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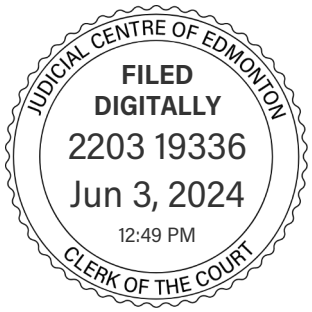

PLAINTIFFS	MIKE PRIESTNER REAL ESTATE INC. and MPRE GP DEV INC.
DEFENDANTS	2399430 ALBERTA LTD., 2399449 ALBERTA LTD, TURNIP HOMES INC., and HENOK KASSAYE
DOCUMENT	**BOOK OF AUTHORITIES OF MNP LTD., IN ITS CAPACITY AS RECEIVER OF 2399430 ALBERTA LTD. AND 2399449 ALBERTA LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Ryan Trainer Telephone: 780.482.9153 Fax: 780.733.9790 Email: ryan.trainer@mross.com File No.: 20230841

TABLE OF AUTHORITIES

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 243(1) ..... **TAB 1**

Royal Bank v Soundair Corp., 1991 CarswellOnt 205..... **TAB 2**

Bank of Montreal v River Rentals Group Ltd., 2010 ABCA 16 ..... **TAB 3**

PricewaterhouseCoopers Inc. v 1905393 Alberta Ltd., 2019 ABCA 433 ..... **TAB 4**

Alberta Rules of Court, AR 124/2010, Division 4 of Part 6 ..... **TAB 5**

Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC *41* ..... **TAB 6**

Sherman Estate v. Donovan, 2021 SCC 25 ..... **TAB 7**

Romspen Investment Corporation v Hargate Properties Inc., 2012 ABQB 412..... **TAB 8**

Look Communications Inc. v Look Mobile Corporation, 2009 CarswellOnt 7952 ..... **TAB 9**

887574 Ontario Inc. v Pizza Pizza Ltd., 1994 CarswellOnt 1214 ..... **TAB 10**

Alberta Treasury Branches v Elaborate Homes Ltd., 2014 ABQB 350..... **TAB 11**

Bank of Nova Scotia v Diemer, 2014 ONCA 851, 2014 CarswellOnt..... **TAB 12**

Servus Credit Union Ltd. v Trimove Inc., 2015 ABQB 745..... **TAB 13**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

Most Recently Cited in: PricewaterhouseCoopers Inc. v. Northern Citadel, 2023 ONSC 37, 2023 CarswellOnt 737 | (Ont. S.C.J., Jan 19, 2023)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to February 1, 2023
Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 247

s 247. Good faith, etc.

Currency

247.Good faith, etc.
A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Amendment History
1992, c. 27, s. 89(1)

Currency
Federal English Statutes reflect amendments current to February 1, 2023
Federal English Regulations Current to Gazette Vol. 156:25 (December 7, 2022)

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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 assets to them.

Per McKinlay J.A. (concurring in the result): 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. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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 the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

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.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

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

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. 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.

2 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.

3 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 million dollars. 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 million on the winding up of Soundair.

4 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.

5 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.

6 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.

7 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.

8 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, 1990. 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.

9 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."

10 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.

11 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.

12 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?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 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.

15 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.

16 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, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.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.

17 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?

18 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 do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 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.

20 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.

21 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 Co. v. Rosenberg* , supra, at p. 112 [O.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.]

22 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, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.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.]

23 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 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.

24 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 10 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.

25 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.

26 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 Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.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.

27 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. S.C.) , 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.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , 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.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , 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.]

30 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.

31 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.

32 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.

33 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.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-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.

35 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.

36 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.

37 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.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 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* , supra (Saunders J.). 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."

40 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), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), 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.

41 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

42 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.

43 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* , 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 considera tion 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 binding 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.

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

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.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.]

46 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.

47 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.]:

> 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.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of 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?

49 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.

50 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 or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 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.

52 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.

53 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.

54 Moreover, I am not prepared to 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.

55 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 7 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, that it would have told the court that it needed more information before it would be able to make a bid.

56 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.

57 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.

58 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.]:

> 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.]:

> 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.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, 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.

60 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.

61 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.

62 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.

63 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.

64 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 debtor's assets.

65 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 inter-lender 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 inter-lender 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 million 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.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million 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.

67 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 inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 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.

69 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.

70 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.

71 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-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A. **:**

72 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), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . 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.

73 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 therefore), 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):**

2010 ABCA 16
Alberta Court of Appeal

Bank of Montreal v. River Rentals Group Ltd.

2010 CarswellAlta 57, 2010 ABCA 16, [2010] A.J. No. 12, 184 A.C.W.S. (3d) 686, 18 Alta. L.R. (5th) 201, 469 A.R. 333, 470 W.A.C. 333, 63 C.B.R. (5th) 26

Bank of Montreal (Not a Party To the Appeal / Plaintiff) and River Rentals Group Ltd., Taves Contractors Ltd. and McTaves Inc. (Respondent / Defendant) and Hutterian Brethren Church of Codesa (Appellant / Other) and Bill McCulloch and Associates Inc. (Respondent / Other) and Don Warkentin (Respondent / Other)

Ronald Berger, Patricia Rowbotham JJ.A., R. Paul Belzil J. (ad hoc)

Heard: January 7, 2010
Judgment: January 18, 2010
Docket: Edmonton Appeal 0903-0191-AC, 0903-0236-AC

Counsel: D.R. Bieganek for Respondent, River Rentals Group, Taves Contractors Ltd., McTaves Inc., Bill McCulloch and Associates Inc.
G.D. Chrenek for Appellant, Hutterian Brethren Church of Codesa
T.M. Warner for Respondent, Don Warkentin

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Court-appointed receiver of group of companies called for offers to purchase property — Tender closing date was May 7 — H offered $2,205,000 — W tendered offer of $2,100,000 on understanding that he would receive possession of property in fall — On May 21, W learned that he would get possession of property earlier and increased bid to $2,300,000 — Receiver brought application to approve sale of property to H — Chambers judge granted order extending deadline to submit revised offers to purchase property, with submissions restricted to H and W — During extension period, W submitted highest bid — Chambers judge granted order directing that property be sold to W — H appealed — Appeal allowed — Chambers judge erred in principle and on insufficient evidence ordered that property be subject of extended re-tendering process — Chambers judge made no finding that price in H's offer was so unreasonably low as to demonstrate that receiver was improvident in accepting it — Chambers judge did not consider interests of H as highest bidder nor interests of others who made compliant bids — There was no cogent evidence before chambers judge of any unfairness to W — Chambers judge's order conferred advantage upon W who then knew price that had previously been offered by H.
Table of Authorities
Cases considered:
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, 1981 CarswellNS 47 (N.S. C.A.) — followed
Royal Bank v. Fracmaster Ltd. (1999), (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.) — referred to

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

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

APPEAL by bidder from orders extending deadline to submit revised offers to purchase property and approving sale of property to another bidder.

***Per curiam*:**

1 At the hearing of this appeal, we announced that the appeal is allowed with reasons to follow.

2 Bill McCulloch and Associates Inc. is the court-appointed Interim Receiver and/or Receiver Manager of the corporate Respondents ("the Taves Group") by order dated March 5, 2009. Prior to that date, the Receiver had become Trustee in Bankruptcy of the Taves Group.

3 The Receiver issued an information package and called for offers to purchase the assets of the Taves Group which included a property known as the Birch Hills Lands. The call for offers was dated April 17, 2009. The deadline for submission of offers was on or before May 7, 2009 (the tender closing date).

4 On June 2, 2009, the Receiver brought an application before Wachowich C.J.Q.B. to approve the sale of the Birch Hills Lands to the Appellant. The Appellant's offer was $2,205,000. An appraisal concluded that the most probable sale price was $1,560,000. Counsel for the Receiver explained that "the Receiver did effect wide advertizing in local and national newspapers. Sent out 160 tender packages and made the tender package available on the Receiver's website." (A.B. Record Digest, 3/30-33)

5 Fifteen offers were received on the Birch Hills Lands, six of which were for the entirety of the parcel.

6 In his submission to the Chief Justice, counsel for the Receiver stated:

> Now, what we have advised the party that we're looking to accept is that we can't put them in possession yet until the Court approves the offer. That has caused some angst given the time of year and it is agricultural land, but we're not in a position to put people on the land before we get court approval to do so. So — and that's fine, they're still — they're still at the table so we're good with that.
>
> The offer that the Receiver is recommending acceptance of is — was from the Hutterite Church of Codesa. That offer was for $2,205,000 ... the offer is very significant ... it was an excellent offer.
>
> (A.B. Record Digest, 5/46 -6/19)

7 In considering other tenders with respect to other portions of the property of the Taves Group, the Chief Justice expressed his views regarding the importance of adhering to the integrity of the tender process:

> You know, we ran a tender process, tender process is meant to be — there are certain rules. It is like, you do not change the rules of baseball or football during the middle of the game. This is the same thing except in this particular case the Court is prepared to exercise the — its inherent jurisdiction to extend the time in Mr. Taves' position. But I — you know, I could be the person who says no, Mr. Taves, you were late, I am sorry. Next time use Fed Ex.(Appeal Record Digest, 12/11-19)

And further:

> We could be coming back right and left. I am inclined, you know, to grant the applications as submitted on these tenders because the tender process was followed properly. That was the market at the time, this is the people that — this is how they bid. You know, circumstances change and when circumstances change, somebody is the beneficiary of it, some — somebody is the loser on this. But the rules were adhered to and having the rules adhered to if, you know — if you want

> to — if you want to go to the Court of Appeal after the order is entered and say to the Court of Appeal, guess what, oil is now at $90, we want this one resubmitted. And if those five people are wise enough to accept that argument, then good luck to you but — but you know, I am inclined to say we follow a process, the law has to be certain. The law has to be definite. This is what we did and we complied.(Appeal Record Digest, 12/40-13/8)

8 One of the persons who had tendered an offer to purchase the Birch Hills Lands was the Respondent Don Warkentin. Counsel for the guarantor, Mr. Orrin Toews, addressed the Court. He explained that Mr. Warkentin had submitted an offer of $2.1 million "on the understanding that he would be receiving possession of the property sometime in the fall." Counsel further explained that "I believe it was the Receiver while during the initial auction, that it was brought to his attention on May 21 st that he would in fact get possession of the property much earlier than he was anticipating. And on that basis he increased his bid by 200,000 which brings his offer to 2.3 million dollars cash." (A.B. Record Digest, 13/27-36) He submitted that Mr. Warkentin's offer be accepted.

9 In response, counsel for the Receiver advised the Court that he had been in written communication with counsel for Mr. Warkentin "and there was no indication in that correspondence that he thought he would get [possession of the lands] in the fall." (Appeal Record Digest, 14/18-20) He added: "I think the tender package is clear that the way it was supposed to close is after the appeal periods on any order has expired. ... So how anybody could reasonably conceive that possession wouldn't be granted until the fall based on that escapes me." (Appeal Record Digest, 14/20-25) He further added: "But the bottom line was at the time tenders closed, Mr. [Warkentin]'s offer was found wanting." (Appeal Record Digest, 14/36-38)

10 On the basis of that information, the Court ruled as follows:

> Well, you know, rather than adjourning it to hear from Mr. Carter, what I am — what I am inclined to do with that piece of property, because of — is — because of an uncertainty as to occupation, dates of occupation or potential lease or whatever it may be, it is too late to put in the crop right now anyway so — ... Retender on this one and make it clear in the tender.
>
> (Appeal Record Digest, 15/7-19)

11 Wachowich, C.J. then granted an order extending the deadline to submit revised offers to purchase the Birch Hills Lands; with submissions restricted to the Appellant and Warkentin. During this extension period, Warkentin submitted a bid higher than the Appellant's. The Appellant did not increase its original offer. Subsequently, on June 17, 2009, Wachowich, C.J. granted an order directing that the Birch Hills Lands be sold to Warkentin. An application by the Appellant to reconsider the June 17, 2009 order was dismissed. The Court also granted a stay order for parts of the June 2 order and the entirety of its June 17 order, pending the determination of the appeal of the June 2 order. The Appellant appealed the June 2 order on July 22, 2009; and appealed the June 17 order on August 13, 2009 (the appeals were consolidated on August 20, 2009).

12 On applications by a Receiver for approval of a sale, the Court should consider whether the Receiver has acted properly. Specifically, the Court should consider the following:

> (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16

13 The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

> (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

(b) whether the circumstances indicate that insufficient time was allowed for the making of bids;

(c) whether inadequate notice of sale by bid was given; or

(d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (N.S. C.A.)

Salima Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (Alta. C.A.) at para. 12.

14 The central issue in this appeal is whether the chambers judge, mindful of the record before him, should have permitted rebidding and whether he should have thereafter entertained and accepted the higher offer of $2.51 million plus GST tendered by Mr. Warkentin during the extension period.

15 The relevance of higher offers after the close of process was considered by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.*, *supra*. Upon review of the jurisprudence, the Court stated at para. 30:

> 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. ...

16 The chambers judge made no such finding. Indeed, he made no assessment whatever of the conduct of the Receiver. The only evidence before the Court at the June 2, 2009 application was the Receiver's fifth report and the affidavit of Orrin Toews who proffered no evidence that the Receiver acted improvidently in accepting the offer of the Appellant.

17 Moreover, the June 2, 2009 order neither considers the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids to purchase the Birch Hills Lands pursuant to the call for offers.

18 This Court has consistently favoured an approach that preserves the integrity of the process. See *Salima Investments Ltd.*, *supra*, and *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.).

19 That was also the view of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia*, *supra*, at para. 35:

> 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 a 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. 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. ...

20 In addition, there was no cogent evidence before the chambers judge of any unfairness to Warkentin. On the contrary, the impugned order of June 2 conferred an advantage upon Warkentin who then knew the price that had previously been offered by the Appellant when re-tendering his offer.

21 In cases involving the Court's consideration of the approval of the sale of assets by a court-appointed Receiver, decisions made by a chambers judge involve a measure of discretion and "are owed considerable deference". The Court will interfere only if it concludes that the chambers judge acted unreasonably, erred in principle, or made a manifest error.

22 In our opinion, the chambers judge erred in principle and on insufficient evidence ordered that the property in question be the subject of an extended re-tendering process. The appeal is allowed. An order will go setting aside paras. 26 through 32 of the June 2, 2009 and the June 17, 2009 orders, and approving the tender of the Appellant on the terms and conditions upon which the Receiver originally sought approval.

Appeal allowed.

2019 ABCA 433
Alberta Court of Appeal

Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd

2019 CarswellAlta 2418, 2019 ABCA 433, [2019] A.W.L.D. 4519,
312 A.C.W.S. (3d) 237, 74 C.B.R. (6th) 14, 98 Alta. L.R. (6th) 1

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd. (Respondent / Cross-Appellants / Applicant) and 1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd. (Appellants / Cross-Respondents / Respondents) and Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd. (Respondents / Interested Parties)

Thomas W. Wakeling, Dawn Pentelechuk, Jolaine Antonio JJ.A.

Heard: September 3, 2019
Judgment: November 14, 2019
Docket: Edmonton Appeal 1903-0134-AC

Counsel: D.M. Nowak, J.M. Lee, Q.C., for Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393 Alberta Ltd.
D.R. Peskett, C.M. Young, for Appellants
C.P. Russell, Q.C., R.T. Trainer, for Respondent, Servus Credit Union Ltd.
S.A. Wanke, for Respondent, Ducor Properties Ltd.
S.T. Fitzgerald, for Respondent, Northern Electric Ltd.
H.S. Kandola, for Respondent, Fancy Doors & Mouldings Ltd.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Appellants appeal Approval and Vesting Order which approved sale proposed in Asset Purchase Agreement between Receiver, PWC, and respondent, D Ltd. — Appeal dismissed — Chambers judge was keenly alive to abbreviated marketing period and appraised values of hotels — Nevertheless, having regard to unique nature of property, incomplete construction of development hotel, difficulties with prospective purchasers in branding hotels in area outside of major centre and area which was in midst of economic downturn, she concluded that receiver acted in commercially reasonable manner and obtained best price possible in circumstances — Even with abbreviated period for submission of offers, chambers judge reasonably concluded that receiver undertook extensive marketing campaign, engaged commercial realtor and construction consultant, and consulted and dialogued with owner throughout process, which process appellants took no issue with, until offers were received.
Table of Authorities
Cases considered:
Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 ABCA 16, 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 470 W.A.C. 333, 469 A.R. 333, 63 C.B.R. (5th) 26 (Alta. C.A.) — considered
Northstone Power Corp. v. R.J.K. Power Systems Ltd. (2002), 2002 ABCA 201, 2002 CarswellAlta 1111, 36 C.B.R. (4th) 272, 317 A.R. 192, 284 W.A.C. 192 (Alta. C.A.) — referred to

Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc. (2013), 2013 BCSC 2222, 2013 CarswellBC 3640, 12 C.B.R. (6th) 282 (B.C. S.C.) — referred to

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

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

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

1905393 Alberta Ltd v. Servus Credit Union Ltd (2019), 2019 ABCA 269, 2019 CarswellAlta 1342, 72 C.B.R. (6th) 20 (Alta. C.A.) — referred to

Statutes considered:

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

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(c) — considered

s. 193(e) — considered

APPEAL by appellants from Approval and Vesting Order which approved sale proposed in Asset Purchase Agreement between receiver, PWC, and respondent, D Ltd.

***Per curiam*:**

1 The appellants appeal an Approval and Vesting Order granted on May 21, 2019 which approved a sale proposed in the May 3, 2019 Asset Purchase Agreement between the Receiver, PriceWaterhouseCoopers, and the respondent, Ducor Properties Ltd ("Ducor"). The assets consist primarily of lands and buildings in Grande Prairie, Alberta described as a partially constructed 169 room full service hotel not currently open for business (the "Development Hotel") and a 63 room extended stay hotel ("Extended Stay Hotel") currently operating on the same parcel of land (collectively the "Hotels"). The Hotels are owned by the appellant, 1905393 Alberta Ltd. ("190") whose shareholder is the appellant, Stellar One Holdings Ltd, and whose president and sole director is the appellant, David Podollan.

2 The respondent, Servus Credit Union Ltd ("Servus"), is 190's largest secured creditor. Servus provided financing to 190 for construction of the Hotels. On May 16, 2018, Servus issued a demand for payment of its outstanding debt. As of June 29, 2018, 190 owed Servus approximately $23.9 million. That debt remains outstanding and, in fact, continues to increase because of interest, property taxes and ongoing carrying costs for the Hotels incurred by the Receiver.

3 On July 20, 2018, the Receiver was appointed over all of 190's current and future assets, undertakings and properties. The appellants opposed the Receiver's appointment primarily on the basis that 190 was seeking to re-finance the Hotels. That re-financing has never materialized.

4 As a result, the Receiver sought in October 2018 to liquidate the Hotels. In typical fashion, the Receiver obtained an appraisal of the Hotels, as did the respondents. After consulting with three national real estate brokers, the Receiver engaged the services of Colliers International ("Colliers"), which recommended a structured sales process with no listing price and a fixed bid submission date. While the sales process contemplated an exposure period of approximately six weeks between market launch and offer submission deadline, Colliers had contacted over 1,290 prospective purchasers and agents using a variety of mediums in the months prior to market launch, exposing the Hotels to national hotel groups and individuals in the industry, and

conducted site visits and answered inquiries posed by prospective buyers. Prospective purchasers provided feedback to Colliers but that included concerns about the quality of construction on the Development Hotel.

5 The Receiver also engaged the services of an independent construction consultant, Entuitive Corporation, to provide an estimate of the cost to complete construction on the Development Hotel and to assist in decision-making on whether to complete the Development Hotel. In addition, the Receiver contacted a major international hotel franchise brand to obtain input on prospective franchisees' views of the design and fixturing of the Development Hotel. The ability to brand the Hotels is a significant factor affecting their marketability. Moreover, some of the feedback confirmed that energy exploration and development in Grande Prairie is down, resulting in downward pressure on hotel-room demand.

6 Parties that requested further information in response to the listing were asked to execute a confidentiality agreement whereupon they were granted access to a "data-room" containing information on the Hotels and offering related documents and photos. Colliers provided confidential information regarding 190's assets to 27 interested parties.

7 The deadline for offer submission yielded only four offers, each of which was far below the appraised valued of the Hotels. Three of the four offers were extremely close in respect of their stated price; the fourth offer was significantly lower than the others. As a result, the Receiver went back to the three prospective purchasers that had similar offers and asked them to re-submit better offers. None, however, varied their respective purchase prices in a meaningful manner when invited to do so. The Receiver ultimately accepted and obtained approval for Ducor's offer to purchase which, as the appellants correctly point out, is substantially less than the appraised value of the Hotels.

8 The primary thrust of the appellants' argument is that an abbreviated sale process resulted in an offer which is unreasonably low having regard to the appraisals. They argue that the Receiver was improvident in accepting such an offer and the chambers judge erred by approving it. Approving the sale, they argue, would eliminate the substantial equity in the property evidenced by the appraised value and that the "massive prejudice" caused to them as a result materially outweighs any further time and cost associated with requiring the Receiver to re-market the Hotels with a longer exposure time. Mr. Podollan joins in this argument as he is potentially liable for any shortfall under personal guarantees to Servus for all amounts owed to Servus by 190. The other respondents, Fancy Doors & Mouldings Ltd and Northern Electric Ltd, similarly echo the appellants' arguments as the shortfall may deprive them both from collecting on their builders' liens which, collectively, total approximately $340,000.

9 The appellants obtained both a stay of the Approval and Vesting Order and leave to appeal pursuant to s 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: *1905393 Alberta Ltd v. Servus Credit Union Ltd*, [2019] A.J. No. 895, 2019 ABCA 269 (Alta. C.A.). The issues around which leave was granted generally coalesce around two questions. First, whether the chambers judge applied the correct test in deciding whether to approve of the Receiver recommended sale; and second, whether the chambers judge erred in her application of the legal test to the facts in deciding whether to approve the sale and, in particular, erred in her exercise of discretion by failing to consider or provide sufficient weight to a relevant factor. The standard of review is correctness on the first question and palpable and overriding error on the second: *Northstone Power Corp. v. R.J.K. Power Systems Ltd.*, 2002 ABCA 201 (Alta. C.A.) at para 4, (2002), 317 A.R. 192 (Alta. C.A.).

10 As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) at para 16, (1991), 46 O.A.C. 321 (Ont. C.A.) ("*Soundair*"). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

11 The appellants suggest that *Soundair* has been modified by our Court in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 13, (2010), 469 A.R. 333 (Alta. C.A.), to require an additional four factors in assessing whether a receiver has complied with its duties: (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic; (b) whether the circumstances indicate that insufficient time was allowed for the making of bids; (c) whether inadequate notice of sale by bid was given; and (d) whether it can be said that the proposed sale is not in the best interests of

either the creditor or the owner. The appellants argue that, although the chambers judge considered the *Soundair* factors, she erred by failing to consider the additional *River Rentals* factors and, in so doing, in effect applied the "wrong law".

12 We disagree. The chambers judge expressly referred to the *River Rentals* case. *River Rentals*, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the *Soundair* test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: *Salima Investments Ltd. v. Bank of Montreal* (1985), 65 A.R. 372 (Alta. C.A.) at paras 12-13. At its core, *River Rentals* highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the *Soundair* test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

13 At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para 4, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]), aff'd on appeal (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).

14 Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: *Soundair* at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": *Soundair* at para 22.

15 The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers — of which there is absolutely none — the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 (Alta. C.A.) at para 13.

16 Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": *Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (B.C. S.C.) at para 20.

17 The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers

judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.

18 We see no reviewable error. This ground of appeal is also dismissed.

19 Finally, leave to appeal was also granted on whether s 193 of the *Bankruptcy and Insolvency Act*, and specifically s 193(a) or (c) of the Act, creates a leave to appeal as of right in these circumstances or whether leave to appeal is required pursuant to s 193(e). As the appeal was also authorized under s 193(e), we find it unnecessary to address whether this case meets the criteria for leave as of right in s 193(a)-(d) of the Act.

Appeal dismissed.

End of Document

Division 4
Restriction on Media Reporting and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

6.31 An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Notice to media

6.32 When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or applications judge assigned to application

6.33 A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020;136/2022

Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Persons having standing at application

6.35 The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

No publication pending application

6.36 Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

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

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

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

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

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

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

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

XIV.8.a Crown privilege

Headnote

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

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

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

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

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

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

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

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

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

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

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

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

Held: The appeal was allowed.

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

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

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

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

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

Arrêt: Le pourvoi a été accueilli.

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

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

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

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s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

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

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

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

I. Introduction

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

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

II. Facts

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

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

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

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

IV. Judgments below

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

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

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

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

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

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

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

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found

that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

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

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

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

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

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

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

V. Issues

35

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

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

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

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

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of 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 *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

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

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

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

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

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

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

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

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

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

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

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

(2) The Proportionality Stage

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

(a) Salutary Effects of the Confidentiality Order

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

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

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

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

(b) Deleterious Effects of the Confidentiality Order

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

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

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents

relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

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

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

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

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

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

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

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

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

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a

confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

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

84 This motion relates to an application for judicial review of a decision by the government to fund a 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. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

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

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

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

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

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

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would

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

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

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

VII. Conclusion

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

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

Appeal allowed.

Pourvoi accueilli.

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Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

INDEXED AS: SHERMAN ESTATE *v.* DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

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

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at

discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexpliqués ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them.

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R.

En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

Jurisprudence

Arrêt appliqué : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; **arrêts mentionnés :** *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113; *R. c. Oakes*,

(3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jaqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

Rochette, Sébastien, et Jean-François Côté. « Article 12 », dans Luc Chamberland, dir. *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, 5e éd., Montréal, Yvon Blais, 2020.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rouleau et Hourigan), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), qui a infirmé une décision du juge Dunphy, 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Pourvoi rejeté.

Chantelle Cseh et *Timothy Youdan*, pour les appelants.

Iris Fischer et *Skye A. Sepp*, pour les intimés.

Peter Scrutton, pour l'intervenant le procureur général de l'Ontario.

Jaqueline Hughes, pour l'intervenant le procureur général de la Colombie-Britannique.

Ryder Gilliland, pour l'intervenante l'Association canadienne des libertés civiles.

Ewa Krajewska, pour l'intervenant le Centre d'action pour la sécurité du revenu.

Robert S. Anderson, c.r., pour les intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, pour l'intervenante British Columbia Civil Liberties Association.

Khalid Janmohamed, pour les intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH et Mental Health Legal Committee.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of

Version française du jugement de la Cour rendu par

LE JUGE KASIRER —

I. Survol

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

proportionality, the benefits of that order restricting openness outweigh its negative effects.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist,

le maintien de la forte présomption de publicité des débats judiciaires. En outre, la protection accordée à la publicité des débats ne s'arrête pas là. Le demandeur doit encore démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs.

[4] Le présent pourvoi porte sur la question de savoir si les préoccupations soulevées par les personnes qui demandent qu'une exception soit faite à la publicité habituelle des dossiers judiciaires dans le cadre de procédures d'homologation successorale — à savoir les préoccupations concernant la vie privée et la sécurité physique des personnes touchées — constituent des intérêts publics importants qui sont à ce point sérieusement menacés que les dossiers devraient être mis sous scellés. Les parties au présent pourvoi conviennent que la sécurité physique constitue un intérêt public important qui pourrait justifier une ordonnance de mise sous scellés, mais elles ne s'entendent pas sur la question de savoir si cet intérêt serait sérieusement menacé, dans les circonstances de l'espèce, advenant la levée des scellés. Elles sont également en désaccord sur la question de savoir si la vie privée constitue en elle-même un intérêt important qui pourrait justifier une ordonnance de mise sous scellés. Les appelants affirment que la vie privée est un intérêt public suffisamment important pouvant justifier l'imposition de limites à la publicité des débats judiciaires, plus particulièrement à la lumière des menaces auxquelles les gens sont exposés dans un contexte où la technologie facilite la diffusion à grande échelle de renseignements personnels sensibles. Ils font valoir que la Cour d'appel a eu tort d'affirmer que les préoccupations personnelles en matière de vie privée, à elles seules, ne comportent pas l'élément d'intérêt public qui relève à juste titre d'une ordonnance de mise sous scellés.

[5] Notre Cour a, dans différents contextes, défendu de manière constante la vie privée en tant que considération fondamentale d'une société libre. Invoquant des arrêts rendus dans d'autres contextes, les appelants soutiennent que la vie privée devrait être reconnue en l'espèce comme un intérêt public qui, au vu des faits de la présente affaire, étaye leur

recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

plaidoyer en faveur du prononcé d'ordonnances de mise sous scellés des dossiers d'homologation. Les intimés s'opposent à ce que de telles ordonnances soient rendues, rappelant que la protection de la vie privée est généralement considérée comme une faible justification à une exception à la publicité des débats. Ils affirment qu'après tout, presque chaque procédure judiciaire entraîne un certain dérangement dans la vie des personnes concernées et que ces atteintes à la vie privée doivent être tolérées parce que la publicité des débats judiciaires est essentielle à une saine démocratie.

[6] Le présent pourvoi offre donc l'occasion de trancher la question de savoir si la vie privée peut constituer un intérêt public suivant la jurisprudence relative à la publicité des débats judiciaires et, dans l'affirmative, si la publicité des débats menace sérieusement la vie privée en l'espèce au point de justifier le type d'ordonnances demandé par les appelants.

[7] Pour les motifs qui suivent, je propose de reconnaître qu'un aspect de la vie privée constitue un intérêt public important pour l'application du test pertinent énoncé dans l'arrêt *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522. La tenue de procédures judiciaires publiques peut mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui me semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, est sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée.

[8] Dans la présente affaire, et en gardant cet intérêt à l'esprit, on ne peut pas dire que le risque pour la vie privée est suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en est de même du risque pour la sécurité physique en l'espèce. Dans les circonstances, la Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés et je suis donc d'avis de rejeter le pourvoi.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")[1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

[1] As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate". In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

II. Contexte

[9] Bernard Sherman et Honey Sherman, figures importantes du monde des affaires et de la philanthropie, ont été retrouvés morts dans leur résidence de Toronto en décembre 2017. Leur décès apparemment inexpliqué a suscité un vif intérêt chez le public et une attention médiatique intense. En janvier de l'année suivante, le service de police de Toronto a annoncé que les décès faisaient l'objet d'une enquête pour homicides. Au moment où l'affaire a été portée devant les tribunaux, l'identité et le mobile des personnes responsables demeuraient inconnus.

[10] Les successions du couple et les fiduciaires des successions (collectivement les « fiduciaires »)[1] ont cherché à réfréner l'attention médiatique intense provoquée par les événements. Les fiduciaires souhaitaient veiller au transfert harmonieux des biens du couple, à distance de ce qu'ils percevaient comme un intérêt morbide du public pour les décès inexpliqués et la curiosité suscitée par les importantes sommes d'argent apparemment en jeu.

[11] Quand le temps est venu d'obtenir auprès de la Cour supérieure de justice leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires (« personnes touchées ») de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les fiduciaires ont soutenu que, si les renseignements contenus dans les dossiers judiciaires étaient révélés au public, la sécurité des personnes touchées serait menacée et leur vie privée compromise tant et aussi longtemps que les décès demeureraient inexpliqués et que les personnes responsables de la tragédie seraient en liberté. À l'appui de leur demande, ils ont fait valoir qu'il existait un risque réel et important que les personnes touchées subissent un préjudice sérieux en raison de la diffusion publique des documents dans les circonstances.

[1] Comme l'indique l'intitulé de la cause, les appelants en l'espèce ont, tout au long des procédures, été désignés comme suit : « succession de Bernard Sherman et fiduciaires de la succession et succession de Honey Sherman et fiduciaires de la succession ». Dans les présents motifs, les appelants sont appelés les « fiduciaires » par souci de commodité.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension

[2] The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

[12] Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par Kevin Donovan, un journaliste qui avait rédigé une série d'articles sur le décès du couple, ainsi que par Toronto Star Newspapers Ltd., le journal pour lequel il écrivait (collectivement le « Toronto Star »)[2]. Le Toronto Star a affirmé que les ordonnances portaient atteinte à ses droits constitutionnels à la liberté d'expression et à la liberté de la presse, ainsi qu'au principe corollaire selon lequel les activités des tribunaux devraient être accessibles au public comme moyen de garantir l'équité et la transparence de l'administration de la justice.

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (le juge Dunphy)*

[13] Examinant la question de savoir si les circonstances justifiaient une atteinte au principe de la publicité des débats judiciaires, le juge de première instance s'est appuyé sur l'arrêt *Sierra Club* de notre Cour. Il a souligné qu'une ordonnance de confidentialité ne devrait être accordée que si [TRADUCTION] : « (1) elle est nécessaire [. . .] pour écarter un risque sérieux pour un intérêt important en l'absence d'autres options raisonnables pour écarter ce risque, et (2) ses effets bénéfiques l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression et l'intérêt du public à la publicité des débats judiciaires » (par. 13(d)).

[14] Le juge de première instance a examiné la question de savoir si les intérêts des fiduciaires seraient servis par l'octroi des ordonnances de mise sous scellés. À son avis, les fiduciaires avaient correctement mis en évidence deux intérêts légitimes à l'appui d'une exception au principe de la publicité des débats judiciaires, à savoir [TRADUCTION] « la

[2] L'utilisation du terme « Toronto Star » pour désigner collectivement les deux intimés ne devrait pas être interprétée comme indiquant que seule la société Toronto Star Newspapers Ltd. participe au présent pourvoi. Monsieur Donovan est le seul intimé à avoir été une partie devant toutes les cours. Toronto Star Newspapers Ltd. a participé à la première instance, mais, sur consentement, elle a été retirée comme partie à la Cour d'appel. Par une ordonnance de la juge Karakatsanis datée du 25 mars 2020, Toronto Star Newspapers Ltd. a été ajoutée en tant qu'intimée devant notre Cour.

of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

protection de la vie privée et de la dignité des victimes d'actes criminels ainsi que de leurs êtres chers », et « une crainte raisonnable d'un risque de préjudice chez les personnes connues comme ayant un intérêt à recevoir ou à administrer les biens des défunts » (par. 22-25). S'agissant du premier intérêt, le juge de première instance a conclu que [TRADUCTION] « le degré d'atteinte à cette vie privée et à cette dignité est déjà extrême et [. . .] insoutenable » (par. 23). En ce qui a trait au deuxième intérêt, bien qu'il ait souligné qu'« il aurait été préférable d'inclure des éléments de preuve objectifs de la gravité de ce risque, obtenus, par exemple, auprès des policiers responsables de l'enquête », il a conclu que « l'absence de tels éléments de preuve n'est pas fatale » (par. 24). Les inférences nécessaires pouvaient plutôt être tirées des circonstances, notamment [TRADUCTION] « la volonté de la personne ou des personnes ayant perpétré les crimes de recourir à une violence extrême pour obéir à un mobile quelconque » (*ibid.*). Il a conclu que [TRADUCTION] « l'incertitude actuelle » était source d'une crainte raisonnable du risque de préjudice, et qu'en outre, le préjudice prévisible était « grave » (*ibid.*).

[15] Le juge de première instance a finalement accepté l'argument des fiduciaires selon lequel ces intérêts [TRADUCTION] « l'emportent très fortement » sur ce qu'il a qualifié d'intérêt public proportionnellement restreint à l'égard des « dossiers essentiellement administratifs » en cause (par. 31 et 33). Il a donc conclu que les effets bénéfiques des ordonnances de mise sous scellés sur les droits et les intérêts des personnes touchées l'emportaient sensiblement sur leurs effets préjudiciables.

[16] Enfin, le juge de première instance a examiné la question de savoir quelle ordonnance protégerait les personnes touchées tout en portant le moins possible atteinte au principe de la publicité des débats judiciaires. Il a décidé que, si l'on devait apporter aux deux dossiers le caviardage nécessaire à la protection des intérêts qu'il avait constatés, il n'en resterait plus aucun passage digne d'intérêt susceptible d'être divulgué. Des ordonnances de mise sous scellés d'une durée indéterminée ne lui semblaient toutefois pas une bonne solution. Le juge de première instance a donc fait placer sous scellés les dossiers pour une période initiale de deux ans, avec possibilité de renouvellement.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

[17] The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

B. *Cour d'appel de l'Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (les juges Doherty, Rouleau et Hourigan)*

[17] L'appel interjeté par le Toronto Star a été accueilli à l'unanimité et les ordonnances de mise sous scellés ont été levées.

[18] La Cour d'appel a examiné les deux intérêts qui avaient été soulevés devant le juge de première instance au soutien des ordonnances visant à mettre sous scellés les dossiers d'homologation. En ce qui concerne la nécessité de protéger la vie privée et la dignité des victimes de crimes violents et de leurs êtres chers, elle a rappelé que le type d'intérêt qui est à juste titre protégé par une ordonnance de mise sous scellés doit comporter un élément d'intérêt public. Citant l'arrêt *Sierra Club*, la Cour d'appel a écrit que [TRADUCTION] « [d]es préoccupations personnelles ne peuvent à elles seules justifier une ordonnance de mise sous scellés de documents qui seraient normalement accessibles au public en vertu du principe de la publicité des débats judiciaires » (par. 10). Elle a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas cette qualité d'intérêt public.

[19] Bien qu'elle ait reconnu que la sécurité personnelle des gens constituait, de manière générale, un intérêt public important, la Cour d'appel a écrit qu'il n'y avait aucun élément de preuve en l'espèce permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Le juge de première instance avait commis une erreur sur ce point : [TRADUCTION] « l'idée selon laquelle les bénéficiaires et les fiduciaires sont en quelque sorte en danger parce que les Sherman ont été assassinés n'est pas une inférence, mais une conjecture. Elle ne justifie aucunement l'octroi d'une ordonnance de mise sous scellés » (par. 16).

[20] La Cour d'appel a conclu que les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation. Elle a donc accueilli l'appel et annulé les ordonnances.

C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical

C. *Procédures subséquentes*

[21] L'ordonnance de la Cour d'appel annulant les ordonnances de mise sous scellés a été suspendue en attendant l'issue du présent pourvoi. Le Toronto Star a présenté une requête pour être autorisé à déposer de nouveaux éléments de preuve dans le cadre du pourvoi, éléments de preuve qui comprennent des documents d'enregistrement des droits immobiliers, des transcriptions du contre-interrogatoire d'un détective sur l'enquête relative aux meurtres ainsi que divers articles de presse. Ces éléments de preuve, affirme-t-il, étayent la conclusion selon laquelle les ordonnances de mise sous scellés devraient être levées. La requête a été renvoyée à notre formation.

IV. Moyens

[22] Les fiduciaires ont interjeté appel devant notre Cour pour demander le rétablissement des ordonnances de mise sous scellés rendues par le juge de première instance. En plus de contester la requête en production de nouveaux éléments de preuve, ils soutiennent que les ordonnances sont nécessaires pour écarter un risque sérieux pour la vie privée et la sécurité physique des personnes touchées, et que les effets bénéfiques de la mise sous scellés des dossiers d'homologation judiciaire l'emportent sur les effets préjudiciables du fait de limiter la publicité des débats judiciaires. Les fiduciaires soutiennent que deux erreurs de droit ont amené la Cour d'appel à conclure autrement.

[23] Premièrement, ils soutiennent que la Cour d'appel a conclu à tort que la vie privée est une préoccupation personnelle qui ne peut, à elle seule, constituer un intérêt important suivant l'arrêt *Sierra Club*. Les fiduciaires affirment que le juge de première instance a qualifié à bon droit la vie privée et la dignité comme un intérêt public important qui, étant exposé à un risque sérieux, justifiait les ordonnances. Ils demandent à notre Cour de reconnaître que la vie privée constitue en elle-même un intérêt public important pour les besoins de l'analyse.

[24] Deuxièmement, les fiduciaires avancent que la Cour d'appel a commis une erreur en infirmant la conclusion du juge de première instance selon

harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files

laquelle il y avait un risque sérieux de préjudice physique. Ils font valoir que la Cour d'appel n'a pas reconnu que les tribunaux sont habilités à tirer des inférences raisonnables sur le fondement de la raison et de la logique, même en l'absence d'éléments de preuve précis du risque allégué.

[25] Les fiduciaires affirment que ces erreurs ont amené la Cour d'appel à annuler à tort les ordonnances de mise sous scellés. En réponse aux questions qui leur ont été posées à l'audience, les fiduciaires ont reconnu qu'une ordonnance de caviardage de certains documents dans le dossier ou encore une interdiction de publication pourrait contribuer à apaiser certaines de leurs préoccupations, mais ils ont maintenu qu'aucune de ces mesures ne constituait une solution de rechange raisonnable aux ordonnances de mise sous scellés dans les circonstances.

[26] Les fiduciaires font également valoir que la protection de ces intérêts l'emporte sur les effets préjudiciables des ordonnances. Ils soutiennent que la nature des procédures d'homologation successorale dans la présente affaire atténue l'importance du principe de la publicité des débats judiciaires. Étant donné qu'elle n'est ni contentieuse ni, à proprement parler, nécessaire au transfert des biens au décès, l'homologation est une procédure judiciaire de nature [TRADUCTION] « administrative », ce qui réduit la nécessité d'appliquer le principe de la publicité des débats judiciaires à l'espèce (par. 113-114).

[27] Le Toronto Star soutient pour sa part que la Cour d'appel n'a commis aucune erreur en annulant les ordonnances de mise sous scellés et que l'appel devrait être rejeté. Selon le Toronto Star, bien que la vie privée puisse constituer un intérêt important quand elle révèle la présence d'un élément public, les fiduciaires ont seulement fait état d'un désir subjectif de la part des personnes touchées en l'espèce d'éviter toute publicité supplémentaire, laquelle n'est pas préjudiciable en soi. De l'avis du Toronto Star et de certains des intervenants, la position des fiduciaires reviendrait à permettre à cette part d'inconvénients et d'embarras propre à toute instance judiciaire à avoir préséance sur l'intérêt dans la publicité des débats judiciaires, un principe qui est garanti par la *Charte canadienne des droits et libertés* et dans

is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the

lequel toute la société a un intérêt. Le Toronto Star soutient également que les renseignements contenus dans les dossiers judiciaires ne sont pas de nature très sensible. En ce qui a trait à la question de savoir si les ordonnances de mise sous scellés étaient nécessaires pour protéger les personnes touchées d'un préjudice physique, le Toronto Star fait valoir que la Cour d'appel a eu raison de conclure que les fiduciaires n'avaient pas établi l'existence d'un risque sérieux pour cet intérêt.

[28] Subsidiairement, le Toronto Star affirme que, même s'il existe un risque sérieux pour un intérêt important quelconque, les ordonnances de mise sous scellés ne sont pas nécessaires, car le risque pourrait être écarté par une autre ordonnance moins sévère. De plus, il soutient que les ordonnances ne sont pas proportionnées. En cherchant à minimiser l'importance de la publicité des débats judiciaires dans les procédures d'homologation, les fiduciaires invitent à adopter, à l'égard de la pondération des effets de l'ordonnance, une approche inflexible, incompatible avec le principe de la publicité qui s'applique à toutes les procédures judiciaires. Quoi qu'il en soit, il existe précisément un intérêt public à l'égard de la publicité des débats dans la présente affaire, étant donné que les certificats demandés peuvent avoir une incidence sur les droits de tiers et que la publicité des débats garantit l'équité des procédures, qu'elles soient contestées ou non.

V. Analyse

[29] L'issue du pourvoi dépend de la question de savoir si le juge de première instance aurait dû rendre les ordonnances de mise sous scellés conformément au test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires, test établi par notre Cour dans l'arrêt *Sierra Club*.

[30] La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de notre démocratie (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 23; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 23-26). On dit souvent de la liberté de la presse de rendre compte

principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra*

des procédures judiciaires qu'elle est indissociable du principe de publicité. [TRADUCTION] « En rendant compte de ce qui a été dit et fait dans un procès public, les médias sont les yeux et les oreilles d'un public plus large qui aurait parfaitement le droit d'y assister, mais qui, pour des raisons purement pratiques, ne peut le faire » (*Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, par. 16, citant *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1339-1340, le juge Cory). Le pouvoir d'imposer des limites à la publicité des débats judiciaires afin de servir d'autres intérêts publics est reconnu, mais il doit être exercé avec modération et en veillant toujours à maintenir la forte présomption selon laquelle la justice doit être rendue au vu et au su du public (*Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 878; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, par. 32-39; *Sierra Club*, par. 56). Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir cette présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger ces autres intérêts publics lorsqu'ils entrent en jeu (*Mentuck*, par. 33). Les parties conviennent qu'il s'agit du cadre d'analyse approprié à appliquer pour trancher le présent pourvoi.

[31] Les parties et les tribunaux d'instance inférieure ne s'entendent pas, cependant, sur la façon dont ce test s'applique aux faits de la présente affaire et cela nécessite des éclaircissements sur certains points de l'analyse établie dans l'arrêt *Sierra Club*. Plus fondamentalement, il y a désaccord sur la façon dont un intérêt important à la protection de la vie privée pourrait être reconnu de telle sorte qu'il justifierait des limites à la publicité des débats, et en particulier lorsque la vie privée peut constituer une question d'intérêt public. Les parties font valoir deux principes établis dans la jurisprudence de la Cour à l'appui de leur position respective. Tout d'abord, notre Cour a souvent fait observer que la vie privée est une valeur fondamentale nécessaire au maintien d'une société libre et démocratique (*Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 25; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66, le juge La Forest (dissident, mais non sur ce point); *Nouveau-Brunswick*, par. 40).

Club test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

Dans certains cas, les tribunaux ont invoqué la vie privée pour justifier l'application d'une exception à la publicité des débats judiciaires conformément au test établi dans *Sierra Club* (voir, p. ex., *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, par. 11 et 17). En même temps, la jurisprudence reconnaît qu'un certain degré d'atteinte à la vie privée — qui entraîne des inconvénients, voire de la contrariété ou de l'embarras — est inhérent à toute instance judiciaire accessible au public (*Nouveau-Brunswick*, par. 40). Par conséquent, le maintien de la présomption de la publicité des débats judiciaires signifie reconnaître que ni la susceptibilité individuelle ni le simple désagrément personnel découlant de la participation à des procédures judiciaires ne sont susceptibles de justifier l'exclusion du public des tribunaux (*Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, p. 185; *Nouveau-Brunswick*, par. 41). Déterminer le rôle de la vie privée dans le cadre de l'analyse prévue dans l'arrêt *Sierra Club* exige de concilier ces deux idées, et c'est là le nœud du désaccord entre les parties. Le droit à vie privée n'est pas absolu et le principe de la publicité des débats judiciaires n'est pas sans exception.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[32] Pour les motifs qui suivent, je ne suis pas d'accord avec les fiduciaires pour dire que l'intérêt en matière de vie privée apparemment illimité qu'ils invoquent constitue un intérêt public important au sens de *Sierra Club*. Leur revendication large n'est pas axée sur les éléments de la vie privée qui méritent une protection publique dans le contexte de la publicité des débats judiciaires. Cela ne veut pas dire, cependant, que la protection de la vie privée ne peut jamais justifier une mesure exceptionnelle comme les ordonnances de mise sous scellés sollicitées en l'espèce. Bien que le simple embarras causé par la diffusion de renseignements personnels dans le cadre d'une procédure judiciaire publique ne suffise pas à justifier une limite à la publicité des débats judiciaires, il existe des circonstances où un aspect de la vie privée d'une personne revêt une dimension d'intérêt public manifeste.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this

[33] La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne.

affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent selon *Sierra Club*. La dignité en ce sens est une préoccupation connexe à la vie privée en général, mais elle est plus restreinte que celle-ci; elle transcende les intérêts individuels et, comme d'autres intérêts publics importants, c'est une question qui concerne la société en général. Un tribunal peut faire une exception au principe de la publicité des débats judiciaires, malgré la forte présomption en faveur de son application, si l'intérêt à protéger les aspects fondamentaux de la vie personnelle des individus qui se rapportent à leur dignité est sérieusement menacé par la diffusion de renseignements suffisamment sensibles. La question est de savoir non pas si les renseignements sont « personnels » pour la personne concernée, mais si, en raison de leur caractère très sensible, leur diffusion entraînerait une atteinte à sa dignité que la société dans son ensemble a intérêt à protéger.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[34] Cet intérêt du public à l'égard de la vie privée axe à juste titre l'analyse sur l'incidence de la diffusion de renseignements personnels sensibles, plutôt que sur le simple fait de cette diffusion, intérêt qui est fréquemment menacé dans les procédures judiciaires et qui est nécessaire dans un système qui privilégie la publicité des débats judiciaires. Il s'agit d'un seuil élevé — plus élevé et plus précis que le vaste intérêt en matière de vie privée invoqué en l'espèce par les fiduciaires. Cet intérêt public ne sera sérieusement menacé que lorsque les renseignements en question portent atteinte à ce que l'on considère parfois comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this

[35] Je m'empresse de dire que la personne qui demande une ordonnance visant à faire exception au principe de la publicité des débats judiciaires ne peut se contenter d'affirmer sans fondement que cet intérêt du public à l'égard de la dignité est compromis, pas plus qu'elle ne le pourrait si c'était son intégrité physique qui était menacée. Selon *Sierra Club*, le demandeur doit démontrer, au vu des faits de l'affaire,

dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

(1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;

(2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et

(3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

public à l'égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l'arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] "l'une des caractéristiques d'une société démocratique" » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d'analyse par analogie avec le test de l'arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d'une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps. Dans l'arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d'un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s'exprimant encore une fois au nom de la Cour à l'unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d'un litige » (par. 53). Il a en

case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

même temps précisé que l'intérêt important doit être exprimé en tant qu'intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n'aurait pas été suffisant, mais « l'intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l'égard de la jurisprudence relative à l'arrêt *Oakes*, laquelle met l'accent sur l'objectif « urgen[t] et rée[l] » d'un texte de loi d'application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L'expression « intérêt important » vise donc un large éventail d'objectifs d'intérêt public.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[42] Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants pour l'application de ce test, je partage l'opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu'ils constatent les intérêts publics importants (par. 56). Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d'une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d'une part, un intérêt important et celui de constater, d'autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu'un intérêt public important valide n'est pas sérieusement menacé au vu des faits de l'affaire ou, à l'inverse, parce que les intérêts constatés, qu'ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of

[43] Le test énoncé dans *Sierra Club* continue d'être un guide approprié en ce qui a trait à l'exercice du pouvoir discrétionnaire des tribunaux dans des

"important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of

affaires comme en l'espèce. L'étendue de la catégorie d'« intérêt important » transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer (voir, p. ex., P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (4e éd. 2020), par. 3.185; J. Bailey et J. Burkell, « Revisiting the Open Court Principle in an Era of Online Publication : Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information » (2016), 48 *R.D. Ottawa* 143, p. 154-155). Parallèlement, cependant, l'obligation de démontrer l'existence d'un risque sérieux pour un intérêt important établit un seuil valable nécessaire au maintien de la présomption de publicité des débats. S'ils devaient tout simplement mettre en balance les avantages et les effets négatifs de l'imposition d'une limite à la publicité des débats judiciaires, les décideurs appelés à examiner les incidences concrètes pour les personnes qui comparaissent devant eux pourraient avoir du mal à accorder un poids suffisant aux effets négatifs moins immédiats sur le principe de la publicité des débats. Une telle pondération pourrait échapper à un contrôle efficace en appel. À mon avis, le cadre d'analyse fourni par les arrêts *Dagenais*, *Mentuck* et *Sierra Club* demeure approprié et devrait être confirmé.

[44] Enfin, je rappelle que le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature (*MacIntyre*, p. 185-186; *Vancouver Sun*, par. 31). Je suis en désaccord avec les fiduciaires dans la mesure où ils affirment, dans leurs arguments sur les effets négatifs des ordonnances de mise sous scellés, que l'homologation successorale en Ontario ne fait pas intervenir le principe de la publicité des procédures judiciaires ou que la publicité de ces procédures n'a pas de valeur pour le public. Les certificats que les fiduciaires ont demandés au tribunal sont délivrés sous le sceau de ce tribunal, portant ainsi l'imprimatur du pouvoir judiciaire. La décision du tribunal, même si elle est rendue dans un contexte non contentieux, aura une incidence sur des tiers, par exemple en déterminant l'écrit testamentaire qui constitue un testament valide (voir *Otis c. Otis* (2004), 7 E.T.R. (3d) 221 (C.S. Ont.), par. 23-24). Contrairement

estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its

à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire, et la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence — s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire.

[45] Il est vrai que d'autres mécanismes de planification successorale non assujettis à une procédure d'homologation peuvent permettre que le transfert du patrimoine soit effectué en dehors des voies ordinaires de la succession testamentaire ou *ab intestat* — c'est le cas, par exemple, de certaines assurances et prestations de retraite, et de certains biens détenus en copropriété. Cependant, cela ne change rien au caractère nécessairement public des procédures d'homologation. Le fait que les transferts non assujettis à une procédure d'homologation soustraient aux regards du public certains renseignements se rapportant à l'administration d'une succession ne signifie pas que les fiduciaires en l'espèce, en demandant au tribunal de leur délivrer des certificats, ne font pas d'une façon ou d'une autre intervenir ce principe. Les fiduciaires sollicitent les avantages qui découlent de la procédure judiciaire publique d'homologation : la transparence garantit que le tribunal successoral exerce son pouvoir de manière équitable et efficace (*Vancouver Sun*, par. 25; *Nouveau-Brunswick*, par. 22). La forte présomption en faveur de la publicité des débats judiciaires s'applique manifestement aux procédures d'homologation et les fiduciaires doivent satisfaire au test des limites discrétionnaires à cette publicité.

B. *L'importance pour le public de la protection de la vie privée*

[46] Comme il a été mentionné précédemment, je ne suis pas d'accord avec les fiduciaires pour dire qu'un intérêt illimité en matière de vie privée constitue un intérêt public important au sens du test des

manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

limites discrétionnaires à la publicité des débats judiciaires. Pourtant, dans certaines de ses manifestations, la vie privée revêt une importance sociale allant au-delà de la personne la plus immédiatement touchée. Sur ce fondement, elle ne peut être exclue en tant qu'intérêt qui pourrait justifier, dans les circonstances appropriées, une limite à la publicité des débats judiciaires. En fait, la Cour a dans divers contextes reconnu l'importance pour le public de la vie privée, ce qui permet de mieux comprendre pourquoi l'aspect plus restreint de la vie privée lié à la protection de la dignité constitue un intérêt public important.

[47] Soit dit en tout respect, je ne puis souscrire à la manière dont la Cour d'appel a statué sur l'allégation des fiduciaires selon laquelle il existe un risque sérieux pour l'intérêt à la protection de la vie privée personnelle dans la présente affaire. Pour les juges d'appel, les préoccupations en matière de vie privée soulevées par les fiduciaires équivalent à des [TRADUCTION] « [p]réoccupations personnelles » qui ne peuvent, « à elles seules », satisfaire à l'exigence énoncée dans *Sierra Club* voulant qu'un intérêt important soit exprimé en tant qu'intérêt public (par. 10). Au paragraphe 10 de ses motifs dans l'affaire qui nous occupe, la Cour d'appel s'est appuyée sur l'arrêt *H. (M.E.) c. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, où il a été conclu que [TRADUCTION] « [d]es intérêts purement personnels ne peuvent justifier des ordonnances de non-publication ou de mise sous scellés » (par. 25). Citant les arrêts *MacIntyre* et *Sierra Club* de notre Cour comme des décisions faisant autorité à cet égard, la cour a poursuivi en soulignant que « les préoccupations personnelles d'une partie, y compris les préoccupations relatives à la détresse émotionnelle et à l'embarras bien réels que peuvent subir les parties quand la justice est rendue en public, ne satisferont pas à elle seules au volet nécessité du test » (par. 25). En toute déférence, j'estime que la Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité dans la présente affaire et dans *Williams*. Les préoccupations personnelles qui s'attachent à des aspects de la vie privée de la personne qui comparaît devant les tribunaux peuvent coïncider avec un intérêt public à la confidentialité.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional . . . harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[48] À l'instar de la Cour d'appel, je souscris à l'opinion exprimée en particulier dans *MacIntyre*, une affaire antérieure à la *Charte*, selon laquelle lorsque la publicité des débats judiciaires entraîne une atteinte à la vie privée qui perturbe « la susceptibilité des personnes en cause » (p. 185), cette préoccupation est généralement insuffisante pour justifier une ordonnance de mise sous scellés ou une ordonnance semblable et ne constitue pas un intérêt public important suivant l'arrêt *Sierra Club*. Cependant, je ne suis pas d'accord avec la Cour d'appel dans la présente affaire et dans *Williams* pour dire que c'est parce que l'atteinte n'occasionne que des [TRADUCTION] « préoccupations personnelles ». Certaines préoccupations personnelles — même « à elles seules » — peuvent coïncider avec des intérêts publics importants au sens de *Sierra Club*. Pour reprendre l'expression du juge Binnie dans *F.N. (Re)*, 2000 CSC 35, [2000] 1 R.C.S. 880, par. 10, il y a un « droit du public à la confidentialité » qui touche, d'abord et avant tout, la personne concernée et qui est très certainement une préoccupation personnelle. Même dans *Williams*, la Cour d'appel a pris soin de souligner que lorsque, sans protection de la vie privée, une personne serait exposée à [TRADUCTION] « un risque important de préjudice émotionnel [. . .] débilitant », une exception à la publicité des débats devrait être permise (par. 29-30). Pour savoir si un intérêt en matière de vie privée reflète un « droit du public à la confidentialité », il ne s'agit donc pas de se demander si l'intérêt est le reflet ou tire sa source de « préoccupations personnelles » relatives à la vie privée des personnes concernées. Il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public en matière de confidentialité. Ces intérêts relatifs à la vie privée peuvent, à mon avis, être des intérêts publics importants au sens de *Sierra Club*. Il est vrai que la vie privée d'une personne est d'une importance primordiale pour celle-ci. Cependant, notre Cour reconnaît depuis longtemps que la protection de la vie privée est, dans divers contextes, dans l'intérêt de la société dans son ensemble.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on

[49] La proposition selon laquelle la vie privée est importante, non seulement pour la personne touchée, mais également pour notre société, est profondément enracinée dans la jurisprudence de la Cour en dehors

court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59).

du contexte du test des limites discrétionnaires à la publicité des débats judiciaires. Cela aide à expliquer pourquoi la vie privée ne saurait être rejetée en tant que simple préoccupation personnelle. Cependant, les différences clés dans ces contextes sont telles que l'importance pour le public de la vie privée ne saurait être transposée sans adaptation dans le contexte de la publicité des débats judiciaires. Seuls certains aspects particuliers des intérêts en matière de vie privée peuvent constituer des intérêts publics importants suivant l'arrêt *Sierra Club*.

[50] Dans le contexte de l'art. 8 de la *Charte* et des mesures législatives sur la protection de la vie privée dans le secteur public, le juge La Forest a cité un universitaire américain spécialiste de la vie privée, Alan F. Westin, à l'appui de la thèse selon laquelle la vie privée est une valeur fondamentale de l'État moderne; il l'a fait d'abord dans *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428 (motifs concordants), puis dans *Dagg*, par. 65 (dissident, mais non sur ce point). Dans ce dernier arrêt, le juge La Forest a écrit : « La protection de la vie privée est une valeur fondamentale des États démocratiques modernes. Étant l'expression de la personnalité ou de l'identité unique d'une personne, la notion de vie privée repose sur l'autonomie physique et morale — la liberté de chacun de penser, d'agir et de décider pour lui-même » (par. 65 (références omises)). Notre Cour a entériné à l'unanimité cette déclaration dans *Lavigne*, par. 25.

[51] De plus, dans l'arrêt *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733 (« *TTUAC* »), qui a été jugé dans le contexte d'une loi régissant l'utilisation de renseignements par des organisations, il a été reconnu que l'objectif de fournir à une personne un certain droit de regard sur les renseignements la concernant était « intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l'importance va de soi » (par. 24). L'importance de la vie privée, son « caractère quasi constitutionnel » et son rôle dans la protection de l'autonomie morale continuent de trouver écho dans notre jurisprudence récente (voir, p. ex., *Lavigne*, par. 24; *Bragg*, par. 18, la juge Abella, citant *Toronto Star Newspaper Ltd. c. R.*,

In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean,

[3] At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

2012 ONCJ 27, 289 C.C.C. (3d) 549, par. 40-41 et 44; *Douez c. Facebook, Inc.*, 2017 CSC 33, [2017] 1 R.C.S. 751, par. 59). Dans l'arrêt *Douez*, les juges Karakatsanis, Wagner (maintenant juge en chef) et Gascon ont insisté sur le même point, ajoutant que « la croissance d'Internet — un réseau quasi atemporel au rayonnement infini — a exacerbé le préjudice susceptible d'être infligé à une personne par une atteinte à son droit à la vie privée » (par. 59).

[52] La protection de la vie privée en tant qu'intérêt public est mise en évidence par des aspects particuliers de cette protection présents dans les lois fédérales et provinciales (voir, p. ex., *Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21; *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, c. 5 (« LPRPDE »); *Loi sur l'accès à l'information et la protection de la vie privée*, L.R.O. 1990, c. F.31; *Charte des droits et libertés de la personne*, RLRQ, c. C-12, art. 5; *Code civil du Québec*, art. 35 à 41)[3]. En outre, en examinant la constitutionnalité d'une exception législative au principe de la publicité des débats judiciaires, notre Cour a reconnu que la protection de la vie privée de la personne pouvait constituer un objectif urgent et réel (*Edmonton Journal*, p. 1345, le juge Cory; voir également les motifs concordants de la juge Wilson, à la p. 1354, dans lesquels a explicitement été souligné « l'intérêt public à la protection de la vie privée de l'ensemble des parties aux affaires matrimoniales par rapport à l'intérêt public à la publicité du processus judiciaire »). L'importance sociale et publique de la vie privée de la personne trouve également un appui continu dans la doctrine (voir, p. ex., A. J. Cockfield, « Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies » (2007), 40 *U.B.C. L. Rev.* 41, p. 41; K. Hughes, « A Behavioural Understanding of Privacy and its Implications for Privacy Law » (2012), 75 *Mod. L. Rev.* 806, p. 823; P. Gewirtz,

[3] Au moment de la rédaction des présents motifs, la Chambre des communes étudiait un projet de loi destiné à remplacer la première partie de la *LPRPDE* : le projet de loi C-11, *Loi édictant la Loi sur la protection de la vie privée des consommateurs et la Loi sur le Tribunal de la protection des renseignements personnels et des données et apportant des modifications corrélatives et connexes à d'autres lois*, 2e sess., 43e lég., 2020.

however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of

« Privacy and Speech », [2001] *Sup. Ct. Rev.* 139, p. 139). Il est donc inapproprié, en toute déférence, de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. Cela ne signifie pas, cependant, que la vie privée est, de façon générale, un intérêt public important dans le contexte de l'imposition de limites à la publicité des débats judiciaires.

[53] Le fait que l'affaire dont était saisi le juge de première instance concernait des personnes défendant leurs propres intérêts en matière de vie privée, intérêts qui étaient indéniablement importants pour elles en tant qu'individus, ne signifie pas qu'il n'y a aucun intérêt public en jeu. Dans *F.N. (Re)*, il était question de l'intérêt personnel que les jeunes contrevenants avaient à garder l'anonymat dans les procédures judiciaires afin de favoriser leur réadaptation personnelle (par. 11). Selon le juge Binnie, la société dans son ensemble avait un intérêt dans les perspectives personnelles de réadaptation de l'adolescent visé. Cette même idée exposée dans *F.N. (Re)* a été citée à l'appui de la conclusion selon laquelle l'intérêt en cause dans *Sierra Club* était un intérêt public. Cet intérêt, qui prenait tout d'abord sa source dans une entente touchant personnellement les parties contractantes concernées, était une question de nature privée qui, en plus de son intérêt personnel pour les parties, faisait état d'un « intérêt public à la confidentialité » (*Sierra Club*, par. 55). De même, si les fiduciaires ont un intérêt personnel à protéger leur vie privée, cela ne signifie pas que le public n'a pas un intérêt à cet égard, car — comme l'a clairement souligné la Cour —, cet intérêt est lié à l'autonomie morale et à la dignité, lesquelles constituent des préoccupations urgentes et réelles.

[54] Dans le présent pourvoi, le Toronto Star avance que les préoccupations légitimes en matière de vie privée seraient efficacement protégées par une ordonnance discrétionnaire dans le cas où il y aurait [TRADUCTION] « quelque chose de plus » pour les élever au-delà des préoccupations et de la susceptibilité personnelles (m.i., par. 73). Le Centre d'action pour la sécurité du revenu, par exemple, soutient que la protection de la vie privée sert les intérêts du public qui consistent à prévenir les préjudices et à faire en sorte que les particuliers ne soient pas

privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

dissuadés de recourir aux tribunaux. Je reconnais que ces notions sont liées, mais il faut, à mon avis, prendre soin de ne pas confondre l'importance pour le public de la vie privée avec l'importance pour le public d'autres intérêts; des aspects de la vie privée, comme la dignité, peuvent constituer des intérêts publics importants en soi. Un risque pour la vie privée personnelle peut être lié à un risque de préjudice psychologique, comme c'était le cas dans l'affaire *Bragg* (par. 14; voir également J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (feuilles mobiles), section 2.4.1). Cependant, il se peut que les préoccupations relatives à la vie privée ne coïncident pas toujours avec le désir d'éviter un préjudice psychologique et soient plutôt axées, par exemple, sur la protection de la réputation professionnelle d'une personne (voir, p. ex., *R. c. Paterson* (1998), 102 B.C.A.C. 200, par. 76, 78 et 87-88). De même, il peut y avoir des circonstances où la perspective de devoir communiquer les renseignements personnels nécessaires à la poursuite d'une action en justice peut dissuader une personne d'intenter cette action (voir *S. c. Lamontagne*, 2020 QCCA 663, par. 34-35 (CanLII)). De la même manière, la perspective de devoir communiquer des renseignements commerciaux sensibles aurait nui à la conduite de la défense d'une partie dans *Sierra Club* (par. 71), ou pourrait inciter une personne à régler un litige prématurément (K. Eltis, *Courts, Litigants, and the Digital Age* (2e éd. 2016), p. 86). Cependant, cela ne signifie pas nécessairement qu'un intérêt public en matière de vie privée est entièrement subsumé dans de telles préoccupations. Je tiens à souligner, par exemple, que les préoccupations relatives à l'accès à la justice ne s'appliquent pas lorsque l'intérêt à protéger en matière de vie privée est celui d'un tiers au litige, comme un témoin, dont l'accès aux tribunaux n'est pas en cause et à qui il n'est pas loisible de mettre fin au litige et d'éviter toute incidence sur sa vie privée (voir, p. ex., *Himel c. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, par. 58; voir également Rossiter, section 2.4.2(2)). En tout état de cause, la reconnaissance de ces importants intérêts publics connexes et valides ne permet pas de savoir si certains aspects de la vie privée constituent en eux-mêmes des intérêts publics importants et ne diminue en rien le caractère public distinctif de la vie privée, examiné précédemment.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)), and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy

[55] En fait, les atteintes particulières à la vie privée ayant été occasionnées par la publicité des débats judiciaires ne sont pas passées inaperçues et n'ont pas non plus été écartées au motif qu'il s'agissait de simples préoccupations personnelles. Les tribunaux ont exercé leur pouvoir discrétionnaire de limiter la publicité des débats judiciaires afin de protéger les renseignements personnels de la publicité, y compris pour empêcher que soient divulgués l'orientation sexuelle d'une personne (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), sa séropositivité (voir, p. ex., *A.B. c. Canada (Citoyenneté et Immigration)*, 2017 CF 629, par. 9 (CanLII)), et ses antécédents de toxicomanie et de criminalité (voir, p. ex., *R. c. Pickton*, 2010 BCSC 1198, par. 11 et 20 (CanLII)). Notre Cour a souligné cette nécessité de concilier l'intérêt du public à l'égard de la vie privée et le principe de la publicité des débats judiciaires (voir, p. ex., *Edmonton Journal*, p. 1353, la juge Wilson). Dans un article de doctrine, la juge en chef McLachlin a expliqué que [TRADUCTION] « [s]i nous nous préoccupons sérieusement de la vie intime des gens, nous devons protéger un minimum de vie privée. De même, si nous nous préoccupons sérieusement de notre système judiciaire, les débats judiciaires doivent être publics. La question est de savoir comment concilier ces deux impératifs d'une manière qui soit équitable et raisonnée » (« Courts, Transparency and Public Confidence – To the Better Administration of Justice » (2003), 8 *Deakin L. Rev.* 1, p. 4). En cherchant à concilier ces deux impératifs, il faut alors se demander si la dimension de la vie privée en cause constitue un intérêt public important qui, lorsqu'il est sérieusement menacé, justifierait de réfuter la forte présomption en faveur de la publicité des débats judiciaires.

C. *L'intérêt public important en matière de vie privée se rapporte à la protection de la dignité de la personne*

[56] Bien que l'importance pour le public de la protection de la vie privée ait clairement été reconnue par la Cour dans divers contextes, la prudence est de mise lorsqu'il s'agit d'utiliser cette notion dans le cadre du test des limites discrétionnaires à la publicité des débats judiciaires. Il est bien établi en droit que les procédures judiciaires publiques, de par leur

are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (*ibid.*).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For

nature, peuvent être une source de désagrément et d'embarras, et l'on considère généralement que ces atteintes à la vie privée ne sont pas suffisamment importantes pour réfuter la présomption de publicité des débats. Le Toronto Star a exprimé la crainte que la reconnaissance de la vie privée en tant qu'intérêt public important n'allège le fardeau de preuve incombant aux demandeurs, car la vie privée des parties à un litige sera, à certains égards, toujours menacée dans les procédures judiciaires. Je conviens que l'exigence de démontrer l'existence d'un risque sérieux pour un intérêt important est un élément préliminaire clé de l'analyse qui doit être maintenu afin de protéger le principe de la publicité des débats judiciaires. La reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité si la vie privée est définie trop largement sans tenir compte de son caractère public.

[57] La vie privée pose des défis dans l'application du test des limites discrétionnaires à la publicité des débats judiciaires en raison de la diffusion nécessaire de renseignements que supposent des procédures publiques. Il convient de rappeler que lorsqu'il a écrit, dans l'arrêt *MacIntyre*, que « le secret est l'exception et que la publicité est la règle », le juge Dickson, plus tard juge en chef, examinait explicitement un argument relatif à la vie privée en revenant sur un point de vue préconisé maintes fois auparavant devant les tribunaux selon lequel « le droit des parties au litige de jouir de leur vie privée exige des audiences à huis clos » (p. 185 (je souligne)), et en rejetant celui-ci. Le juge Dickson a rejeté l'opinion selon laquelle les préoccupations personnelles en matière de vie privée exigent des audiences à huis clos, expliquant qu'« [e]n règle générale, la susceptibilité des personnes en cause ne justifie pas qu'on exclut le public des procédures judiciaires » (*ibid.*).

[58] Bien qu'il ait rendu sa décision avant le prononcé de l'arrêt *Dagenais* et qu'il ne commente donc pas les étapes précises de l'analyse telles que nous les comprenons aujourd'hui, j'estime que le juge Dickson a, à juste titre, reconnu que le principe de la publicité des débats judiciaires apporte des limites nécessaires au droit à la vie privée. Quoique les particuliers puissent s'attendre à ce que les renseignements qui les concernent ne soient pas révélés

example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

dans le cadre de procédures judiciaires, le principe de la publicité des débats judiciaires s'oppose par présomption à cette attente. Par exemple, dans l'arrêt *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, le juge LeBel a conclu que la « partie qui engage un débat judiciaire renonce, à tout le moins en partie, à la protection de sa vie privée » (par. 42). L'arrêt *MacIntyre* et les jugements similaires reconnaissent — en affirmant que la publicité est la règle et le secret, l'exception — que le droit à la vie privée, quelle qu'en soit la définition, cède le pas, dans une certaine mesure, à l'idéal de la publicité des débats judiciaires. Je partage le point de vue selon lequel le principe de la publicité des débats suppose que cette limite au droit à la vie privée est justifiée.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[59] Le Toronto Star a donc raison d'affirmer que la vie privée des personnes sera très souvent en quelque sorte menacée dans les procédures judiciaires. Les litiges entre et concernant des particuliers qui se déroulent dans le cadre de débats judiciaires publics révèlent nécessairement des renseignements qui pourraient autrement être restés à l'abri des regards du public. En fait, tout comme la Cour d'appel en l'espèce, les tribunaux ont explicitement fait mention de cette préoccupation lorsqu'ils ont conclu que de simples inconvénients ne suffisaient pas à franchir le seuil initial du test (voir, p. ex., *3834310 Canada inc. c. Chamberland*, 2004 CanLII 4122 (C.A. Qc), par. 30). Affirmer que toute incidence sur la vie privée d'une personne suffit à établir un risque sérieux pour un intérêt public important pour l'application du test des limites discrétionnaires à la publicité des débats judiciaires pourrait rendre cette exigence préliminaire théorique. Le sort de nombreuses causes dépendrait de la pondération à l'étape de la proportionnalité. Une telle évolution reviendrait à déroger à l'arrêt *Sierra Club*, qui constitue le cadre approprié à appliquer, lequel doit être maintenu.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90

[60] De plus, la reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée pourrait s'avérer trop indéterminée et difficile à appliquer. La vie privée est une notion complexe et contextuelle (*Dagg*, par. 67; voir également B. McIsaac, K. Klein et S. Brown, *The Law of Privacy in Canada* (feuilles mobiles), vol. 1, p. 1-4; D. J.

Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such

Solove, « Conceptualizing Privacy » (2002), 90 *Cal. L. Rev.* 1087, p. 1090). En fait, notre Cour a décrit la nature des limites à la vie privée comme étant dans un état de « confusion [. . .] sur le plan théorique » (*R. c. Spencer*, 2014 CSC 43, [2014] 2 R.C.S. 212, par. 35). Cela dépend en grande partie du contexte dans lequel la vie privée est invoquée. Je suis d'accord avec le Toronto Star pour dire que la reconnaissance de la vie privée, sans nuances, comme un intérêt important dans le contexte du test des limites discrétionnaires à la publicité des débats judiciaires, ainsi que le revendiquent les fiduciaires en l'espèce, susciterait énormément de confusion. Il serait difficile pour les tribunaux de mesurer un risque sérieux pour un tel intérêt, en raison de ses multiples facettes.

[61] Bien que je reconnaisse la validité de ces préoccupations, je ne suis pas d'accord pour dire qu'elles exigent que la vie privée ne soit jamais prise en considération lorsqu'il s'agit de décider s'il existe un risque sérieux pour un intérêt public important. J'arrive à cette conclusion pour deux raisons. Premièrement, il est possible d'atténuer le problème de la complexité de la vie privée en se concentrant sur l'objectif qui sous-tend la protection publique de la vie privée, lequel est pertinent dans le cadre du processus judiciaire, de manière à s'en tenir précisément à l'aspect qui transcende les intérêts des parties dans ce contexte. Cette dimension plus restreinte de la vie privée est la protection de la dignité, un intérêt public important qui peut être menacé par la publicité des débats judiciaires. D'ailleurs, plutôt que d'essayer d'appliquer une notion unique et complexe de la vie privée à tous les contextes, notre Cour s'est généralement arrêtée sur des intérêts plus précis en matière de vie privée adaptés à la situation particulière en cause (*Spencer*, par. 35; *Edmonton Journal*, p. 1362, la juge Wilson). C'est ce qu'il faut faire en l'espèce, en vue de cerner l'aspect public de la vie privée que la publicité des débats risque de miner indûment.

[62] Deuxièmement, je rappelle que, pour franchir la première étape de l'analyse, il ne suffit pas d'invoquer un intérêt important, mais il faut aussi réfuter la présomption de publicité des débats en démontrant l'existence d'un risque sérieux pour cet intérêt. Le

an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

fardeau d'établir l'existence d'un risque pour un tel intérêt au vu des faits d'une affaire donnée constitue le véritable seuil initial à franchir pour la personne cherchant à restreindre la publicité. Il n'est jamais suffisant d'alléguer la seule existence d'un intérêt public important reconnu. Démontrer l'existence d'un risque sérieux pour cet intérêt demeure toujours nécessaire. Ce qui importe, c'est que l'intérêt soit précisément défini de manière à ce qu'il n'englobe que les aspects de la vie privée qui font entrer en jeu des objectifs publics légitimes, de sorte que le seuil à franchir pour établir l'existence d'un risque sérieux pour cet intérêt demeure élevé. De cette manière, les tribunaux peuvent efficacement maintenir la garantie de la présomption de publicité des débats.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[63] Plus particulièrement, pour maintenir l'intégrité du principe de la publicité des débats judiciaires, un intérêt public important à l'égard de la protection de la dignité devrait être considéré sérieusement menacé seulement dans des cas limités. Rien en l'espèce n'écarte le principe selon lequel le secret en matière de procédures judiciaires doit être exceptionnel. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte au principe de la publicité des débats judiciaires (*MacIntyre*, p. 185; *Nouveau-Brunswick*, par. 40; *Williams*, par. 30; *Coltsfoot Publishing Ltd. c. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, par. 97). Ces principes n'empêchent pas de reconnaître l'importance du caractère public d'un intérêt en matière de vie privée quand celui-ci est lié à la protection de la dignité. Ils obligent simplement à faire la preuve de l'existence d'un risque sérieux pour cet intérêt de manière à justifier, à titre exceptionnel, une restriction à la publicité des débats, comme c'est le cas pour tout intérêt public important au regard de l'arrêt *Sierra Club*. Comme l'expliquent les professeures Sylvette Guillemard et Séverine Menétrey, « [l]a confidentialité des débats peut se justifier notamment pour protéger la vie privée des parties [. . .] La jurisprudence affirme cependant que l'embarras ou la honte ne sont pas des motifs suffisants pour ordonner le huis clos ou la non-publication » (*Comprendre la procédure civile québécoise* (2e éd. 2017), p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[64] Comment devrait-on considérer que l'intérêt en matière de vie privée en cause soulève un intérêt public important qui est pertinent pour les besoins du test des limites discrétionnaires à la publicité des débats judiciaires dans le présent contexte? Il est utile de rappeler que les ordonnances rendues en première instance avaient été demandées pour limiter l'accès aux documents et aux renseignements figurant dans les dossiers judiciaires. L'argument des fiduciaires sur ce point était directement axé sur le risque de diffusion immédiate et à grande échelle, par le Toronto Star, de renseignements permettant d'identifier des personnes ainsi que d'autres renseignements sensibles contenus dans les documents placés sous scellés. Les fiduciaires soutiennent que cette diffusion constituerait une atteinte injustifiée à la vie privée des personnes touchées, qui s'ajouterait à la contrariété qu'elles ont déjà subie en raison de la publicité ayant entouré le décès des Sherman.

[65] À mon avis, il est bon de laisser les personnes libres de fixer des limites quant à savoir à quel moment les renseignements très sensibles les concernant seront communiqués à d'autres personnes dans la sphère publique, et de quelle manière et dans quelle mesure ils le seront. En effet, en choisissant la manière dont on se présente en public, on protège son autonomie morale et sa dignité en tant que personne. La Cour a eu l'occasion de faire ressortir le lien entre l'intérêt en matière de vie privée mis en jeu par la tenue de procédures judiciaires publiques et la protection de la dignité plus particulièrement. Par exemple, dans l'arrêt *Edmonton Journal*, la juge Wilson a souligné que la disposition contestée, qui devait avoir pour effet de limiter la publication de détails sur des procédures matrimoniales, portait sur « un aspect un peu différent de la vie privée, un aspect qui se rapproche davantage de la protection de la dignité personnelle [. . .], c'est-à-dire l'angoisse et la perte de dignité personnelle qui peuvent résulter de la publication dans les journaux de détails gênants de la vie privée d'une personne » (p. 1363-1364). Citons comme autre exemple l'affaire *Bragg*, dans laquelle la protection de la capacité des jeunes à contrôler des renseignements sensibles avait été considérée comme favorisant le respect [TRADUCTION] « de leur dignité, de leur intégrité personnelle et de leur autonomie » (par. 18, citant *Toronto Star Newspaper Ltd.*, par. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990

[66] Conformément à cette jurisprudence, je relève, par exemple, que le législateur québécois a expressément fait ressortir la protection de la dignité lorsque le test énoncé dans l'arrêt *Sierra Club* a été codifié dans le *Code de procédure civile*, RLRQ, c. C-25.01 (« *C.p.c.* »), art. 12 (voir Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01* (2015), art. 12). Selon l'art. 12 *C.p.c.*, un tribunal peut faire exception de façon discrétionnaire au principe de la publicité si « l'ordre public, notamment la protection de la dignité des personnes concernées par une demande, ou la protection d'intérêts légitimes importants » l'exige.

[67] La notion d'ordre public témoigne d'une souplesse analogue à la notion d'intérêt public important suivant l'arrêt *Sierra Club*; elle rappelle pourtant que l'intérêt invoqué transcende, en ce qui a trait à son importance et à ses conséquences, la susceptibilité purement subjective des personnes touchées. Tout comme l'« intérêt public important » qui doit être sérieusement menacé pour justifier des ordonnances de mise sous scellés dans le présent pourvoi, l'ordre public englobe un large éventail de principes généraux et de normes impératives qu'un législateur et les tribunaux considèrent comme fondamentaux pour une société donnée (voir *Goulet c. Cie d'Assurance-Vie Transamerica du Canada*, 2002 CSC 21, [2002] 1 R.C.S. 719, par. 42-44, citant *Godbout c. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), p. 2570, conf. par [1997] 3 R.C.S. 844). Comme l'a écrit un juge québécois en renvoyant à l'arrêt *Sierra Club* avant l'adoption de l'art. 12 *C.p.c.*, l'intérêt doit être considéré comme étant défini « en termes d'intérêt public à la confidentialité » (voir *3834310 Canada inc.*, par. 24, le juge Gendreau s'exprimant au nom de la Cour d'appel). Parmi les diverses considérations qui composent la notion d'ordre public et d'autres intérêts légitimes évoqués par l'art. 12 *C.p.c.*, il est significatif que la dignité, et non une référence générale à la vie privée, au préjudice ou à l'accès à la justice, se soit vu accorder une place de choix. En effet, c'est cet aspect restreint de la vie privée considéré comme un droit fondamental que les tribunaux ont retenu avant l'adoption de l'art. 12 *C.p.c.* — « ce qui fait partie de la vie intime de la personne, bref ce qui constitue un

CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

cercle personnel irréductible » (*Godbout*, p. 2569, le juge Baudouin; voir également *A. c. B.*, 1990 CanLII 3132 (C.A. Qc), par. 20, le juge Rothman).

[68] La « protection de la dignité des personnes concernées » est désormais consacrée comme l'archétype de l'intérêt d'ordre public à l'art. 12 *C.p.c.* C'est le modèle de l'intérêt public important à la confidentialité de *Sierra Club* qui sert à justifier une exception à la publicité des débats (S. Rochette et J.-F. Côté, « Article 12 », dans L. Chamberland, dir., *Le grand collectif : Code de procédure civile — Commentaires et annotations* (5e éd. 2020), vol. 1, p. 102; D. Ferland et B. Emery, *Précis de procédure civile du Québec* (6e éd. 2020), vol. 1, par. 1-111). La dignité donne une expression concrète à cet intérêt d'ordre public parce que toute la société a intérêt à ce qu'elle soit protégée, malgré ses liens personnels avec les personnes touchées. Cette codification de la notion d'intérêt public important de *Sierra Club* souligne l'importance primordiale de la dignité humaine et la pertinence de limiter la publicité des débats judiciaires sur ce fondement au lieu de donner une interprétation trop large à la vie privée qui pourrait par ailleurs ne pas convenir au contexte de la publicité des débats.

[69] Dans le même ordre d'idée, on a fait valoir qu'il est utile de considérer que la vie privée se fonde sur la dignité dans le contexte des défis que posent les communications numériques (K. Eltis, « The Judicial System in the Digital Age : Revisiting the Relationship between Privacy and Accessibility in the Cyber Context » (2011), 56 *R.D. McGill* 289, p. 314).

[70] Il est également significatif, à mon avis, que le juge de première instance en l'espèce ait explicitement reconnu, en réponse aux arguments pertinents des fiduciaires, un intérêt à [TRADUCTION] « la protection de la vie privée et de la dignité des victimes d'actes criminels ainsi que de leurs êtres chers » (par. 23 (je souligne)). Cela montre clairement que la préoccupation centrale des personnes touchées à cet égard n'est pas simplement de protéger leur vie privée en tant que telle, mais bien de protéger leur vie privée là où elle coïncide avec le caractère public de leurs intérêts en matière de dignité.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible

[71] Les atteintes à la vie privée qui entraînent une perte de contrôle à l'égard de renseignements personnels fondamentaux peuvent porter préjudice à la dignité d'une personne, car elles minent sa capacité à présenter de manière sélective certains aspects de sa personne aux autres (D. Matheson, « Dignity and Selective Self-Presentation », dans I. Kerr, V. Steeves et C. Lucock, dir., *Lessons from the Identity Trail : Anonymity, Privacy and Identity in a Networked Society* (2009), 319, p. 327-328; L. M. Austin, « Re-reading Westin » (2019), 20 *Theor. Inq. L.* 53, p. 66-68; Eltis (2016), p. 13). La dignité, employée dans ce contexte, est un concept social qui consiste à présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée (voir de manière générale Matheson, p. 327-328; Austin, p. 66-68). La dignité est minée lorsque les personnes perdent le contrôle sur la possibilité de fournir des renseignements sur elles-mêmes qui touchent leur identité fondamentale, car un aspect très sensible de qui elles sont qu'elles n'ont pas décidé consciemment de communiquer est désormais accessible à autrui et risque de façonner la manière dont elles sont perçues en public. Cela a même été évoqué par le juge La Forest, dissident mais non sur ce point, dans l'arrêt *Dagg*, lorsqu'il a parlé de la notion de vie privée comme « [é]tant l'expression de la personnalité ou de l'identité unique d'une personne » (par. 65).

[72] En cas d'atteinte à la dignité, l'incidence sur la personne n'est pas théorique, mais pourrait entraîner des conséquences humaines réelles, y compris une détresse psychologique (voir de manière générale *Bragg*, par. 23). Dans l'arrêt *Dyment*, le juge La Forest a fait remarquer dans ses motifs concordants que la notion de vie privée est essentielle au bien-être d'une personne (p. 427). Vu sous cet angle, un intérêt en matière de vie privée, lorsqu'il protège les renseignements fondamentaux associés à la dignité qui est nécessaire au bien-être d'une personne, commence à ressembler beaucoup à l'intérêt relatif à la sécurité physique également soulevé en l'espèce, dont la nature importante et publique n'est pas débattue, et n'est pas non plus, selon moi, sérieusement discutable. Lorsque le fonctionnement des tribunaux menace le bien-être physique d'une

court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of

personne, l'administration de la justice en souffre, car un système judiciaire responsable est sensible aux dommages physiques qu'il inflige aux individus et s'efforce d'éviter de tels effets. De même, j'estime qu'un tribunal responsable doit être sensible et attentif aux dommages qu'il cause à d'autres éléments fondamentaux du bien-être individuel, notamment la dignité individuelle. Ce parallèle aide à comprendre que la dignité est une dimension plus limitée de la vie privée, pertinente en tant qu'intérêt public important dans le contexte de la publicité des débats judiciaires.

[73] Je suis donc d'avis que protéger les gens contre la menace à leur dignité qu'entraîne la diffusion de renseignements révélant des aspects fondamentaux de leur vie privée dans le cadre de procédures judiciaires publiques constitue un intérêt public important pour l'application du test.

[74] Insister sur la valeur sous-jacente de la vie privée lorsqu'il s'agit de protéger la dignité d'une personne de la diffusion de renseignements privés dans le cadre de débats judiciaires publics permet de surmonter les critiques selon lesquelles la vie privée sera toujours menacée dans un tel cadre et constitue une notion théoriquement complexe. La publicité des débats donne lieu à des atteintes à la vie privée personnelle dans presque tous les cas, mais la dignité en tant qu'intérêt public dans la protection de la sensibilité fondamentale d'une personne entre plus rarement en jeu. Plus précisément, et conformément à l'approche prudente servant à reconnaître des intérêts publics importants, cet intérêt en matière de vie privée, bien qu'il soit déterminé par rapport au contexte factuel plus large, ne sera sérieusement menacé que lorsque le caractère sensible des renseignements touche à l'aspect le plus intime de la personne.

[75] S'il porte essentiellement sur la protection de la dignité d'une personne, cet intérêt sera miné dans le cas de renseignements qui révèlent quelque chose de sensible sur elle en tant qu'individu, par opposition à des renseignements d'ordre général révélant peu ou rien sur ce qu'elle est en tant que personne. Par conséquent, les renseignements qui

intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity

seront révélés en raison de la publicité des débats judiciaires doivent être constitués de détails intimes ou personnels concernant une personne — ce que notre Cour a décrit, dans sa jurisprudence relative à l'art. 8 de la *Charte*, comme le cœur même des « renseignements biographiques » — pour qu'un risque sérieux pour un intérêt public important soit reconnu dans ce contexte (*R. c. Plant*, [1993] 3 R.C.S. 281, p. 293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 60; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 46). La dignité transcende les inconvénients personnels en raison de la nature très sensible des renseignements qui pourraient être révélés. Notre Cour a tracé dans l'arrêt *Cole* une ligne de démarcation similaire entre le caractère sensible des renseignements personnels et l'intérêt du public à protéger ces renseignements en ce qui a trait au cœur même des renseignements biographiques. Elle a conclu que « les Canadiens raisonnables et bien informés » seraient plus disposés à reconnaître l'existence d'un intérêt en matière de vie privée lorsque les renseignements pertinents concernent le cœur même des « renseignements biographiques » ou, « [a]utrement dit, plus les renseignements sont personnels et confidentiels » (par. 46). La présomption de publicité des débats signifie que le simple désagrément associé à des atteintes moindres à la vie privée sera généralement toléré. Cependant, il est dans l'intérêt public de veiller à ce que cette publicité n'entraîne pas indûment la diffusion de ces renseignements fondamentaux qui menacent la dignité — même s'ils sont « personnels » pour la personne touchée.

[76] Selon le test des limites discrétionnaires à la publicité des débats judiciaires, il incombe au demandeur de démontrer que l'intérêt public important est sérieusement menacé. Reconnaître que la vie privée, considérée au regard de la dignité, n'est sérieusement menacée que lorsque les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles permet d'établir un seuil compatible avec la présomption de publicité des débats. Ce seuil est tributaire des faits. Il répond à la préoccupation, mentionnée précédemment, portant que les dossiers judiciaires comportent fréquemment des renseignements personnels, mais conclure que cela suffit à franchir le

of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses

seuil du risque sérieux dans tous les cas mettrait en péril la structure du test. Exiger du demandeur qu'il démontre le caractère sensible des renseignements comme condition nécessaire à la conclusion d'un risque sérieux pour cet intérêt a pour effet de limiter le champ d'application de l'intérêt aux seuls cas où la justification de la non-divulgation des aspects fondamentaux de la vie privée d'une personne, à savoir la protection de la dignité individuelle, est fortement en jeu.

[77] Il n'est aucunement nécessaire en l'espèce de fournir une liste exhaustive de l'étendue des renseignements personnels sensibles qui, s'ils étaient diffusés, pourraient entraîner un risque sérieux. Qu'il suffise de dire que les tribunaux ont démontré la volonté de reconnaître le caractère sensible des renseignements liés à des problèmes de santé stigmatisés (voir, p. ex., *A.B.*, par. 9), à un travail stigmatisé (voir, p. ex., *Work Safe Twerk Safe c. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, par. 28 (CanLII)), à l'orientation sexuelle (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), et au fait d'avoir été victime d'agression sexuelle ou de harcèlement (voir, p. ex., *Fedeli c. Brown*, 2020 ONSC 994, par. 9 (CanLII)). Je prends acte également de l'observation du Centre d'action pour la sécurité du revenu, intervenant, selon laquelle des renseignements détaillés quant à la structure familiale et aux antécédents professionnels pourraient, dans certaines circonstances, constituer des renseignements sensibles. Dans chaque cas, il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

[78] Je marque ici un temps d'arrêt pour souligner que je renvoie ci-dessus aux décisions relatives à l'art. 8 de la *Charte* à seule fin de donner une idée des types de renseignements qui sont plus ou moins personnels et qui méritent donc une protection publique. Pour mesurer avec précision l'incidence de la divulgation sur la dignité, il est essentiel que l'analyse différencie ainsi les renseignements. Ce qui est utile, c'est que l'un des facteurs permettant de déterminer si l'attente subjective d'un demandeur en

on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

matière de vie privée est objectivement raisonnable dans la jurisprudence relative à l'art. 8 met l'accent sur la mesure dans laquelle les renseignements sont privés (voir, p. ex., *R. c. Marakah*, 2017 CSC 59, [2017] 2 R.C.S. 608, par. 31; *Cole*, par. 44-46). Cependant, bien que la consultation de ces décisions puisse être avantageuse à cette fin précise, cela ne veut pas dire que le reste de l'analyse relative à l'art. 8 est pertinent pour l'application du test des limites discrétionnaires à la publicité des débats. Par exemple, demander aux fiduciaires quelle était leur attente raisonnable en matière de vie privée en l'espèce pourrait entraîner une analyse circulaire visant à déterminer s'ils s'attendaient raisonnablement à ce que leurs dossiers judiciaires soient accessibles au public ou s'ils s'attendaient raisonnablement à réussir à obtenir leur mise sous scellés. En conséquence, la jurisprudence relative à l'art. 8 n'est utile qu'à la fin décrite ci-dessus.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[79] Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. Bien qu'il s'agisse manifestement d'une question de fait, il est possible de faire certaines observations générales en l'espèce pour guider cette appréciation.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today,

[80] Je souligne que la mesure dans laquelle les renseignements seraient diffusés en l'absence d'une exception au principe de la publicité des débats judiciaires peut avoir une incidence sur le caractère sérieux du risque. Si le demandeur invoque le risque que les renseignements personnels en viennent à être connus par un large segment de la population en l'absence d'une ordonnance, il s'agit manifestement d'un risque plus sérieux que si le résultat était qu'une poignée de personnes prendrait connaissance des mêmes renseignements, toutes autres choses étant égales par ailleurs. Par le passé, l'obligation d'être physiquement présent pour obtenir des renseignements dans le cadre de débats judiciaires publics ou à partir d'un dossier judiciaire signifiait que les renseignements étaient, dans une certaine

courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

mesure, protégés parce qu'ils n'étaient [TRADUCTION] « pratiquement pas connus » (D. S. Ardia, « Privacy and Court Records : Online Access and the Loss of Practical Obscurity » (2017), 4 *U. Ill. L. Rev.* 1385, p. 1396). Cependant, aujourd'hui, les tribunaux devraient prendre en considération le contexte des technologies de l'information, qui a facilité la communication de renseignements et le renvoi à ceux-ci (voir Bailey et Burkell, p. 169-170; Ardia, p. 1450-1451). Dans ce contexte, il peut fort bien être difficile pour les tribunaux d'avoir la certitude que les renseignements ne seront pas largement diffusés en l'absence d'une ordonnance.

[81] Il y aura lieu, bien sûr, d'examiner la mesure dans laquelle les renseignements font déjà partie du domaine public. Si la tenue de procédures judiciaires publiques ne fait que rendre accessibles ce qui est déjà largement et facilement accessible, il sera difficile de démontrer que la divulgation des renseignements dans le cadre de débats judiciaires publics entraînera effectivement une atteinte significative à cet aspect de la vie privée se rapportant à l'intérêt en matière de dignité auquel je fais référence en l'espèce. Cependant, le seul fait que des renseignements soient déjà accessibles à un segment de la population ne signifie pas que les rendre accessibles dans le cadre d'une procédure judiciaire n'exacerbera pas le risque pour la vie privée. La vie privée n'est pas une notion binaire, c'est-à-dire que les renseignements ne sont pas simplement soit privés, soit publics, d'autant plus que, en raison de la technologie en particulier, il vaut mieux considérer la confidentialité absolue comme difficile à atteindre (voir, de manière générale, *R. c. Quesnelle*, 2014 CSC 46, [2014] 2 R.C.S. 390, par. 37; TTUAC, par. 27). Le fait que certains renseignements soient déjà accessibles quelque part dans la sphère publique n'empêche pas qu'une diffusion additionnelle de ceux-ci puisse nuire davantage à l'intérêt en matière de vie privée, en particulier si la diffusion appréhendée de renseignements très sensibles est plus large ou d'accès plus facile (voir de manière générale Solove, p. 1152; Ardia, p. 1393-1394; E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[82] De plus, la probabilité que la diffusion évoquée par le demandeur se produise réellement a également une incidence sur le caractère sérieux du risque. Je m'empresse de dire qu'il est implicite dans la notion de risque que le demandeur n'a pas besoin d'établir que la diffusion appréhendée se produira assurément. Cependant, plus la probabilité de diffusion des renseignements est grande, plus le risque pour l'intérêt en matière de vie privée lié à la protection de la dignité sera sérieux. Bien qu'elle l'ait fait dans un contexte différent, la Cour a déjà conclu que l'ampleur du risque est le fruit de la gravité du préjudice appréhendé et de sa probabilité (*R. c. Mabior*, 2012 CSC 47, [2012] 2 R.C.S. 584, par. 86).

[83] Cela dit, la probabilité que les renseignements personnels très sensibles d'une personne soient diffusés en l'absence de mesures de protection de la vie privée sera difficile à quantifier avec précision. Il convient également de souligner que la probabilité dans ce contexte n'a pas à être quantifiée en termes mathématiques ou numériques. Les tribunaux peuvent plutôt simplement déterminer cette probabilité à la lumière de l'ensemble des circonstances et mettre en balance ce facteur avec d'autres facteurs pertinents.

[84] Enfin, rappelons que la susceptibilité individuelle à elle seule, même si elle peut théoriquement être associée à la notion de « vie privée », est généralement insuffisante pour justifier de restreindre la publicité des débats judiciaires lorsqu'elle ne surpasse pas les inconvénients et les désagréments inhérents à la publicité des débats (*MacIntyre*, p. 185). Un demandeur ne pourra établir que le risque est suffisant pour justifier une limite à la publicité des débats que dans des cas exceptionnels, lorsque la perte de contrôle appréhendée des renseignements le concernant est fondamentale au point de porter atteinte de manière significative à sa dignité individuelle. Ces circonstances mettent en jeu « des valeurs sociales qui ont préséance », qui vont au-delà des atteintes plus ordinaires propres à la participation à une procédure judiciaire et qui, comme l'a reconnu le juge Dickson, pourraient justifier de restreindre la publicité des débats (p. 186-187).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to

[85] En résumé, l'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a certainement un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Bien qu'il soit évalué en fonction des faits de chaque cas, le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. La reconnaissance de cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée et de la valeur sous-jacente de la dignité individuelle, tout en permettant aussi de maintenir la forte présomption de publicité des débats.

D. *Les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important*

[86] Comme il a été clairement indiqué dans *Sierra Club*, une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour un intérêt public important. Les arguments soulevés dans le présent pourvoi portaient sur la question de savoir si la vie privée constitue un intérêt public important et si les faits en l'espèce révèlent l'existence de risques sérieux pour la vie privée et la sécurité. Bien que le large intérêt en matière de vie privée que font valoir les fiduciaires ne puisse être invoqué pour justifier une limite à la publicité des débats, la notion plus restreinte de vie privée considérée au regard de la dignité constitue un intérêt public important pour l'application du test. Je reconnais aussi qu'un risque pour la sécurité physique représente un intérêt public important, un point qui n'est pas

either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with

contesté en l'espèce. Par conséquent, la question pertinente à la première étape est celle de savoir s'il existe un risque sérieux pour l'un de ces intérêts ou pour ces deux intérêts. Pour les motifs qui suivent, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour l'un ou l'autre de ces intérêts. Cela suffit en soi pour conclure que les ordonnances de mise sous scellés n'auraient pas dû être rendues.

(1) Le risque pour la vie privée allégué en l'espèce n'est pas sérieux

[87] Comme je l'ai déjà dit, l'intérêt public important en matière de vie privée doit être considéré comme un intérêt propre à la protection de la dignité individuelle et non comme l'intérêt largement défini que les fiduciaires ont demandé à la Cour de reconnaître. Pour établir l'existence d'un risque sérieux à l'égard de cet intérêt, les renseignements contenus dans les dossiers judiciaires qui préoccupent les fiduciaires doivent être suffisamment sensibles du fait qu'ils touchent au cœur même des renseignements biographiques des personnes touchées. Si ce n'est pas le cas, il n'y a pas de risque sérieux qui justifierait une exception à la publicité des débats. Si, par contre, c'est le cas, il faut alors se demander si les faits de l'espèce permettent d'établir l'existence d'un risque sérieux.

[88] Le juge de première instance n'a jamais explicitement constaté de risque sérieux pour l'intérêt en matière de vie privée qu'il a relevé, mais, dans la mesure où il est implicitement arrivé à cette conclusion, je ne puis, en toute déférence, partager son point de vue. Sa conclusion se limitait à l'observation selon laquelle [TRADUCTION] « [l]e degré d'atteinte à cette vie privée et à cette dignité [c.-à-d. celle des victimes et de leurs êtres chers] est déjà extrême et, j'en suis sûr, insoutenable » (par. 23). Cependant, l'attention intense dont les Sherman ont fait l'objet jusqu'à la présentation de leur demande n'est qu'une partie de l'équation. Comme les ordonnances de mise sous scellés ne peuvent qu'offrir une protection contre la divulgation des renseignements contenus dans les dossiers judiciaires se rapportant à l'homologation, le juge de première instance était tenu d'examiner le

no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that

caractère sensible des renseignements précis qu'ils contenaient. Or, il n'a pas procédé à une telle appréciation. Sa conclusion sur le caractère sérieux du risque s'est alors entièrement concentrée sur le risque de préjudice physique, alors que rien n'indiquait qu'il avait conclu que les fiduciaires s'étaient acquittés de leur fardeau quant à la démonstration d'un risque sérieux pour l'intérêt en matière de vie privée. En toute déférence, et en sachant qu'il ne disposait pas du cadre d'analyse précédemment exposé, j'estime qu'en n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique. Cela justifiait une intervention en appel.

[89] En appliquant le cadre approprié aux faits de la présente affaire, je conclus que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées, que j'ai défini précédemment au regard de la dignité, n'est pas sérieux. Les renseignements que les fiduciaires cherchent à protéger ne sont pas très sensibles, ce qui suffit en soi pour conclure qu'il n'y a pas de risque sérieux pour l'intérêt public important en matière de vie privée ainsi défini.

[90] Il y a peu de controverse en l'espèce sur la probabilité de diffusion des renseignements contenus dans les dossiers de succession et sur l'étendue de cette diffusion. Il est presque certain que le Toronto Star publiera au moins certains aspects des dossiers de succession si on lui en donne l'accès. Compte tenu de l'important auditoire de l'entreprise médiatique en cause et de la nature très médiatisée des événements entourant la mort des Sherman, je n'ai aucune difficulté à conclure que les personnes touchées perdraient, dans une large mesure, le contrôle des renseignements en question si les dossiers étaient rendus accessibles.

[91] Cependant, en ce qui concerne le caractère sensible des renseignements, ceux contenus dans ces dossiers ne révèlent rien de particulièrement privé sur les personnes touchées. Ce qui serait révélé pourrait bien causer des inconvénients et peut-être de l'embarras, mais il n'a pas été démontré que la divulgation toucherait au cœur même des renseignements

would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that

biographiques de ces personnes d'une manière qui minerait leur contrôle sur l'expression de leur identité. Leur vie privée serait certes perturbée, mais il n'a pas été démontré que l'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées serait sérieusement menacé. Tout au plus, les renseignements contenus dans ces dossiers pourraient-ils révéler quelque chose sur la relation entre les défunts et les personnes touchées, en ce qu'ils pourraient dévoiler à qui les défunts ont confié l'administration de leur succession respective, et qui ils voulaient voir ou étaient présumés vouloir voir devenir héritiers de leurs biens à leur décès. Ils pourraient également révéler certaines données personnelles de base, par exemple des adresses. On peut à juste titre présumer qu'il se peut fort bien que certains des bénéficiaires portent un nom de famille autre que Sherman. Je suis conscient que les décès font l'objet d'une enquête pour homicides par le service de police de Toronto. Cependant, même dans ce contexte, aucun de ces renseignements ne donne des indications importantes sur qui ils sont en tant que personnes, et aucun d'eux n'entraînerait non plus un changement fondamental dans leur capacité à contrôler la façon dont ils sont perçus par les autres. Le fait pour des personnes d'être liées par des documents de succession aux victimes d'un meurtre non résolu n'est pas en soi un renseignement très sensible. Il peut être la source de désagréments, mais il n'a pas été démontré qu'il constitue une atteinte à la dignité, en ce qu'il ne touche pas au cœur même des renseignements biographiques de ces personnes. En conséquence, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important comme l'exige l'arrêt *Sierra Club*.

[92] Le fait que certaines des personnes touchées puissent être mineures ne suffit pas non plus à franchir le seuil du caractère sérieux. Bien que le droit reconnaisse que les mineurs sont particulièrement vulnérables aux atteintes à la vie privée (voir *Bragg*, par. 17), le simple fait que des renseignements concernent des mineurs n'écarte pas l'analyse généralement applicable (voir, p. ex., *Bragg*, par. 11). Même en tenant compte de la vulnérabilité accrue des mineurs pouvant être des personnes touchées

they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

dans les dossiers d'homologation, rien dans la preuve n'indique qu'ils perdraient le contrôle des renseignements les concernant qui révèlent quelque chose se rapprochant du cœur de leur identité. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée des Sherman ne suffit pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité.

[93] De plus, bien qu'elle indique que les renseignements seraient probablement largement diffusés, l'intense attention médiatique dont a fait l'objet la famille à la suite des décès n'est pas en soi révélatrice du caractère sensible des renseignements contenus dans les dossiers d'homologation.

[94] Démontrer que les renseignements qui seraient révélés en raison de la publicité des débats judiciaires sont suffisamment sensibles et privés pour toucher au cœur même des renseignements biographiques des personnes touchées est une condition préalable nécessaire pour établir l'existence d'un risque sérieux pour l'aspect pertinent de la vie privée relatif à l'intérêt public. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Lorsque l'on affirme qu'il existe un risque pour la vie privée, il est essentiel de démontrer non seulement que les renseignements qui concernent des personnes échapperont au contrôle de celles-ci — ce qui sera vrai dans tous les cas —, mais aussi que ces renseignements concernent ce qu'elles sont en tant que personnes, d'une manière qui mine leur dignité. Or, les fiduciaires n'ont pas fait cette preuve.

[95] Par conséquent, même si certains des éléments contenus dans les dossiers judiciaires peuvent fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraîne un risque sérieux pour l'intérêt public important en matière de vie privée, qui a été défini adéquatement dans le présent contexte au regard de la dignité. Pour cette seule raison, je conclus que les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour cet intérêt.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity

(2) Le risque pour la sécurité physique allégué en l'espèce n'est pas sérieux

[96] Contrairement à ce qu'il en est pour l'intérêt en matière de vie privée soulevé en l'espèce, nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Il convient de souligner que le juge de première instance a correctement traité la protection contre un préjudice physique comme un intérêt important distinct de l'intérêt à l'égard de la protection de la vie privée, et a conclu que ce risque était [TRADUCTION] « prévisible » et « grave » (par. 22-24). La question consiste à savoir si les fiduciaires ont établi que cet intérêt est sérieusement menacé pour l'application du test des limites discrétionnaires à la publicité des débats judiciaires. Le juge de première instance a fait remarquer qu'il aurait été préférable d'inclure des éléments de preuve objectifs du caractère sérieux du risque fournis par le service de police menant l'enquête pour homicides. Il a néanmoins conclu que la preuve de risque pour la sécurité physique des personnes touchées était suffisante pour que le test soit respecté. Selon la Cour d'appel, il s'agit d'une mauvaise interprétation de la preuve, et, de son côté, le Toronto Star convient que la conclusion du juge de première instance quant à l'existence d'un risque sérieux pour la sécurité constitue une simple conjecture.

[97] D'entrée de jeu, je souligne qu'une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Notre Cour a statué qu'il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques (*Bragg*, par. 15-16). Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Une inférence doit tout de même être fondée sur des faits circonstanciels objectifs qui permettent raisonnablement de tirer la conclusion par inférence. Lorsque celle-ci ne peut raisonnablement être tirée à partir des circonstances, elle équivaut à une conjecture (*R. c. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, par. 45).

[98] Comme le soutiennent à juste titre les fiduciaires, ce n'est pas seulement la probabilité du

of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed

préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. La question consiste finalement à savoir si le présent dossier permettait au juge de première instance de discerner de manière objective l'existence d'un risque sérieux de préjudice physique.

[99] Il n'était pas loisible au juge de première instance de tirer cette conclusion au vu du dossier. Nul ne conteste que le préjudice physique appréhendé est grave. Je conviens cependant avec le Toronto Star que la probabilité que ce préjudice se produise était conjecturale. La conclusion du juge de première instance quant au caractère sérieux du risque de préjudice physique était fondée sur ce qu'il a appelé [TRADUCTION] « le degré de mystère qui persiste en ce qui concerne à la fois le coupable et le mobile » en lien avec la mort des Sherman et sur sa supposition que ce mobile pourrait être « transposé » aux fiduciaires et aux bénéficiaires (par. 5; voir aussi par. 19 et 23). L'étape suivante du raisonnement, selon laquelle le fait de lever les scellés sur les dossiers de succession amènerait les coupables à commettre leur prochain crime contre une personne mentionnée dans les dossiers, repose sur des conjectures, et non sur les éléments de preuve par affidavit présentés, et ne peut être considérée comme une inférence appropriée ou un quelconque préjudice ou risque de préjudice objectivement discerné. Si tel était le cas, le dossier de succession de chaque victime d'un meurtre non résolu franchirait le seuil initial du test applicable pour déterminer si une ordonnance de mise sous scellés peut être rendue.

[100] En outre, je rappelle que la question à trancher en l'espèce n'est pas de savoir si les personnes touchées sont exposées à un risque pour leur sécurité en général, mais plutôt si la publicité des présents dossiers judiciaires les expose à un tel risque. À la lumière du contenu des dossiers en l'espèce, les

by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*,

fiduciaires devaient avancer une autre raison pour laquelle le risque que posait le fait que ces renseignements deviennent accessibles au public était plus que négligeable.

[101] Le caractère conjectural du raisonnement menant à la conclusion selon laquelle il existe un risque sérieux de préjudice physique en l'espèce ressort des différences entre les faits en cause et ceux des affaires invoquées par les fiduciaires. Dans *X. c. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, le tribunal a inféré le risque de préjudice physique au motif que le demandeur était un policier qui avait enquêté sur des [TRADUCTION] « affaires portant sur la violence des gangs et des armes à feu dangereuses » et qui avait rédigé des rapports de détermination de la peine pour ces contrevenants, rapports dans lesquels il était identifié par son nom au complet (par. 6). Dans *R. c. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, le juge Watt a considéré qu'il était [TRADUCTION] « évident » que la divulgation d'éléments permettant d'identifier un agent d'infiltration travaillant dans le domaine du contre-terrorisme compromettrait la sécurité de l'agent (par. 41). Dans les deux cas, le danger découlait de faits établissant que les demandeurs entretenaient des relations antagonistes avec de prétendues organisations criminelles ou terroristes. Cependant, dans l'affaire qui nous occupe, les fiduciaires ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Il n'est pas raisonnablement possible au vu du dossier en l'espèce d'inférer tout cela en se fondant sur le décès des Sherman et sur les liens unissant les personnes touchées aux défunts. Il ne s'agit pas d'une inférence raisonnable, mais, comme l'a souligné la Cour d'appel, d'une conclusion reposant sur des conjectures.

[102] Si le simple fait d'invoquer un préjudice physique grave suffisait à démontrer un risque sérieux pour un intérêt important, il n'y aurait pas de seuil valable dans l'analyse. Le test exige plutôt que le risque sérieux invoqué soit bien appuyé par le dossier ou les circonstances de l'espèce (*Sierra*

at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination

Club, par. 54; *Bragg*, par. 15), ce qui contribue au maintien de la forte présomption de publicité des débats judiciaires.

[103] Encore une fois, dans d'autres affaires, des faits circonstanciels pourraient permettre à un tribunal d'inférer l'existence d'un risque sérieux de préjudice physique. Les demandeurs n'ont pas nécessairement à retenir les services d'experts qui attesteront l'existence du risque physique ou psychologique lié à la divulgation. Cependant, sur la foi du présent dossier, le simple fait d'affirmer qu'un tel risque existe ne permet pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel.

E. *Il y aurait des obstacles additionnels à l'octroi d'une ordonnance de mise sous scellés fondée sur le risque d'atteinte à la vie privée allégué*

[104] Bien que cela ne soit pas nécessaire pour trancher le pourvoi, il convient de mentionner que les fiduciaires auraient eu à faire face à des obstacles additionnels en cherchant à obtenir les ordonnances de mise sous scellés sur la base de l'intérêt en matière de vie privée qu'ils ont fait valoir. Je rappelle que, pour satisfaire au test des limites discrétionnaires à la publicité des débats judiciaires, une personne doit démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs (*Sierra Club*, par. 53).

[105] Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. La condition selon laquelle l'ordonnance doit être nécessaire oblige le tribunal à examiner s'il existe des mesures autres que l'ordonnance demandée et à restreindre l'ordonnance autant

of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same

qu'il est raisonnablement possible de le faire pour écarter le risque sérieux (*Sierra Club*, par. 57). Une ordonnance imposant une interdiction de publication pourrait restreindre la diffusion de renseignements personnels aux seules personnes qui consultent le dossier judiciaire pour elles-mêmes et interdire à celles-ci de diffuser davantage les renseignements. Comme je l'ai mentionné, la probabilité et l'étendue de la diffusion peuvent être des facteurs pertinents lorsqu'il s'agit de déterminer le caractère sérieux d'un risque pour la vie privée dans ce contexte. Alors que le Toronto Star serait en mesure de consulter les dossiers faisant l'objet d'une interdiction de publication, par exemple, ce qui pourrait l'aider dans ses enquêtes, il ne pourrait publier, et ainsi diffuser largement, le contenu des dossiers. Une interdiction de publication semble offrir une protection contre ce dernier préjudice, qui a été au centre de l'argumentation des fiduciaires, tout en permettant un certain accès au dossier, ce qui n'est pas possible aux termes des ordonnances de mise sous scellés. En conséquence, même si un risque sérieux pour l'intérêt en matière de vie privée avait été établi, ce risque n'aurait probablement pas justifié une ordonnance de mise sous scellés, car une ordonnance moins sévère aurait probablement suffi à atténuer ce risque de manière efficace. Je m'empresse cependant d'ajouter qu'une interdiction de publication ne peut être prononcée en l'espèce, puisque, comme il a été souligné, le caractère sérieux du risque pour l'intérêt en matière de vie privée en jeu n'a pas été établi.

[106] De plus, les fiduciaires auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables, y compris l'incidence négative sur le principe de la publicité des débats judiciaires (*Sierra Club*, par. 53). Pour mettre en balance les intérêts en matière de vie privée et le principe de la publicité des débats judiciaires, il importe de se demander si les renseignements que l'ordonnance vise à protéger sont accessoires ou essentiels au processus judiciaire (par. 78 et 86; *Bragg*, par. 28-29). Il y aura sans doute des affaires où les renseignements présentant un risque sérieux pour la vie privée, du fait qu'ils toucheront à la dignité individuelle, seront essentiels au litige. Cependant, l'intérêt à ce

information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

que des renseignements importants et juridiquement pertinents soient diffusés dans le cadre de débats judiciaires publics pourrait bien prévaloir sur toute préoccupation à l'égard des intérêts en matière de vie privée relativement à ces mêmes renseignements. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

VI. Conclusion

[107] La conclusion selon laquelle les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important met fin à l'analyse. En de telles circonstances, les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires, y compris les ordonnances de mise sous scellés qu'ils ont initialement obtenues. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires. Cette conclusion est déterminante quant à l'issue du pourvoi. La décision d'annuler les ordonnances de mise sous scellés rendues par le juge de première instance devrait être confirmée. Étant donné que je suis d'avis de rejeter le pourvoi eu égard au dossier existant, je rejetterais la requête en production de nouveaux éléments de preuve présentée par le Toronto Star au motif que celle-ci est théorique.

[108] Pour les motifs qui précèdent, je rejetterais le pourvoi. Le Toronto Star ne sollicite aucuns dépens, compte tenu des importantes questions d'intérêt public en litige. Dans les circonstances, aucuns dépens ne seront adjugés.

Pourvoi rejeté.

Procureurs des appelants : Davies Ward Phillips & Vineberg, Toronto.

Procureurs des intimés : Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Procureurs de l'intervenant le Centre d'action pour la sécurité du revenu : Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Procureurs des intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc. : Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Procureurs de l'intervenante British Columbia Civil Liberties Association : McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

Procureurs des intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH and Mental Health Legal Committee : HIV & AIDS Legal Clinic Ontario, Toronto.

2012 ABQB 412
Alberta Court of Queen's Bench

Romspen Investment Corp. v. Hargate Properties Inc.

2012 CarswellAlta 1101, 2012 ABQB 412, [2012] A.W.L.D. 3821, [2012] A.W.L.D. 3824, [2012] A.J. No. 667, 218 A.C.W.S. (3d) 838, 99 C.B.R. (5th) 319

Romspen Investment Corporation Plaintiff and Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd., 1333183 Alberta Ltd., Bellavera Green Condominium Corp. and Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick and Chateau Lacombe Capital Partners Ltd. Defendants

Donald Lee J.

Heard: June 14, 2012
Judgment: June 22, 2012
Docket: Edmonton 1103-17749

Counsel: Schuyler V. Wensel, Q.C. for Plaintiff
Lindsay Miller for Second Mortgagee, Allied Hospitalities Services Inc.
Scott Stevens for Receiver, D. Manning & Associates Inc.
Russel A. Rimer for BDO Canada Ltd.
Atul Omkar for Dr. Singh
Lyle Brookes for Victory Christian Centre Inc.

Subject: Corporate and Commercial; Evidence; Civil Practice and Procedure; Insolvency; Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Evidence
XIV Privilege
XIV.9 Miscellaneous
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Receiver brought application for sealing order with respect to its report about sale process for hotel to protect confidentiality of process, and sought to disburse funds — Primary creditor supported receiver's application but two other interested parties opposed it — Application granted in part — Receiver already released marketing reports and appraisal to primary creditor and counsel for second mortgagee — Counsel for two other interested parties should also be allowed to see reports on same confidential basis since there would be no adverse consequences and these parties had legitimate financial interest in process — Sealing order was granted with exception that documents sealed and future related documents would be released two interested parties confidentially — Court ordered that from funds held by receiver of $632,110.26, there would be hold-back of $120,000 with respect to any potential claims by employees of hotel under Wage Earning Protection Plan — Receiver was required to pay $5,985.57 to Canada Revenue Agency (CRA) in satisfaction of its secured claim for unremitted source deductions.
Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous
Sealing order — Receiver brought application for sealing order with respect to its report about sale process for hotel to protect confidentiality of process — Primary creditor supported receiver's application but two other interested parties opposed it — Application granted in part — Receiver already released marketing reports and appraisal to primary creditor and counsel for

second mortgagee — Counsel for two other interested parties should also be allowed to see reports on same confidential basis since there would be no adverse consequences and these parties had legitimate financial interest in process — Sealing order was granted with exception that documents sealed and future related documents would be released to interested parties confidentially.

Table of Authorities

Cases considered by *Donald Lee J.*:

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

APPLICATION by receiver for sealing order with respect to its report about sale process for hotel and other relief.

***Donald Lee J.*:**

I. Background

1 This is an application by the Receiver, D. Manning & Associates Inc. for a sealing order with respect to the Receiver's report dated June 4, 2012; as well as for directions with respect to the disbursement of certain funds recovered by the Receiver from the accounts of Chateau Lacombe Capital Partners Ltd. ["CLCPL"]. There is also an application by the primary creditor for a one day redemption order in a related foreclosure application.

2 The Receiver's report dated June 4, 2012 provides details with respect to the ongoing sale process of the Chateau Lacombe Hotel in downtown Edmonton, including the realtors marketing reports and appraisal of the hotel. The Receiver submits that the protection of the commercial interest herein forms a proper basis for the issuance of a sealing order as there is an ongoing sales process. In the absence of the sealing order with respect to the appraisal and marketing reports, it is submitted that there is a serious risk that the integrity of the sales process will be adversely affected and that all parties involved in this matter will suffer financially.

3 The primary creditor in this matter, Romspen Investment Corporation ("Romspen"), supports the Receiver's application for a sealing order. Romspen is owed approximately 35 million dollars presently, and submits that the sealing order is required to protect the confidentiality of the sales process. The second mortgagee, Allied Hospitality Services Inc., ["Allied"] also supports the sealing order application.

4 Opposing the sealing order, however, are counsel for Dr. Singh who has claimed a first mortgage on properties known as the "Church lands." The priority of Dr. Singh's claim as first mortgagee on the Church lands is in dispute as Romspen received an apparent postponement in it's favor from Dr. Singh when it financed the hotel purchase in 2010. These lands consist of 20 acres on Ellerslie Road located in a rapidly developing residential suburban area of Edmonton which the principal of CLCPL, Kevin Frederick, had purchased from the Victory Christian Church in August 2008, for 18 million dollars.

5 Counsel for the Victory Christian Church also opposes the sealing order request, arguing that concept of "Marshalling" could be applicable with respect to the Church lands given that the Church has now received an assignment of the 12 million dollar vendor take-back mortgage given by Kevin Frederick in it's favor at the time of the 2008 purchase by his numbered company. The Victory Christian Church advises that at the present time as a result of the current developments in the case, the 20 acres of prime Edmonton real estate sold for 18 million dollars has resulted in no realisable funds to the Church. The Church is now also the subject of a potential removal proceeding from the lands that it uses for its worship services because of Romspen's present foreclosure application.

6 Counsel for Dr. Singh, a retired dentist, and the Church submit that they must have access to the marketing and appraisal reports that the Receiver, Romspen, and Allied Properties already have with respect to the Chateau Lacombe Hotel site. Counsel for Dr. Singh and the Church submit that it is only through their receipt of these marketing reports and appraisal that they will be able to determine that the best price is being obtained for the Chateau Lacombe Hotel site.

7 The present appraisal comes in at a price well below that which is owed to the creditors, so all counsel supporting the granting of the sealing order argue that no useful purpose would be served in disclosing this information any further. They further submit that it is inevitable, and in fact, they wish the Court to direct as part of another application presently before me that a redemption order for the Church property be issued setting the redemption period at one day.

8 Counsel for Dr. Singh, the first mortgagee on the Church lands, points out that the City of Edmonton's current valuation of the Chateau Lacombe Hotel for municipal tax purposes is approximately 32 million dollars, and at the time the hotel was purchased in 2010 it was 38 million dollars. Based on three appraisals done in 2010, the Chateau Lacombe Hotel property was worth between 57 to 70 million dollars. The property was purchased in October 2010 for 47.8 million dollars by Mr. Frederick's company, Hargate Properties Inc. ["Hargate"], with Romspen advancing 32 million dollars, a take-back second mortgage by Allied of 11+ million dollars, and Kevin Frederick's 6 million dollar contribution. The 6 million dollars appears to have come from Dr. Singh's first mortgage loan secured on the Church lands. The Church's 12 million dollar vendor take-back mortgage on its lands from Mr. Frederick has been defaulted on and it has been assigned back to the Church, although curiously, the purchase price for the Church lands was listed at Land Titles as 10 million dollars. The Marshalling concept as I understand it involves certain other Leduc properties owned by Kevin Frederick that are also under foreclosure currently.

9 The argument then of counsel for Dr. Singh and for the Church is that the Chateau Lacombe Hotel property could or should have a value far greater than intimated by the Receiver presently, and if there are proper marketing efforts, all creditors and primarily Romspen would benefit. However, in order to ascertain the validity of the present appraisal and marketing efforts, counsel for Dr. Singh and for the Church need access to the most current reports, which to date has been refused by the Receiver

II. Conclusion

10 All parties agree that the relevant case law is found in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.) at paragraph 53 which reads as follows:

> A confidentiality order under Rule 151 should only be grated when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effect of the confidentiality order, including the effect 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.

11 The commercial interest as stated in *Sierra Club* in presumed in the present case, but as the Supreme Court of Canada also stated at paragraph 57 "reasonably alternative measures" requires the judge to consider whether reasonable alternatives to the confidentiality order are available as well as to restrict the order as much as reasonably possible while preserving the commercial interest in question. Counsel for the Receiver is not prepared to release the marketing and appraisals even to counsel for Dr. Singh and for the church on any basis.

12 I conclude that the Receiver has already released the marketing reports and the appraisal to counsel for Rompsen, the primary creditor, and to counsel for the second mortgagee, Allied, with no adverse consequences, to the sales process as they are entitled to receive that information on a confidential basis. I conclude that counsel for Dr. Singh and for the Church should also be allowed to see those reports on the same confidential basis, and I am satisfied that there will be no adverse consequences as a result notwithstanding the objections of counsel for the Receiver, Romspen and Allied Properties. It is in everyone's financial interest amongst this group including Dr. Singh and the Church to see that the Chateau Lacombe Hotel property is sold for the most monies. The release of the requested sales process and appraisal reports is no reflection that there is anything deficient in the present sales efforts which appear to have been conducted quite efficiently. It is only a recognition of the legitimate financial interest in this process of Dr. Singh and the Church.

13 The application to Seal is granted with the exception that the documents sealed, and future related documents, will be released to counsel for Dr. Singh and for the Church confidentially, in addition to them being released to Romspen and Allied. Pending the receipt of these reports and appraisal, including the results of the current final June 22 bidding round, the application for a one day redemption period on the Church lands pursuant to the foreclosure application presently before me, will be adjourned to July 5, 2012, at which point it will be considered.

III. The CLCPL Application

14 With respect to counsel for BDO Canada's issues regarding the Receiver's request to distribute all of the remaining funds in that company, I understand BDO's objection to be that the Canada Revenue Agency ["CRA"] has a secured priority claims under the Wage Earning Protection Program ("WEPP"), and with respect to certain unremitted employee source deductions.

15 Hargate Properties Inc. purchased the hotel from the previous owner, Chateau Lacombe Limited Partnership in October 2010, financing the purchase in part by a 32 million dollar loan from Romspen. The assets purchased by Hargate formed a substantial part of the security taken by Romspen for the loan. Additional security came from the allegedly improper/fraudulent postponement of the first mortgage on the Church lands that Dr. Singh had advanced to a numbered company controlled by Kevin Frederick. Concurrent with Hargate's acquisition of the assets of the Chateau Lacombe Hotel, unbeknownst to Romspen even at the time I granted the original receivership order to Romspen, in apparent contradiction in the terms of Romspen's security documentation, CLCPL began operating the Chateau Lacombe Hotel.

16 There were no formal agreements between Hargate and CLCPL with respect to the buyers use of Hargate's assets. CLCPL did not render any payments to Hargate for the use of the assets. CLCPL did not appear to have had any assets of its own, yet it received and retained all the revenues generated through the operation of the hotel (with the exception of some of the revenues generated under a lease between Hargate and ImPark in relationship to the hotel's parkade.) Kevin Frederick was the principal and operating mind of both Hargate and CLCPL at all material times, and it is alleged that Mr. Frederick converted at least some of the revenues generated by the hotel to his own use.

17 I have considered the concerns of the bankruptcy trustee of CLCPL BDO Canada Ltd. and I am satisfied that the CRA has properly been notified with respect to any priorities it may have in this matter. From the funds held by the Receiver of $632,110.26, there will be a $120,000 hold-back with respect to any protential WEPP claim made by the employees of CLCPL, although non-union employees were terminated by the Receiver upon his appointment. The Receiver has paid all outstanding wages since the date of their appointment, and has continued to pay vacation pay as it becomes due, payable to non-union and union employees. The hold back will also cover any costs of the Receiver-Manager prior to discharge. The Receiver shall pay $5,985.57 to the CRA in satisfaction of it's secured claim for unremitted source deductions.

18 Additionally, the CRA shall provide the Receiver with notice of any opposition to the payout described above within 14 days of service of these directions.

19 If the CRA does not provide notice to the Receiver within 14 days of service of these directions, then it shall be deemed forever barred from making or enforcing any claim, interest or right of any nature or kind whatsoever, whether arising by statute, at law or in equity (a "Claim") to the Funds, as well as any Claim(s) arising out of or relating to the Funds or the source of the Funds, and all such Claim(s) shall be forever extinguished, barred and released.

Application granted in part.

2009 CarswellOnt 7952
Ontario Superior Court of Justice [Commercial List]

Look Communications Inc. v. Look Mobile Corp.

2009 CarswellOnt 7952, [2009] O.J. No. 5440, 183 A.C.W.S. (3d) 736

IN THE MATTER OF LOOK COMMUNICATIONS INC. (Applicant) and LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P. (Respondent)

AND IN THE MATTER OF AN APPLICATION BY LOOK COMMUNICATIONS INC. UNDER SECTION 192 OF THE BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C.44, AS AMENDED

Newbould J.

Heard: December 17, 2009
Judgment: December 18, 2009
Docket: 08-CL-7877

Counsel: John T. Porter for Look Communications Inc.
Aubrey E. Kauffman for Inukshuk Wireless Partnership

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation Corporation made plan of arrangement under Canada Business Corporations Act — Court approved sale of most of corporation's assets to joint venture — Monitor's first report was ordered sealed until sale was completed — Completion occurred much earlier than expected — Corporation meanwhile was attempting to sell remaining assets and wished to keep earlier bids confidential — Joint venture wanted information to gain advantage in bidding for remaining assets — Corporation brought motion to extend sealing order for six months — Motion granted — Court had jurisdiction under s. 137 of Courts of Justice Act to extend order notwithstanding that plan of arrangement was finalized — Corporation had commercial interest in selling its remaining assets — Extending order would not have substantial detrimental effect on core values of freedom of expression.

Table of Authorities

Cases considered by *Newbould J.*:

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

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

887574 Ontario Inc. v. Pizza Pizza Ltd. (1994), 35 C.P.C. (3d) 323, 23 B.L.R. (2d) 239, 1994 CarswellOnt 1214 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 192 — referred to
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 2(b) — referred to
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137 — considered

MOTION by corporation for order extending sealing order made in court approved sale of assets.

***Newbould J.*:**

1 Look Communications Inc.(Look) moves for an order extending a sealing order under which bids made in a court approved sales process were sealed. The order is opposed by Inukshuk Wireless Partnership which is a joint venture between Rogers Communications Inc. and Bell Canada.

Circumstances of Sealing Order

2 On December 1, 2008, Look was authorized by Pepall J. to conduct a special shareholder's meeting to pass resolutions (i) authorizing Look to establish a sales process for the sale of all or substantially all of its assets and to seek an order approving the sales process, and (ii) authorizing a plan of arrangement under section 192 of the CBCA which contemplated the sale of all or substantially all of Look's assets. The shareholders voted in favour of both a sales process and the arrangement.

3 On January 21, 2009, Look obtained an order approving the sales process and Grant Thornton Limited was appointed as Monitor to manage and conduct the sales process with Look. The sales process provided for bids from interested persons for five assets of Look, which were substantially all of its assets, being (i) Spectrum, being approximately 100MHz of License Spectrum in Ontario and Quebec; (ii) a CRTC Broadcast License; (iii) Subscribers; (iv) a Network consisting of two network operating centers and (v) approximately $300 million in "tax attributes" or losses. Court approval was required for any sale.

4 Under the sales process, a bidder was entitled to bid for any or all of the assets that were being sold, or a combination thereof. Pursuant to the sales process, four bids were received and Look and the Monitor engaged in discussions with each bidder. Look eventually accepted an offer from Inukshuk for the Spectrum and Broadcast License. It is agreed that while not all of the assets of Look were sold, what was sold to Inukshuk were substantially all of the assets of Look.

5 The parties obtained a consent order on May 14, 2009 from Marrocco J. in which the sale of the Spectrum and Broadcast License to Inukshuk was approved. The order provided that the assets would vest in Inukshuk upon the Monitor filing a certificate with the court certifying as to the completion of the transaction. The sale contemplated a staged closing, with the first taking place immediately following the order of Marrocco J., the second being December 31, 2009 and the final taking place as late as what the sale agreement defined as the Outside Date, being the third anniversary of the date of the final order approving the transaction, i.e., May 14, 2012. I am told that the reason for the staged dates was that it was anticipated that the necessary regulatory approvals for the sale of the Spectrum and License could take some time.

6 As it turned out, the final closing took place much earlier than the Outside Date within a few months of the order of Marrocco J. On September 11, 2009, the Monitor filed its certificate with the Court certifying that the purchase price had been paid in full and that the conditions of closing had been satisfied. Thus the sold assets vested in Inukshuk. Under the terms of the plan of arrangement that was approved by the order of Marrocco J., once the certificate of the Monitor as to the completion of the transaction was delivered, the articles of arrangement became effective.

7 In connection with the application to Marrocco J. to approve the arrangement and the sale to Inukshuk, the Monitor filed a redacted version of its First Report, as is usual in the Commercial List for sales carried out under a court process, redacting the information about the bids received in the sales process. The order of Marrocco J. provided that an unredacted version of the First Report was to be sealed and not form part of the public record until the Monitor's Certificate after the sale was completed

was filed with the Court. That certificate, as I have said, was filed with the Court on September 11, 2009. Therefore under the order of Marrocco J. the unredacted First Report of the Monitor was no longer to be sealed.

8 Look is now attempting to sell its remaining assets, which include a corporation which had been approved by the CRTC to hold a license and has $350 million of tax losses. Look is presently in discussions for the sale of its remaining assets with some of the same parties with whom discussions were held and bids were received under the previous sales process, including Rogers.

9 In early November 2009 Inukshuk asked the Monitor for the information contained in the Monitor's First Report that was sealed under the order of Marrocco J. Look immediately obtained an *ex parte* order from Campbell J. on November 4, 2009 extending the sealing of the Monitor's First Report pending a determination of this motion.

Analysis

10 Look seeks to extend the sealing order for six months while it completes the sale of its remaining assets. It has a concern that publication of the information could impede the sale process now underway and affect the amount received. Look is concerned that if the bids were disclosed, and with Rogers being one of the parties in discussions with Look for the purchase of Look's tax losses, other players in the telecommunications industry would not bid for the remaining assets.

11 Inukshuk has filed no affidavit material as to why it is interested in the sealed information in the Monitor's First Report dealing with all of the bids that were received for all assets. Inukshuk's position in a nutshell is that the sales process previously approved by the Court is over and that the public interest in seeing an open court process should prevent any further sealing of the Monitor's First Report. Mr. Kauffman said that his clients are here in this motion "in their own interest as two members of the public" seeking access to the documents that were filed in the court process.

12 It is understandable why Rogers would want the information. It has been negotiating with Look for the purchase of one or more of Look's remaining assets. Having access to prior bids in the prior sales process in which one or more of those remaining assets may have been the subject of a bid would obviously be of benefit to Rogers it in considering what price it is prepared to offer for the company with the tax loss benefits. While Mr. Kauffman pointed out that it is Inukshuk Wireless Partnership that is opposing the order sought, and that includes Bell as well as Rogers, the fact remains that the partnership does include Rogers which is in negotiations with Look. In any event, it is unrealistic to think that Bell, through its interest in Inukshuk, is funding at least in part the opposition to the extension of the sealing order out of altruistic or public purposes.

13 Section 137 of the *Courts of Justice Act* provides that a court may order any document filed in a civil proceeding to be treated as confidential, sealed and not form part of the public record. The fact that the plan of arrangement consummated under the court proceedings under s. 192 of the CBCA has now been finalized does not in itself mean that the court does not have jurisdiction to continue with the sealing order if it is otherwise appropriate to do so. There is no limitation in section 137 limiting a sealing order to the time during which the litigation in question is ongoing.

14 In *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), it was held that sworn information to obtain a search warrant could not be made available to the public until the search warrant had been executed. In that case, Dixon J. (as he then was) for the majority noted that the case law did not distinguish between judicial proceedings which are part of a trial and those which are not, and that subject to a few well-recognized exceptions, all judicial proceedings should be in public. He held that the presumption was in favour of public access and the burden of contrary proof lay upon the person contending otherwise.

15 In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), the court authorized a confidentiality order. It stated that an order should be granted in only two circumstances, being (i) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and (ii) when the salutary effects of the confidentiality order, including the effects on the right civil litigants to a fair trial, outweighs it deleterious effects, including the effects on the right of free expression, which includes public interest in open and accessible court proceedings. In dealing with the notion of an important commercial interest, Iacobucci J. stated:

> 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 *Re N. (F.)* [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".

16 Look points out that it is not a private company. It is a public company with stakeholders, being public shareholders. It is not the kind of private corporation that Iacobucci J. was discussing in *Sierra*.

17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]), Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

18 This case is a little different from the ordinary. Some of the assets that were bid on during the sales process were not sold. However, because the assets that were sold constituted substantially all of the assets of Look, the arrangement under section 192 of the CBCA was completed. Those assets that were not sold remained, however, to be sold and it is in the context of that process that Rogers has been discussing purchasing one or more of these assets from Look.

19 In this case, had the closing of the sale of the Spectrum and the License been drawn out to the maximum three year period provided for in the sale agreement, these remaining assets in all likelihood would have been sold before the maximum period ran out and during a period of time in which the Receiver's First Report remaining sealed. In those circumstances the effect of the sealing order would have been to protect the later sale process, a process which originally involved a sale of all of the assets of Look. While the remaining sales will not take place under the original sale process that was conducted by Look and the Monitor, the commercial interest in seeing that the remaining assets are sold to the benefit of all stakeholders, including the public shareholders of Look, remains now as it did before.

20 The advantage to Rogers in seeing what other bidders may have bid on the assets that have remained unsold is obvious. Rogers is in negotiations with Look regarding the acquisition of one or more of those assets. If other bidders previously bid on one or more of those assets, that information would be beneficial to Rogers. If the other bidders did not bid on any of those remaining assets, that too would be of interest to Rogers. As well, Look's concern that the disclosure of the sealed information could impede other bidders from coming forward is not without some merit.

21 In *Sierra*, Iacobucci J said there were core values that should be considered in a motion such as this. *Sierra* involved an application by the Government of Canada for a confidentiality order protecting documents from public disclosure in litigation between the *Sierra* and the Government. Iacobucci J. stated that under the order sought, public access to the documents in question would be restricted, which would infringe the public's freedom of expression guarantees contained in section 2(b) of the *Charter*. He discussed the core values of freedom of expression and how they should be considered in a motion seeking confidentiality of documents. He stated:

> 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 (AttorneyGeneral)*, [1989] 1 S.C.R. 927, [page551] 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. (underlining added)

22 Rogers, or Inukshuk, cannot, in my view, claim that there will be a substantial detrimental effect on these core values by a continuation of the sealing order for a further six months. What Rogers will lose will be access to information that it could use against the interests of Look and its stakeholders. In my view, the salutary effects of extending the sealing order for six months to permit the sale of the remaining assets of Look outweighs the deleterious effects of such order in this case.

23 Inukshuk asks that if the extension order is made, there is no reason to seal the prior bids for the Spectrum that Inukshuk purchased and thus the order should permit that information to be made public. It is said by Mr. Kauffman that such information is of historical interest. I would not make this exception as requested by Inukshuk. Bidders under the prior sales process were entitled to bid on all of the assets either individually or together, and Mr. Porter points out that it may well be difficult to separate out the portion of any prior bid dealing with the Spectrum from a bid for other assets that are now sought to be sold. If the interest sought is only for historical purposes, a six month delay will not be of much or any consequence.

24 In the circumstances, the order sought by Look shall go. Look is entitled to its costs of the motion against Inukshuk. If costs cannot be agreed, short submissions may be made within ten days by Look and reply submissions may be made within a further ten days by Inukshuk.

Motion granted.

1994 CarswellOnt 1214
Ontario Court of Justice (General Division), Commercial List

887574 Ontario Inc. v. Pizza Pizza Ltd.

1994 CarswellOnt 1214, [1994] O.J. No. 3112, 23 B.L.R. (2d) 239, 35 C.P.C. (3d) 323, 52 A.C.W.S. (3d) 516

RE ARBITRATION BEFORE THE HONOURABLE R.E. HOLLAND, Q.C.

887574 ONTARIO INC., 863644 ONTARIO INC., 801409 ONTARIO INC., WESTBRIDGE FOODS LTD., 830542 ONTARIO INC., 779975 ONTARIO LIMITED, 783129 ONTARIO INC., 284055 ONTARIO INC., 946171 ONTARIO INC., 768027 ONTARIO INC., 841875 ONTARIO INC., 660840 ONTARIO LTD., BULE ENTERPRISES LIMITED, 900766 ONTARIO INC., 755950 ONTARIO LIMITED, 554135 ONTARIO INC., 769049 ONTARIO INC., 781380 ONTARIO INC., 892922 ONTARIO INC., 814591 ONTARIO INC., 925446 ONTARIO LTD., 876310 ONTARIO INC., 812138 ONTARIO INC., 880602 ONTARIO INC., 697339 ONTARIO INC., 863008 ONTARIO INC., 898201 ONTARIO INC., 989897 ONTARIO INC., 857387 ONTARIO INC., 828659 ONTARIO INC., 750242 ONTARIO LIMITED, 803767 ONTARIO INC., 910874 ONTARIO INC., 805837 ONTARIO INC., GOLD LION GROUP OF COMPANIES, 697246 ONTARIO LIMITED, 827532 ONTARIO INC., 914470 ONTARIO LIMITED, 804631 ONTARIO INC., 954270 ONTARIO INC., 686603 ONTARIO LIMITED, 741897 ONTARIO LIMITED, 675367 ONTARIO LIMITED, 809692 ONTARIO LIMITED, 681630 ONTARIO INC., 763012 ONTARIO LTD., 905933 ONTARIO INC., 945671 ONTARIO INC., 807352 ONTARIO INC. and 909206 ONTARIO INC. v. PIZZA PIZZA LIMITED

Farley J.

Oral reasons: December 14, 1994 *
Written reasons: December 27, 1994
Docket: Doc. 93-CQ-33541; Commercial Court File Doc. B85/93

Counsel: *Peter Griffin*, *Gavin MacKenzie* and *Daniel Vukovich*, for moving party (defendant).
Nancy Spies and *Timothy Mitchell*, for responding parties (plaintiffs) except 828659 Ontario Inc., 805837 Ontario Inc., 807353 Ontario Inc., and Drag Eleven Pizza Inc.
P. Waldmann, for other responding parties (plaintiffs).
B. Bruser, for Toronto Star.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Judges and courts
XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files
Headnote
Judges and Courts --- Jurisdiction — Jurisdiction of court over own process
Arbitration — Commercial arbitration — Large group of franchisees and their franchisor agreeing to discontinue litigation and settle their differences through arbitration — Arbitration agreed to be subject to appeal — Franchisor appealing arbitration award

and franchisees cross-appealing — Application by franchisor for order directing material filed on appeal be sealed because arbitration to be kept confidential.

Practice — Practice on appeal — Record on appeal — Application by appellant from arbitration award for order directing record to be sealed denied — No evidence adduced to support any public policy grounds to depart from rule of public accessibility to court proceedings.

In 1993, 50 franchisees commenced legal proceedings against their franchisor, PP Ltd. Later, the parties entered into minutes of settlement whereby the dispute would be mediated and/or arbitrated by H, a retired judge and highly respected private arbitrator. The minutes of settlement also provided that the parties would have a right to appeal any binding decision by H. Arbitration proceedings ensued over many months and interim awards and a final award were issued by H.

He issued a confidentiality award with respect to the arbitration proceedings. This was followed by a consent order made by the judge before whom the present motion was argued confirming that the interim and final awards were to remain confidential until the final Award was filed in court.

PP Ltd. appealed four components of H's award. Six of the franchisees cross-appealed one component of the award. PP Ltd. then brought a motion seeking an order that the appeal material be sealed on the grounds that, (i) the arbitration proceedings were confidential by agreement, (ii) the parties would not have entered into the arbitration process without the condition of confidentiality, and (iii) the disclosure of the arbitration proceedings to the public could affect the competitive position of PP Ltd.

Held:

The motion was dismissed.

When a matter comes to court, the philosophy of the court system is openness. There are established exceptions to this general rule, such as actions involving infants or mentally disturbed people and actions involving matters of secrecy; however, this sealing application did not fit within any of those exceptions.

If the dispute settlement process had involved other types of alternative dispute resolution such as mediation, conciliation or neutral evaluation where the focus is on the parties' coming to a consensual arrangement, then other considerations could be brought to bear.

Curtailment of public accessibility can be justified only where there is present the need to protect social values of great importance. This test is not met by wishing to keep secret the material involved in an arbitration appeal which of necessity takes the parties back into the court system with its insistence on openness, an aspect which one must assume the parties fully recognized before proceeding to appeal the award.

Table of Authorities

Cases considered:

A. (J.) v. Canada Life Assurance Co. (1989), 35 C.P.C. (2d) 6, 70 O.R. (2d) 27 (H.C.) — *considered*

Hassnah Insurance Co. of Israel v. Mew, [1993] 2 Lloyd's Rep. 243, (Q.B.D. [Com. Ct.]) — *considered*

London & Leeds Estates Ltd. v. Paribas Ltd. (July 28, 1994), Mance J. (Eng. Q.B.) [unreported] — *considered*

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

MDS Health Group Ltd. v. Canada (Attorney General) (1993), 20 C.P.C. (3d) 137, 15 O.R. (3d) 630 (Gen. Div.)*applied*

S. (P.) v. C. (D.) (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) — *applied*

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17.

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

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

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

s. 137(2)

Sale of Goods Act, R.S.O. 1990, c. S.1.

Words and phrases considered:

ALTERNATIVE DISPUTE RESOLUTION

This [non-binding arbitration] differs from other forms of [Alternative Dispute Resolution ("ADR")] in which the parties themselves are part of the decision-making mechanism and the neutral third party's involvement is of a facilitative nature: e.g. mediation, conciliation, neutral evaluation, nonbinding opinion, nonbinding arbitration. Of course, the simplest method — often overlooked — is that of noninvolvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately, more to the point . . . it would be unusual to see a public ADR session especially where the focus is on coming to a consensual arrangement. The parties need to have the opportunity of discussion and natural give and take with brainstorming and conditional concessions giving without the concern of being under a microscope. If the parties were under constant surveillance, one could well imagine that they would be severely inhibited in the frank and open discussions with the result that settlement ratios would tend to dry up. The litigation system depends on a couple of percent of new cases only going to trial. If this were doubled to several percent the system would collapse . . . public policy supports the nontrial resolution of disputes.

. . . . .

. . . if the ADR process entered into is along the mediation philosophy structure that it will be appreciated that the best and most productive results re dispute resolution will be achieved generally if such process involves a degree of confidentiality. This of course if subject to some exceptions such as when the parties agree that in a mediation of public policy issues there is a positive requirement for public exposure . . . In other instances public exposure may induce a very negative reaction . . .

BINDING ARBITRATION

. . . a binding arbitration is a noncourt equivalent to a court trial. In either case a neutral third party hears the case and makes his decision which (subject to appeal) is binding upon the parties.

Motion for an order that material relating to appeal from commercial arbitration be sealed on grounds of confidentiality.

Editor's Note

This judgment, taken together with the arbitration award immediately preceding and the two reasons for judgment immediately following, forms an interesting quartet. It provides a basis for comment on several aspects of commercial arbitration in a general business setting. See the Case Comment at p. 277 post.

***Farley J.*:**

1 At the hearing I dismissed the confidentiality/sealing motion, promising formal reasons at a later date. These are those reasons.

2 The defendant Pizza Pizza Limited ("P^2") moved for an order:

(a) pursuant to Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C43 directing that the appeal materials upon the appeal to be heard on February 20, 1995 in this Honourable Court be sealed pending further order;

(b) continuing the order of the Honourable Mr. Justice Farley dated July 20, 1994.

P^2 submitted that the grounds for such a motion were:

1. The parties were originally before this Honourable Court by way of injunction proceedings (and extensive materials) in the spring of 1993;

2. The parties entered into Minutes of Settlement by which they submitted these issues to arbitration/mediation before the Honourable R.E. Holland;

3. Those proceedings were, by agreement and by order of the Honourable R.E. Holland, confidential;

4. The arbitration proceedings were conducted over many months involving at least 20 days of hearing time, during which a wide range of issues were canvassed;

5. The parties would not have entered into the arbitration process without the condition of confidentiality;

6. The parties have expended significant amounts of money upon the arbitration proceedings;

7. Only a handful of the myriad issues before the Honourable R.E. Holland are the subject of the appeal herein;

8. The disclosure of the arbitration proceedings to the public may affect the competitive position of the defendant and its franchisees in releasing the details of its operations to the public and competitors;

9. To fail to continue the order of the Honourable Mr. Justice Farley would discourage the attempts (and success) of the arbitration/mediation process which these parties underwent in confidence.

The aspect of item 8 was not in substance pursued. This is not in essence a situation involving trade secrets or confidential proprietary information. Further it was acknowledged that the proceedings resolved into an arbitration (versus other forms of alternative dispute resolution ("ADR")).

3 On Wednesday, June 22, 1994, the Honourable R.E. Holland, Q.C. ("Arbitrator") issued a confidentiality order. This was followed by a consent order issued by myself on July 20, 1994. Its terms provided (and clearly contemplated not only that there could be an adjustment or amendment to or cancellation of the sealing order, but also that the award would be made public when the matter was in court):

It is hereby ordered that:

1. The Interim Award of the Honourable R.E. Holland dated April 8, 1994 and the Cost Award dated May 19, 1994 (the "Awards") are, as all of the proceedings in this matter, confidential and may not be released to any party other than the parties to this proceeding and their professional advisors in this proceeding.

2. Until such time as it is filed in court, the Final Award arising from the Awards (the "Final Award") is also confidential and may only be released to those parties identified above.

4 The award has been appealed by P^2 and cross-appealed by the plaintiffs. Thus the matter is "re-entering" the court system after functionally having been in the private confidential sector before the Arbitrator. When the matter went out to the arbitration, it may have been that the parties contemplated some form of arbitration, but it was also conceivable that another form of ADR could have been employed. I think it fair to observe that a binding arbitration is a non-court equivalent to a court trial. In either case a neutral third party hears the case and makes his decision which (subject to appeal) is binding upon the parties. This differs from other forms of ADR in which the parties themselves are part of the decision-making mechanism and the neutral third party's involvement is of a facilitative nature: e.g. mediation, conciliation, neutral evaluation, non-binding opinion, non-binding arbitration. Of course, the simplest method — often overlooked — is that of non-involvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately; more to the point, I suspect it would be unusual to see a public ADR session especially where the focus is on coming to a consensual arrangement. The parties need to have the opportunity of discussion and natural give and take with brainstorming and conditional concession giving without the concern of being under a microscope. If the parties were under constant surveillance, one could well imagine that they would be severely inhibited in the frank and open discussions with the result that settlement ratios would tend to dry up. The litigation system depends on a couple of percent of new cases only going to trial. If this were doubled to several percent the

system would collapse. Therefore in my view public policy supports the non-trial resolution of disputes. I note the observation of Oliver Tickell, "Shogun's Beginnings" *Oxford Today*, vol. 7, no. 1 Michaelmas Issue 1994 at p. 20 where he observed as to Professor Jeffrey Mass' view of the benefits of the first Shogunate in Japan:

> ... finding to [Professor Mass'] surprise that its rule was based far more on efficient administration than on military heroics. "Although a warrior government, it was devoted not to the battlefield but to maintaining the peace ... It developed laws, institutions of justice, and an adversarial legal system that even today seems extraordinarily ingenious and sophisticated. Written evidence always took precedence over oral testimony, and women enjoyed their full day in court. The vendetta was illegal, as the objective was to keep people ensnared in litigation".

I also note that perhaps the legal sector in Canada has progressed a little too far in the ensnarement direction.

5 Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA) provides:

> A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

However when a matter comes to court the philosophy of the court system is openness: See *MDS Health Group Ltd. v. Canada (Attorney General)* (1993), 15 O.R. (3d) 630 (Gen. Div.) at p. 633. The present sealing application would not fit within any of the exceptions to the general rule of *public* justice as discussed in *A. (J.) v. Canada Life Assurance Co.* (1989), 70 O.R. (2d) 27 (H.C.) at p. 34: "... actions involving infants, or mentally disturbed people and actions involving matters of secrecy '... secret processes, inventions, documents or the like ...' " The broader principle of confidentiality possibly being "warranted where confidentiality is precisely what is at stake" was also discussed at the same page but would not appear applicable.

6 Mr. Griffin raised the question of reorganization material under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 or valuations submitted by a receiver for the purpose of obtaining court approval on a sale arrangement having been sealed. The purpose of that, of course, is to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information whilst others have to rely on their own resources. I would think the most appropriate sealing order in a court approval sale situation would be that the supporting valuation material remain sealed until such time as the sale transaction has closed.

7 I believe that it is obvious that if the ADR process entered into is along the mediation philosophy structure that it will be appreciated that the best and most productive results re dispute resolution will be achieved generally if such process involves a degree of confidentiality. This of course is subject to some exceptions such as when the parties agree that in a mediation of public policy issues there is a positive requirement for public exposure: see Brown and Marriott, *ADR Principles and Practice* (1993, London), Sweet & Maxwell, at p. 356. In other instances public exposure may induce a very negative reaction — e.g. if outsiders can be observers, then some (depending on their relationship to the parties involved) may become "cheerleaders", "advisors without the benefit of the facts" or "advisors without the discipline of having to live with the end result of the mediation" (which may be a non-resolution of the issues which may otherwise have been resolved). Unwanted pressure may thus be applied to one or more of the participants. Similarly a volunteer advisor-type may give "free" advice (e.g. "Don't settle; take him to court; you've got an absolute winner!") when the hidden agenda of this officious intermeddler is to foment disruption, harass the other side or pursue his own self interests. Allow me to observe that it would be unusual for anyone to feel obliged to conduct all of his negotiations (including those to settle disputes) in a fishbowl: Consider for instance one having a mild disagreement with one's mother as to where the two of you should have lunch — or a debate between a customer and a supplier over whether an order was short-shipped and, if so, what adjustment should be made (all without resort to the *Sale of Goods Act* and/or the courts).

8 While it it true that it appears in this case that the parties went private in a dispute which they could have litigated openly in the courts with a trial rather than an arbitration, I do not see that this choice would oblige the parties to make their arbitration public in and of itself. As for the confidentiality order of July 20, 1994 referring to two types of awards, an interim and a final, I now understand from counsel that the thrust of the interim award was the legal principles and of the final the damage calculation or other results flowing as opposed to the interim being a draft for comment and possible adjustment. If the latter were the

case then one would appreciate the practicality/necessity of maintaining confidentiality so as to avoid the types of unwarranted pressures aforesaid in achieving the end result. If of the other nature, I believe the same result prevails. Similarly if the process were something other than non-binding arbitration, one would also see the same type of necessity. In the instant case, the parties could have, if they had so chosen (i.e. either side), decided not to appeal the Arbitration's award. In such case, the result would have been the same as the two sides entering into settlement negotiations to end their dispute and coming to an agreement. In effect that is what they did by entering the arbitration process except that in doing so, they at the start of the piece delegated the resolution determination function to the Arbitrator for him to do so by applying legal principles to the facts as he found them. If the parties had not made the detour from the main channel of court proceedings leading to trial by going to arbitration but had merely negotiated a settlement, then with a settlement achieved they would customarily merely proceed to put on the public court record that the claim had been dismissed on consent. Details of the settlement would remain with the parties; they would be free to disclose or agree not to disclose, subject to some legal obligation to make disclosure (e.g. timely disclosure requirements under securities legislation).

9 However in this case, it appears that both sides were dissatisfied to some degree by the decision of the Arbitrator for various reasons. Perhaps counsel would be of assistance to their clients if they were able to reflect upon what may have been attempted to be communicated by the other side at the hearing before me. I state the obvious: sometimes signals are obliquely broadcast; sometimes what might be perceived as a signal is nothing more than a false hope by the recipient. However if there is truly a signal intended, it would be very unfortunate if the recipient did not pick it up because it was too oblique or worse still because the mind was closed (possibly because the mouth was open so as to block the ear passage).

10 The onus is upon P^2 as moving party to demonstrate sound reason for departing from the openness rule: See *MDS*, supra, at p. 633. As the factum of P^2 put it:

> There is an overriding public interest in the 1990's especially in fostering effective Alternative Dispute Resolution ("ADR") in such a way that parties will willingly submit to it in a manner which fosters its use and development and reduces the demands for scarce court resources.

The authority for this was given as *Brown and Marriott*, supra, at p. 356; *London & Leeds Estates Ltd. v. Paribas Ltd.*, unreported decision of Mance, J. (Q.B.) of July 28, 1994 and *Hassnah Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B. [Com. Ct.]). In citing *Hassnah*, Mance, J. at p. 8 of *London* merely stated:

> There is no doubt that the parties to such a previous arbitration owed each other a duty of confidence and privacy in respect of the course of and evidence given during it.

He went on to say at p. 9:

> None of those authorities deals with the need to consider the rights of a witness which could arise if duties of confidentiality or privacy were owed to him or her. Despite this I see some force in the submission that it is implicit in the nature of private consensual arbitration that witnesses who give evidence, even paid and professional experts, will within certain limits be accorded the benefits of the privacy which overall attaches to this type of arbitration. The privacy of arbitration is likely to be a factor in persuading many witnesses to give evidence and a factor in encouraging them to speak, or in the case of experts, enabling them to obtain permission from other principals to speak, about matters within their experience about which otherwise they might be hesitant or unable to speak.

London of course involved a question of whether a subpoena to an expert witness should be set aside where the confidential or private documents of the expert were sought to be obtained by the subpoena. It is even clearer in *Hassnah* what the limits of confidentiality would be concerning an arbitration and the award issuing therefrom. In that case there was an arbitration between the defendant who was reinsured by the plaintiff under various reinsurance contracts which had been placed by brokers. The defendant pursued arbitration to recover under the policies; the arbitration went mainly against the defendant which now wished to proceed in court against the placing brokers for negligence in breach of duty. Coleman, J. found as stated in the headnote: "that if it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-a-vis a third party

that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it including its reasons would not be a breach of the duty of confidence (See p. 249, col. 2)".

11 However as discussed above the parties clearly contemplated the possibility of appeal pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17. Both have availed themselves of that opportunity; the court files for whatever is filed pursuant to that appeal (and cross-appeal) will be open for inspection in the same way any other appeal of whatever nature or kind would be (assuming no valid sealing order obtained on the basis of the reasons set out above). This is not a case such as *Hassnah* where witness statements, documents and transcripts of a confidential arbitration were not to be made public for the purpose of a court action against a third person-*Hassnah* being a completely "separate" proceeding. In this case (the P^2 case) the court proceedings are merely the continuation of the fight between P^2 and the plaintiff franchisees (and not between one of them and a third person in separate proceedings), a fight which they took private but which they have now returned to the open arena of the court.

12 As Dickson, J. said at p. 186 (S.C.R.) of *MacIntyre v. Nova Scotia (Attorney General)*), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609 (and cited in *MDS*, supra, at p. 635):

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

In my view "one of these" is not to keep secret the material involved in an arbitration appeal which of its necessity takes the parties back into the court system with its insistence on openness for court proceedings, an aspect which one must assume each side fully recognized before proceeding to appeal the award.

13 I believe it well expressed by Smith, J. in *S. (P.) v. C. (D.)* (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) at p. 229 and p. 231:

> It may be argued that private litigants resorting to our public justice system should have the right to do so away from the public glare. The answer, very simply put, is that secrecy can only attend a private system of justice, not a public one. Or put in a different way, publicity is a necessary consequence of the obvious benefits that are derived from a public system put in place to serve society in general, including private litigants (p. 229).
>
> . . . . .
>
> There is no need to refer to the voluminous case law bearing upon the general principles of openness of Court proceedings. There is a dearth of authority on the interpretation of s. 147(2) of the *Courts of Justice Act*. Suffice it to say that it ought to be resorted to sparingly in the clearest of cases and on the clearest of material where as one instance the interests of justice would be subverted and/or the totally innocent would unduly suffer without any significant compensating public interest being served (p. 231).

14 P^2 has not adduced any evidence to support a sealing order pursuant to s. 137(2) CJA but rather it has relied on the court to fashion an order so as to extend the confidentiality which the parties had in their arbitration to the material in that arbitration which would otherwise be public pursuant to the appeal. I see no public policy grounds for doing so.

15 Mr. Griffin with his usual candour immediately agreed with Mr. Waldmann's proposition that if the sealing motion were dismissed then Mr. Waldmann's two clients outside the arbitration would be allowed access to the arbitration material.

16 The sealing order motion of P^2 is dismissed. P^2 is to pay $1,000 in costs forthwith to the plaintiffs represented by Ms. Spies and Mr. Mitchell; no other costs awarded.

Motion dismissed.

Footnotes

* Leave to appeal to the Ontario Court of Appeal was refused with costs on June 7, 1995, Doc. CA M15773, McKinlay, Griffiths and Doherty JJ.A. (Ont. C.A.).

End of Document

2014 ABQB 350
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Elaborate Homes Ltd.

2014 CarswellAlta 921, 2014 ABQB 350, [2014] A.W.L.D. 3322, [2014] A.W.L.D. 3353, 14 C.B.R. (6th) 199, 243 A.C.W.S. (3d) 80, 590 A.R. 156

In the Matter of the Insolvency of Elaborate Homes Ltd. and Elaborate Developments Inc.

Alberta Treasury Branches, Plaintiff and Elaborate Homes Ltd., Elaborate Developments Inc., Manjit (John) Nagra, Jaswinder Nagra, Defendants

K.G. Nielsen J.

Heard: May 14, 2014
Judgment: June 11, 2014 *
Docket: Edmonton 1103-02937

Counsel: Robert M. Curtis, Q.C. for Alco Industrial Inc.
Michael J. McCabe, Q.C. for PriceWaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.1 Proceedings against bankrupt
XVI.1.a Before discharge of trustee
XVI.1.a.ii Granting of leave
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.i General principles
Headnote
Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave
Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.
Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties — General principles

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R. 9.15(1) — considered

R. 9.15(2) — considered

R. 11.21 — considered
Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
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R. 3 — considered

R. 6(1) — considered

R. 124 — considered

MOTION by corporation for leave to file action against receiver, in bankruptcy matter.

***K.G. Nielsen J.*:**

I. Introduction

1 PriceWaterhouseCoopers Inc. (PWC) was appointed as receiver of all current and future assets and property of Elaborate Homes Ltd. and Elaborate Developments Inc. (collectively referred to as Elaborate).

2 Alco Industrial Inc. (Alco) seeks leave to commence proceedings against PWC in relation to matters arising in the receivership.

II. Background

3 Alco held a second mortgage (the Mortgage) in the amount of $1,075,000 on, *inter alia*, property (the Condo) owned by Elaborate Homes Ltd., legally described as:

> Condominium Plan 0520263 Unit 4 and 905 undivided 1/10,000 shares in the common property Excepting thereout all mines and minerals.

4 Alberta Treasury Branches was a secured creditor of Elaborate. It held, *inter alia*, a first mortgage on the Condo.

5 PWC was appointed as the receiver of Elaborate Homes Ltd. pursuant to a Consent Receivership Order dated February 22, 2011 (the Receivership Order). Pursuant to a separate Receivership Order, also dated February 22, 2011, PWC was named as receiver of Elaborate Developments Inc., a company related to Elaborate Homes Ltd.

6 On March 3, 2011, PWC sent notice to Alco, pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) of the receivership of Elaborate. This was sent by regular mail to the address indicated on the registration of the Mortgage on the Certificate of Title to the Condo. In the Brief filed in this application on behalf of Alco, it is acknowledged that Alco was served with a copy of the Receivership Order.

7 On or about April 5, 2011, an assistant with legal counsel for PWC (not the counsel for PWC on this application) obtained certain contact information with respect to Alco. While the assistant could not recall with whom she spoke at Alco or the exact conversation, she deposed that she believed she followed her typical practice when speaking to creditors which was as follows:

> (a) she identified herself to the creditor and advised that she was calling from counsel for the receiver with respect to the receivership of the debtor company;
>
> (b) she advised the creditor that the receiver required certain information from the creditor with respect to the receivership; and
>
> (c) she requested contact information for the individual within the creditor's organization who would be best suited to receive correspondence with respect to the receivership.

8 In the discussions that ensued with the individual at Alco following this typical practice, she was advised that the owner of Alco was Bob Taubner and she was given his email address. This information is confirmed in a handwritten note made by the assistant. At all material times, Mr. Taubner was the President of Alco.

9 PWC took steps to market Elaborate's assets and property pursuant to the provisions of the Receivership Order. As a result of the marketing efforts, a number of offers were received for individual assets of Elaborate. PWC also received a number of "*en bloc* offers" to purchase all of Elaborate's assets. One of those *en bloc* offers was received from 1601812 Alberta Ltd. (the 160 Offer).

10 In accordance with its obligations, PWC reported to the Court with respect to the offers received in its Second Report, filed May 26, 2011. The Second Report contained a Bid Summary of all of the offers. PWC wished to keep the information in the Bid Summary confidential, and to release it to the public only after the Court had approved a sale. However, parties could obtain a copy of the Bid Summary on signing and sending to PWC a Confidentiality Letter, which provided that anyone signing it would be provided with the Bid Summary, but would be barred from acting as a purchaser in any way in respect of Elaborate's assets.

11 As outlined in the Second Report, PWC was of the opinion that the 160 Offer would lead to the highest net recovery for the creditors of Elaborate, as opposed to accepting other offers for specified or individual assets. PWC formed this view based on the combined value of the cash and assumption of liabilities components of the 160 Offer.

12 PWC accepted the 160 Offer subject to Court approval. PWC recommended to the Court that the 160 Offer be approved on the basis that it was higher than other offers and was preferable from the perspective of all of the creditors of Elaborate as a whole. Compared to all of the other *en bloc* offers, the 160 Offer would produce the highest net recovery on the Condo. Based on its analysis of the 160 Offer, PWC concluded that accepting the 160 Offer would allow for recovery of all of the indebtedness of Elaborate to Alberta Treasury Branches, but would not allow for the full recovery of the indebtedness of Elaborate to another secured creditor, Servus Credit Union. Following discussions with PWC, Servus Credit Union agreed with PWC's recommendation to accept the 160 Offer. PWC had no discussions with Alco with respect to the offers received.

13 The 160 Offer required Court approval by June 3, 2011. By an email dated May 26, 2011, counsel for PWC forwarded to Elaborate's creditors, including Alco, copies of the following:

> (a) the Application for an Order Approving Sale and Vesting Order returnable June 3, 2011 (the Application);
>
> (b) the Second Report;

(c) a copy of a letter directed to the Court; and

(d) a copy of the Confidentiality Letter.

14 On June 3, 2011, Belzil J. heard the application for approval of the sale of Elaborate's assets and property pursuant to the 160 Offer. Belzil J. granted a Sale Approval and Vesting Order approving the acceptance of the 160 Offer by PWC (the Sale Order). Belzil J. also granted a Sealing Order which sealed the Bid Summary until such time as the sale transaction had closed and a letter had been filed with the Clerk of the Court confirming that fact (the Sealing Order).

15 On June 3, 2011, counsel for PWC served the Sale Order and the Sealing Order by email on the listed creditors, including Alco.

16 Mr. Taubner, the President of Alco, has deposed that while he received the email of May 26, 2011 enclosing the Application, and 19 other emails with respect to this receivership, he did not use the email address which had been given to counsel for PWC or any other email address at the material time. He deposed that he was unfamiliar with computers and he did not anticipate that he might receive communications from PWC in such a fashion.

17 On cross-examination on his Affidavit, Mr. Taubner testified that he would occasionally request email communications, some of his employees would communicate with him by email, he would read such emails, and the group accountant for Alco had access to his emails. There is no evidence that any of the emails forwarded to Alco with respect to the Elaborate receivership at the address given, were rejected or returned as undeliverable.

18 The sale of Elaborate's assets and property proceeded pursuant to the 160 Offer, and Alco ultimately received the sum of $90,553.09 net of costs in relation to the security which it held on the Condo. This recovery was insufficient to pay out the Mortgage.

19 PWC reported in its First Report, filed April 20, 2011, that an appraisal of the Condo had been conducted in August 2010, reflecting a market value of $785,000. The Bid Summary indicated that the appraised value of the Condo on a forced liquidation was $505,750. The value assigned to the Condo pursuant to the 160 Offer was $432,000. This was the highest value assigned to the Condo in any of the *en bloc* offers. An offer had been received on the Condo only. This offer was in the amount of $529,444.

20 The value assigned to the Condo in the 160 Offer represented 85% of the forced liquidation valuation. Only two other assets had higher returns compared to their valuations. The lowest allocation to an asset in the offers received was 24% of that asset's valuation.

21 Andrew Burnett, Vice President of PWC, was involved in this receivership. He filed an Affidavit in response to Alco's Application and was examined on it. With respect to the 160 Offer, Mr. Burnett deposed as follows:

Page 30, lines 17 to 22:

> Q Was there ever any conversation with the offeror about modifying its offer in respect of the office condo [the Condo] because of the position of Alco?
>
> A No, there was never discussion with them about changing their position on any of the other pieces of property other than the Althen One [unrelated to the Condo].

Page 33, lines 25 to 27 and Page 34, lines 1 to 11:

> Q One of the bids that PWC did receive for the office condo alone was over $500,000, correct?
>
> A Correct.

> Q When that bid came in, do I take it that the sole consideration was that it was a standalone bid whereas you wanted to have *en bloc* bids?
>
> A No.
>
> Q What consideration was given to possibly accepting that bid?
>
> A We went back to all the purchasers that had more than one item on there and asked them whether we could carve out pieces, saying okay, you're the highest on this, but you're lower on this, can we just take that?

Page 36, lines 15 to 20:

> Q What did Studio Homes [formerly 1601812 Alberta Ltd.] specifically advise with respect to their position on the office condo at the time, not in January of 2014, but at the time?
>
> A At the time, and I won't say it's just on the office condo, we asked whether they would pull any of their other parcels out and they advised no.

III. Terms of the Orders

A. Receivership Order

22 The following provisions of the Receivership Order are relevant to this application:

> ...2. Pursuant to sections 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-03 (the "*BIA*"), 13(2) of the *Judicature Act*, RSA 2000, c. J-2, 99(a) of the *Business Corporations Act*, RSA 2000, c. B-9 and 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, PriceWaterhouseCoopers Inc. is hereby appointed Receiver (the "Receiver"), without security, of all of the Debtor current and future assets, undertakings and properties real and personal of every nature and kind whatsoever, and wherever situate, including all proceeds thereof ("the Property").
>
> 3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> ...(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.
>
> (l) To sell, convey, transfer, lease or assign the Property (the "Disposition") or any part or parts thereof: ...
>
> 7. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> . . .
>
> 16. The Receiver shall incur no liability or obligation as a result of its appointment or carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the WEPPA. Nothing in this order shall derogate from the protection afforded to the Receiver by s. 14.06 of the BIA or any other applicable legislation.

B. Sale Order

23 The following provisions of the Sale Order are relevant to this application:

1. Service of the notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service is abridged to that actually given.

2. The Receiver's acceptance of the Purchaser's offer to purchase the Lands and Personal Property dated May 6th, 2011 as clarified and extended by the letter from the Receiver dated May 13, 2011, the e-mail from the Purchaser's legal counsel to the Receiver's legal counsel dated May 19, 2011, the letter from legal counsel for the Receiver to legal counsel for the Purchaser dated May 20, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 24, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 25, 2011, and the letter from the Receiver to the Purchaser dated May 26, 2011 (the "Offer"), which Offer is summarized at paragraphs 20 to 32 of the Receiver's Second Report, and [sic] is hereby approved and ratified.

. . .

15. Service of this Order may be effected upon those persons (directly or through legal counsel) on the Service List by facsimile or electronic mail, and such service shall constitute good and sufficient service. Service on any person other than as specified in the Service List is hereby dispensed with.

C. Sealing Order

24 The following provision of the Sealing Order is relevant to this application:

1. ... the Clerk of the Court is hereby directed to seal the Bid Summary (the "Confidential Documents") on the Court file until the sale of the Lands and Personal Property to 1601812 Alberta Ltd. has been closed in accordance with the Offer Terms and the filing of a letter with the Clerk of the Court from PriceWaterhouseCoopers Inc. confirming the sale of the Lands and Personal Property has been closed. ...

IV. Positions of the Parties

25 Alco argues that leave should be granted to file the Statement of Claim appended to its Application. Alco submits that it has a claim against PWC for gross negligence or wilful misconduct in serving the Application by email on May 26, 2011, and selling the Condo for less than its appraised value, thereby preferring the interests of other creditors to those of Alco.

26 PWC argues that there is no basis for a claim against it, as all documents were properly served on Alco by email, and all steps taken by it were in accordance with its obligations to act in the best interests of the creditors of Elaborate as a whole. Therefore, it was neither grossly negligent, nor did it wilfully misconduct itself.

V. Issue

27 The sole issue before the Court is whether Alco should be granted leave to file the Statement of Claim against PWC.

VI. Applicable Rules

A. Alberta Rules of Court, Alta Reg 124/2010

28 The following Rules of the *Alberta Rules of Court* are relevant to this application:

9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made

(a) without notice to one or more affected persons, or

(b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.

(2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of

(a) the service of the judgment or order on the applicant, and

(b) the date the judgment or order first came to the applicant's attention.

. . .

11.21(1) A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and

(a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and

(b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.

(2) Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.

(3) In this rule, "electronic" and "electronic agent" have the same meanings as they have in the *Electronic Transactions Act*.

B. Bankruptcy and Insolvency General Rules, CRC, c 368

29 The following *BIA* Rules are relevant to this application:

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

. . .

6.(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

VII. Law

A. Threshold Test for Leave

30 The Supreme Court of Canada in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) confirmed that the threshold is low on an application for leave to commence an action against a receiver or trustee:

55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact...

. . .

57 In the leading case of ***Mancini***, the Court of Appeal summarized the accepted principles as being the following:

1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.

> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

31 Conrad J. (as she then was) considered this issue in her decision in *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 90 A.R. 173 (Alta. Q.B.), at 177 -78, [1988] 6 W.W.R. 156 (Alta. Q.B.):

> ...In ***Royal Bank of Canada v. Vista Homes Ltd. et al*** (1985) 63 B.C.L.R. 366 (B.C.S.C.), Mr. Justice MacDonald stated at p. 374:
>
> > ...the obtaining of an order to sue should not be a perfunctory process... The court should examine with some care the foundation of the alleged claim with a bias against exposing its appointed officer to unnecessary or unwarranted litigation. On the other hand, there is not an onus on the applicant to prove its case against the receiver-manager at this stage.
>
> . . .
>
> I am satisfied the test to be applied by this court is to determine whether it is perfectly clear that there is no foundation for the claim or whether the action is frivolous or vexatious. It is not for this court to deal with the merits of either party's position or to gauge the probability of success should the action proceed to trial. Leave should be granted if the evidence presented discloses that there is some foundation for the claim and that the claim is not merely frivolous nor vexatious.
>
> Indeed, while the Court may by its order want to protect its appointed officer from unnecessary and unwarranted litigation, I do not take that to mean they are entitled to protection against proper actions simply because they are court appointed.

32 Therefore, the proposed plaintiff must have supplied "facts to support the claim sought to be asserted", or "some foundation for the claim". Both of these cases make it clear that there must be some factual basis for the claim, a court should not grant leave for frivolous, vexatious or unmeritorious claims, and it is not appropriate at the leave stage for the court to make a final assessment of the merits of the claim or possible defences to the claim.

33 While the threshold for granting leave is low, the process of reviewing the proposed claim is not to be perfunctory. Therefore, I will analyze in some detail the basis for the claims alleged by Alco against PWC.

B. Gross Negligence and Willful Misconduct

34 Clause 16 of the Receivership Order provides that PWC will incur liability only in circumstances of "gross negligence or wilful misconduct on its part". The starting point, therefore, is to consider what constitutes gross negligence or willful misconduct.

35 *Black's Law Dictionary*, 9th ed (St Paul, MN: West, 2009) defines gross negligence as, *inter alia*:

> A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.
>
> ...As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous...have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof...But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind...

36 The *Dictionary of Canadian Law*, 4th ed (Scarborough, Ont: Thomson Carswell, 2011) provides the following definition:

> Conduct in which if there is not conscious wrongdoing, there is a very marked departure from the standard by which responsible and competent people...habitually govern themselves...a high or serious degree of negligence...

37 The Supreme Court of Canada has considered these terms in the context of tort litigation. In *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.), at 145, [1942] S.C.J. No. 7 (S.C.C.), Duff C.J. observed:

> ... All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. ...

38 In *Société Telus Communications v. Peracomo Inc.*, 2014 SCC 29, [2014] S.C.J. No. 29 (S.C.C.), Cromwell J. for the majority commented on "wilful misconduct":

> 57 In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference"; "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": ***R. v. Boulanger***, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing ***Attorney General's Reference (No. 3 of 2003)***, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an insightful article, Peter Cane states that "[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take": "*Mens Rea* in Tort Law" (2000), 20 *Oxford J. Legal Stud.* 533, at p. 535.
>
> 58 These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know...

39 Therefore, in order for Alco to establish PWC's liability arising from the receivership at an eventual trial, it must show that PWC demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

40 Against this backdrop, I will consider Alco's complaints regarding PWC's conduct.

VIII. Analysis

A. Email Service

41 Alco argues that service of the Application was not effective, as Alco had not specifically provided an address to which information or data in respect of the receivership action might be transmitted to it.

42 Nothing in the material before the Court supports this allegation. Clearly, the assistant for counsel at PWC contacted a representative of Alco who provided an email address for the president of Alco. It is reasonable to infer that whoever provided the email address to the assistant for counsel at PWC was not aware that Mr. Taubner would not access his email account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

43 PWC derived its authority from the Receivership Order which specifically references the *BIA*. Rule 6(1) of the *BIA Rules* requires that every notice or other document pursuant to the *BIA* or the *BIA Rules* be "served, delivered personally or sent by mail, courier, facsimile or electronic transmission". Both the Application and the Sale Order were sent by electronic transmission to an email address provided by Alco. There is nothing in the material before the Court to suggest that service was not effected in compliance with Rule 6(1) of the *BIA Rules*.

44 In contrast, *BIA* Rule 124 provides that a notice pursuant to s. 244(1) of the *BIA* by a secured creditor who intends to enforce a security on all or substantially all property of an insolvent may be "sent, *if agreed to by the parties*, by electronic transmission". Neither s. 245 regarding the initial notice of the receiver, nor general Rule 6(1) imposes a similar requirement.

45 The *Alberta Rules of Court* supplement the *BIA Rules* to the extent that they are not inconsistent with the *BIA* or the *BIA Rules*. Rule 11.21 requires that the recipient has specifically provided an address. Arguably, this is more onerous than Rule 6(1), and therefore inconsistent with it. However, even if Rule 11.21 of the *Alberta Rules of Court* applies, there is nothing in the material before the Court to suggest that the requirements of Rule 11.21 were not met in this case.

46 I also note that if Alco wished to pursue the position that the Sale Order had been obtained without notice to it, it could have availed itself of Rule 9.15 of the *Alberta Rules of Court* which provides a mechanism to seek to vary or discharge a judgment or order on that basis. Such an application must be made within 20 days after the earlier of service of the order on the applicant, or the date the order first came to the applicant's attention.

47 The Sale Order was, of course, also served by email on Alco. Therefore, Alco would argue that the Sale Order was not properly served upon it. However, on the record before me it is clear that Alco was aware of the Sale Order by January 11, 2012 at the latest, when it resisted the apportionment of receivership costs as against the proceeds from the sale of the Condo. Alco took no timely steps to set aside the Sale Order for lack of service upon becoming aware of it.

48 Further, the Sale Order makes it clear that service of the Application was declared to be good and sufficient and that service of the Sale Order could be effected upon all affected persons by way of facsimile or electronic mail, and such service was constituted to be good and sufficient. Therefore, it appears that Belzil J. considered the matter of both service of the Application and the Sale Order. Again, Alco could have either appealed the Sale Order, or sought to set it aside on the basis of a lack of notice. It took neither of these steps.

49 I would add that in today's world, electronic service is a reflection of practical realities. The *Alberta Rules of Court* and the *BIA Rules* recognize this reality. Perhaps there is no area of practice where electronic service of documents is more appropriate than the bankruptcy and insolvency area. I say this because of the volume of documents that are often produced in such matters, and the need for receivers, trustees, monitors and counsel to act expeditiously and often in the face of very short deadlines. Given the commercial and legal realities of bankruptcy and insolvency matters, there is an obvious need to exchange documents electronically. In my view, a party involved in such matters cannot ignore these realities by refusing to move effectively into the electronic age.

50 In summary, I find nothing in the material before the Court to suggest that PWC through its counsel did not properly effect service of both the Application and the Sale Order on Alco by emailing those documents to Mr. Taubner at Alco. There is no factual basis to suggest that PWC was either grossly negligent, or that it wilfully misconducted itself, in effecting service of the documents by email.

B. Sale Transaction

51 Alco also alleges that PWC breached its duties to Alco in the manner in which it conducted the sale of Elaborate's assets. Specifically, Alco alleges that PWC concealed the Bid Summary, and sold the Condo for an amount which was below its appraised value.

52 The Second Report indicated that PWC preferred that the Bid Summary remain confidential until such time as the sale transaction had closed. Upon signing the Confidentiality Letter, the Bid Summary would be disclosed to the signatory on the basis that the information disclosed in the Bid Summary would not later be used by the signatory as a potential purchaser of Elaborate assets.

53 Alco argues that PWC should not have required it to give up any right to make an offer on the Condo. Alco submits that its rights "ought not to have been extorted away under threat that otherwise the information necessary for it to respond to a court application would be kept hidden from view".

54 It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952, [2009] O.J. No. 5440 (Ont. S.C.J. [Commercial List]), Newbould J. explained the reasons for such confidentiality:

> 17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In ***8857574 Ontario Inc. v. Pizza Pizza Ltd***, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

55 Alco alleges that PWC and its counsel ignored Alco, hid the Bid Summary and cloaked their activities in the receivership with secrecy. However, there is nothing in the material before the Court to suggest that PWC's preference to keep the Bid Summary confidential until the sale transaction had been approved and closed was for any purpose other than to ensure the integrity of the marketing process, and to avoid misuse of the information in the Bid Summary by a subsequent bidder to obtain an unfair advantage in the event it was necessary to remarket Elaborate's assets. Further, there is nothing to suggest that Belzil J. granted the Sealing Order for any other reason.

56 Alco may have been in a unique position given that it held a second mortgage on the Condo. Given that unique position, it may very well have been entitled to receive information with respect to the offers received in relation to the Condo and, therefore, could have suggested revised terms to any required confidentiality agreement. However, Alco's position does not render PWC's actions inappropriate. There is nothing to suggest that PWC's actions in this regard were not in accordance with common, prudent and reasonable practice in receiverships, or that they reflect or resulted from gross negligence or wilful misconduct on the part of PWC.

57 With respect to the manner in which the sale of the Condo was conducted, Alco submits that PWC breached a "fundamental duty of Receivers" in that it failed to act with an even hand towards classes of creditors and in accordance with recognised lawful priorities. Again, the law and the material before the Court do not support this contention.

58 The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at paras 27-29, Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

> 30 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.

59 Galligan J.A. recognized that in considering a sale by a receiver, a court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver, and should assume that the receiver is acting properly unless the contrary is clearly shown. He summarized the duties of the court when deciding whether a receiver who has sold property acted properly as follows (at para 17):

> 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.

60 In *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]) at para 4, Farley J. cited *Soundair* with approval, holding that a receiver's conduct is to be reviewed in light of the objective information the receiver had and not with the benefit of hindsight. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver acted improvidently in accepting it.

61 In *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 N.S.R. (2d) 34 (N.S. S.C.), the receiver was of the view that the best realization of the assets in question would come from a sale *en bloc*. Hood J. held that the receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, the receiver must consider the interests of all creditors and then act for the benefit of the general body.

62 PWC accepted the 160 Offer and recommended that the acceptance be approved by the Court on the basis that it was higher than other *en bloc* offers and was preferable from the overall perspective of Elaborate's creditors. The 160 Offer provided for the highest net recovery on the Condo of all of the *en bloc* offers and represented a recovery of 85% of the forced liquidation valuation of the Condo. Only one other offer in the marketing process undertaken by PWC assigned a purchase price for the Condo which was higher than the price assigned in the 160 Offer. This was an offer with respect to the Condo only.

63 The law is clear to the effect that the receiver must not consider the interests of only one creditor, but must act for the benefit of the general body of creditors. PWC was under a duty to act in the interests of the general body of creditors and to conduct a fair and efficient marketing process.

64 The excerpts from the cross-examination of Mr. Burnett on his Affidavit indicate that PWC did attempt to maximize the recovery on all of Elaborate's assets as it conducted negotiations with the various bidders in this regard.

65 There is nothing before the Court to suggest that PWC did not make sufficient efforts to obtain the best price for the assets, nor that it acted improvidently. Alco has not put forward any factual foundation to support an inference that PWC did not act for the benefit of the general body of creditors.

66 Alco submits that had it attended the hearing on June 3, 2011 before Belzil J., it would have been successful in arguing that Alco was deprived of a statutory right to recover its secured debt against the Condo. However, the contents of the Second Report undermine the argument that PWC's acceptance of the 160 Offer would not have been approved in the circumstances as known when the matter proceeded before Belzil J. Further, given my findings on the email service issue, PWC cannot be blamed for Alco's non-attendance at the hearing on June 3, 2011.

67 Therefore, I conclude that Alco has not established a factual basis for the claim that PWC was either grossly negligent or wilfully misconducted itself in the manner that it marketed Elaborate's assets or in its reporting to the Court.

IX. Conclusion

68 The threshold test for leave in this case is low. However, PWC would only be liable if it acted with gross negligence or wilful misconduct. I have found no factual basis to suggest that PWC was either grossly negligent or wilfully misconducted itself as alleged by Alco.

69 PWC is not entitled to protection against proper actions simply because it was court appointed. However, I am mindful of the bias against exposing a court appointed officer to unnecessary or unwarranted litigation. In my view, granting leave to Alco to proceed with the claim against PWC would expose it to a manifestly unmeritorious action.

70 Therefore, Alco's application for leave to file the Statement of Claim against PWC is dismissed.

X. Costs

71 If the parties cannot otherwise agree on costs, they may appear before me within 60 days of the filing of these Reasons for Judgment.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on June 23, 2014 has been incorporated herein.

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851
DATE: 20141201
DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

Pepall J.A.:

[1] The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

[2] This appeal involves a motion judge's refusal to approve legal fees of $255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

[4] The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately $4.9 million (approximately $2 million and $2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

[5] On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in

materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

[6] Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

[7] Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable

insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

[8] The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

[9] The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of $8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and

sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

[10] After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to $138,297 plus $9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of $338.38. The highest hourly rate charged by the Receiver was $525 per hour. Fees estimated to complete were $20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to $255,955, plus $4,434.92 in disbursements and $33,821.69 in taxes for a total account of $294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of $643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of $750.00. The rates of the other 10 people on the account ranged from $950 per hour for a senior lawyer to $195 for a student and $330 for a law clerk.

[14] Fees estimated to complete were $20,000.

[15] In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

[16] As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

[17] In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

[18] On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- $100,000 of BLG's fees be approved; and

- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

[19] Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was $500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to $30,000.

Motion Judge's Decision

[20] On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

[21] In his reasons, the motion judge considered and applied the principles set out in *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.). The motion judge considered the nature, extent and

value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

[22] The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

[23] He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension – the hours) submitted for reimbursement."

[24] The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately $8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

[25] The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

[26] He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of $475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

[27] The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at $157,500 from which the $100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of $4,434.92 and applicable HST.

Grounds of Appeal

[28] The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

[29] The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721, at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

[30] Under s. 243(1) of the *BIA,* the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's

accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

[31] The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

> The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

[32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

> The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[34] In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit

Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

[35] Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "*Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated*" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the

hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

[41] The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

[42] Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

[43] In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

[44] In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair

and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[46] It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

[47] Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

[48] The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

[49] As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its

counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

[50] I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

[51] In this regard, the appellant makes numerous complaints.

[52] The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

[53] While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

[54] In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

[55] As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have

viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

[56] Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

[57] In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

[58] Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

[59] I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

[60] While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

[61] For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of $5,500, together with disbursements and all applicable taxes.

Released:

"DEC -1 2014"
"EAC"

"Sarah E. Pepall J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree E.A. Cronk J.A."

Court of Queen's Bench of Alberta

Citation: Servus Credit Union Ltd v Trimove Inc, 2015 ABQB 745

Date: 20151125
Docket: 1503 06388
Registry: Edmonton

Between:

Servus Credit Union Ltd

Applicant

- and -

Trimove Inc. and Geeta Luthra

Respondents

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] The court-appointed receiver asks for approval of its, and its lawyer's, fees.

[2] The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.

[3] The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately $1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The

receiver recovered a total of approximately $1.1 million, of which approximately $863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately $298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately $82,000.00.

[4] The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be $3,000.00.

[5] The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

[6] Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in ***Belyea***, ***Bakemates*** and ***Diemer***.

[7] Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, 'We'll make sure you get nothing", the nature of the assets – rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

[8] While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in ***Bakemates***, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive.":***BT-PR Realty Holdings***. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

[9] If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in ***Bakemates***.

Cases and authority cited:

[10] **By the debtors**: ***Federal Business Development Bank v Belyea*** [1983] N.B.J. No. 41; ***Bank of Nova Scotia v Diemer (c.o.b. Cornacre Cattle Co.)*** 2014 ONCA 851.

[11] **By the court**: ***Bakemates International Inc. (Re)*** [2002] O.J. No. 3569***; BT-PR Realty Holdings Inc. v Coopers & Lybrand*** [1997] O.J. No. 1097***; 911502 Alberta Ltd. v. Elephant Enterprises Inc.***2014 ABCA 437; ***Sidorsky v CFCN Communications Ltd.*** [1995] A.J. No. 174 (Q.B.); ***Trinier v Shurnaik*** 2011 ABCA 314.

1. Background

[12] Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

[13] Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately $1.1 million. As a representative example,

in the $700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

> 1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

[14] Geeta Luthra guaranteed the repayment of those facilities.

[15] Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

> On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed . . . . In response to this statement Karan stated that "We'll make sure you get nothing".

[16] When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

[17] On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had $146,480.00 in outstanding accounts payable and no funds to pay them.

[18] On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

[19] On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

> [the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security. . . .

> Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands. . . . I provided him the following items . . . list of equipment, I recalled from my memory and locations . . .

[20] Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

[21] Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

[22] Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

[23] Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

[24] In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

[25] The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

2. Testing receivers' and lawyers' fees

[26] I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in ***Belyea*** and ***Diemer***.

[27] In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is ***Bakemates***, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

[28] The other case to which I must refer is ***BT-PR Realty Holdings.*** That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as ***Diemer***, but also any contract in relation to legal fees. As Farley J. said:

> I do not particularly quarrel with the list of factors set out in the Bank of Montreal v. Nicar Trading Co. (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):

(a) the nature extent and value of the cases;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the parties;

(d) time spent by the receiver;

(e) the receiver's knowledge, experience and skill;

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and,

(i) the cost of comparable services.

However I would add

(j) other material considerations –

for example in this case:

(i) the April 12 agreement to the fees;

(ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).

I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

In other words, in ***BT-PR Realty Holdings***, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

3. Applying the principles in this case

a) Receiver's fees

[29] Information about the receiver's fees is attached to an affidavit in the manner recommended by ***Bakemates.*** The debtors do not provide any evidence on the issue of fees.

[30] It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed

some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

[31] More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

[32] In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

[33] The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

[34] Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

[35] Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

[36] It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

[37] Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for $3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

[38] In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.

b) Lawyer's fees

[39] The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in ***Bakemates***: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

[40] However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

[41] More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in ***Elephant Enterprises.***

[42] As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in ***Sidorsky***, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

> 5 There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
>
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
>
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

[43] As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in ***Trinier***:

> G. Any Discretion?
>
> 39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.
>
> 40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.
>
> 41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.
>
> 42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: ***BT-Pr Realty Holdings Inc.***

[44] In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

[45] However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

4. Proposal to hire an expert to review the receiver's fees

[46] If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in ***Bakemates*** rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the ***Bakemates*** procedure does not arise.

5. Costs

[47] The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Heard on the 18th day of November, 2015.
Dated at the City of Edmonton, Alberta this 24th day of November, 2015.

J.B. Veit
J.C.Q.B.A.

Appearances:

Kentigern A. Rowan, QC, Ogilive LLP
for the Receiver MNP Ltd.

Thomas Gusa, Miller Thompson LLP
for the Applicant, Servus Credit Union Ltd.

Darren R. Bieganek, QC, Duncan Craig LLP
for AFSC (Agricultural Financial Service Corporation)

Vishal Luthra and Geeta Luthra
own their own behalfs