursuant to the relevant provisions of the CBCA.
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> . . . . .
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> KeepRite is a company continued pursuant to the provisions of the CBCA. The shares were publicly traded on the Toronto Stock Exchange.
>
> Inter-City Gas Corporation (ICG) is a corporation under the laws of Manitoba and was the sole shareholder of the defendant, Inter-City Manufacturing Ltd. (ICM), also a Manitoba corporation. ICG Energy Products Ltd. (Energy Products) is incorporated under the laws of Canada and was a wholly-owned subsidiary of ICM. ICG Manufacturing Ltd.

(Manufacturing) is a corporation incorporated under the laws of Manitoba and was a wholly-owned subsidiary of ICM. Since 1981 and prior to April 24, 1983, ICM has owned and did own approximately 65% of the shares of KeepRite. Since the events which give rise to this trial, and by means which need not be explored in detail for present purposes, KeepRite has become a wholly-owned subsidiary of ICM. At the time of the events giving rise to these proceedings, the plaintiffs in the oppression action were the owners of shares of KeepRite, representing approximately 28% of its shares.

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Comprehension of these proceedings requires some history of the acquisition by ICM of its shares in KeepRite, of the business operations of ICM and KeepRite respectively, and of the impugned transaction by which KeepRite acquired certain assets of Manufacturing and Energy Products. The dispute between the parties has its origins in that transaction. In these areas the basic facts are not in dispute.

The plaintiffs in the oppression action (hereinafter sometimes referred to as the "dissenting shareholders") acquired their interest in KeepRite by purchases of shares commencing in 1972. Shares in KeepRite were acquired by the Odette Group Limited (Odette) in amounts such that in March of 1979 Odette owned approximately 40% of the issued and outstanding shares. Following that acquisition, in May of 1979, Odette made a written follow-up offer to all shareholders of KeepRite to purchase their shares at $16 per share subject to receiving 90% of the shares outstanding. The offer was accepted by only 80% and was withdrawn. Odette continued to purchase KeepRite's shares, increasing their position ultimately to 51%. In April of 1981, a take-over bid for KeepRite was made by ICG. The original offer was $21 per share, conditional on the acquisition of 90%. The offer was varied to $22, conditional on the acquisition of 50.1%. ICG purchased approximately 64% pursuant to the take-over bid. The shares were subsequently transferred to ICM. Thus, when the transaction impugned in these proceedings by the dissenting shareholders occurred, they were the holders of

approximately 28% of the shares of KeepRite. ICM was the owner of approximately 64%, with the remaining 8%, approximately, in the hands of various individual minority shareholders.

Prior to the impugned transaction, ICG and its subsidiaries carried on various businesses, including manufacture and sale of heating equipment. KeepRite manufactured and sold refrigerating and air-conditioning equipment. The nature of the two businesses and the manner in which they related one to the other will require more detailed examination.

By an agreement having an effective date of March 31, 1983, KeepRite purchased certain assets of Manufacturing and Energy Products used by those companies in the carrying on of their businesses. These assets included plant, equipment, inventory, and accounts receivable. The price was slightly under $20 million.

The discussions which led to this agreement commenced in January of 1983, between representatives of KeepRite and ICG. In that month, McKay, the chief executive officer of KeepRite, proposed the acquisition to the KeepRite board of directors. A committee of the board was struck to consider the matter, comprising H. Purdy Crawford and John Edison, both solicitors, and Ross Hanbury, a former partner of Wood, Gundy. This committee has been referred to in the evidence as the "Independent Committee". The name derives from the fact that its members were not officers or directors of ICG. The independence of the committee is denied and attacked by the dissenting shareholders, but the term is a convenient label for discussion purposes and will be used as such without implying any present conclusion as to its accuracy. The Independent Committee held five meetings in all, the first on February 4, 1983, and the last on March 23, 1983. It considered the merits of the proposed acquisition, the price of the assets to be acquired, and the means of financing. Following its final meeting, the Independent Committee reported to the board of KeepRite that the acquisition would be desirable. At a meeting of the KeepRite board, on the same date, March 23rd, the board approved the acquisition.

The acquisition cost was to be raised by KeepRite by an issue of rights to existing shareholders to acquire further shares at a stipulated price. Until the proceeds of this offering were realized, the acquisition was to be financed by a promissory note of KeepRite which bore no interest.

On April 25, 1983, there was a combined annual and special general meeting of KeepRite shareholders at which the special resolution necessary to authorize the offering of rights was submitted for approval. The special resolution was passed with the requisite two-thirds majority. The dissenting shareholders registered their objection by voting against the resolution.

The impugned transaction was completed on June 28, 1983, for a net purchase price of $19,992,032. The rights offering was subsequently completed in March of 1984. It raised $22,289,928.

In December of 1983, a motion was brought by the dissenting shareholders seeking, among other relief, an injunction restraining KeepRite from proceeding with the rights offering. This motion resulted in an interim order made by Callaghan J. (as he then was) [Re Brant Investments Ltd. et al. and KeepRite Inc. et al. (1983), 44 O.R. (2d) 661, 5 D.L.R. (4th) 116, 24 B.L.R. 201] restraining KeepRite from proceeding with the rights offering pending disposition of the motion. That interim injunction was dissolved on February 1, 1984, when the two orders which resulted in the trial before me were made.

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In the statement of claim in the oppression action the dissenting shareholders allege that certain specified acts or omissions of KeepRite, as influenced or directed by ICG and its subsidiaries, have effected a result that is oppressive and unfairly prejudicial to, and that unfairly disregards, the interests of the dissenting shareholders. They further allege that the business of the defendants, especially

insofar as the impugned transaction is concerned, has been carried on in a manner that is oppressive, prejudicial to, and that unfairly disregards the interests of the plaintiff, and that the powers of the directors of KeepRite and ICG and its subsidiaries have been similarly oppressive and prejudicial.

. . . . .

In the valuation action instituted by KeepRite it seeks an order fixing or declaring the fair value of the shares of the dissenting shareholders.

. . . . .

When ICG acquired its interest in KeepRite, one of its considerations was the complementary nature of the two businesses, heating and refrigeration. Each business was seasonal, activity for KeepRite tending to occur mainly in spring and summer, and for ICG, in fall and winter. In the initial period following the ICG acquisition of its position in KeepRite, the two businesses were operated separately, although attempts were made to harmonize and synthesize their activities. These efforts met with only limited success. During the same period there was interest on both sides in exploring the advantages of integrating and rationalizing the two businesses. There were informal discussions between representatives of the two companies. In May of 1982, independently of ICG, Woodcock of KeepRite tentatively considered the benefits and possible methods of full legal integration of the two businesses. ... In October of 1982, Woodcock proposed full integration of the two businesses to Beenham of ICG who at that time was only prepared to consider limited steps toward that end.

The independent committee held five meetings in total. At its third meeting, a letter from ICG to the president of KeepRite was tabled. It reads in part as follows:

This letter constitutes an offer to sell substantially all of the assets of ICG Manufacturing Ltd. and ICG Energy Products

Ltd. effective March 1, 1983 to KeepRite Inc. at the net book value on that date of approximately $29,600,000 and the assumption of the associated liabilities (excluding bank loans and inter-company advances) of approximately $5,600,000. We would be prepared to take back a note payable to the companies for the net amount of $24,000,000 of which $18,000,000 would be interest free for a period of ninety (90) days and the balance would carry an interest rate equivalent to the Canadian Chartered Bank prime rate, payable monthly.

As part of the offer we would be prepared to underwrite the following equity issue in KeepRite which would be used to repay $18,000,000 of the note payable.

Following the fifth meeting of the independent committee on March 23, 1983, Mr. Crawford presented to the board of directors of KeepRite the committee's recommendation that the transaction proceed subject to certain conditions.

At a meeting of shareholders held on April 25, 1983, a special resolution was passed authorizing the amendment of the articles of KeepRite to remove the limit on authorized common shares. With respect to the events which followed, I again refer to the reasons of the learned trial judge at pp. 750-51 O.R.:

> On May 5, 1983, KeepRite sent notices of the approval of the special resolution to the dissenting shareholders notifying them that if they proceeded with their dissent they were obliged to give notice pursuant to s. 184 of the CBCA, demanding payment of the fair value of their shares. Notices of demand for payment were received from certain dissenting shareholders.
>
> A meeting of the board of directors of KeepRite was held on June 23rd, at which an offer to pay the dissenting shareholders the sum of $9 per share as fair value in accordance with s. 184 of the CBCA was approved. The asset purchase was approved. It was the consensus of the board that a rights offering to raise additional equity should be

contemplated during the fall of 1983 to be completed prior to December 31, 1983.

On June 28, 1983, the ICM acquisition was completed for a net purchase price of $19,992,032. On the following day articles of amendment were filed and a certificate received making effective the special resolution and the increases in authorized capital of KeepRite. On June 29th a letter was sent by KeepRite to dissenting shareholders advising that the articles of amendment had been filed and offering to pay $9 a share.

On August 15, 1983, an originating notice of motion was brought by KeepRite returnable in weekly court at Toronto seeking an order fixing a fair value for the shares of the dissenting shareholders. It was this proceeding which resulted in the valuation action. Proceedings under s. 234 were subsequently instituted by the dissenting shareholders, resulting in the oppression action.

In March of 1984, KeepRite proceeded with the rights offering pursuant to which it raised $22,289,928 of additional equity capital of which $20,601,625 was subscribed for by Manufacturing and $1,688,304 was subscribed for by non-dissenting minority shareholders.

OPPRESSION ACTION

The provisions of the Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 234 [am. 1978, c. 9, s. 74] (the CBCA; now R.S.C. 1985, c. C-44, s. 241), which are in issue in the oppression action, are set out below:

234.(1) Application to court re oppression. -- A complainant may apply to a court for an order under this section.

(2) Grounds. -- If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) Powers of court. -- In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 236;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XVIII to be made;

(n) an order requiring the trial of any issue.

In the oppression action, the plaintiffs claim payment to them of an amount equal to the value of their shares in KeepRite plus interests and costs, damages for loss caused by the allegedly oppressive and unfairly prejudicial conduct of the respondents and, in the alternative, an order appointing a receiver and a receiver-manager to manage KeepRite's affairs for such period of time as the court might direct.

The learned trial judge dismissed the oppression action on the basis that the record did not establish any of the grounds on which an oppression remedy may be granted pursuant to s. 234(2), and that no prejudicial effect on or disregard of the interests of the minority had been shown. The appellants argued three grounds of appeal:

(a) the trial judge erred in concluding that there is no fiduciary duty owed by a majority shareholder to the minority, particularly in respect of a transaction in which the majority

shareholder has a clear conflict of interest with the minority;

(b) the trial judge misdirected himself with respect to the onus of proof of oppression; and

(c) the trial judge erred in failing to apply an objective test of fairness in considering whether the impugned transaction consisted of or resulted in oppression of the dissenting shareholders and, in particular:

(i) he erred in concluding that some "want of probity" or bad faith of the respondents is requisite to a finding of oppression; and

(ii) he erred in suggesting that allegations of oppressive corporate conduct can be disposed of on the basis of judicial deference to the business judgment of corporate officers and directors.

The appellants argue that all of these questions should be viewed in the light of s. 4 of the CBCA, which states:

> 4. The purposes of this Act are to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada, to advance the cause of uniformity of business corporation law in Canada and to provide a means of allowing an orderly transference of certain federal companies incorporated under various Acts of Parliament to this Act.

Although the appellants emphasize that the purposes of the CBCA were to revise and reform corporate law as it applied to federally incorporated companies, a number of the cases relied on by the appellants in their argument pre-date the coming into force of the CBCA in December 1975.

Fiduciary duty

The appellants argue that the issues of fiduciary duty and oppression are intertwined on the facts of this case and that, if a breach of fiduciary duty were established, that breach

would necessarily result in a concurrent finding of oppression under s. 234.

The trial judge, while recognizing that the categories of fiduciary relationships are not closed and have recently been broadened, was of the view that majority shareholders owe no fiduciary duty to minority shareholders, first, because no such duty is currently recognized by Canadian authority or learned opinion and, second, because the relationship between the majority and the minority lacks any of the indicia which have traditionally led courts of equity to find such a duty.

The appellants cite three Ontario cases to support their position that the common law recognizes a fiduciary duty owed by a majority shareholder to the minority: Goldex Mines Ltd. v. Revill (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (C.A.), at pp. 223-24 O.R.; Ontario (Ontario Securities Commission) v. McLaughlin, Ont. H.C.J., Henry J., December 20, 1987 [summarized at 10 A.C.W.S. (3d) 270]; and Re Canadian Tire Corp. (1987), 35 B.L.R. 56, 10 O.S.C.B. 857 (Securities Commission), affd (1987), 59 O.R. (2d) 79 sub nom. Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission, 23 Admin. L.R. 285, 35 B.L.R. 117, 37 D.L.R. (4th) 94, 21 O.A.C. 216 (Div. Ct.) [leave to appeal to Ont. C.A. refused (1987), 35 B.L.R. xx].

In Goldex Mines, the Ontario Court of Appeal dismissed an appeal from the Divisional Court which had set aside the writs in two actions because, in the opinion of the Divisional Court [Probe Mines Ltd. v. Goldex Mines Ltd., [1973] 3 O.R. 869, 38 D.L.R. (3d) 513], the actions were derivative in nature and the requisite leave had not been granted prior to the issuing of the writs. The proposed actions were based on allegedly false and misleading information disseminated by the company to shareholders. In the process of dismissing the appeal, the Court of Appeal made the following comment at p. 224 O.R.:

> The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important -- that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice,

> and when the test of fairness is not met, the equitable jurisdiction of the Court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused. The category of cases in which fiduciary duties and obligations arise is not a closed one: Laskin v. Bache & Co. Inc., [1972] 1 O.R. 465 at p. 472, 23 D.L.R. (3d) 385 at p. 392.

The Court of Appeal in that case did not hold that a fiduciary duty was owed by directors or majority shareholders to the minority shareholders, but merely commented that the category of cases in which fiduciary duties arise is not closed.

The decision of the Ontario Court of Appeal in Laskin v. Bache & Co., [1972] 1 O.R. 465, 23 D.L.R. (3d) 385, cited in the Goldex case, involved a transaction by a stockbroker on behalf of his client in which the broker, on reporting the purchase of shares on the client's behalf, failed to inform his client that he had merely accepted the undertaking of the selling broker to exert his best efforts to deliver the shares involved, rather than obtaining actual delivery of them. The plaintiff suffered substantial loss when the selling broker failed to deliver the shares. Arnup J.A., speaking for the court, stated, at p. 472 O.R., that the categories of cases in which fiduciary duties arise are "no more 'closed' than the categories of negligence at common law". He quoted from the decision of the House of Lords in Nocton v. Lord Ashburton, [1914] A.C. 932, [1914-15] All E.R. Rep. 45, 83 L.J. Ch. 784, where Viscount Haldane L.C. states at p. 955 A.C.:

> ... the Courts, and especially the Court of Chancery, had to deal with ... cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled.
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> . . . . .
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> Such a special duty may arise from the circumstances and

relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity.

(Emphasis added)

In Laskin v. Bache & Co., the Court of Appeal was of the view that the "circumstances and relations of the parties" in the particular case before it did give rise to a fiduciary obligation on the part of the defendant broker to advise his client in advance of the method used in dealing with the selling broker.

Ontario (Ontario Securities Commission) v. McLaughlin, supra, involved motions by the defendants pursuant to rules 20.01 and 21.01 of the Rules of Civil Procedure, O. Reg. 560/84, for orders striking out statements of claim as showing no triable issue. The plaintiffs, in their statements of claim, had asserted an alternative claim for injuries they suffered as minority shareholders, through diminution of the value of their shares by reason of an alleged breach of fiduciary duty owed to them by the majority shareholders. In considering whether or not to strike this claim, Henry J. referred to the Court of Appeal decision in the Goldex case and also to the decision of Anderson J. in the case at bar. He concluded that there were differing views on this issue requiring legal clarification, and that the matter should be left to the trial judge. Consequently, he refused to strike the claim based on breach of fiduciary duty.

The last case cited by the appellants on this issue was Re Canadian Tire Corp., supra, in which the Ontario Securities Commission decided to issue, pursuant to the provisions of s. 123 of the Securities Act, R.S.O. 1980, c. 466, a cease-trading order on a take-over bid and on the trade in common shares owned by the majority shareholders. In its reasons, the Commission stated that the vendors on the take-over bid were "in a fiduciary position in at least two categories -- as directors of Tire and as Tire's controlling shareholders" (at p. 954 O.S.C.B., p. 110 B.L.R.), but did not explain to whom the fiduciary duty was owed. In its comments, the Commission purported to rely on the decision of the Ontario Court of

Appeal in the Goldex Mines case. However, the Commission stated that its decision to impose a cease-trading order did not depend on finding a fiduciary duty, and that the Commission was not the proper forum "particularly in a s. 123 proceeding, to determine the question of whether or not there has been a breach of fiduciary duty" (at p. 955 O.S.C.B., p. 111 B.L.R.). What the Commission did determine in its reasons in that case was that the majority shareholders failed to act fairly and honestly and that their unfair and dishonest conduct supported facts which in themselves would have been sufficient to warrant a cease trading order under s. 123. On appeal, the Divisional Court quite properly rejected the appellant's argument that the Commission had usurped the functions of a court in finding a breach of fiduciary duty on the part of the selling shareholders, since the Commission did not so find.

It is clear that none of the foregoing authorities imposes a fiduciary duty on majority shareholders or directors in favour of minority shareholders. The case that comes closest to doing so is the Goldex Mines case, which was decided prior to the coming into force of the CBCA in December of 1975, and involved facts which, if they arose at the present time, would appropriately lead to an application under s. 234 of the CBCA or its counterpart, s. 247(2) of the Ontario Business Corporations Act, 1982, S.O. 1982, c. 4 (the OBCA). The enactment of these provisions has rendered any argument for a broadening of the categories of fiduciary relationships in the corporate context unnecessary and, in my view, inappropriate.

It must be recalled that in dealing with s. 234, the impugned acts, the results of the impugned acts, the protected groups, and the powers of the court to grant remedies are all extremely broad. To import the concept of breach of fiduciary duty into that statutory provision would not only complicate its interpretation and application, but could be inimical to the statutory fiduciary duty imposed upon directors in s. 117(1) (now s. 122(1)) of the CBCA. That provision requires that

> 117.(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation ...

(Emphasis added)

Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under s. 234. To impose upon directors and officers a fiduciary duty to the corporation as well as to individual groups of shareholders of the corporation could place directors in a position of irreconcilable conflict, particularly in situations where the corporation is faced with adverse economic conditions.

Courts impose fiduciary duties only in situations where someone stands in a particular position of trust by virtue of an agreement or as a result of the circumstances and relationship of the parties. In an application under s. 234, evidence of any relevant agreement between the parties and evidence of the circumstances of their relationship would appropriately be adduced to assist in determining whether the facts of the case warrant a remedy. Because the statutory scheme of s. 234 is so broadly formulated, the evidence necessary to establish a breach of fiduciary duty would be subsumed in the broader range of evidence which would be appropriately adduced on an application under the section.

In any event, on the facts of this case, I do not consider that the respondents, the board of directors of KeepRite, or the members of the independent committee owed a fiduciary duty to the appellants.

Bona fides of the impugned transaction

It was submitted before the trial judge and by the appellant before this court that the granting of a remedy under the oppression provision "does not require a finding that there has been a want of probity in those responsible for the impugned conduct", and "that oppression in the result is sufficient". The learned trial judge viewed that submission with "a measure

of scepticism" because in reviewing the facts in the decisions to which he had been referred, in which a remedy had been granted, there was "always a finding of conduct clearly inconsistent with good faith and honesty" (Brant Investments, supra, at p. 767 O.R.).

A brief review of the authorities, some of which were undoubtedly not cited to the learned trial judge, indicates that judicial opinion on this question is mixed. A careful reading of the section itself does not indicate any statutory requirement of bad faith. In support of its submission that only conduct inconsistent with honesty and good faith can invoke a remedy under s. 234, the respondent relies primarily on the House of Lords decision in Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324, [1958] 3 All E.R. 66, [1958] 3 W.L.R. 404, and the decision of this court in Re Ferguson and Imax Systems Corp. (1983), 43 O.R. (2d) 128, 150 D.L.R. (3d) 718 [leave to appeal to S.C.C. refused (1983), 52 N.R. 317n, 2 O.A.C. 158n].

In the Scottish Co-operative case, the appellant co-operative wished to enter into the rayon business, but a regulatory scheme prevented it from manufacturing rayon directly. Accordingly, a corporation was formed in which the co-operative was the majority shareholder and the two respondents, both experts in the rayon business, were minority shareholders. Raw materials were supplied to the corporation by the co-operative. The corporation prospered, and eventually the particular regulatory scheme was removed, resulting in the co-operative itself being able to enter the rayon manufacturing business directly, which it did. Subsequently, the co-operative withheld raw materials from the corporation and established its own production facilities. The evidence showed that it was the effective policy of the co-operative to "destroy the company it had created, knowing that the minority shareholders alone would suffer in that process" (p. 70 All E.R., per Viscount Simonds). The House of Lords concluded that such activity was oppressive, and therefore ordered that the minority shares be purchased at a price set by the lower court.

In finding that the conduct of the co-operative was

"oppressive", Lord Simonds adopted the dictionary meaning of the term -- that is, "burdensome, harsh and wrongful". Lord Keith stated that oppression could take various forms, but suggested that at the least it involved "a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members" (at p. 86 All E.R.).

At the time of the Scottish Co-operative decision, s. 210 of the Companies Act, 1948 (U.K., 11 & 12 Geo. 6), c. 38, read, in part, as follows:

> 210.(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members ... may make an application to the court by petition for an order under this section.

(Emphasis added)

Thus, under s. 210, the conduct of corporate actors had to be found to be oppressive in order for the court to grant relief.

Since the Scottish Co-operative decision, the definitions adopted by Lord Simonds and Lord Keith have been relied upon in many cases in which oppression has been associated with a lack of probity or an absence of good faith. Such cases, however, pre-date the 1980 amendments to the English oppression provision which now resembles more closely its Canadian counterpart. That provision -- the Companies Act, 1985 (U.K.), c. 6, s. 459(1) -- reads as follows:

> A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(Emphasis added)

It will be noted that the main thrust of the change in the English law is to replace the requirement that the conduct complained of must be "oppressive to some part of the members" with a requirement that it be "unfairly prejudicial to the interests of some part of the members". Since that change, the English cases have adopted the view that bad faith is not required to invoke a remedy. The test adopted in at least two decisions is whether, in considering the acts complained of, "a reasonable bystander, observing the consequences of (the majority's) conduct, would regard it as having unfairly prejudiced the petitioner's interests". See Re Bovey Hotel Ventures Ltd., U.K. Ch.D., July 31, 1981.

Re Bovey Hotel Ventures Ltd. involved a small company of which the only two shareholders were husband and wife. At the time of the action, they were involved in a bitter matrimonial dispute. Mr. Bovey brought petitions under the old s. 210 of the British Companies Act, 1948, and subsequently under s. 75 of the Companies Act, 1980 (U.K.), c. 22 -- identical in terms to s. 459(1) of the 1985 statute quoted above. Numerous allegations of bad faith were alleged on both sides.

In dealing with the question of what constituted conduct "unfairly prejudicial", the learned trial judge expressed his view that the test of unfairness must be an objective and not a subjective one; that it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted in the conscious knowledge that their acts were unfair to the petitioner; and that it is not necessary for the petitioner to show bad faith.

On appeal, the Court of Appeal did not interfere with the test applied by the trial judge.

In Re A Company, [1989] B.C.L.C. 383 (Ch.D.), the court considered a unilateral exercise by a director of his power of allotment so as to increase his own shareholding from 60 per cent to 96 per cent and reduce the holding of the only other shareholder accordingly. The court held that this was unfairly prejudicial conduct and, in so doing, relied on the proposition set out in Re Bovey Hotel Ventures Inc. The court also stated

that the test is one of unfairness, not unlawfulness (see pp. 389-90 B.C.L.C.). The court went on to state, however, that if, from an objective viewpoint, the impugned conduct was performed for an improper purpose or with an improper motive, that could well be a relevant consideration in determining whether the conduct was unfairly prejudicial.

Section 234(2) of the CBCA is drafted in substantially more detail than the provisions of the English Act. Clause (a) makes specific reference to the wrongfulness of the result of corporate conduct. If the result is oppressive, unfairly prejudicial, or unfairly disregards the interests of the complainant, then the court may grant a remedy. Clause (b) refers to the manner in which the business affairs of the corporation are carried on. If they are carried on in a manner that is oppressive, unfairly prejudicial, or unfairly disregards the interests of the complainant, a remedy may be available. Clause (c) refers to the manner in which the powers of the directors have been exercised. If they have been exercised in a manner that is oppressive, unfairly prejudicial, or that unfairly disregards the interests of the complainant, a remedy may be available. It can thus be seen that clause (a) emphasizes the results of behaviour whereas clauses (b) and (c) emphasize the manner in which acts have been carried out. Although the emphasis in wording is different between clause (a) and clauses (b) and (c), I am satisfied that the difference is not significant in any practical sense in this case. It may be significant in cases where clause (a) is inapplicable because no oppressive or unfair result has been alleged, but where the acts complained of allegedly have been carried out in a manner which is oppressive or unfair so as to engage clause (b) or clause (c).

I have concluded that evidence of bad faith or want of probity in the actions complained of is unnecessary in an application under s. 234. I should have been content to arrive at that conclusion merely on the basis of a literal reading of the provision coupled with an application of the statutory objective articulated in s. 4, "to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada", had it not been for the

substantial body of conflicting opinion on this issue cited to us, involving the application of s. 234 or similarly worded provisions in provincial or Commonwealth statutes.

In considering whether conduct is "oppressive" one can appropriately look to the English cases decided before 1980 which defined that word in a similar context. Adopting the definition applied by Lord Simonds in the Scottish Co-operative case -- namely, "burdensome, harsh and wrongful" -- it is unlikely that an act could be found to be oppressive without there being an element of bad faith involved. However, in considering the alternative question of whether any act is unfairly prejudicial to, or unfairly disregards the interests of one of the protected persons or groups, I am of the view that a requirement of lack of bona fides would unnecessarily complicate the application of the provision and add a judicial gloss that is inappropriate given the clarity of the words used. Of course, there may be many situations where the rights of minority shareholders have been prejudiced or their interests disregarded, without any remedy being appropriate. The difficult question is whether or not their rights have been prejudiced or their interests disregarded "unfairly". In testing the facts in a given case against the word "unfairly", evidence of bad faith as to motive could be relevant, but there may be other cases where particular acts effect an unfair result, but where there has been no bad faith whatsoever on the part of the actors. Such a case came before the Ontario Divisional Court in Palmer v. Carling O'Keefe Breweries of Canada Ltd. (1989), 67 O.R. (2d) 161, 41 B.L.R. 128, 56 D.L.R. (4th) 128, 32 O.A.C. 113.

The Palmer case involved an application pursuant to s. 247 of the OBCA. An amalgamated company took on the large acquisition debt of one of the amalgamation companies, which the parent company guaranteed under a support agreement. The increase in debt in the resulting company achieved tax savings for the parent company. The Divisional Court found that the complaining preference shareholders had been made to suffer the risks of higher leverage without any corresponding benefit, and that the support agreement was inadequate to protect their interests. Further, the nature of their investment had changed from that

of a Canadian brewing company to a diversified multi-national holding company. Thus, the amalgamation was held to be unfairly prejudicial to the interests of the holders of preferred shares. Southey J., speaking for the court, stated at p. 172 O.R.:

> I do not think that Elders or the directors of Carling O'Keefe intended to harm the preference shareholders, and I am not prepared to find that the management or directors of either Elders or Carling O'Keefe acted in bad faith. But I am satisfied they did something that violated one of the fundamental principles of our company law. They treated C.O.L. as though it was a private company, when it still had other shareholders. They then tried to make amends in a fashion that those other shareholders were not required to accept.

In support of its position that bad faith or want of probity are essential ingredients of conduct which could result in a remedy under the oppression provision, the respondents cite the following cases: Re Ferguson and Imax Systems Corp., supra; Bank of Montreal v. Dome Petroleum Ltd. (1987), 54 Alta. L.R. (2d) 289, 67 C.B.R. (N.S.) 296 (Q.B.); Re Pizza Pizza Ltd., Ont. H.C.J., August 14, 1987; Cumberland Holdings Ltd. v. Washington H. Soul Pattinson & Co. (1977), 13 A.L.R. 561, 2 A.C.L.R. 307 (P.C.); H.J. Rai Ltd. v. Reed Point Marina Ltd., B.C. S.C., Skipp L.J.S.C. in Chambers, May 26, 1981 [summarized at 9 A.C.W.S. (2d) 216]; and Keho Holdings Ltd. v. Noble (1987), 52 Alta. L.R. (2d) 195, 78 A.R. 131, 38 D.L.R. (4th) 368 (C.A.).

In the Ferguson case, supra, the Ontario Court of Appeal was dealing with a closely held corporation, the founding shareholders of which were three married couples, the men having been issued voting shares and the women non-voting shares. The complainant and her husband ultimately divorced and there followed what the Court of Appeal found to be a lengthy course of oppressive and unfairly prejudicial conduct including a mala fides exercise of the company's power to amend its articles to reorganize its capital structure. In making those findings, Brooke J.A., for the court, made the following

statement (at p. 137 O.R.), on which Anderson J. relied in the judgment under appeal:

> ... the court must consider the bona fides of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholder.

Although Brooke J.A. did state that the court must consider the bona fides of the corporate transaction in question, it must be remembered that he did so in the context of a closely held corporation involving friends and spouses where there was overwhelming evidence of lack of bona fides and unfairly prejudicial conduct leading inevitably to a remedy under the section. The court does not appear to have specifically directed its mind to the issue of whether lack of bona fides must be considered in every application for s. 234 relief. Indeed, the court states, at p. 137:

> ... each case turns on its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another.

I do not consider the Ferguson decision authority for the proposition that lack of bona fides must be shown in all applications under s. 234.

In Bank of Montreal v. Dome Petroleum Ltd., supra, Forsythe J. of the Alberta Court of Queen's Bench stated that in the case before him it was unnecessary to deal with this issue, but in an aside he referred with approval to Anderson J.'s comments in the trial judgment in this case. The decision in Bank of Montreal v. Dome is not of assistance on this issue.

In dealing with an application under s. 247 of the OBCA, Sutherland J. in Pizza Pizza, supra, seems to have held that a want of bona fides is a threshold requirement for success on an application under the oppression provision -- primarily on the authority of this court's decision in Ferguson, supra, and of the trial decision in this case. To the extent that the Pizza Pizza case represents authority for the proposition under

consideration, I would respectfully disagree. I agree, however, with the comments of the learned trial judge where he states at p. 76 of the reasons:

> Obviously, not every adverse consequence to the complainant from conduct of the majority will give rise to relief under s. 247. The term "unfairly" as much as the term "oppressive" invites and requires consideration of the quality of the acts of the alleged wrong doer and not merely of the adverse effects of those acts upon the interests of the complainant. Although the thresholds are clearly different for oppression and for what Anderson J. referred to ... as the "wider range of conduct" under the more modern statutory provisions and are probably different as between "conduct unfairly prejudicial" and "conduct unfairly disregarding" ... the court is required to have regard to the propriety of the conduct complained of where the complaint involves any of the three categories.

(Emphasis added)

Considering the "quality" or "propriety" of the conduct complained of is clearly relevant in determining whether that conduct is oppressive or unfair. However, in my view, that is substantially different from requiring that a complainant show that there was lack of bona fides on the part of the corporate actor.

In Cumberland Holdings v. Washington, supra, the Privy Council was dealing with a petition for winding up pursuant to the provisions of the Companies Act of New South Wales. Two statutory provisions were relied upon; although they were similar in some respects to s. 234 of the CBCA, they contained additional phrases not found in s. 234. In any event, their Lordships, although they stated that no lack of probity on the part of the directors was shown, did not in any way state that such a finding was a requirement under the statutory provisions involved.

In H.J. Rai Ltd., supra, the British Columbia Supreme Court was dealing with an application under s. 224 of the Company

Act, R.S.B.C. 1979, c. 59. Although that section is not identical to s. 234, it does allow for application to the court for an appropriate remedy where the impugned acts have been effected in a manner that is "oppressive" or that is "unfairly prejudicial" to the complainant. In that case, the learned trial judge emphasized the concept of "majority rule" in the corporate context and stated that the facts before him merely disclosed certain directors who had one view as to what was needed to ameliorate the financial plight of the company, which view was not concurred in by the petitioners. He then went on to say that he did not find mala fides on the part of the respondents and that he therefore declined to make the order requested. There is no analysis in his brief reasons of the prerequisites to granting relief, but merely the bald statement that there was no mala fides. I do not consider that case to be helpful in analyzing the provisions of s. 234.

In Keho Holdings Ltd. v. Noble, supra, the Alberta Court of Appeal considered a hybrid provision of the Alberta Business Corporations Act, S.A. 1981, c. B-15, which allowed for dissolution of an Alberta corporation in circumstances similar to those outlined in s. 234 of the CBCA and also in situations similar to those historically contained in corporations Acts for the winding-up of corporations when it is "just and equitable". Although the Alberta Court of Appeal in that case quoted with approval a portion of the reasons in the Ferguson case, supra, including that portion quoted above, it clearly did so only to show concurrence with those reasons to the following extent (Keho, p. 201 Alta. L.R.):

> ... these sections ought to be broadly and liberally interpreted. A broad interpretation will reflect the intention of the legislation to ensure settlement of intracorporate disputes on equitable principles as opposed to adherence to legal rights.

There was no discussion in the reasons in Keho of the bona fides issue.

My reason for summarizing all of the cases cited by the respondents on this question is to demonstrate that lack of

bona fides has not been specifically addressed as an issue in any of those cases, other than in the trial decision in this case and in the decision of Sutherland J. in the Pizza Pizza case. Anderson J. in this case stated that he viewed with "a measure of scepticism" the submission that the granting of the oppression remedy does not require a finding that there has been a want of probity. He discussed some of the cases to which I have referred. However, it appears that the only case cited to him for the proposition that there need be no finding of bad faith was Re R.A. Noble & Sons (Clothing) Ltd., [1983] B.C.L.C. 273, which, in turn, referred to the test set out in the unreported decision in Re Bovey Hotel Ventures Ltd., supra, the facts of which were not made available at trial. This court had the benefit of the unreported reasons of the learned Chancery judge in Bovey Hotel, and also of the English Court of Appeal reasons, both of which were referred to earlier in these reasons.

Other recent decisions have reinforced the view stated in the English cases cited above and in the decision of the Divisional Court in Palmer v. Carling O'Keefe Breweries, supra. In Low v. Ascot Jockey Club (1986), 1 B.C.L.R. (2d) 123 (S.C.), Southin J., in dealing with an "oppression remedy" application pursuant to s. 224(1) of the British Columbia Company Act, stated at p. 129 B.C.L.R.:

> ... I see no reason why the motive or intent of those doing the things complained of should be inquired into. What is at issue is the effect of the conduct or acts complained of. Nothing is to be gained by importing notions of malice into this branch of the law. The best way to put my opinion is to say that malice or an intent on the part of the respondents to do harm is not a necessary ingredient of the petitioner's case at least in circumstances such as those now before me. I do not doubt that there might be cases in which the purpose of the acts complained of would be relevant to determining whether it was oppressive ...

The decision of McEachern C.J.S.C. in Nystad v. Harcrest Apartments Ltd. (1986), 3 B.C.L.R. (2d) 39 (S.C.), is an interesting one, also involving an application under s. 224(1)

of the Company Act of British Columbia. The respondent company was incorporated to operate, as a co-operative, an apartment in west Vancouver, for the benefit of its tenant shareholders. In 1973 the petitioner purchased 28 shares in the company which shares carried with them the right to lease a bachelor suite from the company. He lived in the premises until 1978, when other tenant shareholders became concerned about his use of the suite for noisy parties. In 1981, after several warnings and extraordinary general meetings of shareholders, the petitioner was given a notice to quit, with which he complied. The petitioner continued to pay all assessments for taxes and maintenance of the apartment and made applications for reinstatement of his occupancy, which were refused.

On his petition for relief pursuant to s. 224 of the British Columbia statute, the court found that the shareholders did not act in bad faith, but rather, because of their bad experience with the petitioner, they did not want him residing in the premises. The court considered that there could be no finding of oppression on the facts involved since bad faith was required for such a finding. However, the court proceeded to deal with the question of whether the acts of the company were, within the words of the British Columbia Act, "unfairly prejudicial" to the petitioner.

The petitioner had been without the use of the premises for a period of close to five years, and during that time, his shareholding rights had been sterilized. Any sale of the shares at the time of the petition would have left the petitioner in a position of having to accept a "fire sale" price for his shares. Consequently, because of what the court considered to be "unfair prejudice'' to the petitioner, and absent any bad faith on the part of the corporation, an order was made that the petitioner's shares be valued objectively and that the company either purchase his shares at that value, or find a buyer, or subsidize a buyer, so that the return to the petitioner would equal fair market value of his shares.

I agree with Anderson J. in the judgment under appeal that there will be few cases where there has not been some "want of probity" on the part of the corporate actor where a remedy

pursuant to s. 234 will be appropriate. However, given the wording of the section, and the broad objectives set out in s. 4 of the Act, I do not consider it necessary that a finding of want of bona fides be made in every case where the court is disposed to grant a remedy.

Onus of proof

The appellants submit that, in an application for relief under s. 234 (now s. 241), once a dissenting shareholder has shown that an impugned transaction involves benefits to one group of shareholders in which dissenting shareholders do not share, and a corresponding detriment to the dissenting shareholders which the other group of shareholders do not suffer, then the burden of proof rests upon the majority shareholders to demonstrate that: (a) the impugned transaction is at least as advantageous to the company and to all shareholders as any available alternative transaction; (b) that no undue pressure was applied to the company, its officers and directors, to accept the impugned transaction as proposed; and (c) that the substance of the impugned transaction and the process of decision-making leading to its acceptance were intrinsically fair to the dissenting shareholders.

No case was cited to us that would substantiate such broad and onerous legal requirements. In any event, the learned trial judge in his very careful reasons dealt with each question raised. He did not consider that there were benefits to ICG which were not shared by the dissenting shareholders, nor did he consider that the dissenting shareholders suffered a detriment which ICG did not suffer. A review of the evidence and of the trial judge's decision makes it clear that there was substantial evidence on which he could base such findings. That being so, the burden of proof which the appellants would have shifted to the respondents on the above-mentioned bases does not arise.

Anderson J. pointed out that possible solutions to KeepRite's problems suggested by the dissenting shareholders were considered and rejected by KeepRite management and by the independent committee. To suggest that directors are required,

when entering into a transaction on behalf of the corporation, to consider every available alternative transaction is unrealistic. Any number of considerations may be relevant, if not vital, to the carrying out of a particular transaction at a particular time. In many cases, there will not be obvious or immediate alternatives. The extent to which directors should inquire as to alternatives is a business decision, which, if made honestly in the best interests of the corporation, should not be interfered with.

The appellants also take the position that the single fact that this was a non-arm's-length transaction shifts the burden of proof to the respondent. The only example of such a shift of onus cited to us was in Sinclair Oil Corp. v. Levien, 280 A.2d 717 (1971). The facts in that case were much stronger than the facts in this case. Sinclair Oil Corporation allegedly caused damage to its subsidiary, Sinclair Venezuelan Oil Company (Sinven), as a result of numerous acts, including causing the subsidiary to pay substantial dividends, denying industrial development to the subsidiary and causing breach of contract between that subsidiary and a wholly owned subsidiary of Sinclair. The case involved a derivative action by minority shareholders of Sinven for losses suffered by it as a result of its parent's actions. In that case, the fiduciary duty owed by the parent to the subsidiary resulted in a shifting of the burden of proof to Sinclair to show "intrinsic fairness" in the dealings between it and its subsidiary.

As pointed out by the appellants, courts in this jurisdiction have held that where a party who owes a fiduciary duty deals with trust property to his own personal benefit, a burden of proof, the nature of which will depend on the circumstances of the case, will rest on the fiduciary. There are undoubtedly other cases where proof of basic preliminary facts would warrant a shift of onus. Whether or not this is one of those cases we need not decide since, as pointed out by Anderson J., the respondents in this case assumed from the outset the burden of adducing evidence as to the nature of the transaction, the manner in which it was carried out, and the result. It was not merely the non-arm's-length nature of the transaction that made it, in the trial judge's words, "tactically sound" to do so. As

many of the necessary facts were solely in the knowledge of the respondents, the burden of adducing evidence on those facts would have been theirs in any event.

Independent committee

The appellants attack the role of the independent committee on the basis, first, that it was not, in fact, independent, and second, that the advice given by the committee to the directors of KeepRite was not in the best interests of the company and its shareholders.

With respect to the makeup of the committee, the evidence discloses that all of its members were outside members of the board of KeepRite. None was an officer or director of ICG. The three-member committee comprised H. Purdy Crawford and John Edison, both solicitors, and Ross Hanbury, a former partner of Wood, Gundy. Mr. Crawford became involved with KeepRite in the winter of 1979 when the Odette Group retained him and the law firm in which he was a senior partner in connection with the possible acquisition of KeepRite. That group eventually became owners of approximately 50 per cent of the shares of KeepRite. It was at the request of the Odette Group that Mr. Crawford became a director of KeepRite. His first encounter with ICG was at the time of its failed take-over bid for KeepRite. He continued as a member of the board after ICG acquired its interest in KeepRite in 1981. Mr. Edison had acted as legal adviser to the founder of KeepRite from its inception, and had also acted for the company over a number of years. He was a long term member of the KeepRite board. Mr. Hanbury had been involved with KeepRite since the 1960s, when Wood, Gundy was involved in a public offering of KeepRite shares. There is no evidence of any involvement with ICG by any of these individuals.

The trial judge found as a fact that the members of the committee were truly independent in the sense that they "felt at all times free to deal with the impugned transaction upon its merits" (Brant Investments, supra, at p. 756 O.R.). There was more than adequate evidence to substantiate such a finding.

That, of course, does not end the matter, since the appellants allege that the advice given by the committee to KeepRite was not in the best interests of KeepRite and its shareholders. With respect to those issues, the learned trial judge made the following findings, at p. 756 O.R.:

> I conclude and find that the members of the committee were fully aware that the transaction was not at arm's length and that the function of the committee was to assure that the impugned transaction be fair to the minority shareholders as well as in the best interests of KeepRite as a whole. I likewise conclude and find that the advice which it gave was independent advice and had not been in any way dictated or predetermined.

The real complaint of the appellants on this appeal is that, rather than making his own assessment of the value to KeepRite of the transaction, the learned trial judge relied on the decision of the independent committee that the transaction was of value to KeepRite because of the synergies and economics of scale involved. The appellants argue that, although reliance on investigations carried out by such a committee may be appropriate in some cases, it is not appropriate in this case where, they argue, the committee itself did not adequately assess the benefits of the transaction to KeepRite. The appellants criticize work of the independent committee on the following bases:

(a) the committee did not consider whether there were alternative transactions open to KeepRite;

(b) the committee approved the transaction based upon assurances that certain "synergistic" benefits could be achieved by combining the businesses -- they were aware of the need for a strategic plan to realize these benefits but proceeded without obtaining one;

(c) the committee never received a final report from the consultants retained to review management's assumptions concerning the anticipated synergies; and

(d) the committee did not commission a valuation of the Inter-City businesses on a going concern basis.

(a) Possible alternative transactions

The appellants argue that there were a number of alternative transactions available to KeepRite which were not considered by the independent committee, and they point specifically to three. First, they say that Wood, Gundy, KeepRite's financial advisers, and Mr. McKay, KeepRite's chief executive officer, believed that equity could be raised in the absence of an asset purchase. Mr. S.A. Jarislowsky, called by the appellants, testified that the dissenting shareholders would have looked favourably at supporting such an offering. I do not consider that Mr. Jarislowsky's after-the-fact evidence of such a position is of assistance. There was some evidence that an alternative suggestion was made by Mr. Jarislowsky on behalf of the dissenting shareholders prior to the carrying out of the transaction. However, it is not for the minority shareholders to dictate to corporate officers the manner in which they should deal with corporate problems. Whether or not the directors or the independent committee looked favourably on any suggestion by Mr. Jarislowsky is irrelevant unless it could be shown that he presented an alternative which was definitely available and clearly more beneficial to the company than the chosen transaction. However, the suggestion made by Mr. Jarislowsky was nothing more than that -- a mere suggestion.

With respect to evidence regarding the raising of equity without the asset purchase, Mr. Falconer from Wood, Gundy, opined that the raising of equity financing other than with the co-operation of ICG and the minority shareholders would be extremely difficult, particularly given the recent financial history of the company. In addition, while a public rights offering would have provided additional equity financing to KeepRite, it would not have alleviated its deteriorating competitive position as a seasonal manufacturer with a declining market share. It was the opinion of the independent committee that the synergies available in the impugned transaction would help solve that problem. Other alternatives were considered by the committee and rejected because none was

considered as attractive as the integration of KeepRite's air-conditioning business with the heating business of the ICG companies.

Second, the appellants suggest that certain divisions of KeepRite had been identified as unnecessary to KeepRite's future plans: "They were profitable, and could have been sold with other redundant assets to reduce KeepRite's debt". The evidence to which we were referred on this point is of no assistance whatsoever to the appellants. Mr. McKay, the president of KeepRite during the relevant period, says that he considered the sale of these assets at some time prior to the period when the impugned transaction was under consideration. He had some discussions with an unnamed American firm which did not proceed beyond the preliminary negotiation stage.

Third, the appellants suggest that the shares of Manufacturing and of Energy Products might have been acquired in order to make tax losses in those companies available against future profits in KeepRite. The evidence indicated that such a possibility was in fact considered by the committee but rejected.

It is clear from the evidence that the independent committee did consider some alternative possibilities for solving KeepRite's problems. It did so, however, in the context of a concrete proposal for the purchase of assets from the ICG companies. The evaluation of that proposal was the purpose for which the committee was struck. I agree with the words of the trial judge where he stated at pp. 757-58 O.R.:

> There is nothing inherently wrong in a parent company making such a proposal to a subsidiary. Any difficulty arises because the transaction, if carried forward, will not be at arm's length. It was because of that aspect of the transaction, and to protect against the vices which may be involved, that the Independent Committee was called into existence. In my view, the committee was not thereupon called to make a wide-ranging search for alternatives, or in other words, to determine whether the proposal which had been made was the best possible solution to the problem. Its function

was to determine whether the proposed transaction was fair and reasonable and of benefit to KeepRite and its shareholders.

(b) Strategic plan

The appellants argue that, although the independent committee was aware of the need for a strategic plan to realize the synergistic benefits of the transaction, they proceeded without obtaining such a plan. First of all, the evidence referred to by the appellants on this point does not reveal that the committee considered that a comprehensive "strategic plan" to realize synergistic benefits was necessary. Mr. Purdy Crawford, a witness with broad experience in corporation matters, indicated in his evidence that it is not unusual for decisions to be made with respect to very substantial acquisitions without any previously existing strategic plan. However, in this case, the committee and the directors of KeepRite considered it absolutely necessary in the situation in which KeepRite found itself that some action be taken which would alleviate the concerns of KeepRite's bankers.

Early in 1983 a task force comprised of representatives of both KeepRite and ICG was appointed to study and report on the merits of combining the air-conditioning business of KeepRite and the heating business of the Inter-City companies. In the process of the work of that task force, a background financial paper was prepared which analyzed the financial impact of combining the businesses. This financial analysis was filed as an exhibit at trial. It analyzed the anticipated synergies from the integration of the two operations, and the anticipated effect on the resulting balance sheet of KeepRite -- both of which were very important for the purposes of KeepRite's bankers.

It is clear from the evidence that KeepRite did have a plan to realize the proposed benefits of the transaction, which was reviewed by the independent committee. There does not appear to have been a minutely detailed plan setting out projected day-by-day actions to be followed after closing of the transaction, but no one suggests that such a detailed plan was

necessary, or even desirable.

(c) Consultants' report

The independent committee retained the firm of Crosbie, Armitage as consultants to assess the benefits of the proposed transaction to KeepRite. Crosbie, Armitage did, in fact, make an assessment of the anticipated synergistic benefits of the transaction. Allan Crosbie presented a report dated March 23, 1983 to a meeting of the independent committee on that same date. His report contained an appendix setting forth the main elements of the proposed business plan arising out of the transaction and a reasonably detailed financial analysis of the proposed acquisition. He made it clear in his report that the assumptions on which it was based were developed by KeepRite and ICG senior operating personnel in several working sessions in which Crosbie, Armitage participated. Thus, the underlying assumptions used in the financial analysis represented a consensus view of the senior management of the two companies. On the basis of the information contained in the report, it was Mr. Crosbie's opinion that:

> Not only are there important cost savings as a result of rationalization of the businesses, but in addition there are substantial increased sales opportunities.

At the meeting of the independent committee, Mr. Crosbie informed its members that the transaction appeared to him and his associates to make business sense. Mr. McKay informed the committee that senior management could successfully carry out the integration and business plan as set out in the Crosbie, Armitage report.

The appellants criticize the independent committee because it did not obtain a further final report from Crosbie, Armitage establishing their confirmation of some of the assumptions on which their original report was based. In my opinion, the fact that the committee did not require such a report in no way invalidates the opinion contained in the original report and conveyed orally to the committee by Mr. Crosbie. The learned trial judge considered it completely appropriate that the

assumptions on which the report was based were developed by senior operating personnel of KeepRite and ICG, along with personnel of Crosbie, Armitage. I agree. Those individuals were not only the persons who had access to and familiarity with the relevant information, but many of them were also the officers who would be implementing the integrated business plan after the completion of the transaction. There was no suggestion that any of the information presented was inaccurate or misleading.

(d) Valuation of the Inter-City business on a going-concern basis

The appellants complain that: "The Committee did not commission a valuation of the Inter-City businesses on a going-concern basis, even though Mr. McKay expressed concern about their profitability. The Inter-City businesses had substantial losses in 1982, and budgeted further losses for 1983. They were reviewed by Inter-City, KeepRite and at least two members of the Committee as only marginally profitable, if at all".

None of these allegations is disputed by the respondents. The two Inter-City businesses, the major assets of which were to be purchased by KeepRite, had not recently been profitable. KeepRite itself had suffered substantial losses in the 1982 fiscal year, was experiencing a decrease in its share of the market in its field, and was under substantial pressure from its bankers to acquire new equity financing. It was not the profitability of the businesses as separate entities that was of concern to the independent committee, but the benefits to KeepRite of combining their operations. It is probably worth while at this point to quote from the summary business plan included in the Crosbie, Armitage report, since it very concisely indicates what the expected benefits to KeepRite would be:

1. KeepRite would acquire the assets and liabilities of the businesses of ICG Manufacturing and ICG Energy respectively, exclusive of the St. Catharines facility and deferred taxes.

2. ICG's sheet metal business would be wound up on an orderly basis.

3. The significant portion of ICG's St. Catharines manufacturing business would be integrated into KeepRite's Brantford manufacturing facility.

4. KeepRite and ICG's sales and distribution components would be rationalized. Also, as part of this rationalization, ICG would terminate its existing distribution business and sell direct or through other distributors in a manner similar to KeepRite. As part of the restructuring of ICG's sales and marketing network, this should enable reductions in sales personnel and the amounts of finished goods inventory that would have to be carried.

5. With the rationalization of the KeepRite and ICG selling and distribution networks, it is anticipated that sales of certain product lines in Canada, the U.S. and offshore markets would be expanded slightly. In particular, in Canada, with the rationalization of KeepRite's and ICG's sales forces, domestic sales increases are projected; in the U.S., utilizing KeepRite's existing sales and distribution network, sales increases of selected ICG products are projected.

6. As part of this overall program, provision is to be made for establishing a senior marketing group.

7. As part of the rationalization program, KeepRite and ICG Manufacturing and Engineering personnel requirements would be rationalized with attendant savings in costs.

8. As part of the rationalization program, KeepRite and ICG corporate administration, finance and EDP departments would be rationalized with attendant savings in costs.

The independent committee retained Price, Waterhouse, KeepRite's auditors, to review the statement of net book values of ICG assets as at March 31, 1983. Price, Waterhouse held discussions with Coopers & Lybrand, who had completed an audit of the Inter-City companies as at December 31, 1982. Price, Waterhouse presented its opinion to the committee that the net book values were appropriate and appeared to have been arrived

at in accordance with generally accepted accounting principles.

Since KeepRite was purchasing assets for the purpose of combining the two operations, the committee did not consider a going-concern valuation to be necessary.

The trial judge was satisfied that the independent committee was aware of its mandate, was at all times conscious that this was not an arm's-length transaction, and appropriately carried out its function of assessing the benefits of the transaction to KeepRite. He was completely satisfied on the evidence that the committee carried out its function in an appropriate and independent manner. I see no reason whatever to doubt the correctness of that finding. Neither the evidence nor the argument persuades me that his findings were anything other than appropriate.

Business judgment and the oppression remedy

The appellants argue strongly that since the enactment of s. 234 (now s. 241) of the CBCA, it is no longer appropriate for a trial judge to delegate to directors of a corporation, or to a committee such as that established in this case, judgment as to the fairness of conduct complained of by dissenting shareholders. This is particularly important, they argue, because the persons to whom that judgment is delegated are the very persons whose conduct is under scrutiny. They argue that the trial judge in this case erred in his approach to the exercise of his jurisdiction under s. 234, when he stated, at pp. 759-60 O.R.:

> ... the court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority ... Business decisions, honestly made, should not be subjected to microscopic examination.

This, they argue, indicates that the trial judge declined to exercise independent judgment with respect to the fairness of essential aspects of the impugned transaction. Such a submission is, in my view, patently unfounded. The portion of

the trial judge's reasons quoted above should be placed in context. The relevant portion of the reasons is quoted below (pp. 759-60 O.R.):

> The jurisdiction is one which must be exercised with care. On the one hand the minority shareholder must be protected from unfair treatment; that is the clearly expressed intent of the section. On the other hand the court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority. In Re Bright Pine Mills Pty. Ltd., 1969 V.R. 1002 (Supreme Court of Victoria), analogous legislation to s. 234 was under consideration. At p. 1011 O'Bryan J., writing for the full court, says:
>
> > It is true to say, however, that it was not intended ... to give jurisdiction to the Court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company by directors who in the exercise of the powers conferred upon them by the memorandum and articles of association are acting honestly and without any purpose of advancing the interests of themselves or others of their choice at the expense of the company or contrary to the interests of other shareholders.
>
> Although the statute there under consideration was confined to "oppression", I consider the caveat there expressed to apply with equal force to the wider language of s. 234. Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.

There can be no doubt that on an application under s. 234 the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is

unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required. That does not mean that he is not well equipped to make an objective assessment of the very factors which s. 234 requires him to assess. Those factors have been discussed in some detail earlier in these reasons.

It is important to note that the learned trial judge did not say that business decisions honestly made should not be subjected to examination. What he said was that they should not be subjected to microscopic examination. In spite of those words, the learned trial judge did, in fact, scrutinize, in a very detailed and careful manner, the nature of the transaction in this case and the manner in which it was executed. Having carefully reviewed the major aspects of the appellants' criticisms of the transaction, he came to the conclusion that it in no way, either substantively or procedurally, offended the provisions of s. 234. Having carefully reviewed all of the exhibits and transcribed evidence to which we were referred, I have no hesitation in agreeing with the correctness of his assessment.

The appellants refer specifically to two areas where they say the trial judge declined to exercise independent judgment with respect to the fairness of essential aspects of the transaction. These were:

(1) whether the impugned transaction was, in fact, for the benefit of KeepRite as a whole, or rather beneficial to Inter-City and detrimental to KeepRite; and

(2) whether the "earnings dilution" caused by the disparity in historical earnings between KeepRite and the Inter-City businesses resulted in unfairness to the dissenting shareholders.

With respect to the first argument, I can only say that the reasons of the trial judge indicate exactly the reverse. If anything, he took an excess of care in exercising independent judgment with respect to the fairness of the transaction.

With respect to the second, the trial judge in his reasons dealt with the question of the disparity in historical earnings between the ICG subsidiaries and KeepRite. He stated that the members of the independent committee and the directors were aware of these problems and considered that they had been overcome. The learned trial judge was of the view that this was a matter of business judgment and he was not disposed to intervene. The appellants argue that the disparity in historical earnings would inevitably result in an earnings dilution to the shareholders of KeepRite. Such a result was by no means inevitable. A large proportion of the assets transferred consisted of inventory and accounts receivable, the book value of which were guaranteed by ICG, and no interest was payable on the note given by KeepRite to ICG covering payment of the purchase price. The cash resulting from realization of the receivables and inventory would have the effect of reducing the bank borrowings of KeepRite, and the transaction was very favourably viewed by KeepRite's bankers. If, in addition, the anticipated synergies were realized (which it appears in retrospect they were) there would likely be an earnings enhancement per share rather than the "earnings dilution" alleged by the dissenting shareholders.

Conclusion

For the foregoing reasons, I do not consider that the impugned transaction, or the method by which it was implemented, involved oppression or unfairness within the meaning of s. 234 of the CBCA. I would dismiss the oppression appeal with costs.

VALUATION ACTION

Pursuant to the provisions of s. 184(15) [rep. & sub. 1978, c. 9, s. 60(4)] (now s. 190(15)) of the CBCA, Anderson J. fixed the fair value of the appellants' shares in the respondent

company at $13 per share as at April 24, 1983 -- the valuation date. The valuation action was tried together with the oppression action, and the findings in each are applicable to both of the appeals.

The dissenting shareholders were a group of institutional investors, investment managers, and their nominees, who collectively controlled approximately 28 per cent of the common shares of KeepRite at the valuation date. As stated in the reasons in the oppression appeal, the relevant transaction was recommended by an independent committee to the KeepRite board and approved by that board on March 23, 1983. The transaction was outlined to the shareholders of KeepRite in a management proxy circular dated March 31, 1983. The circular proposed that the shareholders pass a special resolution authorizing an amendment to the articles of KeepRite removing the limit on the number of common shares which could be issued. The circular drew to the attention of shareholders their right to dissent from the proposed amendment and also their right to be paid by the corporation the fair value of their shares as of the close of business the day before the adoption of the resolution -- all pursuant to the provisions of s. 184 [am. 1978, c. 9, s. 60; am. 1980-81-82-83, c. 115, s. 10] of the CBCA.

On June 23, 1983, KeepRite offered the dissenting shareholders $9 per share, which offer was refused. KeepRite subsequently brought application under s. 184(15) for an order fixing the fair market value of the shares pursuant to s. 184(3) [rep. & sub. 1978, c. 9, s. 60(2)]. It is from Anderson J.'s valuation of $13 per share that the minority group appeals.

KeepRite originally cross-appealed in the valuation action, asking for a decrease in the valuation of the shares to $10.80 per share. That cross-appeal was abandoned before the hearing of the appeal.

Three experts gave opinions at trial as to the "fair value" of the KeepRite shares -- Ian Campbell, called on behalf of KeepRite, and Colin Louden and Richard Wise, each called on behalf of the dissenting shareholders. The three gave widely

divergent opinions as to the fair value of the shares and, since their opinions included different constituent elements, their results cannot readily be compared without adjustments. Mr. Campbell made those adjustments and presented to the court schedules showing comprehensible comparisons of the three opinions. Those schedules were marked at trial without objection as Exhibit B-70. Using Mr. Campbell's comparisons as set out in Exhibit B-70, the comparable fair values were:

Campbell 9.00

Louden 22.25

Wise 28.00

The appellants argue that:

(a) the trial judge erred in failing to include in "fair value" a premium in respect of "forcible taking";

(b) the trial judge erred in failing to consider the synergies anticipated from the impugned transaction as some evidence of the premium that a "special interest purchaser" would pay for the shares of KeepRite, and in failing to include any portion of their value in his determination of "fair value"; and

(c) the trial judge erred in his approach to the determination of "fair value" under s. 184 of the CBCA, and failed to disclose the basis for his determination in his reasons.

To lessen the complications in dealing with fair value, the learned trial judge dealt first with the questions of whether "fair value" should include an amount representing the anticipated synergistic benefits attaching to the transaction. I shall do the same.

Forcible taking

The appellants argue that since the trial judge found that the dissenting shareholders viewed their KeepRite shares as a long term investment which they wished to continue, a premium

for "forcible taking" should follow. The learned trial judge decided otherwise, and I am in complete agreement with his reasons for doing so.

He states at pp. 771-72 O.R.:

> In disposing of the oppression action I have found that there was no plan to "squeeze out" the minority and that the impugned transaction did not have that effect. The dissenting shareholders were faced by a fundamental change in the affairs of the corporation, involving a transaction with which, as a matter of business judgment, they disagreed, and they elected to dissent, with the consequence that they would receive the value of their shares. One basis upon which a premium for forcible taking might rest has thus been eliminated: there was no forcible taking.
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> . . . . .
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> It has been accepted by counsel for both parties, correctly I think, that there should be no minority discount in the determination of "fair value". To do so would be unfair to the minority. By parity of reasoning it seems to me that the majority, forced against its inclination to acquire the shares of the minority, ought not to be obliged to pay a premium for those shares. It seems to me therefore that the determination of "fair value" by a court under s. 184(3) should seek to avoid both and to give to the minority the value of its investment without either discount or premium.

Both parties agree, and the authorities make it clear, that in valuing shares under s. 184(3) there should be no discount applied to reflect the minority position of the dissenting shareholders. The parity of reasoning applied by the learned trial judge is eminently fair in this case, since the dissenters were not forced to sell, but the company was forced to buy if the transaction was to go forward.

The appellants argue, however, that in all cases under s. 184 there should be an allowance for forcible taking because the dissenters must always sell if they are not willing to agree to

the transaction involved.

The learned trial judge, in finding as a fact that there was no forcible taking, undoubtedly was referring to the type of forcible taking involved in the two following decisions of the Supreme Court of Quebec: Re Domglas Inc.; Domglas Inc. v. Jarislowsky (1980), 13 B.L.R. 135, [1980] C.S. 925 (Que. S.C.), affd (1982), 22 B.L.R. 121, [1982] C.A. 377, 138 D.L.R. (3d) 521 (Que. C.A.); and Investissements Mont-Soleil Inc. v. National Drug Ltd. (1982), 22 B.L.R. 139, [1982] C.S. 716 (Que. S.C.).

The Domglas case involved an application under s. 184(15) of the CBCA for the fixing of the fair value of the shares of dissenting minority shareholders of D Ltee, one of two amalgamating corporations. Over a period of several years, the parent of D Ltee -- the other corporation in this non-arm's-length vertical amalgamation -- had acquired 96.5 per cent of the outstanding common shares of D Ltee by various means, including a formal takeover bid and a standing bid on the Montreal and Toronto Stock Exchanges which remained open for over two years. Dividend payments of D Ltee were suspended over a substantial period of time and used for an ambitious program of diversification, acquisition, improvements and modernization. D Ltee shares continued to be listed on the exchange, but trading was minimal, as the market was established by the parent which was the only significant buyer. On the amalgamation, the minority shareholders were to receive one redeemable preferred share of the amalgamated corporation for each of their common shares in D Ltee. On redemption of those shares, the minority shareholders would be effectively "squeezed out".

The trial judge considered that this "squeeze out" constituted, in effect, an expropriation of the minority holdings in D Ltee. In addition, he found that there was "not even a hint of oppression as such". After determining what he considered to be the "market value" of all of the shares of D Ltee, he added a premium for forcible taking of 20 per cent of "market value" to arrive at what he considered to be "fair value" within the terms of s. 184(3). The Domglas case was the

first reported decision under the CBCA in which a premium for forcible taking was granted. The trial judge relied for authority on the well known textbook written by former Associate Chief Justice Challies of the Quebec Superior Court, The Law of Expropriation (1954), p. 213, which he quoted as follows, at pp. 228-29 B.L.R.:

> In addition to the usual indemnity for the value of property taken, for injurious affection or resulting injury to other property, and for incidental damage, is the expropriated party entitled to a percentage allowance as compensation for his forcible and compulsory dispossession? It is my firm view that he is so entitled, on grounds of equity, on principle, and on the authority of a substantial jurisprudence, and that the proper rule to be followed is that he should be granted the extra allowance for forcible taking in every case where there is not some special and compelling reason against it.

In 1961 the Supreme Court of Canada in Drew v. R., [1961] S.C.R. 614, 29 D.L.R. 114, put an end to the practice of many courts of automatically adding a percentage (usually 10 per cent) for forcible taking in real property expropriation cases. Judson J. concisely stated the views of the majority thus, at pp. 632-33 S.C.R.:

> ... there is no statutory basis for the allowance and no rule of law requiring it.
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> . . . . .
>
> In fixing the amount of an award there are often factors, other than the market value of the property expropriated, which must be taken into account but which are not easily calculated. In such cases the tribunal of fact may decide that compensation for such factors can best be appraised in the form of a percentage of the market value. This is but a part of the process of determining value to the owner. Once that value has been assessed ... it represents full compensation and the owner is not entitled to an additional amount for compulsory taking.

In the second edition of Challies' The Law of Expropriation, the learned author stated at p. 223:

> If Drew v. R. is the last word from the Supreme Court and it is devoutly hoped that it is not, the allowance for all practical purposes is abolished.

In his reasons in Re Domglas the learned trial judge referred to neither Drew v. R. nor to the second edition of Challies' The Law of Expropriation. His decision was affirmed by the Quebec Court of Appeal and applied in Investissements Mont-Soleil Inc. v. National Drug Ltd., both without reference to Drew v. R. or Challies.

The facts of the Investissements Mont-Soleil Inc. case were very similar to those in Re Domglas. In both cases the transaction involved creating preference shares which could later be redeemed. Thus, whether or not the minority shareholders approved the transaction, they could be forced out of the company. The argument of the appellants that all s. 184 cases involve a forcing out, I cannot accept. However, in some cases, depending upon the nature of the transaction, there may be an element of pressure on the minority to dissent because of what could be required of them as a result of their approval of the transaction. For instance, in this case, approval by the minority would have required that they make a substantial further investment in KeepRite to maintain their holding of 28 per cent. We were referred to no cases in which forcing out premium was awarded in a case such as this, where there was no true "forcing out", but merely strong practical reasons for dissent.

I consider that, given the decision of the Supreme Court of Canada in Drew v. R., both Re Domglas and Investissements Mont-Soleil Inc. were probably wrongly decided on the issue of a forcing out premium. I hold that view for two additional reasons. First, I see no statutory basis for such a premium. Second, statutory remedies are specifically provided to shareholders if a forcible taking has occurred in a manner which offends the provisions of s. 234. However, the facts in this case are substantially different from those in Re Domglas

and in Investissements Mont-Soleil Inc., and I am satisfied that, regardless of the correctness of those decisions, in this case no premium for forcible taking could appropriately constitute an element of "fair value" under s. 184(3).

It should be noted that s. 26(3)(b)(ii) of the present federal Expropriation Act, R.S.C. 1985, c. E-21, allows for compensation for "costs, expenses and losses arising out of or incidental to the owner's disturbance, including moving to other premises", and also permits the allowance of a percentage of "market value" in lieu thereof where these items "cannot practically be estimated or determined". Such an allowance constitutes compensation for the owner's disturbance, and is payable in addition to "market value". "Market value" is defined [s. 26(2)] as "the amount that would have been paid for the interest if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer". Such an allowance, even in the real property expropriation context, does not constitute a blanket allowance for forcible taking.

It may be that in a corporate "squeezing out" situation, costs incurred by the dissenters in assessing alternative investments, and commissions paid in purchasing such investments, would constitute appropriate compensation to dissenting shareholders, and could be an element in the assessment of "fair value" under s. 184(3). However, in this case, the trial judge made an appropriate finding of fact that there was no forcible taking; thus, any change in investment from the KeepRite shares to other holdings was a voluntary move by the dissenting shareholders. In such a situation those costs which could be termed "disturbance costs" were voluntarily incurred by the dissenting shareholders, and should not be chargeable to the corporation.

Synergies -- The special interest purchaser

The appellants argue that the trial judge should have included in his determination of fair value some allowance for the anticipated synergies that would result from the purchase of the ICG assets. Such an allowance, they argued, would reflect the premium that a special interest purchaser would

have paid for the shares of KeepRite. This argument was based on the amendment to s. 184(3) of the CBCA in 1978. Before the amendment the statute read:

> (3) In addition to any other right he may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which he dissents becomes effective, to be paid by the corporation the fair value of the shares held by him in respect of which he dissents, determined as of the close of business on the day before the resolution was adopted, but in determining the fair value of the shares any change in value reasonably attributable to the anticipated adoption of the resolution shall be excluded.

(Emphasis added)

In the subsection as amended by S.C. 1978-79, c. 9, s. 60(2), the words in italics were deleted. The appellants argue that this deletion evidences a parliamentary intention to include in "fair value" changes in share value which could reasonably be attributed to the carrying out of the transaction involved. The learned trial judge in response to this argument stated at p. 773 O.R.:

> In my view, the amendment is not material in the decision of the case at bar. It clears the way for a premium in certain cases, for example, Les Investissements Mont-Soleil Inc., supra.

The appellants interpreted the trial judge as meaning that the amendment merely cleared the way for "forcing out" premiums. In the Investissements Mont-Soleil case the trial judge, in determining the maintainable earnings of the corporation for valuation purposes, included the favourable impact of the impugned transaction on future earnings in addition to a "forcing out" premium. However, he did so on the basis of the parties' agreement that it was appropriate to do so in that case, and specifically declined to consider the effect of the 1978 amendment of the CBCA. It is obvious that it was the former aspect of the Investissements Mont-Soleil case, and not

the "forcing out" premium aspect, to which the learned trial judge was referring in the above-quoted passage.

It is of interest that during the 1977 proceedings of the Standing Senate Committee on Banking, Trade and Commerce, dealing with Bill S-2, entitled "An Act to amend the Canada Business Corporations Act", the Parliamentary Secretary to the Minister of Consumer and Corporate Affairs, remarking on the proposed deletion from s. 184(3), stated:

> Finally, clause 56, in effect, broadens the court's discretion to evaluate a dissenter's share by considering the benefits that flow to the remaining shareholders after the fundamental change has been effected.

(Emphasis added)

I agree with Anderson J.'s interpretation of the deletion from s. 184(3). In appropriate cases, particularly where the dissenters are forced out, the trial judge may exercise his discretion so as to allow the dissenters to participate in the benefits of the transaction. The availability and nature of the participation would necessarily depend on the particular facts of the case. In this case I have no hesitation in agreeing with the learned trial judge that the dissenting shareholders were attempting to have their cake and eat it too. Although clearly free to participate in the transaction, they declined to do so, all the while claiming entitlement to reap the potential financial benefits of participation; they hoped to reap the benefits of the proposed transaction without accepting any of its risks. I agree with the learned trial judge that this is not an appropriate case in which to include in the determination of fair value an amount attributable to the transaction involved.

Fair value under s. 184

Subsections 184(3) and (15) (now ss. 190(3) and (15)) of the CBCA read as follows:

> (3) Payment for shares. -- In addition to any other right

he may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which he dissents or an order made under subsection 185.1(4) becomes effective, to be paid by the corporation the fair value of the shares held by him in respect of which he dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.

. . . . .

(15) Corporation application to court. -- Where a corporation fails to make an offer under subsection (12), or if a dissenting shareholder fails to accept an offer, the corporation may, within fifty days after the action approved by the resolution is effective or within such further period as a court may allow, apply to a court to fix a fair value for the shares of any dissenting shareholder.

The parties agreed that the appropriate approach to valuation of these shares is to place a notional en bloc value on all shares of the corporation and then award dissenters their pro rata share of that en bloc value. They also agreed that no minority discount is to be applied in the determination of "fair value". Both agreements correctly reflect the law on these points.

The learned trial judge stated in his reasons that he would calculate his award to the dissenting shareholders based on "market value", which he considered to constitute "fair value" within the meaning of s. 184(3). He says at p. 775 O.R.:

In this context it is necessary to keep in mind the distinction between "market value" as thus defined and the "market value approach" to valuation referred to in the judgment of Greenberg J. in Domglas, supra. The latter has reference to use of the quoted price or prices on the stock market. Such prices reflect actual transactions of purchase and sale. "Market value" as defined above is a notional or hypothetical concept; an opinion arrived at by evidence, assumptions, calculations and judgment, in the absence of an

actual transaction. The distinction is important for the disposition of this case.

"Market value" has frequently been defined as the best price that can be obtained in an open market by a willing seller from a willing purchaser. It is true that such a value is notional and hypothetical. It is also true that in the context of a case such as this, there is seldom any real market for the shares against which one can test "market value" as determined from the various elements of "evidence, assumptions, calculations and judgment" referred to by Anderson J.

I agree that in this case "fair value" and "market value" can be equated; however, for reasons stated earlier, I consider that there may be situations where an amount not normally included in "market value" might be included in "fair value" under s. 184.

There are four widely accepted approaches to valuation of corporate shares: (a) the market value approach, or the quoted market price on the stock exchange; (b) the asset value approach, or the value of the assets of the corporation, either on a going concern or a liquidation basis; (c) the earnings approach, or the capitalized value of a projected stream of maintainable earnings; or (d) some combination of the preceding three approaches.

All experts agreed that an earnings approach to valuation was appropriate in this case, because KeepRite was not unduly capital-intensive, and was fundamentally viable as a going concern at the valuation date.

Commenting on the evidence of the expert witnesses, the learned trial judge stated on p. 775 O.R.:

> All three used basically the same technique: capitalization of earnings to determine value, with subsidiary use of other techniques as a check on the result. It was common ground among them that valuation is not an exact science. Some judicial and other learned opinion to this effect is accumulated by Greenberg J. and set out at p. 223 et seq. of

Domglas, supra. While due application of the methodical approaches adopted by the experts is useful, it is dependent upon factors which are entirely a matter of judgment and the end result is an opinion, not a precise solution arrived at by precise methods utilizing only known and constant factors. That this is the nature of valuation is well illustrated in the end results arrived at by the three experts who testified.

. . . . .

The court is to be guided by the evidence given by the experts but is not bound by their opinions.

The appellants agree with the appropriateness of applying the capitalization of projected maintainable earnings approach to the valuation of KeepRite shares. However, they argue that the trial judge did not, in fact, apply that approach, and that he failed to indicate the basis upon which he arrived at the figure of $13 as "fair value".

The appellants argue first that in determining "fair value" the courts ought to consider the conduct of the corporation and the majority shareholders in relation to the impugned transaction, whether reasonable steps were taken to ensure the fairness of the transaction, and whether adequate information was provided to the minority. They also argue that the courts will be influenced by the fact that the timing of the proposed transaction is selected by the majority shareholder. I frankly do not find these arguments persuasive on an application to the court to value shares pursuant to the provisions of s. 184(3). There is no doubt that in an action pursuant to the oppression provision -- s. 234 -- the behaviour of the corporation through its officers and directors is of vital importance. If it is oppressive or unfairly prejudicial, then an appropriate remedy may be fashioned by the court to fit the circumstances. However, I fail to comprehend why the behaviour of the corporation through its officers and directors has any bearing on the value of the shares.

The appellants further argue that "fair value" should never

be less than the price at which the shares were trading on the exchange at the valuation date -- in this case, $15. Such a position is only sustainable on the basis that the price at which the shares were traded was the price that the dissenting shareholders could have obtained had they offered their shares on the market on valuation day. If the offering were for a very small percentage of the shares of a widely held corporation, such a finding might be appropriate; however, on the facts of this case there is no reason to believe that 28 per cent of the shares of KeepRite being placed on the market on valuation date would have been saleable at all, let alone for $15 per share. This was also the view of the learned trial judge.

The appellants argue that the foregoing is an inappropriate method of considering stock market prices on valuation date, since determining "fair value" assumes the sale of 100 per cent of the shares rather than a sale of a minority holding -- large or small. If they are right, this merely emphasizes the inappropriateness, in most cases, of applying stock market prices on a specific day as an indication of "fair value". Any purchaser of 100 per cent of the shares of KeepRite would have been well informed as to the plight of the company on valuation day, and such knowledge would have been reflected in the price. On the other hand, it was the opinion of Mr. Campbell, whose opinion the trial judge preferred over those of Mr. Louden and Mr. Wise, that the valuation day trading price of shares reflected a lack of knowledge of the actual plight of KeepRite on the part of the small number of purchasers in the market.

I consider the trading price to be only one item of evidence to consider in arriving at "fair value" in a case such as this.

Assessment of expert evidence

The learned trial judge generally preferred the evidence of Mr. Campbell over that of Mr. Louden and Mr. Wise, and gave reasons for so doing. The appellants argue that because no finding of credibility as such was made by the trial judge, this court is in as good a position as was the trial judge to assess the evidence of the experts and arrive at an independent opinion of value. It is true that the trial judge did not make

findings of credibility with respect to the expert witnesses, and it would be unusual for a trial judge to do so. However, without considering whether any particular expert is being less than honest and forthright in giving his evidence, triers of fact have a duty to assess the evidence of experts to determine whose evidence they prefer. That is what the trial judge did in this case.

In assessing the expert evidence, the trial judge commenced his analysis by indicating the selection made by each of the three experts of pre-tax, pre-interest income. He gleaned these amounts from Mr. Campbell's schedule of comparative figures. The appellants say that these figures are not comparable, primarily because Mr. Campbell and Mr. Wise did not inflation-adjust their income figures as Mr. Louden did. Thus, they say, the trial judge misconceived the expert evidence from the start, thereby tainting all of his subsequent analysis. I have reviewed the evidence in this area, and although it is not possible to reconcile it in total, I am satisfied that Mr. Campbell's and Mr. Louden's pre-tax, pre-interest income figures as stated by the trial judge are comparable. While Mr. Campbell did not purport to inflation-adjust, he stated in his evidence that had he done so "it would not have changed the numbers". He stated that the choice of an income figure is very subjective in this case because of the extremely poor results in 1982 and the off-forecast results in the first part of 1983. In Schedule 32 of his 1986 report Mr. Campbell shows unadjusted pre-tax, pre-interest income figures for the years 1978 to and including the first three months of 1983. Had Mr. Campbell used those figures without adjustment, his income figure would have been approximately $5.74 million. However, he declined to use the unsatisfactory results in the 1982/1983 years, thus arriving at a figure very close to that of Mr. Louden. Mr. Louden did inflation-adjust, but took into account the poor results in 1982 and the forecast results for 1983 and 1984. Mr. Wise, on the other hand, did not include in his calculations the poor results of 1982. However, in preparing his comparative schedule, Mr. Campbell added in the 1982 figures set out in Annex VI to Mr. Wise's report in order to arrive at the comparable figure of $8.61 million. I am satisfied that the pre-tax, pre-interest income figures stated on p. 776 O.R. of

the trial judge's reasons are in fact comparable, and therefore an appropriate starting point in assessing the evidence of the three experts on a comparative basis.

Level of debt and interest rate

There was substantial disparity between the opinions of the experts as to the probable future debt level of KeepRite and the probable rate of interest which would have to be paid on that debt. The following schedule shows this divergence:

Estimated Debt LevelProjected Interest Rate
Campbell$40,000,00013 - 14% Louden$37,000,00011%
Wise$20,865,000121/4 - 121/2%

These choices resulted in significant differences in the final value placed on the shares by the expert witnesses.

The trial judge considered Mr. Campbell's anticipated debt level to be realistic, and pointed out that the difference between his estimate and that of Mr. Louden was not dramatic. However, he did feel that the debt level selected by Mr. Wise was "unrealistically optimistic". While I am inclined to agree with counsel for the appellant that Mr. Campbell's estimate of likely debt level was somewhat high, it was certainly not an error for the trial judge to accept his estimate.

With respect to the projected rates of interest, the learned trial judge preferred Mr. Campbell's opinion on that point because it was an opinion formed in "the actual climate of the times". This was an appropriate finding on the evidence, although Mr. Louden's opinion was, in retrospect, more accurate.

Earnings multiple

The three experts applied different multiples to the annualized earnings to arrive at their "fair value" of all of KeepRite's shares: Campbell 7.5, Louden 10.5, and Wise 10.0. In looking at these chosen multiples, the trial judge made clear his knowledge and understanding of their constituent

ingredients. At p. 778 O.R. he states:

> Selection of a capitalization rate involves an assessment of the elements of risk in the future operations of the company; a matter of assessing its history and predicting its future. It involves a consideration of the rate of return which a prospective purchaser would expect, and hence involves consideration of rates of return available on other investments. A measure of prediction concerning the future of the industry in which the company is involved is required, as is an element of economic forecasting. In the application of judgment to these and many other factors it is obvious there is great scope for difference.

He was of the view that Mr. Campbell had had greater opportunity to assess the future prospects of the company than had either Mr. Louden or Mr. Wise. However, he did not specifically accept the evidence of any one expert on the appropriate earnings multiple.

Miscellaneous specific adjustments to value

The appellants point to a number of specific differences between the experts which they say the learned trial judge did not take into account in determining "fair value".

(a) Tax loss carry forward and carry back

Mr. Campbell acknowledged in his evidence income tax omissions which would have resulted in an increase of 75 cents per share, which omissions were not specifically referred to by the trial judge.

(b) Redundant assets

The appellants argue that Mr. Campbell ignored the value of assets which they considered redundant. Mr. Campbell agreed that had those assets been in fact redundant, he would have added their value to his total valuation of KeepRite as separate saleable assets. However, since in his opinion they were not redundant, they constituted part of the overall assets

used to create income.

(c) Goodwill amortization and warranty expense

The appellants argue that Mr. Campbell admitted ignoring in his valuation the amortization of goodwill and a large one-time warranty expense in 1981. They state that making such adjustments would have increased his share value by 67 cents. Mr. Campbell's evidence indicates that he did not consider an adjustment necessary with respect to the warranty expense, given the way he "selected the indicated earnings level". He did, however, admit that he had not adjusted for goodwill amortization. It is not clear to me from the evidence what the difference in value per share would have been had this one adjustment been made, but if the 67 cents figure is correct, the amount attributable to amortization of goodwill could not have been more than 20 cents per share (see Revised Annex II to Valuation Summary of R. Wise).

The total increase in value per share attributable to the two items which Mr. Campbell acknowledged omitting is 95 cents.

Application of projected earnings' approach

The appellants submit that, having accepted the proper approach to valuation as the capitalization of projected maintainable earnings, the trial judge erred in failing to apply that approach, and in failing to indicate the basis upon which he arrived at the figure of $13 as "fair value".

I am satisfied that the learned trial judge did indicate the basis on which he arrived at the "fair value" figure. First, he stated that he preferred the opinion of Mr. Campbell over that of the other experts. He then went on to state concern that the value at which Mr. Campbell had arrived was too low. However, he stated that he could not identify precisely where in the valuation process Mr. Campbell had erred, except with respect to his application of the 1983/84 earnings, which resulted in a difference between Mr. Louden's and Mr. Campbell's valuation of $1.80 per share. Had the learned trial judge left matters at that point it is clear that he would have placed a value of $9

plus $1.80, or $10.80 on the shares. However, he went on to consider the evidence as a whole including (a) the opinions of the experts as to the en bloc value of KeepRite shares, (b) the prices of KeepRite shares as disclosed by past transactions, especially those involving substantial blocks, and (c) the plight and condition of KeepRite at April 24, 1983 as disclosed by the evidence. Taking all those matters into consideration he arrived at his figure of $13 per share. Had the learned trial judge applied the figure of $10.80 per share and added thereto the 95 cents resulting from admissions made by Campbell, the final figure would have been $11.75 per share. On the evidence presented, and on the trial judge's assessment of that evidence, such a figure would have been a reasonable and justifiable one. However, the learned trial judge considered that a slightly higher figure would be appropriate given his overall assessment of the evidence.

Mathematical precision is impossible in these cases, and the final figure is as much a matter of judgment on the part of the experts as it is on the part of the trial judge. In this case, the trial judge did not consider it either necessary or productive for him to duplicate the procedure carried out by the experts in arriving at their opinions. Although he stated his preference for the opinion of Mr. Campbell, he also considered the opinions of Mr. Louden and Mr. Wise, the prices of KeepRite shares as disclosed by past transactions, and the plight and condition of KeepRite at April 24, 1983. In looking at all the evidence he considered a figure somewhat higher than $10.80 per share to be appropriate. The figure at which he arrived would encompass the 95 cents attributable to the omissions raised by the appellants and admitted by Mr. Campbell plus an amount of $1.25 per share. I see no room for adjustment upwards.

I would dismiss the valuation appeal with costs.

Appeal dismissed.

Ontario Supreme Court
UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.,
Date: 2002-06-20

UPM-Kymmene Corporation, Plaintiff

and

UPM-Kymmene Miramichi Inc., F. Steven Berg, Clifford M. Sifton and Stephen W. Phillips, Defendants

Ontario Superior Court of Justice [Commercial List] Lax J.

Heard: March 4-6, 18-22, 25, April 2-5, 8, 9, 22-24, 2002

Judgment: June 20, 2002

Docket: 99-CL-3536

Ronald G. Slaght, Q.C., Kristen Crain, for Plaintiff

Paul Steep, Lara Teoli, for Defendant, UPM-Kymmene Miramichi Corporation

Earl A. Cherniak, Q.C., George Glezos, for Defendant, F. Steven Berg

***Lax J.*:**

Part I - Overview

[1] This is an oppression remedy case, which examines the conduct of a director who seeks the benefit of a self-interested contract with the corporation he serves. It considers the duties of a Board of Directors when it reviews and approves this kind of contract. It engages the tension between the democratic structure of a corporation and the rights of a shareholder to obtain the court's intervention if this structure has been compromised. At the heart of it is an Executive Employment Agreement and ancillary Stock Option Grant Agreement ("the Agreement") between Repap Enterprises Inc. and F. Steven Berg. Mr. Berg was both a director and the Chairman of the Board of Directors of Repap between January and August 1999.

[2] Repap was a Canadian public company in the forest products industry. Mr. Berg is an American lawyer and businessman. He introduced Repap to Third Avenue Funds, a U.S.-based fund, and it became Repap's largest shareholder and owned 18.7% of its shares when it purchased the block of shares of Paloma Partners on January 27, 1999. Contemporaneously, the three Paloma nominees on the Board of Directors resigned and

Mr. Berg was appointed a director and Chairman of the Board. He was Repap's largest individual shareholder with 4.3% of its equity.

[3] Mr. Berg's proposed compensation was considered at two Board meetings on February 22, 1999 and March 23, 1999. At the February meeting, the contract was contentious and the directors did not approve it. They decided that it would be prudent to retain an independent consultant to advise them. The Compensation Committee was asked to consider the matter further and report back to the Board. Following the meeting, two directors resigned, and one of them was the Chairman of the Compensation Committee.

[4] In March, the Board of Directors of Repap was differently constituted. It approved the Agreement on the recommendation of the Compensation Committee, which was also differently constituted. The Agreement provides Mr. Berg with generous payments, benefits and perquisites, including a five-year employment term with renewals, a signing bonus of 25 million shares, a stock option grant of 75 million shares, a market capitalization bonus, immediate pension credit of eight years, executive employee benefits and liberal change of control and termination provisions. Upon execution of the Agreement, Mr. Berg became Chairman and Senior Executive Officer of Repap.

[5] In approving the Agreement, the Board relied in part on an opinion prepared by Margaret Engel, an executive compensation consultant at William M. Mercer ("Mercer"). Due to time constraints imposed on the preparation of the opinion, it was based on "high level observations" and was limited in scope. Ms. Engel believed that Repap had made a strategic decision to bring in Mr. Berg to restructure the company and she was providing advice to it on a non-contentious executive contract. She was not informed that Mr. Berg was unknown to the members of the Board, that his employment contract met with resistance in February, that the Chair of the Compensation Committee had resigned and that management was opposed to it and had questioned its propriety. The Board of Directors was also unaware of these matters.

[6] There was immediate shareholder opposition. The original plaintiff in this action was TD Asset Management Inc. ("TDAM"). It is a wholly owned subsidiary of the Toronto Dominion Bank with responsibility for managing the Bank's equity investments. In 1999, it was Repap's second largest shareholder and owned 13.4% of Repap's shares. Robert MacLellan was TDAM's Executive Vice-President. In April, he became aware of the Agreement and came to

the conclusion that it was not in the interests of Repap's shareholders and something should be done. He enlisted the support of Marty Whitman, the principal of Third Avenue Funds. In June, TDAM led a proxy fight to replace the Board.

[7] Within a few weeks, the outside directors resigned and a new Board was appointed to manage the affairs of Repap. In August, the shareholders elected new directors, but Mr. Berg was not nominated to stand for re-election. As a result, he terminated his employment with Repap under the provisions of the Agreement. In a proceeding commenced in the State of New York, he is claiming U.S. $27 million in benefits and payments due under the Agreement. The New York action is stayed, and this action proceeded to trial.

[8] The current plaintiff in this action is UPM-Kymmene Corporation ("UPM"). In October 2000, it acquired all of the common shares of Repap, including the shares of TDAM, who assigned its rights in the cause of action. UPM is also plaintiff in its capacity as a shareholder of Repap through an affiliated corporation. The defendant, UPM-Kymmene Miramichi Inc. ("Repap"). is the successor by amalgamation with Repap. The Title of Proceedings has been amended to reflect these changes, but I will refer to the corporate defendant as Repap. The action against Clifford Sifton and Stephen Phillips has been dismissed.

[9] UPM and Repap ask the court to set aside the Agreement but on different grounds. The UPM case is a directors' duties and oppression case. The Repap case is a fraud case. In general terms, I am asked to determine these issues:

1. Did Mr. Berg breach his fiduciary duties to Repap because of the manner in which he negotiated and presented his agreement for approval?

2. Did the Compensation Committee and the Board of Directors of Repap fail in their own obligations to establish a prudent or reasonable process that led to a contract that is not fair and reasonable?

3. Does the Berg Agreement unfairly disregard the interests of Repap's shareholders?

4. Did Mr. Berg knowingly or recklessly make false representations to the Board on which the Board relied to its detriment in approving the Agreement?

5. Does the "business judgment rule" shield the Agreement from judicial scrutiny?

[10] My answer to the first three questions is yes. My answer to questions 4 and 5 is no.

[11] ***The Evidence***

[12] I will review the evidence in some detail, but I wish here to make some general comments on the testimony, which I was fortunate to be able to consider with the benefit of transcript and with the unfailing and admirable assistance of counsel.

[13] I heard testimony from four outside directors: Curtis Jensen, Guy Dufresne, Stephen Phillips and Marshall Cohen. Mr. Jensen was a portfolio manager at Third Avenue and its nominee on the Board. Mr. Dufresne is the President and Chief Executive Officer of Quebec Cartier Mining Company and had been a member of the Repap Board for five or six years. He was the only director to testify who was present at both the February and March Board meetings. Mr. Cohen is an experienced director and former CEO of a major Canadian public corporation, but he was a new Repap director attending his first Board meeting on March 23, 1999, as was Mr. Phillips.

[14] Jonathan Mishkin is an investment banker, and in 1999, he was the head of the Paper and Forest Products Group at Donaldson, Lufkin, Jenrette ("DLJ"). Pierre Raymond is a corporate solicitor at Stikeman Elliot in Montreal. I have already mentioned Margaret Engel of Mercer. These individuals were involved in a more limited way, but their evidence was straightforward and, by and large, uncontraverted. They were entirely credible and reliable witnesses.

[15] Steven Larson was Repap's President and CEO, Michelle Cormier was Chief Financial Officer, and Terry McBride was Vice-President and General Counsel. They were the senior officers of Repap before, during and after Mr. Berg's tenure, and their evidence is obviously important. Marty Whitman and Curtis Jensen of Third Avenue Funds were able to contribute to my understanding of the role they expected Mr. Berg to play in Repap. Mr. Jensen was present for the February Board meeting and prepared a memorandum outlining the Board's opposition, which is a significant document in the trial. Mr. Whitman was present for the March Board meeting when the Agreement was approved. I also found each of these witnesses to be credible and reliable.

[16] The same is true of Robert MacLellan. In addition to the responsibilities he held in 1999 as Executive Vice-President of TDAM, he is currently Chairman of TD Wealth Management. He is an experienced senior executive. I found him to be knowledgeable about

Repap, informed about executive compensation in the Canadian context, reliable in his analysis of the Agreement, accurate in his assessment of Berg's value to Repap and credible in his evidence about his dealings with Mr. Berg. His testimony was direct, thoughtful and cogent, and I give it considerable weight.

[17] During the course of Mr. Berg's evidence, objection was raised to some of his testimony on the basis that it contravened the Rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.). Initially, I was inclined to give effect to the objections, but as the record will show, I decided that the better course was to hear the evidence and assess it on the basis of weight. Accordingly, I believe that Mr. Berg was given every opportunity and considerable latitude in presenting his story to the court. As his evidence unfolded, the *Browne v. Dunn* issues became much less significant and were not much pressed during argument.

[18] Mr. Berg testified for four days, and I listened carefully to his evidence. I have taken account of the fact that giving testimony is a stressful event and that this is a long lime to be in the witness box. I regret to say that I did not find Mr. Berg to be a credible witness. His evidence was tainted by self-interest. He was unresponsive to questions, both in direct examination and cross-examination. In the face of important documents that were in clear contradiction of his testimony, he made no concessions. He was prone to exaggeration. He was evasive, argumentative and lacking in candour. His evidence is not reliable.

[19] The evidence that was not presented in this case has some importance. Arnold Jacobs, Andrea Rattner and Jeffrey Horwitz are lawyers at Proskauer Rose. Ms. Rattner is an employment specialist and partner at the firm and was centrally involved in the preparation of the Agreement. Mr. Jacobs was the senior lawyer on the Repap file. Both were present for the February and March Board meetings. Mr. Horwitz acted as Secretary to the Board at the March meeting and prepared the Minutes. These individuals could have clarified and given evidence about the nature of their retainer, the nature of the discussion at the Board meetings and whether there ever was an arm's-length negotiation over the Agreement. Although their evidence was available to be called, they were not called to testify.

[20] Mr. Berg testified that he retained Proskauer Rose on behalf of Repap and negotiated the terms of his contract on his own behalf believing that Ms. Rattner was negotiating on behalf of Repap. Mr. Berg relies on the fact that the Proskauer accounts went to Repap and that they reveal an on-going retainer on a variety of matters. This is true. However, it was

Mr. Berg who approved the accounts for payment. They show that Mr. Berg was the only person at Repap with whom Ms. Rattner was communicating in connection with his employment contract.

[21] There is no magic in describing Ms. Rattner as “Repap’s lawyer”. This is merely a descriptive term that does not explain her role in the development of the Agreement. Neither UPM nor Repap assert that she was “Repap’s lawyer”. This is Mr. Berg’s assertion. Normally, proof lies with the party making the assertion.

[22] Neither the dockets nor the documents support Mr. Berg’s understanding. Ms. Rattner was the witness who could illuminate this important issue. Mr. Berg obtained an Order from the New York court to examine Ms. Rattner, but he elected not to call her. In so doing, he ran the risk that I would draw an adverse inference and I do.[1] I find that had she been called to testify, her evidence would not have supported Mr. Berg’s belief that she was representing Repap in the negotiation of the contract.

[23] ***The Board Meetings***

[24] There were four meetings of the Board of Directors of Repap between January and March. The Agreement was discussed at the February 22, 1999 and March 23, 1999 meetings. For the meetings on January 27 and March 8, there are signed Minutes, but there is no formal record of the two most important meetings. The Minutes of the March 23 meeting were never circulated or signed, and Mr. Horwitz’s dockets indicate that he was still working on revisions on April 30. By this time, there was controversy about the Agreement and the process that had led to it. In view of this, I give greater weight to the evidence of those who were present when the contract was approved.

Part II - Factual Analysis

A Brief History of Repap

[25] When Steven Larson joined Repap in the spring of 1997, it had six subsidiaries operating in Canada and the United States. The growth of the company had been very rapid, and it was top-heavy with debt, both at the corporate holding company and at each of the subsidiaries. Paper prices, which tend to be cyclical, were depressed, cash was tight and the

lenders had lost patience. As a result, Repap was forced to dispose of the majority of its assets and convert a significant amount of debt into equity by issuing over 600 million new shares. It was on the debt conversion in 1997 that Paloma Partners emerged as Repap's largest shareholder.

[26] By the end of 1997, there remained only one operating company, a coated paper mill in Miramichi, New Brunswick, which Repap owned through its wholly owned subsidiary, Repap New Brunswick Inc. As part of this dramatic downsizing, Repap closed its Montreal head office and reduced its staff from 80 to 5 employees. Its senior officers, Larson, Cormier and McBride, re-located to Stamford, Connecticut, where the Repap sales and customer service operations were already headquartered.

[27] Despite the divestitures, cost cutting, and downsizing, Repap still faced challenges. The New Brunswick mill was a state-of-the-art, world-class facility and Repap was the low cost producer with significant market share. However, it remained one of the more highly leveraged forest product companies in the industry with $1.5 billion in debt. In 1998, Mr. Larson and Ms. Cormier successfully undertook a significant refinancing and avoided further conversion of debt and dilution of shareholders' equity. However, as paper prices remained depressed, Repap was a cash-constrained company with too much debt, whose shares were trading at very low levels.

[28] When Mr. Berg entered the picture in January 1999, he believed that Repap was a virtually bankrupt company and unless there was an immediate restructuring of the debt, it had no prospect for survival. He did not think anyone would invest in the company or acquire it unless it was "fixed up".

[29] Not only did Repap survive, but UPM paid a premium for it. Its offer to the shareholders in August 2000 was for approximately twice the market value of the shares. Evidently, UPM saw value in Repap despite its significant debt, which was at approximately the same level then as it was in January 1999. I observe that the UPM offer, which was unsolicited, was made after Mr. Berg departed and at a time when Repap was operating with the same management that was there before he arrived.

Third Avenue Funds

[1] J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at para.

[30] Third Avenue Funds is a registered investment and mutual fund business based in New York. About fifteen per cent of its portfolio is invested in distressed companies, an area in which Mr. Whitman has special knowledge and experience. Mr. Berg knew Mr. Whitman slightly, but Mr. Whitman was a well-known personality in the business community, the author of two books and, for many years, an Adjunct Professor at the business school at Yale.

[31] Mr. Berg and Mr. Larson knew one another from a prior business dealing in the mid-1990's while Mr. Larson was still at Domtar Inc. After he joined Repap in 1997, they stayed in touch with each other. By 1998, Mr. Larson had relocated to Stamford, Connecticut, and in May of that year, he and Mr. Berg had dinner together in Greenwich, Connecticut.

[32] Mr. Berg testified that at their dinner, they discussed Repap's problems, and Mr. Berg outlined some ideas he had for addressing them. Shortly after, he met with William Anderson, Repap's Chairman, and in October or November, he introduced Mr. Larson to Huff Asset Management, a potential investor in Repap. Mr. Berg was probably somewhat more active with Repap during this period than Mr. Larson acknowledged and somewhat less active than Mr. Berg claimed. Nothing ultimately turns on this because Mr. Berg agreed that he first contacted Mr. Whitman in late December or early January. Before this, he could have had no expectation that he would play any role in Repap.

[33] In January, Mr. Whitman and Mr. Berg had several discussions about Third Avenue's purchase of the Paloma Block. By then, Mr. Berg was already a Repap shareholder, but Third Avenue would only invest in Repap if Berg increased his personal ownership as Mr. Whitman wanted them to have a "community of interest" as common stock investors. Mr. Whitman believed that there was a window of opportunity of perhaps up to five years to do something with Repap. His understanding was that both he and Mr. Berg would have a role to play in increasing shareholder value and that Mr. Larson would apply his management skills to running the mill and keeping it cost-efficient.

[34] Third Avenue Funds anticipated that Mr. Berg would become Chairman of Repap, performing a non-executive role. This was also Mr. Larson's expectation. Mr. Whitman would not have invested in Repap had he thought that Mr. Berg would displace Mr. Larson as he considered Larson essential to Repap. It was in fact the dissension that developed between

them as a result of the controversy created by Mr. Berg's employment agreement that motivated Mr. Whitman to lend his support to TDAM in the proxy fight.

[35] Mr. Berg testified that he discussed specific compensation he would receive to implement a restructuring plan for Repap, namely—"a load of warrants"—with Mr. Larson at their May dinner and with both Larson and Whitman at a January meeting prior to Third Avenue's investment. He also testified that it was at the January meeting that his role as an executive Chairman was discussed. In direct contradiction, Whitman, Larson and Jensen testified consistently that there was no discussion about Berg's compensation or his role at Repap at any time before Third Avenue made its investment on January 27, 1999.

[36] It was Mr. Whitman's expectation that Mr. Berg would perhaps get some options by way of compensation, but that Mr. Berg's basic interest would be as a common shareholder. Mr. Jensen said, "I expected that he would look into his Rolodex to make contacts in the financial community", dealing with rating agencies and "bigger picture" issues. Mr. Larson said, "I expected he would be a one-for-one replacement for Mr. Anderson". Although the Board of Repap was consulted and agreed that the Paloma nominee directors would resign, it did not ask Mr. Berg to become a full-time Chairman or agree to employ him. I find that there was no understanding that Repap would compensate Mr. Berg in any material way or that he would assume a role other than as a non-executive Chairman.

Mr. Berg's Investment in Repap

[37] Much was made of the fact that Repap's financial statements had a "going concern" note, but Mr. Berg was well aware of this. This did not deter him from making a substantial investment in Repap in November 1998 for U.S.$700,000. In January 1999, he increased his investment by purchasing additional shares for U.S.$1,000,000. When he made his investment in November, Mr. Berg could not have expected to have any relationship with Repap except as a common shareholder. Mr. Berg conceded that it was common for him to make speculative investments.

[38] Mr. Berg invested in Repap for the same reason as Third Avenue Funds. The shares were trading at an all-time low of U.S.$0.05. Both he and Mr. Whitman believed there was value in the company that the share price did not reflect. Mr. Whitman's hope was "to hit a home run with a penny stock", which is precisely what happened. On the acquisition by UPM,

Third Avenue almost tripled its investment. Mr. Berg's motivation was no different. His purpose was to make money on the stock. It was only after he was installed as Chairman that he saw the opportunity to make money in another way.

Mr. Berg Becomes Chairman of Repap

[39] Mr. Berg was appointed a director and Chairman of Repap at the Repap Board meeting on January 27, 1999, by a Board consisting of William Anderson, Robert Poile and David McAusland (the Paloma nominees), Guy Dufresne, Robert Bellamy, John Purcell and Steven Larson. There is consistent evidence that there was no discussion at the meeting about Mr. Berg performing a senior executive or management role.

[40] Two important issues in this trial are whether Repap needed a "Senior Executive Officer" in addition to a Chief Executive Officer, and, if it did, whether Mr. Berg was qualified for the job. It is therefore important to examine his credentials against the circumstances of Repap at the time.

[41] In 1999, Mr. Berg was 63 years of age. During the 1970's and 1980's, he had developed a successful business, National Home Products. In 1989 or 1990, the company was involuntarily petitioned into bankruptcy. During the 1990's, he devoted some of his time providing legal services to long-standing clients and some of his time managing the investments of a family holding company. By 1998, he was no longer engaged in an active business life or practising law on any regular basis. He was semi-retired and living in Florida for substantial periods each year. He had last served as a member of a Board of Directors in 1973. However, over the years he had developed a network of business and social contacts and he was not shy about using them. He was experienced in business, but he had no recent or relevant experience to bring to Repap. He was not a restructuring expert or a specialist in the forest products industry.

[42] What expectations would Repap have about the individual I have described? It knew it had not gone out and recruited Mr. Berg. There is no evidence that anyone at Repap believed Repap needed a fourth full-time executive or that he was the candidate to fill that role. Mr. Berg was assuming the role of Chairman as a nominee of Third Avenue. He was replacing Mr. Anderson, a nominee of Paloma, who had served as a non-executive Chairman. The management team had already accomplished the most difficult part of Repap's

turn-around. According to Mr. MacLellan, there was little or anything that an executive Chairman could contribute. He stated:

> …So you have to start at the beginning and say: What was REPAP'S corporate strategy? And the corporate strategy, as I think I've already explained, was to minimize costs and to wait for an upturn in commodity prices. And except for that there wasn't a lot that could be done. So what that would say, then, is: What structure does that lead you to? And that structure would be that you would have a CEO of a company who was familiar with the operations of a paper making operation, and could get costs as low as possible. A good CFO who could fend off the lenders and the other banks and could extend maturities for as long as possible. And somebody internal to do the legal work.
>
> And in addition to that I think there's room in this kind of a structure for a non-executive Chairman to run the Board meetings, and to address things like the CEO's compensation. Nowhere in this framework that I outlined did I see a need for what was described in this contract as a Senior Executive Officer…

[43] Mr. Berg testified that he outlined at the May 1998 dinner with Mr. Larson (or shortly after) a detailed plan for Repap's restructuring. This plan included converting the second priority bonds to equity and offering the seconds preferred stock with a right to redeem at 100 cents on the dollar over five years. The redemption value of the shares would be the face amount of the bonds, which were then trading in the market below par. He also proposed to give the bondholders warrants, which would become valuable if he could increase the price of the common shares. The bondholders would then get a "free ride on the shares of the stocks".

[44] He planned to change the company's name, re-incorporate in Delaware, relist Repap's shares on the NASDAQ and, in order to meet the minimum trade amount of $5.00, do a reverse stock split. Mr. Berg produced some notes that he made on a napkin at that dinner on which he jotted the names of "Anderson", "Poile", a Repap director, and "Sussman", the principal of Paloma Partners. However, he acknowledged that, apart from these jottings, he was unable to locate any document that he prepared at that time or at any time, that set out this plan, or any plan, for restructuring Repap.

[45] In contrast to Mr. Berg's evidence, five witnesses testified that Mr. Berg had neither a detailed nor a feasible plan. Each of these witnesses described Mr. Berg's "three-point

restructuring plan", which consisted of a corporate name change, a reverse stock split and a re-listing of Repap's shares on the NASDAQ exchange or the New York Exchange. Some of them recalled Mr. Berg talking in a general way about restructuring the debt. None of them recounted the plan described by Mr. Berg in his testimony.

[46] Mr. Cohen was asked for his recollection about Mr. Berg's restructuring plans. He did not have a detailed recollection, but on the basis of what he could recall, his evidence is consistent with the testimony of other witnesses. He stated:

> As I recollect, his plans really were strategic and financial. He didn't purport to be a paper manufacturer or know very much about running a mill. But he did have a lot of business experience, and he thought that he could go in and—what the company needed really was a refinancing, they had too much debt. And that it needed a new strategic vision which might lead to some sort of perhaps a sale or a take-over, or something of that sort. But nothing would really happen unless and until the financial structure had been repaired, and he had a lot of ideas in that regard.
>
> Q. Did he tell you what those ideas were?
>
> A. He probably did, but I don't recall specifically other than something had to be done about the debt—either some conversion of the debt into equity, or some refinancing, new loans, and what have you. But, again, specifically, I don't recall.

[47] Mr. Larson noted that a reverse stock split was a commonly suggested strategy that had been discussed and discounted. Mr. MacLellan confirmed that a reverse stock split was not a desirable solution and could actually worsen the situation.

[48] It was Mr. Whitman's evidence that neither he nor Mr. Berg had any clear idea about how to restructure, but he did not think that there was any opportunity to convert debt into equity. Mr. Jensen characterised Berg's "three-point plan" as "cosmetic" and said it did not address the financial problems Repap was facing.

[49] Credit Suisse First Boston had been retained in December 1998 and had concluded that a debt restructuring was not feasible. In April 1999, Jonathan Mishkin of DLJ came to a similar conclusion. This was the opinion of Oasis Capital Group who was also consulted in April about a possible debt restructuring. In rejecting the idea, Oasis explained:

> The bondholders are not geared to voluntarily enter into such arrangements especially when they feel that a company is merely passing through a liquidity squeeze rather than facing a solvency issue.

[50] This statement was an accurate picture of Repap's financial situation. The company had too much debt and needed to manage it, which Mr. Larson and Ms. Cormier were doing. Michelle Cormier had an excellent relationship with Repap's bondholders. Along with Mr. Larson, she had successfully raised $320 million of financing in June 1998. Together, they had managed a major restructuring. Before Mr. Berg arrived, discussions were well under way with DLJ and others to refinance Repap's operating credit facility, which was falling due. Larson and Cormier were a sophisticated, effective, financial management team and were generally credited with keeping the company afloat despite its burdensome debt. That the bondholders had confidence in Repap and in its management was demonstrated in May. DLJ went to the market with a high-yield bond financing on behalf of Repap, which was pre-sold. According to Mr. Mishkin, Mr. Berg's contribution to the financing was a modest one.

[51] Mr. Berg's testimony about his restructuring plan stands alone, unsupported by documentation and inconsistent with the evidence of qualified and credible witnesses who were not asked about it. In view of the significance of this evidence, the plan Mr. Berg testified to at trial ought to have been put to them. I accord his evidence little weight for this reason and also because I believe the evidence of the other witnesses to be more reliable than the evidence of Mr. Berg.

[52] It is also of interest that the unexecuted Minutes of the March Board meeting at which Mr. Berg discussed recapitalization with the Board, makes no mention of the plan he described in his testimony. What he reviewed with the Board then was reincorporating in the U.S., with a simultaneous reverse stock split and possible change of name.

[53] For the reasons offered by Mr. Mishkin and Oasis, there was no prospect of any debt restructuring based on the premise that the bondholders would convert their high-interest, secured debt into any form of equity. Nor was there any prospect that the existing shareholders would agree to any further dilution. As Mr. Larson stated, "the restructuring had already taken place".

[54] Finally, no restructuring could take place without the involvement of an investment bank. Mr. Berg admitted that his role in any restructuring would be limited to that of “point man,” and in fact, he explored with several investment banks in the spring of 1999, the fees they would charge for their services. There was, therefore, no saving to Repap to have Mr. Berg aboard, as he was not equipped to do this on his own.

[55] Mr. Berg did not have any particular skills to bring to Repap that weren’t already available to it through its senior management team. His appointment brought no material benefits to Repap that would justify the hiring of a Senior Executive Officer with a lucrative employment contract. How and why did this happen then?

The Genesis of the Agreement

[56] Mr. Berg did not begin to think about an employment contract for himself until early February. When he did, he went to see Mr. Whitman to tell him what he had in mind.

[57] Mr. Whitman had strong views about Mr. Berg’s proposal, which he described as a “huge—huge, huge potential cash bonus based on stock price, options, a sign up option, another option for 75 million. It was quite a package”. Despite this, he said nothing to Mr. Berg. After hearing about it, Mr. Whitman concluded that he and Berg no longer had a community of interest, “Mr. Berg’s interest was not in the common stock—in making money in the common stock. His basic interest was getting rich off an Employment Contract”.

[58] In early February, Mr. Berg retained Proskauer Rose, and specifically, Arnold Rose, as counsel to Repap. Mr. Whitman had known Mr. Jacobs for a long time and was enthusiastic about him. However, it was Mr. Berg’s idea to retain Proskauer. He testified that his primary reasons for doing so were to bring Repap’s security filings up to date (a matter he said he discussed with Mr. Whitman) and to assist in the recapitalization.

[59] Mr. Whitman did not recall discussing the securities filings with Mr. Berg, and I am doubtful that they ever did. The so-called deficiencies in the securities filings were never raised with Terry McBride or with Repap’s securities counsel, Sullivan & Cromwell, or with Stikeman Elliott, Repap’s Canadian counsel. There is no credible evidence that the securities filings were deficient.

[60] When Mr. Berg made the decision to retain Proskauer, he had not yet been to a Board meeting. Apart from Mr. Larson and Mr. Jensen, whom he had recently met, he did not know any of the Repap Directors. He had not been to the head office of Repap. He did not consult the Board, Mr. Larson or Mr. McBride about changing counsel. There was, in fact, no formal retainer of Proskauer until the Board meeting of March 23, 1999. The Proskauer accounts show that in February and March its services were primarily devoted to the preparation of Mr. Berg's contract.

[61] It is very unlikely that Mr. Berg retained Proskauer for the reasons he gave. He probably did this to assert his control over Repap, to direct the process leading to his contract and to marginalize Repap's senior officers, particularly Mr. McBride. He was the logical person to consult about retaining new counsel, but his views were never sought.

[62] Between February 4, 1999 and February 22, 1999, Ms. Rattner generated two versions of a document entitled "Proposed Term Sheet" and two versions of a document that was first called "Executive Summary of Proposed Employment Agreement for F. Steven Berg" and was later entitled "Employment Contract Term Sheet Between Repap Enterprises Inc. and F. Steven Berg" ("Contract Term Sheet"), collectively referred to as ("Term Sheets"). Each of those four versions of the Term Sheets was sent to Mr. Berg, and at least three contain his hand-written comments. No one from Repap reviewed any of the versions. The preponderance of changes benefited Mr. Berg and not Repap.

[63] Mr. Larson first realized Mr. Berg was seeking compensation when he saw the Contract Term Sheet on February 17, 1999. He was stunned. Both Mr. Larson and Ms. Cormier tried to alert Mr. Berg to the problems that his proposed contract would create for him and for Repap. Mr. Larson's notes reflect the following concerns, which he reviewed with Mr. Berg:

> (a) The past Chairman of Repap, Mr. Anderson, took nothing from the company, had no employment contract and did not draw a salary;
>
> (b) The prior Chairman of Repap, Mr. Petty, took everything, destroyed morale, never looked to the team, and put personal greed ahead of results;

(c) The team of Larson, Cormier, McBride, the sales force and manufacturing team had turned the company around in the past two years. Mr. Berg had nothing to do with that turnaround and the toughest part was behind them;

(d) Repap was in a cyclical business, and was a one product company. The coated paper price tended to move the share value. An increase in the price of coated paper would translate into significant earnings in the company, irrespective of the actions of any person;

(e) Repap had extremely limited cash and the company did not need more costs. It was a small Canadian company with a Canadian culture. Repap was not a US company. There were also management and union sensitivities, and such a contract would be detrimental to labour negotiations;

(f)The shareholders of Repap were quiet but significantly diluted and waiting. They did not want to see the Board or management taking action that would dilute them further as would occur with the number of options Mr. Berg required; and

(g) Mr. Petty was watching the company closely, he was still an investor, and he would not react well to Mr. Berg's employment agreement.

[64] Despite their comments, Mr. Berg said it was nonetheless his intention to have a contract with payments and benefits similar to those of the three senior officers.

[65] ***Board Meeting of February 22, 1999***

[66] This was Mr. Berg's first Repap Board meeting. It was also the first Board meeting for Pierre Fitzgibbon, Clifford Sifton and Curtis Jensen. They were elected directors at this meeting to fill the vacancies created by the resignations of the three Paloma nominees, as well as that of Mr. Purcell, who decided to leave the Board at that time. Robert Bellamy, Guy Dufresne (the only remaining long-serving directors) and Steven Larson were in attendance, as were Andrea Rattner and Arnold Jacobs. They were there at the invitation of Mr. Berg.

[67] It was at this meeting that Mr. Jensen was elected Chairman of the Compensation Committee. As long-term passive investors, it was not usual for Third Avenue Funds to take a position on a Board, but Mr. Whitman thought that it would be beneficial for Mr. Jensen ("one of my young people"), to gain some Board experience. Mr. Jensen testified that he felt uneasy

about being appointed as Chair of the Compensation Committee. He had no prior public company Board experience and no experience as a Compensation Committee Chairman.

[68] Mr. Dufresne formed the impression that Ms. Rattner was at the Board Meeting as “an expert” to explain the Berg Agreement. Mr. Jensen testified that he did not know whether Ms. Rattner was there to represent the company or Mr. Berg. In whatever capacity she was there, it is clear the directors did not accept her advice.

[69] The Minutes reflect the Board’s concern with one element of the Agreement, namely the market capitalization bonus. However, this does not accurately reflect the discussion. Rather, as Mr. Jensen said, it reflects the Board’s attempt to find a way to be polite and soften the blow when it had to advise Mr. Berg, after he returned to the meeting, that his contract had not been approved, while the proposed arrangements for management had been. Mr. Jensen’s testimony reveals the difficult and sensitive issues that can arise with the employment contract of a Chairman, particularly if a Chairman is the nominee of the company’s largest shareholder. The Board did not know anything about Mr. Berg or Third Avenue Funds. This is dangerous territory for a Board of Directors and underscores the necessity of establishing an independent Committee to delve into it.

[70] The Board appreciated that it could not bless the Agreement without further scrutiny. At the conclusion of the Board discussion, it was decided some guidance from a compensation consultant was required in order to understand if the Agreement was, to use Mr. Jensen’s words, “within the realm of fairness”. It was Mr. Jensen’s expectation that the Board would retain a firm to review the contract and the consultant would prepare a report to Compensation Committee members. This was also Mr. Dufresne’s expectation. Specifically, Mr. Dufresne asked that the review include a benchmarking analysis as he did not believe that either the manner of the proposed remuneration, specifically, the market capitalization bonus, or the quantum, was common for similarly situated companies. The Compensation Committee was requested to give the Agreement further consideration and report back to the full Board.

[71] There is no credible evidence to support Mr. Berg’s belief that his contract was “approved in principle” at the Board meeting. Nevertheless, even if Mr. Berg genuinely believed this, he soon learned why his contract was not approved.

The Aftermath of the February 22nd Board Meeting

[72] Mr. Jensen described the Board's reaction to the Berg Agreement as one of "outrage and disgust". On the day following the meeting, Mr. Bellamy, the longest standing member of the Board, unexpectedly resigned. In the week following the meeting, Mr. Jensen was inundated with calls from directors to express their concerns about the Agreement. Mr. Dufresne was one of those who contacted Mr. Jensen.

[73] In a letter to Mr. Jensen dated March 1, 1999, Mr. Dufresne highlighted his concerns, which he expanded on in his evidence. They were threefold.

[74] First, he did not think Repap, which was a one-mill company, could afford or needed two highly paid top executives, that is, an active Chairman and also a President and CEO. He pointed out that the three operating officers of Repap (Larson, Cormier and McBride) were paid slightly above industry average to recognize the difficult conditions they were coping with and their excellent performance.

[75] Second, he did not think Mr. Berg's remuneration should be tied to market appreciation but to the work he would be doing. In his view, the reward of market capitalization was primarily for the shareholders and to a significantly lesser extent, the senior officers.

[76] Third, he wrote that he welcomed Mr. Berg as a full-time Chairman to help resolve the capital structure of the company as he thought this was a better alternative than paying a merchant bank for these services. However, he thought there should be a time limit for his active involvement and suggested three years. This comment shows that Mr. Dufresne recognized there was no benefit to Repap to have a second full-time CEO, unless it resulted in savings to the company. He realized that if Mr. Berg was there to bring about a restructuring, his appointment was a time-limited assignment.

[77] Mr. Berg recognized this too. He testified that he expected to be able to accomplish the restructuring by October 1999, or at least within one year. He did not anticipate being involved with Repap after this. Mr. Berg did not tell the Board this, yet he permitted his contract to go before it with terms that are wholly inconsistent with the terms of employment that a corporation, acting reasonably, would provide to a senior executive who is employed for a short-term, task-oriented assignment.

[78] Although Mr. Dufresne had sat on several Boards of Directors and continues to do so, this was the only time he had ever written to a co-director expressing concern about an issue then before a Board. He said he took this unusual step because the presentation of Mr. Berg's Contract Term Sheet to the Board was, in his words, "light weight or almost a farce".

[79] Mr. Dufresne sent his letter to Mr. Jensen as head of the Compensation Committee on a confidential basis. Nonetheless, Mr. Berg acquired a copy of the letter and telephoned Mr. Dufresne. In that conversation, Mr. Berg angrily stated that Mr. Dufresne should have talked to him directly. Mr. Dufresne expressed surprise that Mr. Berg had a copy of his letter and told him that he should not be involved in this exchange because he was the party whose employment agreement was at issue. Mr. Berg's conduct is inconsistent with an independent review of a director-corporation transaction.

The Jensen Memorandum

[80] Following the Board meeting, Mr. Jensen wrote a memorandum on February 26, 1999, for Mr. Whitman. He wished to alert him that there was an immediate problem that needed to be addressed. In his memorandum, he tried to capture some of the concerns expressed to him by the other directors and to illustrate one or two examples of the implications of "the market cap bonus". He testified that he had never seen an executive bonus linking compensation to market capitalization. He also prepared some calculations to illustrate "the rather staggering numbers" that Mr. Berg could earn through this bonus. He indicated that the Board was concerned not only with the absolute numbers, but also with the prospect that Berg could benefit handsomely from an increase in market capitalization, a benefit that could be completely unrelated to his performance.

[81] He recorded that Mr. Berg's proposed compensation package had met with "enormous resistance". He went on to detail the concerns of three directors, Mr. Bellamy (a long-standing Board member who had by then resigned), and Mr. Dufresne (another long-standing Board member) and a newly appointed director, Pierre Fitzgibbon. He pointed out that each of these directors was Canadian and the seven-member Board required at least four Canadians.

[82] He also wrote a section entitled "Potential Solutions". He testified that this was not intended to be an exhaustive list of every possible solution. They included: (1) eliminating the

market cap bonus altogether; (2) reducing the number of shares from 50 million to 15 million and making them options without a loan; and (3) increasing the strike price of the options to the $0.35 to $0.50 range in order to make it a true incentive program.

Jensen's Resignation

[83] After making Mr. Whitman aware of the controversy surrounding the Berg Agreement, they decided that he should immediately resign from the Board. Jensen tendered his resignation on March 1, 1999. His resignation letter, which was sent to Mr. Larson and copied to Mr. Berg, specifically drew attention to the necessity of hiring a compensation expert. His statement leads me to infer that the directors who attended the February Board meeting were not informed that Mercer had already been retained and was in the process of preparing an opinion.

[84] The concluding line of Mr. Jensen's letter states, "Third Avenue Funds is not entitled to, nor does it desire that any warrants or options be issued to it". Previously, it had been contemplated that Third Avenue would receive some options or warrants. Mr. Whitman asked Mr. Jensen to include this to make clear that it was Third Avenue's intention to divorce itself entirely from the Board and to have nothing further to do with Repap, other than as a passive outside investor. According to Mr. Whitman, this meant that Third Avenue would not interfere in decisions of management, approved through an appropriate Board process.

Mr. Berg's Response

[85] By March 2, 1999, Mr. Berg had received a copy of the Jensen memorandum, Mr. Jensen's letter of resignation, Mr. Bellamy's letter of resignation and the letters from two directors, Dufresne and Fitzgibbon, commenting on Mr. Berg's proposed compensation package. He sent this material to Andrea Rattner and asked her to call him.

[86] At the very same time as Mr. Berg received this material, he was in the process of recruiting Stephen Phillips and Marshall Cohen as new Board members. Although Mr. Berg met with Mr. Cohen in Toronto on March 4 and in New York on March 8, and had conversations with Mr. Phillips around this time, he did not show them this material, nor did he ever discuss its substance with them. He took no steps to ensure the existing directors or incoming Board members received it. He took no steps to ensure Mercer received it. He

informed no one about his conversations with Mr. Larson or Ms. Cormier and their analysis of his contract, in light of the circumstances of Repap at the time.

[87] Following the Board meeting on February 22, 1999 and in the weeks leading up to the March 23, 1999. Board meeting, five versions of the Executive Employment Agreement were prepared by Ms. Rattner and sent to Mr. Berg. Versions one through three contain Mr. Berg's hand-written mark-ups. As with the Term Sheets, no director, apart from Mr. Berg, saw these drafts. During this period, Mr. Berg also saw a draft of the Mercer opinion letter and made some comments on it, although there is no evidence that any director had the same opportunity. By March 8, there was again a functioning Compensation Committee, but Mr. Berg did not bring its three members into the process.

Berg's March 18, 1999 Memorandum

[88] Mr. Berg, in his capacity as Chairman, sent the directors a memorandum dated March 18, 1999, enclosing a "finalized draft" of his Agreement. It was copied to Ms. Rattner and Mr. Jacobs. As early as March 8, Mr. Berg had prepared drafts of this memorandum and sent them to Ms. Rattner. This belies his assertion that he believed that she was "Repap's lawyer". What possible reason was there for "Repap's lawyer" to review this? Mr. Berg sent the drafts to Ms. Rattner because he wanted her advice on the wording.

[89] Mr. Berg testified that he thought the version of the Agreement he sent to the directors on March 18 was the same version that was executed and he did not appreciate until much later that there was a difference between them. I reject this evidence because Proskauer's dockets show an entry for a March 22 conference between Berg and Rattner and state: "rev. option agmts; rev. emp. Agmt; conf. S. Berg… ". I find that Mr. Berg knew there were changes made to the Agreement.

[90] The changes were by no means insignificant. The version the directors received provided that the grant of stock options was conditional on shareholder approval. This language was removed from the executed Agreement, giving rise to an immediate legal obligation on the part of Repap for the value of the options. This provision is the basis for Mr. Berg's claim in the New York action for U.S.$6,750,000. There were also changes made to the stock option grant, which has an extremely short vesting period. The "finalized draft"

provided that the options would vest on a change of control and if Mr. Berg left Repap. Under the executed Agreement, the options vest immediately on a change of control.

The Compensation Committee

[91] The Compensation Committee was Stephen Phillips, Clifford Sifton and Guy Dufresne. Mr. Dufresne was the only member who had served on the Repap Board for any period of time. Before March 23, 1999, Mr. Sifton had attended one Board meeting in person and had participated in the telephonic Board meeting on March 8, 1999, where Mr. Phillips was elected a director and Chairman of the Compensation Committee.

[92] Mr. Phillips was a former employee of Mr. Berg in the 1980's. He had also held positions in sales and product development in the food and advertising industries and had worked as a business consultant for about ten years, but he had never served as a director of a public company, nor as a director of a Canadian company. He had never chaired a Compensation Committee. The only Repap officer or director he knew was Mr. Berg. He had proposed Mr. Phillips as a director because his residence was in Stamford, Connecticut.

[93] Mr. Berg had also proposed Mr. Sifton as a director and a member of the Compensation Committee, although he did not know him personally. He knew him only as the son of Colonel Michael Sifton, a fellow polo player. As Mr. Sifton did not testify at the trial, I do not know what qualifications he had to serve on the Repap Board, but, based on Mr. Berg's testimony, Mr. Sifton's main qualification was that he was Canadian.

[94] Mr. Phillips' knowledge of Repap was limited and in some cases, wrong. For example, he adopted Mr. Berg's view that Repap was on the verge of bankruptcy and that it was about to disappear unless immediate steps were taken to turn it around. He believed Mr. Berg had been hired to avert a bankruptcy.

[95] His understanding of the Agreement was sadly inadequate. Although he believed it was important for the contract to be performance-driven, in cross-examination, he agreed that many of the key benefits in the contract, such as the signing bonus, the eight years' accrued pension credit and the market capitalization bonus, had nothing to do with Mr. Berg's performance.

[96] He did not understand how the market capitalization bonus worked. He believed stock prices drove an increase in market capitalization and, if this occurred, it would be due to Mr. Berg's efforts. He did not understand that Repap's stock price could rise due to factors unrelated to Mr. Berg's efforts, such as an increase in paper prices. He did not understand that Repap's market capitalization could increase without a rise in the stock price. He believed that if there was significant improvement in the company's stock price calling for payment to Mr. Berg that, "somehow the company would either find the money, or the Board and Mr. Berg would renegotiate, or if we're on the brink of success, we'll work out the issues".

[97] Mr. Phillips was never told that Curtis Jensen had been the prior Chair of the Compensation Committee. In fact, up until July 2001, Phillips did not know who Jensen was. He did not meet with or discuss the Agreement with Andrea Rattner or Margaret Engel. He did not receive Minutes from earlier Board meetings, a memo from anyone from the Compensation Committee, or any notes from anyone with respect to what might have been discussed about the employment contract. At the same time, he never asked for any material or had any discussions that might have assisted him in fulfilling his duties as Chairman in a responsible manner. Before March 23, the only discussions Mr. Phillips had with any director about the Agreement was a telephone call he said he initiated to Mr. Dufresne on March 22, 1999, about which there is conflicting evidence.

[98] Mr. Phillips testified that Dufresne told him in that telephone call that the Agreement was "a significantly better draft" and he was planning to vote for it. In direct contradiction to this, Mr. Dufresne testified that he objected to the Agreement and did not vote for it. When Phillips' version of the phone call was put to Dufresne in cross-examination, he vigorously resisted the suggestion that he would have made a statement to Mr. Phillips indicating his support for the Agreement.

[99] Although Mr. Dufresne did not recall the March 22 conversation with Mr. Phillips, I believe Mr. Phillips is mistaken in his recollection of this conversation. It was only three weeks earlier that Mr. Dufresne had taken the unusual step of writing to Mr. Jensen about his concerns with the Berg Agreement. It was only four weeks earlier that the Board had requested an independent opinion and had delegated to the Compensation Committee the responsibility of obtaining one and reporting back to the Board. It was Mr. Dufresne who had requested a benchmarking analysis.

[100] Following the February Board meeting, the Contract Term Sheet had been developed into two documents, an Executive Employment Agreement and a Stock Option Grant Agreement. Although some of the provisions had changed, the market capitalization bonus remained, the employment term went well beyond three years and the salary and benefits were at a senior executive level. As none of Mr. Dufresne's objections had been addressed, I find it difficult to accept that he would tell Mr. Phillips he was in favour of the Agreement. Accordingly, I prefer Mr. Dufresne's evidence.

[101] The Compensation Committee met only once, immediately before the commencement of the March 23, 1999, Board meeting. Mr. Phillips acknowledged that the meeting was not "long" or "involved", nor could it have been as it lasted for a total of five to seven minutes. This "meeting" can hardly be described as a serious attempt on the part of an important Board Committee to review, analyze and discuss with any diligence the matter that was before them. It took Mr. MacLellan one hour on an initial review to work through the provisions in the Agreement. In addition, he sought assistance from two analysts in his department, one with legal experience and the other with a finance background. The Agreement is incapable of being reviewed, let alone understood and discussed, in a five to seven minute meeting.

[102] Apart from its lack of substance, this was not really a meeting of the Compensation Committee at all. As Mr. Dufresne's plane was delayed arriving in New York, he was not present and joined the Board meeting later. Mr. Phillips acknowledged that he had already made up his mind to support the Agreement prior to the Compensation Committee meeting and that he advised Mr. Sifton of this, although neither had seen the Mercer Report. It was distributed during the Board meeting.

The Mercer Opinion

[103] There is no dispute about Ms. Engel's qualifications or her ability to provide a meaningful opinion had she been afforded the opportunity to do this. She is a very experienced executive employment consultant and a principal in Mercer's New York office.

[104] Ms. Engel was retained by Ms. Rattner shortly before the February Board meeting. In her draft opinion, she requested information about Repap, including the company's business plan, strategic direction, compensation philosophy, input from the company's senior management and Board concerning comparator companies or situations to provide a context

for a reasonableness opinion. Had this information been provided to her, she would have learned about the opposition from the Board and management. She would have had some history about Repap. These were matters she said it would have been important for her to know. She could have done a benchmarking analysis. As it was, she believed the Compensation Committee was involved in the negotiations, drafts were going to the Chairman, he was reviewing them and this was having an influence on the process. She did not know the Compensation Committee was not in the loop.

[105] Ms. Engel testified that Ms. Rattner declined to provide the requested information because of the time frame. She stated:

> …I made it clear because of that—because of that constraint in terms of the time frame, that it would be just impossible to do the sort of, you know, typical back and forth with the company in terms of understanding the underlying business plan and so forth. And that it was certainly impossible to do research on market comparables given that time frame. So I made it clear that our comments would be general in nature based on anecdote or experience or whatever information was readily at hand just because of the time frame.

[106] The public information on Repap that Ms. Engel reviewed was the “minimal bare bones of the corporate structure”. The information did not provide an ability to prospectively judge the company or how the executive might be expected to impact on it. In cross-examination, Ms. Engel agreed that she had provided “high level” opinions in the past, but this does not change the limitations of this kind of opinion. A view from 30,000 feet does not provide a great deal of insight. Mr. Phillips acknowledged that the opinion was not the result of any due diligence, but was essentially a “high level” opinion with a “hedge”. This is a rather startling admission from the Chairman of the Compensation Committee.

The Board Meeting of March 23, 1999

[107] The directors present in person at the meeting were Berg, Cohen, Dufresne, Larson, Phillips and Sifton. This was the first Board meeting for Mr. Cohen and Mr. Phillips. It was the third Board meeting for Mr. Sifton and Mr. Fitzgibbon, but Mr. Fitzgibbon never attended a Board meeting. He participated by telephone each time. Mr. Dufresne was the only outside director who had been a director prior to January 1999.

[108] When the time came to consider the Agreement, Mr. Larson and Mr. Berg left the room at Mr. Phillips' request, and he chaired this portion of the meeting. Ms. Rattner came into the meeting at that point and handed out copies of the Mercer opinion and made a presentation to the Board.

[109] The evidence is unclear which version of the Agreement the directors considered. Mr. Cohen testified that Ms. Rattner reviewed the important clauses of the Agreement. The Minutes indicate that changes from previous drafts were drawn to the attention of the directors. However, Mr. Phillips testified he was not aware the Agreement that was executed was different from the Agreement that had been provided to the directors by Mr. Berg on March 18, 1999. Specifically, he was not aware the language requiring shareholder approval of the options was removed from the executed version of the Agreement. He acknowledged that it would have been preferable for that language to have been in the Agreement. It is evident that Mercer never opined at all on the actual signed Agreement. It did not, therefore, address the changes that had been made to it, and in particular, the implications for Repap's liability of eliminating shareholder approval as a condition of the options.

[110] Mr. Cohen did not recall the Board discussion, but he believed the vote was unanimous, as did Mr. Phillips. Mr. Whitman recalled nothing about the discussion, but testified that the Board "rubber-stamped" the Agreement. Mr. Dufresne testified the vote was "phony", and he did not vote in favour of approving the Agreement. However, he did not dissent. He was fair to acknowledge that he regretted this. In the course of the meeting, he decided that he was going to resign, which he did the following day.

[111] There is consistent evidence that the portion of the meeting devoted to a consideration of the Agreement was brief, probably no longer than one half-hour. There is consistent evidence that no director made any comment on the Mercer opinion. Mr. Dufresne made some comments about the Agreement, although there is conflicting evidence about what he said. Apart from this, there was no comment or discussion about the Agreement. It was, as Mr. Phillips said, a "non-issue".

[112] Against these facts, I turn first to the positions of the parties and next to an analysis of the legal principles that apply in these circumstances.

Part III - Analysis and Law

The Positions of the Parties

UPM

[113] On behalf of UPM, Mr. Slaght and Ms. Crain submit that because of the manner in which Mr. Berg negotiated and presented for approval the Agreement, he breached his fiduciary duties to Repap. Further, the Repap Directors failed in their own obligations to establish a prudent and reasonable process. Taken together, this led to a contract that is not fair and reasonable or in the best interests of Repap. They submit that this conduct unfairly disregards the interests of TDAM and those of other shareholders. They argue that the appropriate remedy is to set aside the Agreement either under section 241, the oppression remedy provision, or under section 120 of the *Canada Business Corporations Act.* This section permits the court to invalidate material transactions between a director and a corporation where the director has failed to make adequate disclosure and the contract is not fair and reasonable to the corporation when it is approved.

Repap

[114] On behalf of Repap, Mr. Steep and Ms. Teoli submit that Mr. Berg obtained his employment agreement with Repap through breach of his fiduciary duties as Chairman of the Board and a director and also through fraudulent misrepresentations. They rely on at least three false misrepresentations: (1) that Mr. Berg was recruited to effect a restructuring of Repap in a senior executive capacity; (2) that the Mercer opinion was an informed and independent opinion; and, (3) that Mercer's comments and those of the directors had been incorporated into the Agreement. They claim these representations were made with a dishonest state of mind and the directors relied on them to their detriment. The appropriate remedy, they argue, is rescission of the Agreement.

Berg

[115] On behalf of Mr. Berg, Mr. Cherniak and Mr. Glezos submit that this action is an attempt to usurp the jurisdiction of the New York court in which Mr. Berg first commenced his action against Repap. They argue that UPM and Repap seek to have this court substitute its judgment for the business judgment of the directors who were involved with the review and the approval of the Agreement, which was unanimously approved in reasonable reliance on the opinion of Mercer, a leading North American compensation consultant. They further argue

that UPM has suffered no prejudice because it acquired Repap with knowledge of the Agreement and paid a premium for its shares. It is, therefore, incapable of being oppressed. They submit the Agreement should stand. In the alternative, if certain provisions of the Agreement are found to be oppressive, the appropriate remedy is to rectify the Agreement under section 241 or to vary it under section 120 of the *CBCA.*

The Duties of Directors

[116] The cases advanced by UPM and Repap are different, but both have as their starting point the common law and statutory fiduciary duties that are imposed on directors of Canadian corporations. These duties require directors to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[117] In the context of a director-corporation transaction, there are also duties of disclosure. The *CBCA* codifies the manner and extent to which disclosure must be made. It provides that a director shall disclose to the corporation the nature and extent of any interest he has in a material contract with the corporation. With these principles in mind, I turn first to Mr. Berg.

The Duties of Mr. Berg

[118] In *Gray v. New Augarita Porcupine Mines Ltd.,* a decision of the Judicial Committee of the Privy Council, on appeal from the Ontario Court of Appeal, the court had to consider the level of disclosure that is required to meet the statutory requirement. Lord Radcliffe stated:

> There is no precise formula that will determine the extent of detail that is called for when a director declares his interest or the nature of his interest. Rightly understood, the two things mean the same. The amount of detail required must depend in each case upon the nature of the contract or arrangement proposed and the context in which it arises. It can rarely be enough for a director to say, “I must remind you that I am interested” and to leave it at that… His declaration must make his colleagues “fully informed of the real state of things” (see, *Imperial Mercantile Credit Ass’n v. Coleman* (1873), L.R. 6 H.L. 189 at 201, per Lord Chelmsford). If it is material to their judgment that they should know not merely that he has an interest, but what it is and how far it goes, then he must see to it that they are informed.

[119] Measured against this standard, Mr. Berg's conduct falls well short of what was required of him. The Repap directors were not fully informed of 'the real state of things'. It was material to their judgment to know about the comments of management and prior Board members on his compensation package. It was material to their judgment to know that Mercer had not done any research, benchmarking or analysis of comparable companies as requested by the Board at the February 22, 1999, meeting. It was material to their judgment to know that the Agreement tabled before it on March 23, 1999, was different in several important respects from the version they received with the March 18, 1999, memorandum. It is no answer to the duty to disclose to say the directors could have discovered this for themselves. The duty to disclose is an absolute one, because, without full disclosure, any investigation into whether the beneficiary would have acted in the same manner is impossible.[2]

[120] Disclosure of a director's interest is but the first step. Disclosure does not relieve the director of his duty to act honestly and in good faith with a view to the best interests of the corporation. The director must always place the interests of the corporation ahead of his own.[3] *Pente Investment Management Ltd. v. Schneider Corp.*[4] and *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*[5] are take-over bid cases. They are helpful decisions because they raise conflict of interest issues that are not unlike those that can arise in a director-corporation transaction. The classic way that Boards protect themselves when conflicts arise is to retain independent legal and financial advisors and to establish independent or special directors' committees.[6]

[121] There was little that was independent about the process Mr. Berg followed. He retained Proskauer without consulting the Board and set them to work on his contract. The employment contracts of the three senior officers were also being revised at this time. It was appropriate for Mr. Berg to exercise an oversight role in this process. It was inappropriate for him to exercise an oversight role in regard to his own contract.

[122] Mr. Berg testified that he put no restrictions on Ms. Rattner and gave her no instructions to preclude her from dealing with Repap's Compensation Committee or the Board

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[2] K.P. McGuiness, *The Law and Practice of Canadian Business Corporations* (Toronto and Vancouver, Butterworths, 1999) at para. 8.235, p.754; see, *Crighton v. Roman*, [1960] S.C.R. 858 (S.C.C.), per Cartwright J. at p. 869.
[3] *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 54 C.P.R. (3d) 161 (Ont. Gen. Div.) at 341 [123-124 QL])
[4] (1998), 42 O.R. (3d) 177 (Ont. C.A.) ("*Maple Leaf Foods*").
[5] (1998), 39 O.R. (3d) 755 (Ont. Gen. Div. [Commercial List]) ("*CW Shareholdings*")
[6] Ibid at 10.

of Directors. He says he left this to Ms. Rattner. This is not an answer to his fiduciary duties. Mr. Berg, not Ms. Rattner, was Chairman and a director of Repap. He knew or ought to have known that she was preparing drafts of his contract for his review and comment, but that the Compensation Committee was not involved. It was a breach of his fiduciary duty to instruct Ms. Rattner on the terms of his contract, as I find he was, without ensuring that Repap's interests were also protected.

[123] The *CBCA* does not expressly provide that a director must make sure the corporation is independently represented in negotiating the terms of a transaction. However, a director is most ill-advised if he does not make every reasonable effort to ensure that the corporation receives independent representation beginning with the negotiation stage of the contract process.[7] There can be little question that there was no negotiation of this contract. Repap was not involved at all.

[124] To make matters worse, Mr. Berg did not conduct himself in an upright manner, as he was required to do. He requested types and amounts of compensation that he knew or ought to have known were not in the best interests of Repap, a company, which he believed was "on the brink of bankruptcy". He removed from drafts of the Agreement reasonable safeguards for Repap, including good faith renegotiation of windfall bonuses, performance criteria and shareholder approvals. If there is any validity in his evidence that the entire restructuring was to be complete within the year, he had a duty to disclose this and to ensure the terms of his contract limited Repap's liabilities in that event. Mr. Berg's conduct fell short of the standard of integrity required of a fiduciary in its dealing with the corporation.

[125] A reasonably prudent Chairman and director acting in the best interests of Repap would have provided a mostly new Board with the opportunity to educate itself about the company so as to have a basis to ground an informed business judgment about the Agreement. A reasonably prudent Chairman and director acting in the best interests of Repap would have afforded the Board adequate time to retain a compensation consultant, to instruct the consultant and to consider a genuinely independent opinion about his own employment contract. A reasonably prudent Chairman and director acting in the best interests of Repap would have arranged for someone at Repap to instruct Ms. Rattner with respect to the negotiation of the Agreement. A reasonably prudent Chairman and director acting in the best

[7] *McGuiness, supra*, note 5 at para. 8.248, 760.

interests of Repap would have done none of the things Mr. Berg did and would have done all of the things he failed to do.

[126] Mr. Berg failed utterly in his duties to Repap. His own self-interest prevailed. His conduct was exactly opposite to the conduct that the law required of him as a fiduciary - disclosure, honesty, loyalty, candour, and the duty to favour Repap's interest over his own. This failure is illustrated starkly by his conduct after the Agreement was approved and came under attack by Repap's shareholders. I will come to this shortly.

The Duties of the Board of Directors

[127] There is no serious complaint that the directors who approved Mr. Berg's agreement failed to act honestly or in good faith. The focus of the attack on their conduct is their failure to act carefully, diligently and skilfully in the best interests of the corporation.

[128] It is settled law that the duty of due care requires that where directors make decisions likely to affect shareholder welfare, their decision must be made on an informed and reasoned basis. In *CW Shareholdings,* Mr. Justice Blair expressed it in this way:

> In the end, they must make a decision and exercise their judgment in an informed and independent fashion, after a reasonable analysis of the situation and acting on a rational basis with reasonable grounds for believing that their actions will promote and maximize shareholder value: see, *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.) at p. 176; *Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 at pp. 270-273, 37 D.L.R. (4th) 193 (Div. Ct.).[8]

[129] A Board is entitled, indeed encouraged, to retain advisors, but this does not relieve directors of the obligation to exercise reasonable diligence. In *Hanson Trust PLC v. ML SCM Acquisition Inc.*[9], the United States Court of Appeals for the Second Circuit was asked to determine if directors' approval to grant a lockup option of substantial corporate assets in a take-over struggle was protected by the business judgment rule. As Pierce J. stated, in duty of care analysis, a presumption of propriety inures to the benefit of directors, who enjoy wide latitude under the business judgment rule in devising strategies. However, as he noted:

[8] *CW Shareholdings, supra* note 8 at 10.
[9] *Hanson Trust PLC v. ML SCM Acquisition Inc.,* 781 F.2d 264 (U.S. 2nd Cir. N.Y. (1986) at 274 -276 [14-16 (Lexis)].

> The proper exercise of due care by a director in informing himself of material information and in overseeing the outside advice on which he might appropriately rely is, of necessity, a pre-condition to performing his ultimate duty of acting in good faith to protect the best interests of the corporation.[10]

[130] Here, the Compensation Committee exercised no oversight role whatsoever, although it was the independent duty of that group of directors to have such involvement. It provided no instructions to Ms. Rattner or Ms. Engel. It consulted no legal or expert advice. It took no steps to inform itself of the prior deliberations or comments of the previous members of the Compensation Committee or Board. It took no steps to obtain the Mercer Report before formulating a recommendation. In short, the Committee did not have or seek sufficient information upon which to ground a reasonable judgment about whether to recommend the Agreement, yet other directors relied upon the assumption that a full review had been done.

[131] No director could have considered the Mercer Report in any meaningful way as no director had seen the report before the Board meeting and there was no opportunity to study it carefully during the meeting. Mr. Fitzgibbon, who participated in the Board meeting by telephone, had never seen the Mercer letter. Nonetheless, he voted in favour of the Agreement. There were enough qualifiers, inconsistencies and question marks in the Mercer opinion that any Board acting prudently should have slowed the approval process and delved into the compensation package.

[132] In *Hanson,* Pierce J. held that a *prima facie* case was made out that the directors breached their fiduciary duties in making their decision after a three-hour, late-night meeting relying on their financial advisor's "conclusory opinion" and without asking enough questions of their advisors prior to making a decision. The Board failed to read or review carefully the various offers and agreements and instead relied on the advisors' descriptions.

[133] The circumstances were no different here. The Board assumed or permitted itself to believe that the Agreement was performance-driven when many aspects of it were not. Mr. Phillips admitted as much on cross-examination. Mr. Cohen acknowledged that paper prices would have an impact on the share price and increase the market capitalization, but he said that as it was very difficult to isolate the CEO's productivity contribution from exogenous factors, it was not common to try to do this. This approach may be defensible in the common

[10] Ibid. at 16.

case, but this was an uncommon case. Mr. Cohen had never seen a bonus tied to market capitalization. Neither had anyone else.

[134] Ms. Engel described the bonus as “unique”. As a result, she could find no direct comparables. The directors who reviewed the Contract Term Sheet in February did not have the benefit of Ms. Engel’s comments but they understood that the bonus was not performance-driven. They also appreciated the exposure it created for Repap. On Mr. Jensen’s calculations, if the share price increased to $0.15, Repap was liable to pay a bonus to Mr. Berg of $7.2 million; if the share price increased to $0.25, the bonus was $13.9 million.

[135] The Jensen memorandum noted that the last time the industry announced a paper price increase; Repap’s stock went from $0.10 to $0.38, although this increase was unrelated to any efforts by management. In direct contradiction to this, Mr. Berg testified that an increase in paper prices would not be reflected in an increase in share prices. There is no support for his view.

[136] Mr. Cohen testified that in cyclical commodity-based industries, exogenous prices have a bigger impact on share price performance. Mr. MacLellan was asked what he would conclude about the knowledge of somebody who thought there was no relationship between paper prices and share price. He said:

> I would find it inconceivable that anybody could think that. The—the number one determinant for REPAP’S share prices is going to be the commodity at which they sell their product. So REPAP would be no different than any other commodity producer, which is absolutely dependent on the commodity price of the product they’re selling. So, for example. Inco is absolutely dependent on the price of nickel. And Alcan is absolutely dependent on the price of aluminium. And anyone in the gas company that you want to mention would be dependent on the price of oil and gas. And as those commodities go up and down the earnings of the company are all affected the same way as the commodity price. And the share prices all move in that same direction…

[137] The point here is that the directors did not engage in any kind of analysis. Had they done so, they should have come to the conclusion that a bonus tied to the market capitalization of a company such as Repap was wholly inappropriate. It was the price of paper

and not the performance of Mr. Berg that would have an impact, if not the biggest impact, on the share price. Mr. Berg's evidence on this point is not credible, but if he genuinely believed paper prices and share price were unrelated, this reflects a complete lack of understanding of the factors that influenced Repap's stock price.

[138] The Agreement that went before the directors in March did not contemplate the payment of a bonus upon a debt to equity conversion. This provision had been in the Contract Term Sheet. Its removal was a basis for Mr. Berg's contention that the concerns of the directors had been addressed. However, an equity issue, merger, or rights offering, could equally cause the share price to stay flat and the market cap to go up, resulting in a cash bonus to Mr. Berg without any corresponding benefit to shareholders.

[139] The whole concept of the market capitalization bonus was flawed. It exposed Repap to cash payments of potentially millions of dollars, notwithstanding that an increase in market capitalization would not necessarily result in an increase in cash to pay the bonus. There was no correlation to either share price or performance. Although earlier drafts of the Agreement had limiting language to achieve this, this language had been deleted.

[140] Repap was a cash-constrained company. It was unreasonable for the Compensation Committee to recommend an Agreement with this provision knowing that Repap might not be able to afford it, and relying, as Mr. Phillips testified, on the assumption that Mr. Berg would be willing to renegotiate with Repap. The directors who approved the Agreement in March could not have understood the implications of this bonus for Repap. The Mercer opinion very clearly states that it exposed Repap to "significant compensation expense". In view of this, it was unreasonable for the directors to approve an Agreement with this provision when they knew that Repap might not have the cash to pay the bonus.

[141] The comparators that are used throughout the Mercer opinion are to U.S. practice. Mr. Cohen testified that he thought that this was appropriate, as Repap was, in most ways, an American company. This was not Mr. Larson's view. Mr. Larson is American, but he took pains to point out to Mr. Berg in February that Repap was a Canadian company with a "Canadian culture". Ms. Engel could have provided a benchmarking analysis. She could have compared the Agreement with other paper companies or with other Canadian companies. She compared it only to other highly leveraged companies in the United States. This should have raised a duty of inquiry.

[142] Ms. Engel was not invited to the Board meeting to address her opinion, which she said was unusual. She should have been there. Mr. Berg, the Compensation Committee and the Board failed in their duties to ensure her presence in these circumstances.

[143] Mercer described the amount of dilution created by the equity and stock option grants as “at the high end of practice”, meaning American practice. Mr. MacLellan had never heard of a stock option grant of this magnitude under Canadian practice. As he said:

> …the thought that an individual could be awarded immediately 10% of the company under option was something that was so large that I had never seen it before. It’s very rare that you see companies giving the whole management team 10% over a long period of time. It is unheard of in my experience to give one individual 10% under option.

[144] Under the policies of the Toronto Stock Exchange (“TSE”) and Montreal Exchange (“ME”), the maximum number of options normally permitted to one individual was up to 5% of the total capitalization of the company. Other aspects of the stock option grant, for example, the pricing of the options, provoked a large number of comments and concerns from staff at both exchanges. Mr. Raymond, Canadian securities counsel to Repap at Stikeman Elliot in Montreal, testified that this degree of comment was highly unusual because the TSE and ME did not normally receive a request for approval of a stock option grant of this magnitude and with these features.

[145] Whether or not Repap was in substance an American company in 1999, it was nonetheless, a company incorporated under the *CBCA* with its shares trading on Canadian exchanges. The approvals of the TSE and ME are required so these regulators may be satisfied that the issuance of the options does not create dilution for the shareholders of a publicly traded company. The stock option grant of 75 million shares and the signing bonus of 25 million shares together amounted to an award of 13.4% of Repap. By any standard, this was excessive shareholder dilution.

[146] Although the Board knew next to nothing about Mr. Berg, it approved a contract that is drafted in such a way that it would virtually be impossible for Repap to terminate him for cause. On termination without cause, there are a host of payments that are due. According to Mr. Berg, the value of the termination provisions is $27 million, which is the amount that he is

claiming in the New York action. The directors never turned their mind to the kind of exposure this could create for Repap.

[147] The Board never questioned why there was a change of control provision in the Agreement. It is drafted in the widest possible language and includes any sale or reduction in share ownership to less than 10% of the stock. It is effectively a single trigger provision as the only requirements are that there be a change of control, and that Mr. Berg leave, involuntarily or voluntarily, within a specified time frame. Upon that event, he was entitled to a number of extraordinarily generous payments, including the remainder of his salary (U.S.$420,000 as of January 27, 1999) for the full employment term (5 years plus two automatic renewals of 2 years each), an additional eleven years past service credit (a pension of approximately U.S. $190,000 annually) and full vesting of the stock options, tied only to a change of control.

[148] The Board had a duty to understand why Mr. Berg was at Repap. Mr. Berg knew why he was there. As he testified, he was there “to fix it up and sell it”. What possible commercial purpose did a change of control provision serve in such circumstances? Under the language of the change of control provision, a restructuring would in all likelihood result in a change of control, as would a sale. A change of control provision is a form of protection for a senior executive. It is not a form of payment for performing the job you were hired to do. That Mr. Berg was protected by this provision at all is illogical. That 75 million stock options would immediately vest and trigger other extremely generous payments was never questioned by the Board and should have been.

[149] There was no urgency and yet the entire process was the subject of haste and a rush to approval. In *Hanson,* the court rejected SCM’s defence that it was a “working board” that was familiar with the corporation and therefore capable of making the swift decisions it did. This was not a “working board”. As a mostly new Board, the directors owed the shareholders a higher duty to go slowly and to educate itself thoroughly. Mr. Dufresne was the only serving director who tried to address the unfavourable implications of the Agreement for Repap. Still, Mr. Dufresne did not do enough. He did not press his concerns forcefully enough. He did not formally dissent or otherwise act to protect the shareholders’ interests. This was his obligation even if he chose to resign.

[150] The position of “Senior Executive Officer” gave Mr. Berg general oversight responsibilities for all aspects of Repap except day-to-day manufacturing operations.

Although the Board did not know this, it is clear from the mark-ups to the drafts of the Agreement in Mr. Berg's hand that he developed the title and the job description, which progressively increased his area of responsibility and diminished Mr. Larson's duties. On its face, the position responsibilities of the SEO overlap those of the CEO and, to some extent, the CFO.

[151] The Board never asked why Repap required a full-time "SEO" when it already had a CEO and CFO who were performing well. Neither the Compensation Committee nor the Board sought management's views about the Agreement. Instead, the Board directed Mr. Larson to absent himself from the deliberations, when they ought to have required his presence in order to ensure that these views were thoroughly aired and considered.

[152] The SEC title first appeared in a version of the Agreement around the middle of March. When Mr. Larson saw this, he called Mr. Berg who told him this had been inserted at the request of "his advisors", but Larson should not be concerned because, "it's just part of the game; don't worry about it, you're still in charge".

[153] These were difficult circumstances for Mr. Larson with a new Chairman making excessive compensation demands and new lawyers and directors selected by the Chairman. Even so, if he knew the Chairman regarded his position title and responsibilities as a fabrication to justify his contract, he had an obligation to say something. He spoke to Mr. Dufresne before the March 23rd Board meeting, but only about the overlap with his duties. Apart from Mr. Berg, Mr. Larson had the most knowledge about the process and the terms of the Agreement. As a Repap director, it was Mr. Larson's obligation to bring this information to the attention of the Board, consistent with his duty to place the interests of Repap ahead of his own.

[154] Finally, Mr. Whitman was present for the Board meeting on March 23, 1999, but said nothing. Despite his views, he did not communicate either his approval or disapproval of the Agreement. This posture may be an unusual one for a company's largest shareholder, but the directors were not entitled to take his silence as acquiescence. Whatever views Mr. Whitman had or was assumed to have, the Board owed duties to all the shareholders of Repap. A Board does not act in the interests of the largest shareholder. In exercising its duty of care to

the corporation, a Board must consider the shareholders generally not only the shareholder with the largest single vote.[11]

The Business Judgment Rule

[155] The business judgment rule protects Boards and directors from those that might second-guess their decisions. The court looks to see that the directors made a reasonable decision, not a perfect decision.[12] This approach recognizes the autonomy and integrity of a corporation and the expertise of its directors. They are in the advantageous position of investigating and considering first hand the circumstances that come before it and are in a far better position than a court to understand the affairs of the corporation and to guide its operation.

[156] However, directors are only protected to the extent that their actions actually evidence their business judgment. The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made.[13] Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.

[157] In March 1999, Repap did not require, nor could it afford, Mr. Berg's services. With a minimum of effort, the Compensation Committee and the Board could have learned this and everything else they needed to know to make an informed decision on a reasonable basis. This did not occur. Instead, the Agreement was approved on the recommendation of a Compensation Committee that never met to discuss it and had no substantive involvement in the process that led to it.

[158] The business judgment rule cannot apply where the Board of Directors acts on the advice of a director's committee that makes an uninformed recommendation.[14] Although it was not unreasonable for the Board to assume the Committee had done a careful job, this did not relieve the directors of their independent obligation to make an informed decision on a reasonable basis. In order to act in the best interests of the shareholders of Repap, each

[11] *820099 Ontario Inc. v. Harold E. Ballard Ltd., supra*, note 10 at 177 [(1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.)].
[12] *Maple Leaf Foods, supra*, note 7 at 10.
[13] *CW Shareholdings, supra*, note 8 at 10.

director was required to understand the terms and meaning of the Agreement and to consider it carefully against the circumstances of Repap at the time. They were required to review the Mercer opinion carefully and evaluate it thoughtfully against the circumstances of Repap at the time. This did not happen.

[159] A contract, such as the one in issue between the Chairman and the Company, should be the subject of careful, objective analysis, and it was not. The process leading up to the March 23, 1999, meeting and the proceedings there fall far short of the exercise of prudent judgment in the interests of the shareholders that is expected of directors. In the space of thirty minutes taken up with Ms. Rattner's presentation, without questions or discussion, with comment from the only director who had served for longer than two months, the Board of Directors of Repap approved an Agreement that gave someone it did not know, had not recruited, and had just met, a generous salary with a lengthy term of employment, an unprecedented bonus structure, termination and change of control protection inconsistent with the employment objective, and stock options amounting to 13.4% of the company. The directors did not fulfil their duties to Repap. Their decision was not an informed or reasoned one. The business judgment rule cannot be applied in these circumstances to protect their decision from judicial intervention.

Events Subsequent to March 23, 1999

Shareholder Opposition

[160] The Agreement first came to the attention of Robert Poile of CAP Advisors Inc. when it was annexed to Repap's "Form 10K" S.E.C. filing. CAP was a shareholder of Repap and Mr. Poile was a former director. Byers Casgrain, counsel to CAP, sent a letter dated April 14, 1999, to several stock exchanges, which was copied to the Repap Board. The letter states in part:

> At the request of our client, we have reviewed the Employment Agreement and the Option Agreement. This review was made in view of our client's substantial concern about the legitimacy and fairness of the Employment Agreement and the Option Agreement and possible related issues of conflict of interest. Our client is of the view that the Employment Agreement and the Option Agreement are oppressive to the

[14] *CW Shareholdings, supra*, note 8 at 13-14.

shareholders of the Corporation, contain abusively generous terms for the Executive, may have been negotiated on a non-arm's length basis.

[161] The letter goes on to review other concerns including a possible lack of independent assessment of the Agreement by a separate and independent committee of the Board and share compensation arrangements in contravention of the rules of the TSE and the ME. Despite the clear language of the letter, which is highly critical of the Agreement and the process by which it was approved, Mr. Berg refused to admit the letter was a fundamental attack on the whole Agreement and this refusal reflects generally and adversely on his credibility.

[162] In May and June, Mr. Berg had several discussions with Mr. MacLellan and Mr. Larson about the Agreement against the background of increasing shareholder opposition to it. In these conversations, Berg made remarks that were intended to threaten and intimidate. For example, he told Mr. MacLellan that if the 75 million options were not approved by the TSE, he intended to take cash from Repap to offset the amount that would represent his loss. He emphasized that Repap was a cash-constrained company and that if MacLellan were to defeat the Agreement, he intended to present Repap with an immediately payable cash amount. He outlined the dire consequences that could flow from a change in control of the Board. None of this evidence was contradicted or explained.

[163] Mr. Larson urged Mr. Berg to unilaterally change his Agreement so the option grant would comply with TSE requirements. In response, Mr. Berg said, "My contract is a play - just to negotiate a settlement when (the) company is sold (or) merged - (and) then get the cash, (U.S. $10 million)". He made similar comments to Mr. MacLellan. These statements echo ones made to Mr. Lawson in March in connection with the SEO title and to Ms. Cormier in February. When she asked him whether Repap would have to purchase immediately the automobile that his contract provided, he replied, "No, but I want to set it up in the contract as a liability".

The "Berg Pur"

[164] There had been on-going discussions between Ms. Cormier and Jonathan Mishkin of DLJ since the end of 1998 about a refinancing of Repap's debt. This came together in April in the form of a proposal for a high-yield bond financing to which I have already made reference.

An engagement letter was signed on May 17, 1999, but DLJ had been working on this for some weeks when Mr. Berg called Mr. Mishkin to tell him that he wanted to put a change of control clause in Repap New Brunswick's offering memorandum. This request was referred to at trial as the "Berg Put". The idea Mr. Berg proposed was the same concept as that set out in a hand-written note, which Mr. Berg admitted he sent to Mr. Jacobs of Proskauer on May 14, 1999. The note says:

> If the present Chairman and SEO leaves for any reason except by his own consent, illness, disability or death on 60 days notice this (sic) Bonds are callable if present (sic).

[165] In uncontradicted evidence, Mr. Mishkin testified that Berg said to him:

> Look, all I want to make certain is someone comes to buy the company or force me out they got to come through me, they got to pay me off, they got to make me whole, do something for me or else it will collapse the capital structure.

[166] According to Mr. Mishkin and Mr. Raymond, "the put" made no sense from Repap's perspective. Repap had a very precarious capital structure, and this language would have interfered with the balance the bankers were trying to achieve. None of the bondholders had ever asked for this and, frankly, it is difficult to imagine why they would. Mr. Mishkin had never seen it done before in the high-yield market. Moreover, the company issuing the bonds was Repap New Brunswick Inc. Mr. Berg was not an officer of this company, although he soon attempted to see to it that he was. A proposed Board of Directors resolution of May 25, 1999, emerged just prior to the closing of the DLJ bond financing. Mr. Berg claimed it "came from the lawyers" but the evidence does not support this. Contrary to the terms of his own contract, the resolution gave Mr. Berg sole responsibility to manage and supervise the business affairs of Repap New Brunswick. It put Mr. Berg exclusively in control of Repap's most valuable asset.

[167] Ultimately, the proposed resolution was revised and the "Berg Put" was not included in the final offering memorandum, because the Canadian tax lawyers were unable give a supportive tax opinion. When Mr. Mishkin called Mr. Berg to tell him this, Mr. Berg was angry. This evidence is consistent with testimony from Ms. Cormier, who reported Mr. Berg saying, "I know what Stikeman Elliott is up to and this is not going to be the end of it".

[168] There was no valid commercial purpose for either the Board resolution or the “Berg Put”. Both were detrimental to Repap’s interests. Mr. Berg’s motive was entirely improper. Knowing that the Agreement was under attack and required shareholder approval at the annual meeting then scheduled for June 18, these were plans to protect and entrench himself at the expense of Repap.

The Lawsuits

[169] As opposition to the Agreement mounted, Mr. Berg completely lost sight of the obligations imposed on him by law, and, in particular, his duty to favour Repap’s interest over his own. This is perhaps best revealed in a “speech” made by Mr. Berg to Mr. Larson and Ms. Cormier on May 28, 1999, following the closing of the DLJ bond financing. Mr. Larson made the following notes of Mr. Berg’s soliloquy. The statements attributed to him were not disputed or explained in Mr. Berg’s testimony:

> I have huge resources at my disposal ($100 million financing) and now I have the company till as well. I’m in the catbird seat and can’t lose. I’m also going to get a letter from DLJ to attach to the suit that opines the bonds will go down with my removal (change of control, rating downgrade, default the company, that’s the $1 billion). He (Mr. Poile) better understand. That any attempt to remove me or this Board will result in my taking intentional steps to destabilise the bonds and default the company. I wrote the book on proxy fights don’t corner me. Even if I lose I win. I’ll immediately file a US $25 million suit against the company for my contract the next day. This will also destabilise the bonds. I’m also filing a personal suit against Poile for tortuous interference with my legal employment contract. I’m in the catbird seat. You do what you want Larson but if not with me, you’re putting your position at risk. If you oppose me in this, I’ll come at you and your personal assets with the company and its resources aligned with me.

[170] While Mr. Berg was Chairman, Repap sued Mr. Poile and Mr. McBride, much as he had threatened. Mr. Berg also terminated Mr. McBride’s employment. Subsequently, Mr. Berg took legal action against Mr. Larson and the Toronto-Dominion Bank. In this lawsuit, he alleged that the take-over of Repap by the new Board was engineered by Mr. Cohen who “…masterminded the resignation of Repap’s independent directors so that TD Bank could appoint five new directors under his control”. This allegation is completely false and without any foundation.

Part IV - Remedies

[171] The remedies that are requested by UPM and Repap arrive at the same result—the setting aside of the Agreement. I will begin with the fraud case advanced by Repap and then will consider the remedies sought by UPM under section 120 and 241 of the *CBCA.*

Fraudulent Misrepresentation

[172] The appropriate test for civil fraud is the test that was stated by Lord Hershell in *Derry v. Peek* in the following passage:[15]

> [f]raud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[173] To succeed in an action for fraudulent misrepresentation, the plaintiff must show that the defendant not only spoke falsely and contrary to belief, but that the defendant had the intent to deceive, which is to say he had the aim of inducing the plaintiff to act mistakenly and the plaintiff did so to its detriment.

[174] Repap alleges that Mr. Berg actively misled the Board into believing, among other things, he was recruited to effect a restructuring of Repap, that Third Avenue wished to have him employed as Chairman and SEO to do this, that the Mercer opinion was informed and independent, and that the Agreement that the directors received as the “finalized draft” incorporated the comments of Mercer and of the directors when he knew that none of this was true.

[15] (1889), 14 A.C. 337 (U.K. H.L.) at 374.

[175] Fraud involves a discordance between what a person says and what a person believes:[16]

> The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made.[17]

[176] As it is the defendant's belief and intent that are in issue, the false statements must be understood with the meaning placed on them by Mr. Berg.

[177] I do not agree Mr. Berg actively misled the Board about his role at Repap. Mr. Berg had brought the deal to Mr. Whitman. It was understood that Mr. Berg would become Chairman and they would work together on some kind of restructuring. From early February, Mr. Whitman knew Mr. Berg was planning to do this as an executive Chairman, on a full-time basis. He did not oppose it. It was not unreasonable for Mr. Berg to believe he had been "brought in" by Third Avenue to do this and Mr. Whitman supported this plan. There was nothing that Mr. Berg said or did or failed to say or do, that amounts to a fraudulent misrepresentation on this score.

[178] Mr. Berg provided the Jensen memorandum and the directors' letters to Ms. Rattner. There is no evidence that he instructed her to conceal this material, and I will not draw an inference that there was a nefarious reason that she did not bring this to the attention of the directors. Fraud must be strictly proved. Mr. Berg was not entitled to assume Ms. Rattner would look after its distribution, but his conduct was not fraudulent. If he wanted to intentionally deceive the Board, he would not have sent anything to Ms. Rattner. Moreover, he knew Mr. Whitman and Mr. Larson had the material, and he did not have any control over their use of it.

[179] Repap's case relies heavily on the contents of Mr. Berg's March 1^{8th} memorandum, which it characterizes as a "landmark in the evidence" against which to measure his misrepresentations and omissions. Its salient portion reads:

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[16] Paul M. Perell, "*The Fraud Elements of Deceit and Fraudulent Misrepresentation*", [1996] 18 Advocates' Q 23 at 24.
[17] *Akerhielm v. de Mare*, [1959] A.C. 789 (Kenya P.C.) at 805, per Lord Jenkins.

> Enclosed you will find a finalized draft of my employment agreement with Repap Enterprises, Inc. This draft incorporates a number of comments and suggestions previously made by the Directors, as well as the consultants and others. It has been further reviewed by William M. Mercer, Inc., the independent compensation consultants retained by the company whose comments are also incorporated therein. I had hoped to enclose Mercer's letter to the Board concerning their review with respect to the reasonableness of the proposed contract, a copy of which I am advised you will receive if not before, then at the meeting on the 23rd.

[180] After the February Board meeting, there were some changes made to the Agreement. Specifically, the Contract Term Sheet provided for a loan for the stock options, which was removed, as was the payment of a market capitalization bonus upon a debt to equity conversion. Mr. Berg testified that these changes addressed the directors' concerns. On any fair reading of the Jensen memorandum, the executed Agreement did not address all of the objections and Mr. Berg's refusal to acknowledge this also reflects adversely on his credibility. However, the memorandum does not misrepresent this. It says the Agreement incorporates "a number of comments and suggestions" and it did.

[181] Was it fraudulent then for him to describe Mercer as "the independent compensation consultants retained by the company whose comments are also incorporated herein"? The reference to Mercer is more troubling as Mr. Berg alone had seen a draft of the opinion and had made some factual comments on it. Mr. Cohen testified that there was nothing unusual about an executive reviewing a draft of an opinion concerning the executive's own compensation. I must say I find this surprising. Nevertheless, there is no evidence that Mr. Berg spoke with Ms. Engel or influenced the content of her opinion in any way. Nor is there evidence that he was involved in her retainer, which Ms. Rattner arranged.

[182] The percentage payments on which the market capitalization bonus is based were amended as a result of Ms. Engel's comments. Therefore, to this extent, it was not inaccurate to say that Mercer's comments were incorporated. Viewed objectively, the memorandum is somewhat inaccurate and somewhat misleading, but I cannot say the meaning placed on it by Mr. Berg is so far removed from the sense in which it would be understood by a reasonable

person as to make it impossible to hold that he honestly understood it to bear the meaning claimed by him.[18]

[183] There is no evidence that Mr. Berg's description of Mercer deceived any Repap director. Mr. Phillips knew that the Mercer opinion was being prepared at the request of Ms. Rattner as he had spoken with her to find out when it would be available. He could have contacted Ms. Engel. In the memorandum, Mr. Berg invited the directors to contact Mr. Phillips or himself with any questions and he provided phone numbers. This is inconsistent with an intention to deceive the Board about Mercer's role.

[184] Fraud involves intentional dishonesty. Repap must show that the fraud was an inducing cause to the contract. If the statements would not have changed the plaintiffs conduct, then they are not material. They must be of a type likely to make the plaintiff act upon it. Only then can it be interred that the defendant had the intent to make the plaintiff act accordingly. In *Hinchey v. Gonda,* Schroeder J. stated the proposition in this way:

> A misrepresentation to be material, must be one necessarily influencing and inducing the transaction and affecting and going to its very essence and substance… The test, therefore, of material inducement is not whether the person's conduct *would,* but whether it *might* have been different if the misrepresentation had not been made.[19]

[185] The best evidence of what the directors relied on is contained in a memorandum dated June 21, 1999, authored by Mr. Cohen, but sent with the approval of the outside directors, except Mr. Dufresne, who had by then resigned. In it, they set out their rationale for approving the Agreement and give four reasons: (1) that the Compensation Committee had done a careful job; (2) that the Mercer report supported the Agreement; (3) that the Agreement was performance based; and, (4) that the Board had taken Mr. Whitman's silence as acquiescence.

[186] As to the first reason, Mr. Berg never represented that the Compensation Committee had done a careful job, but any of the directors could easily have discovered what they had done or not done. I have already mentioned that the memorandum invited the directors to contact Mr. Phillips or himself if they had any questions, but none ever did. Contrary to

[18] Ibid.
[19] (1954), [1955] O.W.N. 125 (Ont. H.C.)

inducing the directors to mistakenly believe there had been a careful review, he invited them to conduct their own due diligence.

[187] There is no persuasive evidence that the directors were induced to approve the Agreement in reliance on Mr. Berg's description of the Mercer opinion in his March 18th memorandum. They took comfort from the existence of the opinion and not from Mr. Berg's representations about it. I have earlier dealt with the third and fourth reasons and do not propose to say anything further, except that nothing Mr. Berg said or did, or failed to say or do, induced a mistaken belief about these matters.

[188] Repap relies on the conduct of Mr. Berg after March 23, 1999, (the "Berg Put", the May 25th Board resolution), as well as the statements he made before and after the approval of the contract, as evidence of fraudulent intention, constituting admissions of improper motive. This evidence has troubled me, but in the end, I am not satisfied that this is evidence of "a wicked mind" that proves Mr. Berg intended to deceive Repap.

[189] When I consider all the evidence, it appears to me that Mr. Berg genuinely, but erroneously believed that he could do some good for Repap. He genuinely, but erroneously believed that he was entitled to be compensated in a grand manner. For his own reasons, Mr. Berg wanted to be Chairman of Repap with a contract that proved he was valuable to it. His entire course of conduct was designed to achieve and preserve this objective. His statements were grandiose, boastful and ill considered. They were intended to intimidate and squelch opposition to the Agreement. He did and said things that were designed to entrench his position. In breach of his fiduciary duties, he at all times put his own interests ahead of the interests of Repap. He was greedy and overreaching and failed miserably in his duties to Repap, but in my opinion, he was not fraudulent.

[190] I conclude that Repap has failed to establish the elements of fraud. Although negligent misrepresentation is pleaded in the alternative, Repap conceded in argument that the facts on which it relies do not fit very well with this cause of action and I agree.

Section 120 of the CBCA

[191] Section 120 of the *CBCA* presumes the invalidity of a contract or transaction between a director or officer and the corporation unless approval of the directors is obtained, the disclosure requirements are met and the contract was reasonable and fair to the company

when it was approved.[20] The section appears to contemplate that the contract must meet all three parts of the test, but there is little to guide me on its interpretation.

[192] I was referred to two Canadian cases on the meaning to be ascribed to the words "reasonable and fair to the corporation". In *Rooney v. Cree Lake Resources Corp.,*[21] Dilks J. was called on to interpret the equivalent provision in the *Ontario Business Corporations Act.* He refused to give effect to a "golden parachute" provision in a contract as it would have triggered the payment of unearned compensation in a lump sum equal to over 70 per cent of the corporation's assets, although there was no reasonable prospect of any sudden influx of capital or income to support the payment. Dilks J. concluded that since such a provision would prevent dissatisfied shareholders from exercising their right to effect a legitimate ouster of what they consider to be incompetent management, this was neither reasonable nor fair to the corporation.

[193] *Cannaday v. McPherson*[22] was also a case that concerned a "golden parachute" provision. Lowry J., sitting in chambers, was required to interpret a provision of the *Alberta Business Corporations Act,* which is similar to section 120(7) of the *CBCA.* On appeal, it was successfully argued that Lowry J. had committed an error by considering only the language of the agreement and he should have had regard to the factual matrix that formed the background to the contract. Mr. Justice Dilks, in *Rooney,* did not have the benefit of the reasons on appeal. Nevertheless, he came to a similar conclusion. He stated:

> In determining whether a particular contract is reasonable and fair to the corporation, one must examine all the surrounding circumstances including the purpose of the agreement and its possible ramifications for the corporation. It need not be either fair or reasonable to the director. It is his fiduciary duty to the corporation which requires it to be fair and reasonable to the corporation.[23]

[194] It seems to me that *Cannaday* stands for a proposition that is already well imbedded in the jurisprudence surrounding the interpretation of a commercial contract. It has been said many times that no contract is made in an vacuum, and the court is obliged to consider its

[20] *CBCA*, s. 120(7)(a)(b).
[21] *Rooney v. Cree Lake Resources Corp.*, [1998] O.J. No. 3077 (Ont. Gen. Div.)
[22] *Cannaday v. McPherson* (1998), 44 B.C.L.R. (3d) 195 (B.C. C.A.) rev'g (1995), 25 B.L.R. (2d) 75 (B.C. S.C. [In Chambers])
[23] Ibid. at para. 52.

factual matrix when interpreting it.[24] This direction is expressly contained within the language of subsection 120(7)(c) of the *CBCA* itself as it states:

> 120 (7) A contract for which disclosure is required under subsection (1) is not invalid… if
>
> (c) the contract or transaction was reasonable and fair to the corporation when it was approved.

[195] In view of this, I do not see how one could determine if the contract was reasonable and fair to the corporation when it was approved without considering the circumstances against which it was approved. During the course of these reasons, I have endeavoured to do this.

[196] In *Cannaday,* Lowry J. was dealing with the issue on a summary application where the relevant facts had not been determined. In that case, there were also issues as to the adequacy of the disclosure and the approval, but he found it unnecessary to reach a conclusion on those issues in light of his conclusion that the contract on its face was "wholly one-sided" and neither fair nor reasonable when approved.

[197] The Court of Appeal reviewed the evidence at some length to illustrate that there were matters that ought to have weighed in the balance. In particular, Mr. Cannaday asserted the corporation's chief lender, who had functioned as the controlling mind of the corporation, had knowledge of the contract and had approved it. Mr. Berg relies on this decision, but I do not think it greatly assists him. Here, Repap's largest shareholder knew about the Agreement, but Mr. Whitman was not the controlling mind of Repap and had no direct or indirect involvement in the process that led to the contract or to its ultimate approval. While his apparent lack of opposition is a factor to be considered, it is not determinative, particularly in view of the explanation that he offered for his lack of intervention. Mr. Jensen's resignation letter was intended to make this clear. In any event, Mr. Whitman's views about the Agreement do not support the conclusion that it was fair and reasonable to Repap.

[198] The purpose of section 120 of the *CBCA* is to mitigate the strictness of the common law principle relating to contracts between a director and a corporation. In *Cannaday,* the court appears to be concerned that in setting aside a contract, a party could be unjustly enriched if benefits are obtained for which no consideration is required. I do not regard this as

[24] *Kentucky Fried Chicken Canada v. Scott's Food Service Inc.* (1998), 114 O.A.C. 357 (Ont. C.A.) at 363.

a serious concern here. In any event, a court is normally quite capable of weighing the equities to arrive at a just result. For example, in *Rooney,* the court found the "golden parachute" provision was unenforceable, but then went on to award damages against the corporation for wrongful dismissal.

[199] I was referred to one American authority, a decision of the Supreme Court of Delaware in *Weinberger v. UOP, Inc.*[25] There, Justice Moore held that the concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when a transaction was timed, how it was initiated, structured, negotiated, disclosed to directors and how the directors' approval was obtained. In that case, which dealt with minority shareholders' attack on a cash-at-merger transaction, Moore J. held that the transaction did not meet the requirement for fair dealing, because there were inadequate arm's length negotiations, a lack of material information in the possession of the Board and undue haste, including a cursorily prepared fairness opinion supporting the transaction in question.

[200] The Agreement in this case is flawed on both counts. Its procedural unfairness is imbued with the same characteristics of unfair dealing referred to in *Weinberger, supra,*— inadequate or, more accurately, non-existent arm's length negotiations, a lack of material information in the possession of the Board and undue haste, including a cursorily-prepared "reasonableness" opinion supporting the Agreement.

[201] I have already considered in some detail the substantive unfairness of this contract. It created an enormous liability for Repap, without any corresponding benefit to it. It represented excessive dilution for its shareholders, and, like the contract in *Rooney,* it burdened the company with extraordinarily large and unearned cash payments, with the potential to create a financially perilous situation for it.

[202] It is also relevant to consider that Mr. Berg viewed his contract as a liability for Repap that could be useful to him as a negotiating tool when the company was sold or merged. This is further evidence that the contract was not fair and reasonable to Repap. The question is what is to be done about it. I will consider this below.

The Oppression Remedy

[25] *Weinberger v. UOP, Inc.,* 457 A.2d 701 (U.S. Del. S.C. 1983) at 711-712 [13-15 (Lexis)].

[203] The oppression remedy has been a part of the Canadian corporate law landscape since 1975. It is a broad, remedial, curative provision that is designed to protect reasonable shareholder expectations, although the acts complained of may be entirely lawful. The court is concerned with the effect of conduct that is oppressive or unfairly prejudicial or unfairly disregards the interests of any security holder. The court has broad powers under section 241, and there are a variety of orders that can be made, including compensatory orders, or, under subsection 241(3)(h), an order to vary or set aside a contract to which a corporation is a party. It is this remedy that UPM seeks.

[204] The fact that UPM paid a premium for the shares of Repap is irrelevant. UPM does not seek damages. It asks that the Agreement be set aside. If the Agreement stands, UPM is bound by it. As assignee of TDAM's cause of action, and as a shareholder of Repap, it is entitled to ask for an Order setting aside the Agreement if the effect of the conduct complained of unfairly disregards the interests of TDAM and other shareholders.

[205] TDAM had a reasonable expectation that its directors would comply with their statutory obligations to act in good faith and in the best interests of Repap, with due care, diligence and skill. For the reasons I have already given, the process by which the Agreement was negotiated and approved and the terms of the Agreement unfairly disregard the interests of TDAM and other shareholders as a consequence of the conduct of Mr. Berg and of the Board of Directors of Repap. The oppression remedy is available to rectify conduct by directors that amounts to self-dealing at the expense of the corporation or other shareholders.[26] There is no principled reason that it should not also be available to rectify conduct by a Chairman and directors that saddles a corporation with a huge liability and no corresponding benefit to shareholders.

[206] In *820099 Ontario Inc. v. Harold E. Ballard Ltd., supra* at 197, Mr. Justice Farley made this observation about the role of the court when it is asked to "rectify the matters complained of":

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even

[26] *C.I. Covington Fund Inc. v. White* (2000), 10 C.P.R. (4th) 49 (Ont. S.C.J.) at paras. 21, 40, 41, 43, aff'd (2001), 15 C.P.R. (4th) 144 (Ont. Div. Ct.)

if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party.

[207] Mr. Berg therefore submits that if a remedy is to be fashioned, the court should revise the employment agreement, and only to the extent necessary to relieve the oppression. He also submits that section 120 should be interpreted consistently with the court's power under section 241 of the *CBCA* and it should vary the Agreement by severing those provisions that are not fair and reasonable.

[208] The setting aside of a self-interested contract can hardly be described as a significant interference in the affairs of a company. In cases of breach of fiduciary duty, disgorgement is a common remedy. I was referred, for example, to the decision in *Sparling c. Javelin International Lteé Internationale Lteé*.[27] There, the court "rectified the matters complained of" by ordering the cancellation of the shares of Mr. Doyle, ordering the removal from office of the Board of Directors of Javelin and amending the articles of association and the by-laws of the corporation to reduce the number of directors. In appropriate circumstances, it seems that courts have not been hesitant to use a heavier hand if this is required to rectify the oppression.

[209] Mr. Berg was at Repap for seven months. His contribution was a modest one, and there is no reliable evidence that he would have or could have contributed a great deal more. In that time, he earned approximately U.S.$200,000. The Chairman who succeeded him was a restructuring specialist who was remunerated at an annual salary in the range of $100,000 to $150,000, with no other benefits. The Chairman who preceded him was not paid. In my view, these are the appropriate comparisons. Measured against them, Mr. Berg was generously compensated for the work he performed.

[210] UPM makes no claim in this action to be reimbursed for the payments Mr. Berg has already received. Setting aside the Agreement would not tip the scale in favour of the corporation. It would leave Mr. Berg with more than adequate remuneration for the services he provided to Repap and would relieve UPM of the obligation of further performance under an unjustified contract that ought never to have been approved. Rectifying the Agreement would tip the scale in favour of Mr. Berg. In any event, there is no adequate evidentiary record upon which I could do this. While the court is encouraged to be creative in fashioning an

appropriate remedy to cure oppression, there is no need to be creative here. In many ways, this is an easy case because the only parties affected are Mr. Berg, who wishes to retain the benefit of some or all of the contract, and the corporation, who wishes to be relieved of its burden. There are no third party interests at stake.

[211] The oppression remedy is an equitable remedy and those who wish the court to rectify matters with a scalpel, rather than a battle axe, should give the court some reason to do this. In this case, I can think of no reason why the court should preserve aspects of the Agreement for Mr. Berg, when he had every reasonable opportunity to revise it himself.

[212] He had this opportunity in February when Mr. Larson and Ms. Cormier explained to him why his proposed compensation package was wholly inappropriate. He had another opportunity in early March, when he reviewed the Jensen memorandum and the letters from the directors. Mr. Larson again urged him in May to modify his demands. In early June, with a proxy fight looming and a shareholders' meeting pending, he told Mr. MacLellan that he was amenable to changing the Agreement, or even leaving, but he proposed no terms to him or to the Board. Instead, while Mr. Berg was Chairman, Repap commenced litigation against Mr. Poile, a Repap shareholder, and Mr. McBride.

[213] UPM has satisfied me that it is entitled to a remedy under section 241(3)(h) of the *CBCA.* I conclude that the appropriate remedy in this case is to set aside the Agreement. There are also grounds for doing this under section 120(7) of the *CBCA.*

[214] In the result, the claim is allowed. The crossclaim of Mr. Berg is dismissed. The crossclaim of Repap for a declaration that the employment agreement is unenforceable having been procured through a breach of fiduciary duty is granted, but the balance of the crossclaim is dismissed. If costs are not agreed within 30 days, counsel are directed to arrange a conference call attendance with me. I am greatly indebted to all counsel who presented this case with skill, candour and civility.

Action allowed.

[27] [1986] R.J.Q. 1073 (Que. S.C.).

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*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

Indexed as: Sierra Club of Canada *v.* Canada (Minister of Finance)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

Répertorié : Sierra Club du Canada *c.* Canada (Ministre des Finances)

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

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

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

Jurisprudence

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

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

Statutes and Regulations Cited

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

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

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

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

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

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

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

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL). Pourvoi accueilli.

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

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

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

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

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

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

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

II. Facts

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

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

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

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

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

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

II. Les faits

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

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

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

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

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

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

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.

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

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.

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

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

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

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

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

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

IV. Judgments Below

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

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

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

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

III. Dispositions législatives

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

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

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

IV. Les décisions antérieures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

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

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

(2) Le juge Robertson (dissident)

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

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

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

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

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

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

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

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

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

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

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

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

V. Issues

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

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

VI. Analysis

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

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

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

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

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

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

V. Questions en litige

A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the 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. 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*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

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*, at para. 33;

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

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

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

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

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

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

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

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

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

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

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

> a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;
>
> b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et
>
> c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

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

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

(2) Les droits et les intérêts des parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Application of the Test to this Appeal*

(1) Necessity

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

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

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

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

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

B. *Application de l'analyse en l'espèce*

(1) Nécessité

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

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

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. no 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Proportionality Stage

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

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

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

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

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

(2) L'étape de la proportionnalité

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

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

(a) *Salutary Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

(b) *Deleterious Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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.

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

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.

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Conclusion

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

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

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

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

VII. Conclusion

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

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

Appeal allowed with costs.

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

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

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

Pourvoi accueilli avec dépens.

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

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

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