COURT FILE NUMBER	24-3356741
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ENDRUM ENERGY CORP.
APPLICANT	**ENDRUM ENERGY CORP.**
RESPONDENTS	**2672682 ALBERTA LTD., JAKE ENERGY INC., and BRAD PEAKE**
DOCUMENT	**BOOK OF AUTHORITIES OF THE RESPONDENTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	LAWSON LUNDELL LLP Barristers and Solicitors 1100, 225 – 6th Avenue SW Brookfield Place Calgary, AB T2P 1N2 Attention: Jennie A. Buchanan / Eloise Hirst Telephone: (403) 269-6900 Fax: (403) 269-9494 Email: jbuchanan@lawsonlundell.com ehirst@lawsonlundell.com File No.: 119661-195145

BANKRUPTCY AND INSOLVENCY
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Commercial List Chambers Application

Scheduled for the 12th day of August, 2026 at 11:00 am

Before the Honourable Justice M.A. Burns

VI. LIST OF AUTHORITIES

Tab 1	*R. v Canadian Broadcasting Corp.*, 2018 SCC 5
Tab 2	*ACCEL Canada Holdings Limited v Pembina Pipeline Corporation*, 2018 ABQB 1039
Tab 3	*RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC)
Tab 4	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
Tab 5	*Fraudulent Conveyances Act*, 13 Eliz 1, c 5 (UK)
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Tab 7	*Questor Technology Inc v Stagg,* 2020 ABQB 3
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Tab 9	*C2 Recycling Inc v All West Demolition Ltd*, 2022 CarswellAlta 3816
Tab 10	*Polesystems Inc. v Martec Manufacturing Ltd.*, 1989 CanLII 3168 (ABQB)
Tab 11	*Sam Lévy & Associés Inc. v Azco Mining Inc.*, 2001 SCC 92
Tab 12	*Blade Energy Services Corp (Re)*, 2024 ABKB 100
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Tab 1

Canadian Broadcasting Corporation *Appellant*

v.

Her Majesty The Queen *Respondent*

and

CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/Canadian Media Lawyers Association *Interveners*

Indexed as: R. *v.* Canadian Broadcasting Corp.

2018 SCC 5

File No.: 37360.

2017: November 1; 2018: February 9.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Injunctions — Interlocutory injunctions — Publication bans — Mandatory publication ban issued pursuant to Criminal Code respecting identity of young victim — Media outlet refused to remove from its website articles which pre-existed publication ban and which identified victim by name and photograph — Crown bringing application for contempt and for mandatory interlocutory injunction requiring removal of information from media outlet's website — Applicable framework for granting mandatory interlocutory injunction — Whether Crown must establish strong prima facie case or serious issue to be tried — Whether chambers judge erred in refusing interlocutory injunction because Crown failed to show strong prima facie case of criminal contempt — Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(2.1), (2.2).

Société Radio-Canada *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Studio Vice Canada Inc., Réseau de télévision des peuples autochtones et AD IDEM/Canadian Media Lawyers Association *Intervenants*

Répertorié : R. *c.* Société Radio-Canada

2018 CSC 5

N° du greffe : 37360.

2017 : 1 novembre; 2018 : 9 février.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

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

Injonctions — Injonctions interlocutoires — Interdictions de publication — Prononcé d'une interdiction de publication mandatoire en vertu du Code criminel quant à l'identité d'une jeune victime — Refus du média de retirer de son site Web les articles affichés avant l'interdiction de publication et identifiant la victime par son nom et sa photo — Demande par le ministère public pour que soient prononcées une assignation pour outrage au tribunal et une injonction interlocutoire mandatoire intimant le retrait des renseignements du site Web du média — Cadre d'analyse applicable à la délivrance d'une injonction interlocutoire mandatoire — Le ministère public doit-il établir une forte apparence de droit ou l'existence d'une question sérieuse à juger? — Le juge en cabinet a-t-il commis une erreur en refusant de délivrer une injonction interlocutoire parce que le ministère public n'a pas établi une forte apparence de droit quant à l'existence d'un outrage criminel? — Code criminel, L.R.C. 1985, c. C-46, art. 486.4(2.1), (2.2).

An accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the *Criminal Code*. Prior to the issuance of the publication ban, CBC posted information revealing the identity of the victim on its website. As a result of CBC's refusal to remove this information, the Crown sought an order citing CBC in criminal contempt of the publication ban and an interlocutory injunction directing the removal of the victim's identifying information. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. The majority of the Court of Appeal allowed the appeal and granted the mandatory interlocutory injunction.

Held: The appeal should be allowed.

To obtain a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has demonstrated a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. This modified *RJR — MacDonald* test entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. The applicant must also demonstrate that irreparable harm will result if the relief is not granted and that the balance of convenience favours granting the injunction.

In this case, a literal reading of the originating notice shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding. The Crown thus proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt. The originating notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. The two applications are linked, such that the latter is tied not to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. Each prayer for relief does not launch an independent proceeding; rather, both relate to

Un accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans. À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu du par. 486.4(2.2) du *Code criminel*. Avant la délivrance de l'interdiction de publication, la SRC a affiché sur son site Web des renseignements qui révélaient l'identité de la victime. Compte tenu du refus de la SRC de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre la SRC pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant le retrait des renseignements identifiant la victime. Le juge en cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. Les juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire mandatoire.

Arrêt : L'appel est accueilli.

Pour obtenir une injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test énoncé dans *RJR — MacDonald* n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit. Les conséquences potentiellement sérieuses pour un défendeur de la délivrance d'une injonction interlocutoire mandatoire exigent en outre qu'un examen approfondi soit fait sur le fond à l'étape interlocutoire. Suivant cette version modifiée du test énoncé dans *RJR — MacDonald*, le demandeur doit démontrer une forte chance au regard du droit et de la preuve présentée que, au procès, il réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance. Le demandeur doit aussi démontrer qu'il subira un préjudice irréparable si la réparation n'est pas accordée et que la prépondérance des inconvénients favorise la délivrance de l'injonction.

En l'espèce, une interprétation littérale de l'avis introductif d'instance démontre que le ministère public a intenté une action pour outrage criminel et a cherché à obtenir une injonction interlocutoire dans le cadre de cette instance. Le ministère public s'est donc fondé sur le fait que l'injonction interlocutoire était sollicitée à l'égard de la demande d'assignation pour outrage criminel. L'avis introductif d'instance en soi, ainsi que l'ordre dans lequel les réparations y sont demandées, contredit qu'il puisse avoir un caractère hybride. Les deux demandes sont liées, de sorte que la deuxième se rapporte non pas au simple affichage sur le site Web de la SRC des renseignements identifiant la victime, mais à l'assignation pour outrage the alleged criminal contempt. In addition, an injunction is not a cause of action, in the sense of containing its own authorizing force. It is a remedy. An originating application must state both the claim and the basis for it and the remedy sought. Here, the Crown's originating notice discloses only a single basis for seeking a remedy: CBC's alleged criminal contempt of court. Therefore, the Crown was bound to show a strong *prima facie* case of criminal contempt of court. This case should not however be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters. The delineation of the circumstances in which an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct is not decided here.

The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge proceeded on a misunderstanding of the law or of the evidence before him, where an inference can be demonstrated to be wrong by further evidence that has since become available, where there has been a change of circumstances or where the decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge could have reached it. In this case, the Crown's burden was not to show a case for criminal contempt that leans one way or another, but rather a case, based on the law and evidence presented, that has a strong likelihood that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and the Crown has failed to do so here. The chambers judge applied the correct legal test in deciding the Crown's application and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

Cases Cited

Applied: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; **distinguished:** *Canada (Human Rights Commission) v. Canadian Liberty Net*,

criminel sollicitée. Chaque demande de réparation ne donne pas lieu à une instance distincte; elles sont plutôt toutes les deux liées à l'outrage criminel reproché. De plus, l'injonction n'est pas une cause d'action, en ce sens qu'elle ne contient pas son propre pouvoir d'autoriser l'action. Il s'agit d'une réparation. Une demande introductive d'instance doit énoncer tant l'objet de la demande et son fondement que la réparation demandée. En l'espèce, la demande introductive d'instance du ministère public n'indique qu'un motif pour lequel il veut obtenir une réparation : l'outrage criminel au tribunal reproché à la SRC. Le ministère public était donc tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal. L'issue du présent appel ne devrait cependant pas être interprétée comme signifiant que l'injonction est une réparation courante et facile à obtenir dans les affaires criminelles. La façon dont il faut définir les circonstances permettant de demander et de délivrer une injonction interlocutoire pour empêcher une conduite prétendument criminelle n'est pas tranchée ici.

La décision d'accorder ou de refuser une injonction interlocutoire relève d'un pouvoir discrétionnaire, et les cours d'appel ne doivent pas modifier la décision en découlant simplement parce qu'elles auraient exercé ce pouvoir différemment. Une intervention en appel est justifiée uniquement lorsque le juge en cabinet a pris une décision qui repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui, lorsque le caractère erroné d'une conclusion peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l'appel, lorsque les circonstances ont changé ou lorsque la décision du juge d'accorder ou de refuser l'injonction est à ce point aberrante qu'elle doit être infirmée pour le motif qu'aucun juge raisonnable n'aurait pu la rendre. En l'espèce, le fardeau du ministère public n'était pas de présenter une preuve d'outrage criminel qui penche dans un sens ou dans l'autre, mais plutôt une preuve qui, au regard du droit et des éléments de preuve présentés, avait une forte chance de réussir à prouver la culpabilité de la SRC pour outrage criminel au tribunal. Il n'est pas facile de s'acquitter d'un tel fardeau et le ministère public n'a pas réussi à le faire en l'espèce. Le juge en cabinet a appliqué le bon test juridique lorsqu'il s'est prononcé sur la demande du ministère public, et sa décision selon laquelle la preuve présentée par ce dernier ne satisfaisait pas à ce test ne justifiait pas, dans les circonstances, une intervention en appel.

Jurisprudence

Arrêt appliqué : *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; **distinction d'avec l'arrêt :** *Canada (Commission des droits de la*

[1998] 1 S.C.R. 626; **referred to:** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway v. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc*., 2013 ONCA 455, 307 O.A.C. 152; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. v. Inisoft Corp*., 2009 CanLII 37911; *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc*. (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp*., 2002 CanLII 34862; *Bark & Fitz Inc. v. 2139138 Ontario Inc*., 2010 ONSC 1793; *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. v. Weyerhaeuser Co*., 2002 CanLII 26148; *Parker v. Canadian Tire Corp*., [1998] O.J. No. 1720 (QL); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331, aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, leave to appeal refused, [2008] 3 S.C.R. viii.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 3.8(1).
Criminal Code, R.S.C. 1985, c. C-46, s. 486.4 (2.1), (2.2).

personne) c. Canadian Liberty Net, [1998] 1 R.C.S. 626; **arrêts mentionnés :** *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901; *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110; *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. c. Equustek Solutions Inc.*, 2017 CSC 34, [2017] 1 R.C.S. 824; *Medical Laboratory Consultants Inc. c. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry c. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway c. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. c. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. c. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, conf. par 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum c. Look Communications Inc*., 2013 ONCA 455, 307 O.A.C. 152; *Bande de Sawridge c. Canada*, 2004 CAF 16, [2004] 3 R.C.F. 274; *Jamieson Laboratories Ltd. c. Reckitt Benckiser LLC*, 2015 CAF 104; *Potash Corp. of Saskatchewan Inc. c. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante c. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. c. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. c. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. c. Inisoft Corp*., 2009 CanLII 37911; *Fradenburgh c. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. c. Bristol-Myers Squibb Canada Inc*. (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. c. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. c. Alfresh Beverages Canada Corp*., 2002 CanLII 34862; *Bark & Fitz Inc. c. 2139138 Ontario Inc*., 2010 ONSC 1793; *Quality Pallets and Recycling Inc. c. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. c. Weyerhaeuser Co*., 2002 CanLII 26148; *Parker c. Canadian Tire Corp*., [1998] O.J. No. 1720 (QL); *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *Hadmor Productions Ltd. c. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) c. Wale*, [1987] 2 W.W.R. 331, conf. par [1991] 1 R.C.S. 62; *White Room Ltd. c. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band c. Canada (Minister of Public Works and Government Services)*, 2008 CAF 214, 378 N.R. 335, autorisation d'appel refusée, [2008] 3 R.C.S. viii.

Lois et règlements cités

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Code criminel, L.R.C. 1985, c. C-46, art. 486.4 (2.1), (2.2).

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Sharpe, Robert J. *Injunctions and Specific Performance*, 4th ed, Toronto, Canada Law Book, 2012.
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APPEAL from a judgment of the Alberta Court of Appeal (Slatter, McDonald and Greckol JJ.A.), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QL), 2016 CarswellAlta 2034 (WL Can.), setting aside a decision of Michalyshyn J., 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Slatter, McDonald et Greckol), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QL), 2016 CarswellAlta 2034 (WL Can.), qui a infirmé une decision du juge Michalyshyn, 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Pouvoi accueilli.

Frederick S. Kozak, *Q.C.*, *Sean Ward*, *Tess Layton* and *Sean Moreman*, for the appellant.

Frederick S. Kozak, *c.r.*, *Sean Ward*, *Tess Layton* et *Sean Moreman*, pour l'appelante.

Iwona Kuklicz and *Julie Snowdon*, for the respondent.

Iwona Kuklicz et *Julie Snowdon*, pour l'intimée.

Iain A. C. MacKinnon, for the interveners.

Iain A. C. MacKinnon, pour les intervenants.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

Brown J. —

Le juge Brown —

I. Introduction

[1] The background leading to this appeal was summarized in the reasons of the chambers judge:[1]

> On March 5, 2016, [the accused] was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.

I. Introduction

[1] Le contexte ayant mené au présent pourvoi est résumé dans les motifs du juge en cabinet[1] :

> [TRADUCTION] Le 5 mars 2016, [l'accusé] a été inculpé du meurtre au premier degré de D. H., une personne âgée de moins de 18 ans (« la victime »). Le 15 mars 2016, le ministère public a demandé et obtenu une interdiction mandatoire en vertu du par. 486.4(2.2) du *Code criminel*, L.R.C. 1985, c. C-46. L'ordonnance interdit de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité de la victime.

[1] 2016 ABQB 204, [2016] 9 W.W.R. 613, at paras. 2-6 (emphasis added).

[1] 2016 ABQB 204, [2016] 9 W.W.R. 613, par. 2-6 (je souligne).

As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.

In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.

On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

[2] Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction[2] directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part:[3]

TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, . . . for an Order citing [CBC] in criminal contempt of court.

[2] The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R. J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

[3] A.R., at pp. 39-40.

En date du 16 mars 2016, deux articles publiés avant l'interdiction de publication, et qui révélaient l'identité de la victime par son nom et sa photo (« les articles »), figuraient encore sur le site Web de la SRC d'Edmonton.

Le 16 mars 2016, lors d'une conversation entre un détective du service de police d'Edmonton et un producteur principal de contenu numérique de la SRC d'Edmonton, ce dernier a affirmé qu'aucun article futur ne contiendrait de renseignements permettant d'établir l'identité de la victime.

Or, le 18 mars 2016, les articles publiés avant l'interdiction de publication figuraient toujours sur le site Web, sans qu'ils aient été modifiés.

Un des articles contient des éléments de preuve selon lesquels l'identité de la victime est déjà largement connue en raison des médias sociaux, mais aussi parce que la victime fréquentait l'école et vivait dans une petite collectivité de l'Alberta où le meurtre aurait été commis.

[2] Puisque la Société Radio-Canada (« SRC ») ne voulait pas retirer de son site Web les renseignements qui établissaient l'identité de la victime publiés avant la délivrance de l'ordonnance de non-publication, le ministère public a déposé un avis introductif d'instance afin de faire déclarer la SRC coupable d'outrage criminel pour violation de l'interdiction en question, et afin d'obtenir une injonction interlocutoire[2] exigeant le retrait des renseignements en cause du site Web de la SRC. Les mots utilisés dans l'avis introductif d'instance sont importants compte tenu de la décision que j'entends rendre dans le présent pourvoi; j'en reproduis donc ici les passages pertinents[3] :

[TRADUCTION]

PRENEZ AVIS que le procureur général de l'Alberta, au nom de Sa Majesté la Reine, présentera une demande au juge présidant la Cour du Banc de la Reine [. . .] visant l'obtention d'une ordonnance déclarant [la SRC] coupable d'outrage criminel au tribunal.

[2] L'avis introductif d'instance du ministère public utilise le terme anglais « *interim injunction* » ([TRADUCTION] « injonction intérimaire »). Il s'agit toutefois en substance d'une demande d'injonction interlocutoire. (Voir R. J. Sharpe, *Injunctions and Specific Performance* (4e éd. 2012), par. 2.15 et 2.55.)

[3] d.a., p. 39-40.

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.

RELIEF SOUGHT:

1. That [CBC] be cited in criminal contempt of court.

2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.

3. That an appropriate sentence be imposed against [CBC].

4. Any such further order that this Honourable Court deems appropriate.

[3] The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.[4]

[4] For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

[5] Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,[5] taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim

4 2016 ABCA 326, 404 D.L.R. (4th) 318.
5 R.S.C. 1985, c. C-46.

ET EN OUTRE PRENEZ AVIS qu'une demande d'injonction intérimaire sera présentée afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire.

RÉPARATION DEMANDÉE :

1. Que [la SRC] soit déclarée coupable d'outrage criminel au tribunal.

2. Qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire.

3. Qu'une peine appropriée soit infligée à [la SRC].

4. Toute autre ordonnance que cette honorable Cour juge appropriée.

[3] Le juge en cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. En appel, les juges étaient divisés quant au droit du ministère public d'obtenir une telle injonction. Bien que les juges majoritaires aient accueilli l'appel et accordé l'injonction, la juge Greckol, dissidente, aurait rejeté l'appel, concluant que les juges majoritaires appliquaient des principes juridiques erronés à la demande du ministère public[4].

[4] Pour les motifs qui suivent, j'accueillerais le pourvoi. À mon avis, le juge en cabinet a appliqué le bon test juridique lorsqu'il s'est prononcé sur la demande du ministère public, et sa décision selon laquelle la preuve présentée par ce dernier ne satisfaisait pas à ce test ne justifiait pas, dans les circonstances, une intervention en appel.

II. Dispositions législatives

[5] Les paragraphes 486.4(2.1) et 486.4(2.2) du *Code criminel*[5], considérés conjointement, prévoient que le juge ou le juge de paix qui préside est tenu, à la demande de la victime ou du poursuivant, de rendre une ordonnance d'interdiction de publication dans les affaires relatives à toute infraction dont la

4 2016 ABCA 326, 404 D.L.R. (4th) 318.
5 L.R.C. 1985, c. C-46.

is entitled to an order "directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way".

victime est âgée de moins de 18 ans. Plus particulièrement, le ministère public ou la victime a droit à une ordonnance « interdisant de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité de la victime ».

III. Judicial History

A. *The Chambers Judge's Reasons*

[6] Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR — MacDonald Inc. v. Canada (Attorney General)*.[6] This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

[7] As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban.[7] The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *United Nurses of Alberta v. Alberta (Attorney General)*,[8] he found that the Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order.[9]

[8] Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing

III. Historique judiciaire

A. *Motifs du juge en cabinet*

[6] Souscrivant aux arguments des parties, le juge en cabinet a appliqué une version modifiée du test en trois étapes applicable à l'octroi d'une injonction interlocutoire énoncé dans *RJR — MacDonald Inc. c. Canada (Procureur général)*[6], selon lequel le ministère public devait établir (1) une forte apparence de droit menant à la conclusion que la SRC était coupable d'outrage criminel; (2) que le ministère public subirait un préjudice irréparable si la demande d'injonction était rejetée; et (3) que la prépondérance des inconvénients favorisait l'octroi de l'injonction.

[7] En ce qui a trait à l'exigence relative à la forte apparence de droit, le ministère public a revendiqué une [TRADUCTION] « interprétation large » des mots « *publish[ed]* » et « *transmitt[ed]* » de la version anglaise du par. 486.4(2.1), de sorte que ceux-ci viseraient les articles mis en ligne *avant* le prononcé de l'interdiction de publication[7]. Le juge en cabinet a cependant conclu que la jurisprudence n'étayait pas une telle interprétation. Dans ces circonstances, et appliquant le test relatif à l'outrage criminel établi dans l'arrêt *United Nurses of Alberta c. Alberta (Procureur général)*[8], il a jugé que le ministère public ne pourrait « vraisemblablement » pas « réussir » à démontrer hors de tout doute raisonnable que la SRC, en laissant sur son site Web les renseignements identifiant la victime après la délivrance de l'interdiction de publication, était en « transgression patente et publique » de cette ordonnance[9].

[8] En ce qui a trait à l'exigence relative au préjudice irréparable, le ministère public a soutenu que ce serait l'administration de la justice qui subirait un

[6] [1994] 1 S.C.R. 311.
[7] Chambers judge's reasons, at para. 26.
[8] [1992] 1 S.C.R. 901, at p. 933.
[9] Chambers judge's reasons, at para. 34.

[6] [1994] 1 R.C.S. 311.
[7] Motifs du juge en cabinet, par. 26.
[8] [1992] 1 R.C.S. 901, p. 933.
[9] Motifs du juge en cabinet, par. 34.

display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. *The Court of Appeal*

[9] At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, . . . has a 'hybrid' aspect to it",[10] in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.[11] The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website".[12]

[10] As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance

[10] para. 5.
[11] para. 6.
[12] para. 7.

tel préjudice, puisque l'affichage continu des renseignements identifiant la victime sur le site Web de la SRC dissuaderait d'autres personnes de demander de l'aide ou de solliciter des réparations. Le juge en cabinet a refusé de tirer une telle conclusion, mais il a souligné que l'objectif de politique sous-jacent visant la protection de l'anonymat des victimes perd de son importance lorsque la victime est décédée. De plus, lorsqu'il a soupesé la prépondérance des inconvénients, le juge en cabinet a établi que l'atteinte à la liberté d'expression de la SRC, et à l'intérêt du public envers cette expression, l'emportait sur tout préjudice causé à l'administration de la justice qui découlerait du fait que les deux articles en cause soient laissés sur le site Web de la SRC.

B. *La Cour d'appel*

[9] En Cour d'appel, les juges majoritaires (les juges Slatter et McDonald) ont infirmé la décision du juge en cabinet et ont accordé l'injonction interlocutoire mandatoire demandée par le ministère public. Selon eux, le juge en cabinet avait commis une erreur en jugeant que le ministère public devait établir une forte apparence de droit quant à l'existence d'un outrage criminel. En effet, l'avis introductif d'instance, [TRADUCTION] « [b]ien qu'il soit essentiellement de nature civile, [. . .] comporte un aspect "hybride" »[10], dans la mesure où il vise l'obtention d'une assignation pour outrage criminel *et* le retrait du site Web de la SRC des renseignements identifiant la victime. Les juges majoritaires ont expliqué que la demande d'injonction interlocutoire « se rapportait » à la demande relative à l'ordonnance de retrait des renseignements identifiant la victime, et non à la demande relative à l'assignation pour outrage criminel[11]. En conséquence, la question était de savoir si « le ministère public a établi une forte apparence de droit donnant ouverture en sa faveur à une ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »[12].

[10] Quant à la question de savoir si les renseignements identifiant la victime sont considérés comme « publi[és] » aux termes du par. 486.4(2.1) (comme

[10] par. 5.
[11] par. 6.
[12] par. 7.

of such information on a website after it is first posted, the majority conceded that "either position is arguable".[13] That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory.[14] Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

[11] Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to

[13] para. 10.
[14] para. 11.

le prétend le ministère public) du fait qu'ils apparaissent de façon continue sur le site Web depuis qu'ils y ont été affichés pour la première fois, les juges majoritaires ont reconnu que [TRADUCTION] « les deux thèses sont défendables »[13]. Cela dit, selon eux, le ministère public avait établi une forte apparence de droit justifiant l'octroi d'une injonction interlocutoire mandatoire puisque, si le mot « publier » est interprété comme étant une activité continue, on peut faire valoir que la SRC a volontairement désobéi à l'interdiction de publication. En outre, une telle désobéissance porte préjudice à l'intégrité de l'administration de la justice, et est contraire à la directive du législateur selon laquelle de telles ordonnances sont mandatoires[14]. Enfin, pour les juges majoritaires, la prépondérance des inconvénients ne milite pas en faveur de la SRC, puisque, à cette étape de l'instance, il faut présumer que l'interdiction de publication est constitutionnelle et que la liberté d'expression ne peut, en aucun cas, constituer un moyen de défense contre l'accusation d'outrage.

[11] La juge Greckol aurait rejeté le pourvoi. À son avis, les juges majoritaires ont été mal avisés de qualifier d'« hybride » la réparation demandée dans l'avis introductif d'instance, puisque la demande d'injonction interlocutoire du ministère public a été présentée à l'égard de l'assignation sollicitée pour outrage criminel. Le juge en cabinet a posé la bonne question (soit celle de savoir si le ministère public pouvait établir une forte apparence de droit quant à l'existence d'un outrage criminel) et l'exercice de son pouvoir discrétionnaire de refuser de délivrer une injonction commandait la retenue. En outre, en l'espèce, où les proscriptions relatives à la « publi[cation] » et la « diffu[sion] » peuvent raisonnablement comporter deux sens — un visant les articles en cause et l'autre non —, aucune forte apparence de droit quant à l'existence d'un outrage criminel ne peut être établie. De plus, même si on admet que la transgression patente d'une ordonnance judiciaire en apparence valide peut constituer un préjudice irréparable pour l'administration de la justice, la portée des proscriptions énoncées à l'art. 486.4 du *Code criminel* est une question non résolue. J'ajouterais que, comme

[13] par. 10.
[14] par. 11.

consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

[12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*[15] and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*[16] At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.[17] The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.[18] Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.[19]

[13] This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald*, the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.[20]) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima*

15 [1987] 1 S.C.R. 110.
16 [1975] A.C. 396.
17 *RJR — MacDonald*, at pp. 334-35.
18 *RJR — MacDonald*, at pp. 334 and 348.
19 *RJR — MacDonald*, at p. 334.
20 pp. 338-39.

la victime en l'espèce est décédée, sa vie privée n'est pas susceptible de subir un préjudice. Finalement, et même si les dispositions pertinentes du *Code criminel* sont présumées constitutionnelles, le juge en cabinet pouvait tenir compte de la liberté d'expression lorsqu'il a soupesé la prépondérance des inconvénients.

IV. Analyse

A. *Quel est le cadre d'analyse applicable à la délivrance d'une injonction interlocutoire mandatoire?*

[12] Dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*[15], et plus tard dans l'arrêt *RJR — MacDonald*, la Cour a affirmé que les demandes d'injonction interlocutoire devaient respecter chacun des trois volets du test qui tire son origine de la décision de la Chambre des Lords dans *American Cyanamid Co. c. Ethicon Ltd.*[16] À la première étape, le juge de première instance doit procéder à un examen préliminaire du bien-fondé de l'affaire pour décider si le demandeur a fait la preuve de l'existence d'une « question sérieuse à juger », c'est-à-dire que la demande n'est ni futile ni vexatoire[17]. À la deuxième étape, le demandeur doit convaincre la cour qu'il subira un préjudice irréparable si la demande d'injonction est rejetée[18]. Enfin, à la troisième étape, il faut apprécier la prépondérance des inconvénients, afin d'établir quelle partie subirait le plus grand préjudice en attendant qu'une décision soit rendue sur le fond, selon que la demande d'injonction est accueillie ou rejetée[19].

[13] Ce cadre d'analyse n'est toutefois que général. (En effet, dans *RJR — MacDonald*, la Cour a cerné deux exceptions qui pourraient commander un « examen plus approfondi du fond d'une affaire » à la première étape de l'analyse[20].) Dans le présent litige, les parties ont convenu à chaque palier judiciaire que, lorsqu'une injonction interlocutoire *mandatoire* est sollicitée, la question à trancher à la première étape du test énoncé dans *RJR — MacDonald* était celle de

15 [1987] 1 R.C.S. 110.
16 [1975] A.C. 396.
17 *RJR — MacDonald*, p. 334-335.
18 *RJR — MacDonald*, p. 334 et 348.
19 *RJR — MacDonald*, p. 334.
20 p. 338-339.

facie case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.*[21] In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.[22] By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

[14] Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.[23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold.[24]

[15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie*

savoir si les demandeurs ont établi une forte apparence de droit. J'observe que ce seuil plus exigeant n'a pas été appliqué par la Cour lorsqu'elle a maintenu une telle injonction dans *Google Inc. c. Equustek Solutions Inc.*[21] Dans cet arrêt, l'appelante n'avait toutefois pas plaidé que la première étape du test énoncé dans *RJR — MacDonald* devait être modifiée. Elle avait plutôt reconnu qu'il suffisait de prouver l'existence d'une « question sérieuse à juger », de sorte que la Cour n'a pas été appelée à se pencher sur l'opportunité d'appliquer un seuil plus élevé[22]. En revanche, en l'espèce, l'application par les tribunaux d'instances inférieures d'un seuil plus élevé pose pour la première fois la question du seuil qui devrait être effectivement appliqué à la première étape, lorsque le demandeur sollicite une injonction interlocutoire mandatoire.

[14] Depuis *RJR — MacDonald*, les tribunaux canadiens sont divisés quant à cette question. En Alberta, en Nouvelle-Écosse et en Ontario, par exemple, le demandeur doit établir une forte apparence de droit[23]. À l'inverse, d'autres tribunaux ont appliqué le seuil moins exigeant, soit celui de la « question sérieuse à trancher »[24].

[15] À mon avis, lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test énoncé dans *RJR — MacDonald n'*est *pas* celui de l'existence d'une question sérieuse à juger, mais plutôt celui de

21 2017 SCC 34, [2017] 1 S.C.R. 824.

22 *Google*, at paras. 25-27.

23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161, at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74, at paras. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, at para. 10; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, at para. 20, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, at para. 54.

24 *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274, at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414, at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, at para. 65.

21 2017 CSC 34, [2017] 1 R.C.S. 824.

22 *Google*, par. 25-27.

23 *Medical Laboratory Consultants Inc. c. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161, par. 4; *Modry c. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, par. 40; *Conway c. Zinkhofer*, 2006 ABCA 74, par. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. c. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, par. 10; *AMEC E&C Services Ltd. c. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, par. 20, conf. 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum c. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, par. 54.

24 *Bande de Sawridge c. Canada*, 2004 CAF 16, [2004] 3 R.C.F. 274, par. 45; *Jamieson Laboratories Ltd. c. Reckitt Benckiser LLC*, 2015 CAF 104, par. 1 et 22-25 (CanLII); *Potash Corp. of Saskatchewan Inc. c. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, par. 42; *La Plante c. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, par. 16-17; *Summerside Seafood Supreme Inc. c. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, par. 65.

case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.[27]

[16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.[28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions".[29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that

savoir si le demandeur a établi une forte apparence de droit. Une injonction mandatoire intime au défendeur de faire quelque chose — comme de rétablir le *statu quo* —, ou d'autrement [TRADUCTION] « restaurer la situation », ce qui est souvent coûteux et pénible pour le défendeur et ce que de longue date l'equity a été réticente à faire[25]. Une telle ordonnance est également (en règle générale) difficile à justifier à l'étape interlocutoire, puisque la réparation qui vise à restaurer la situation peut habituellement être obtenue au procès. De plus, comme l'a exprimé le juge Sharpe (dans un ouvrage de doctrine), « le risque qu'un tort soit causé au défendeur est [rarement] moins important que le risque couru par le demandeur du fait de la décision du tribunal de ne pas agir avant le procès »[26]. Les conséquences potentiellement sérieuses pour un défendeur du prononcé d'une injonction interlocutoire mandatoire, y compris la décision finale relativement à la poursuite en faveur du plaignant, exigent en outre ce que la Cour a décrit dans *RJR — MacDonald* comme étant « un examen approfondi sur le fond » à l'étape interlocutoire[27].

[16] Dans certains cas, un dernier élément devra être examiné, soit que, parce que les injonctions interlocutoires mandatoires requièrent que le défendeur fasse quelque chose, elles peuvent constituer un fardeau plus important ou avoir des conséquences coûteuses pour lui. Il faut toutefois garder à l'esprit que le respect d'injonctions prohibitives peut entraîner des coûts aussi lourds que ceux découlant des injonctions mandatoires[28]. Tout en concluant que les demandes d'injonctions interlocutoires mandatoires doivent être examinées à la lumière d'une version modifiée du test énoncé dans *RJR — MacDonald*, je reconnais qu'il peut être difficile de faire une distinction entre les injonctions mandatoires et les injonctions prohibitives, puisqu'une injonction interlocutoire au libellé prohibitif peut avoir [TRADUCTION] « l'effet de forcer le défendeur à faire quelque chose »[29]. Par exemple, en l'espèce, cesser de diffuser les renseignements

25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.
26 *Injunctions and Specific Performance*, at para. 2.640.
27 *RJR — MacDonald*, at pp. 338-39.
28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.
29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

25 *Injunctions and Specific Performance*, par. 1.510, 1.530 et 2.640.
26 *Injunctions and Specific Performance*, par. 2.640.
27 *RJR — MacDonald*, p. 338-339.
28 *Injunctions and Specific Performance*, par. 1.530 et 1.540. Voir aussi *Potash*, par. 43-44.
29 *Potash*, par. 44; voir aussi *Injunctions and Specific Performance*, par. 1.540.

information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be".[30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

[17] This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge

30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, at para. 20.

31 *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (Ont. S.C.J.), at para. 24.

32 *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, at para. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.)), at paras. 49 and 52 (citing *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), at p. 409).

33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (Ont. S.C.J.), at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, at para. 12 (CanLII).

34 *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (Ont. S.C.J.), at para. 16.

35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (Ont. S.C.J.), at para. 16.

36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, at para. 11 (QL).

37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M.-A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2011* (2011), 367, at pp. 378-79.)

établissant l'identité de la victime requerrait qu'un employé de la SRC prenne les mesures nécessaires pour retirer ces renseignements du site Web de l'entreprise. En définitive, le juge de première instance, lorsqu'il qualifie l'injonction interlocutoire de mandatoire ou de prohibitive, doit regarder au-delà de la forme et du libellé de la demande sollicitant l'ordonnance de manière à déceler l'essence de ce qui est recherché et, à la lumière des circonstances particulières de l'affaire, à déterminer [TRADUCTION] « quelles risquent d'être les conséquences pratiques de l'injonction »[30]. Bref, le juge de première instance doit examiner si, en substance, l'effet global de l'injonction consisterait à exiger du défendeur qu'il *fasse* quelque chose ou qu'il *s'abstienne* de le faire.

[17] Ceci m'amène à ce qu'implique l'établissement d'une « forte apparence de droit ». Les tribunaux ont utilisé diverses formulations, exigeant que le demandeur présente la preuve [TRADUCTION] « convaincante et manifeste d'une possibilité de succès »[31]; qu'il présente une preuve [TRADUCTION] « convaincante et manifeste » ou « exceptionnellement convaincante et manifeste »[32]; qu'il a [TRADUCTION] « nettement raison »[33]; qu'il y a une [TRADUCTION] « forte probabilité » ou une « forte chance de succès »[34]; qu'il y a une [TRADUCTION] « grande assurance » quant au succès[35]; une [TRADUCTION] « perspective importante » de succès[36]; ou un succès [TRADUCTION] « presque assuré »[37]. Toutes ces formulations ont en

30 *National Commercial Bank Jamaica Ltd. c. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, par. 20.

31 *H&R Block Canada Inc. c. Inisoft Corp.*, 2009 CanLII 37911 (C.S.J. Ont.), par. 24.

32 *Fradenburgh c. Ontario Lottery and Gaming Corp.*, 2010 ONCS 5837, par. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. c. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (C. Ont. (div. gén.)), par. 49 et 52 (citant *Shepherd Home Ltd. c. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), p. 409).

33 *Barton-Reid Canada Ltd. c. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (C.S.J. Ont.), par. 9; *Bark & Fitz Inc. c. 2139138 Ontario Inc.*, 2010 ONSC 1793, par. 12 (CanLII).

34 *Quality Pallets and Recycling Inc. c. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (C.S.J. Ont.), par. 16.

35 *West Nipissing Economic Development Corp. c. Weyerhaeuser Co.*, 2002 CanLII 26148 (C.S.J. Ont.), par. 16.

36 *Parker c. Canadian Tire Corp.*, [1998] O.J. No. 1720, par. 11 (QL).

37 *Barton-Reid*, par. 9, 12 et 17. (Voir, plus généralement, M.-A. Vermette, « A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation, 2011* (2011), 367, p. 378-379.)

must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

commun d'imposer au demandeur le fardeau de présenter une preuve telle qu'il serait très susceptible d'obtenir gain de cause au procès. Cela signifie que, lors de l'examen préliminaire de la preuve, le juge de première instance doit être convaincu qu'il y a une *forte chance* au regard du droit et de la preuve présentée que, au procès, le demandeur réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance.

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

(1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;

(2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and

(3) The applicant must show that the balance of convenience favours granting the injunction.

[18] En résumé, pour obtenir une injonction interlocutoire mandatoire, le demandeur doit satisfaire à la version modifiée que voici du test établi dans *RJR — MacDonald* :

(1) Le demandeur doit établir une forte apparence de droit qu'il obtiendra gain de cause au procès. Cela implique qu'il doit démontrer une *forte chance* au regard du droit et de la preuve présentée que, au procès, il réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance;

(2) Le demandeur doit démontrer qu'il subira un préjudice irréparable si la demande d'injonction n'est pas accueillie;

(3) Le demandeur doit démontrer que la prépondérance des inconvénients favorise la délivrance de l'injonction.

B. *Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?*

B. *Le test d'un cas parmi « les plus manifestes, et extrêmement rares » énoncé dans Liberty Net s'applique-t-il dans ces circonstances?*

[19] CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.[38] This would entail the applicant showing "the rarest and clearest of cases",[39] such that the conduct complained of would be impossible to defend.

[19] Selon la SRC, dans le cas d'une demande d'injonction interlocutoire où la liberté d'expression d'un média est en jeu, le juge de première instance devrait appliquer le test énoncé dans l'arrêt *Canada (Commission des droits de la personne) c. Canadian Liberty Net*[38]. Ainsi, le demandeur serait tenu de prouver qu'il s'agit d'un cas parmi [TRADUCTION] « les plus manifestes, et extrêmement rares »[39], de sorte que le comportement reproché serait impossible à défendre.

[38] [1998] 1 S.C.R. 626.
[39] *Liberty Net*, at para. 49 (emphasis deleted).

[38] [1998] 1 R.C.S. 626.
[39] *Liberty Net*, par. 49 (soulignement omis).

[20] In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".[40] This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] other than the expression itself".[41] Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages.[42] In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.[43] Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

[20] Dans *Liberty Net*, la Cour a expliqué que le test en trois étapes établi dans *RJR — MacDonald* ne convient pas dans les affaires de liberté d'expression « seulement », ce qui comprend celle de la personne « qui s'exprime en dehors [du] contexte [commercial], lorsque le discours en cause n'a pas d'utilité concrète et directe à part la liberté d'expression elle-même »[40]. Le présent appel n'est pas un cas de ce type. Pour expliquer sa décision dans *Liberty Net* de ne pas appliquer le test énoncé dans *RJR — MacDonald* pour les affaires de liberté d'expression « seulement », la Cour a affirmé que le défendeur dans de tels cas « n'a [. . .] aucun intérêt tangible ou mesurable [aussi appelé "utilité concrète et directe"] outre le discours lui-même »[41]. Lorsqu'un discours haineux discriminatoire ou un autre type de discours possiblement de peu de valeur est en cause (comme c'était le cas dans *Liberty Net*), le test énoncé dans *RJR — MacDonald* « joue[rait] contre » le défendeur aux deuxième et troisième étapes[42]. Cependant, dans le présent appel, le juge en cabinet a correctement discerné une « utilité concrète et directe » à ce que la SRC diffuse l'information permettant d'établir l'identité de la victime, soit [TRADUCTION] « l'intérêt public » à ce que la SRC ait le droit d'exprimer la teneur de ces renseignements, et la liberté de la presse[43]. Puisque la SRC n'a donc pas à faire face au même désavantage que les défendeurs aux deuxième et troisième étapes du test énoncé dans *RJR — MacDonald* dans les cas où il est question d'un discours de peu ou pas de valeur, il n'est pas nécessaire d'appliquer le seuil du cas parmi « les plus manifestes » et je m'abstiendrais de le faire.

C. *What Strong Prima Facie Case Must the Crown Show?*

C. *Quelle forte apparence de droit le ministère public doit-il établir?*

[21] As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the

[21] Comme je l'ai déjà évoqué, lorsque, en l'espèce, les juges majoritaires de la Cour d'appel ont infirmé la décision du juge en cabinet, ils ont estimé que celui-ci avait mal évalué le fondement de la demande d'injonction présentée par le ministère public.

[40] paras. 47 and 49.
[41] para. 47 (emphasis in original).
[42] para. 47.
[43] Chambers judge's reasons, at para. 59.

[40] par. 47 et 49.
[41] par. 47 (souligné dans l'original).
[42] par. 47.
[43] Motifs du juge en cabinet, par. 59.

Originating Notice, properly read, was "hybrid",[44] such that the application for the injunction did not "relate directly"[45] to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back . . . to . . . the removal of the objectionable postings".[46] The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] . . . to a mandatory order directing removal of the identifying material from the website".[47]

[22] In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding".[48] This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

[23] For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively

44 para. 5.
45 para. 6.
46 C.A. reasons, at para. 6.
47 C.A. reasons, at para. 7.
48 C.A. reasons, at para. 23 (emphasis added).

Plus précisément, les juges majoritaires ont affirmé que l'avis introductif d'instance, correctement interprété, était [TRADUCTION] « hybride »[44], de sorte que la demande d'injonction n'était pas « directement liée »[45] à la demande d'assignation pour outrage criminel, mais plutôt à la directive sollicitée exigeant que la SRC retire de son site Web tout renseignement identifiant la victime. Ils ont soutenu que le libellé identique du préambule de l'avis introductif d'instance ([TRADUCTION] « ET EN OUTRE PRENEZ AVIS qu'une demande d'injonction intérimaire sera présentée afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire ») et de la partie de l'avis introductif d'instance où l'injonction est sollicitée (« Qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire ») prouvait que « la demande d'injonction interlocutoire se rapportait [. . .] au [. . .] retrait des articles en cause »[46]. Selon les juges majoritaires, la « forte apparence de droit » que le ministère public était tenu d'établir *n'*était donc *pas* celle quant à l'existence d'un outrage criminel, mais plutôt celle quant à l'existence du « droit [. . .] à une ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »[47].

[22] Dissidente, la juge Greckol a vu l'affaire d'un autre œil. Elle a affirmé qu'une [TRADUCTION] « interprétation littérale de l'avis introductif d'instance démontre que le ministère public a intenté une action pour outrage criminel et a cherché à obtenir une injonction interlocutoire dans le cadre de cette instance »[48]. Selon elle, le dossier — qui révèle que le ministère public s'était fondé sur le fait que l'injonction interlocutoire était sollicitée à l'égard de la demande d'assignation pour outrage criminel — le confirmait.

[23] Je souscris à l'opinion de la juge Greckol pour deux raisons. Premièrement, l'avis introductif d'instance en soi, ainsi que l'ordre dans lequel les

44 par. 5.
45 par. 6.
46 Motifs de la Cour d'appel, par. 6.
47 Motifs de la Cour d'appel, par. 7.
48 Motifs de la Cour d'appel, par. 23 (je souligne).

hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication . . . for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application . . . for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case".[49] The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

réparations y sont demandées, contredit qu'il puisse avoir un caractère théoriquement hybride. En effet, il commence par un avis ([TRADUCTION] « PRENEZ AVIS ») quant à la présentation d'une « demande [. . .] visant l'obtention d'une ordonnance déclarant [la SRC] coupable d'outrage criminel au tribunal ». Cet avis est immédiatement suivi d'un *autre* avis (« ET EN OUTRE PRENEZ AVIS ») quant à la présentation d'une « demande d'injonction intérimaire [. . .] afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire »[49]. L'expression « ET EN OUTRE PRENEZ AVIS » indique clairement que les deux demandes sont liées, de sorte que la deuxième se rapporte *non pas* au simple affichage sur le site Web de la SRC des renseignements identifiant la victime, mais à l'assignation pour outrage criminel sollicitée. Autrement dit, chaque demande de réparation ne donne pas lieu à une instance distincte; elles sont plutôt toutes les deux liées à l'outrage criminel reproché.

[24] The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court*[50] requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "a remedy ancillary to a cause of action".[51] And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

[24] La deuxième raison pour laquelle je souscris à la conclusion de la juge Greckol se rapporte à la nature fondamentale d'une injonction et à son lien avec une cause d'action. Le paragraphe 3.8(1) des *Alberta Rules of Court*[50] prévoit qu'une demande introductive d'instance doit énoncer *tant* [TRADUCTION] « l'objet de la demande et son fondement », *que* « la réparation demandée ». Autrement dit, le demandeur doit indiquer *tant* « un fondement » *qu'*« [une] réparation ». En général, une injonction est « une réparation qui est subordonnée à une cause d'action »[51]. Or, en l'espèce, la demande introductive d'instance du ministère public n'indique qu'un motif pour lequel il veut obtenir cette réparation : l'outrage criminel au tribunal reproché à la SRC. Comme je l'ai déjà souligné, cette analyse est conforme à la façon dont le ministère public a présenté sa thèse aux tribunaux de juridictions inférieures.

[25] The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] . . . to a mandatory order directing removal

[25] En conséquence, la conclusion des juges majoritaires de la Cour d'appel selon laquelle l'injonction repose sur le [TRADUCTION] « droit à une

49 A.R., at p. 39.
50 Alta. Reg. 124/2010.
51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 930 (emphasis added).

49 d.a., p. 39.
50 Alta. Reg. 124/2010.
51 *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, p. 930 (je souligne).

of the identifying material from the website",[52] therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.[53] And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

[26] I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

D. *Is the Crown Entitled to a Mandatory Interlocutory Injunction?*

[27] The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In

ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »[52] soulève clairement la question de savoir quelle est la source précise de ce droit. L'injonction n'est pas une cause d'action, en ce sens qu'elle ne contient pas son propre pouvoir d'autoriser l'action. Il s'agit, je le répète, d'une réparation. C'est sans doute la raison pour laquelle, tant devant le juge en cabinet que devant la Cour d'appel, le ministère public a présenté l'affaire comme étant une demande d'injonction interlocutoire dans le cadre d'une demande d'assignation pour outrage criminel[53]. À cet égard, je souscris respectueusement à la conclusion de la juge Greckol selon laquelle il n'appartient pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée. Le ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal.

[26] J'ajouterais ceci. Dans l'analyse qui précède, il est implicite que, dans certaines circonstances, une injonction interlocutoire peut être demandée et délivrée pour empêcher une conduite prétendument criminelle. Je ne me prononcerai toutefois pas ici sur la façon dont il faudrait définir ces circonstances. Je tiens toutefois à préciser que l'issue du présent appel ne devrait pas être interprétée comme signifiant que l'injonction est une réparation courante et facile à obtenir dans les affaires criminelles, ou que — même si le ministère public avait été en mesure d'établir en l'espèce une forte apparence de droit quant à l'existence d'un outrage criminel — une injonction aurait pu être prononcée.

D. *Le ministère public a-t-il droit à une injonction interlocutoire mandatoire?*

[27] La décision d'accorder ou de refuser une injonction interlocutoire relève d'un pouvoir discrétionnaire, et les cours d'appel ne doivent pas modifier la décision en découlant simplement parce qu'elles

52 C.A. reasons, at para. 7.
53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.

52 Motifs de la Cour d'appel, par. 7.
53 Motifs de la Cour d'appel, par. 25-26; motifs du juge en cabinet, par. 7.

Metropolitan Stores,[54] the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*[55] about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge . . . could have reached it".[56] This principle was recently affirmed in *Google*.[57]

[28] In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

[29] In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens*

[54] pp. 154-55.

[55] [1982] 1 All E.R. 1042, at p. 1046 (H.L.).

[56] See also *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C.C.A.), aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii.

[57] para. 22.

auraient exercé ce pouvoir différemment. Dans l'arrêt *Metropolitan Stores*[54], la Cour a fait sienne l'affirmation de lord Diplock dans *Hadmor Productions Ltd. c. Hamilton*[55] concernant les circonstances dans lesquelles l'exercice de ce pouvoir discrétionnaire peut être infirmé. Une intervention en appel est justifiée uniquement lorsque le juge en cabinet a pris une décision qui [TRADUCTION] « repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui », lorsque « le caractère erroné [d'une conclusion] peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l'appel », lorsque les circonstances ont changé, ou lorsque la « décision du juge d'accorder ou de refuser l'injonction est à ce point aberrante qu'elle doit être infirmée pour le motif qu'aucun juge raisonnable [. . .] [n']aurait pu la rendre »[56]. Ce principe a récemment été confirmé dans *Google*[57].

[28] En l'espèce, comme je l'ai expliqué, la première étape de la version modifiée du test établi dans *RJR — MacDonald* exigeait que le ministère public convainque le juge en cabinet qu'il y avait une forte chance au regard du droit et de la preuve présentée qu'il réussirait à prouver la culpabilité de la SRC pour outrage criminel au tribunal. Il n'est pas facile de s'acquitter d'un tel fardeau et, comme je l'expliquerai plus loin, le ministère public n'a pas réussi à le faire en l'espèce.

[29] Dans l'arrêt *United Nurses of Alberta*, la juge McLachlin (maintenant juge en chef) a décrit les éléments de l'outrage criminel au tribunal de cette façon :

> Pour démontrer l'outrage criminel, le ministère public doit prouver que l'accusé a transgressé une ordonnance d'un tribunal ou y a désobéi publiquement (l'*actus reus*), tout en voulant que cette désobéissance publique contribue à miner l'autorité de la cour, en le sachant ou sans s'en

[54] p. 154-155.

[55] [1982] 1 All E.R. 1042, p. 1046 (H.L.).

[56] Voir aussi *B.C. (A.G.) c. Wale*, [1987] 2 W.W.R. 331 (C.A. C.-B.), conf. [1991] 1 R.C.S. 62; *White Room Ltd. c. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band c. Canada (Minister of Public Works and Government Services)*, 2008 CAF 214, 378 N.R. 335, par. 37, autorisation d'appel refusée, [2008] 3 R.C.S. viii.

[57] par. 22.

rea). The Crown must prove these elements beyond a reasonable doubt.[58]

[30] As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way"[59] by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted.[60] In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

[31] Significantly, the majority at the Court of Appeal conceded that "either position is arguable".[61] In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order".[62] But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law

58 p. 933 (emphasis added).
59 Chambers judge's reasons, at para. 12.
60 para. 33.
61 C.A. reasons, at para. 10.
62 C.A. reasons, at para. 10; transcript, at pp. 65 and 70-71.

soucier (la *mens rea*). Le ministère public doit prouver ces éléments hors de tout doute raisonnable[58].

[30] Pour ce qui est de l'*actus reus* — c'est-à-dire la question de savoir si le ministère public pouvait établir une forte apparence de droit selon laquelle la SCR a [TRADUCTION] « transgressé [l'interdiction de publication] ou y a désobéi publiquement »[59] en laissant sur son site Web les renseignements identifiant la victime —, le juge en cabinet a rejeté l'argument du ministère public voulant que les mots « *publish[ed]* » et « *transmitt[ed]* » de la version anglaise du par. 486.4(2.1) devaient recevoir une interprétation « large »[60]. À son avis, le sens de ce texte n'était pas évident au point où le ministère public « aurait vraisemblablement eu gain de cause au procès » pour démontrer que le par. 486.4(2.1) viserait les articles qu'elle reprochait à la SRC d'avoir affichés sur son site Web, puisqu'ils avaient été affichés *avant* la délivrance de l'interdiction de publication. Autrement dit, et comme la SRC l'a soutenu devant le juge en cabinet, le texte de loi pourrait aussi être raisonnablement interprété comme interdisant seulement les publications diffusées pour la première fois *après* la délivrance d'une interdiction de publication.

[31] Je souligne que les juges majoritaires de la Cour d'appel ont reconnu que [TRADUCTION] « les deux thèses sont défendables »[61], ce qui, à mon avis, constituait essentiellement une reconnaissance que le ministère public n'avait pas établi une forte apparence de droit quant à l'existence d'un outrage criminel. Ce dernier a demandé à la Cour de conclure que les juges majoritaires de la Cour d'appel avaient néanmoins « penché » vers l'interprétation du mot anglais « *publish[ed]* » qu'il privilégie lorsqu'ils ont affirmé que de voir l'affaire autrement « réduirait de façon importante la portée de nombreux droits et obligations qui dépendent de l'accès pour des tiers à des renseignements [et que] [s]i la publication est une activité continue, on peut aussi soutenir que [la SRC] désobéit volontairement à l'ordonnance de la cour »[62]. Or, même si on admettait que tel puisse

58 p. 933 (je souligne).
59 Motifs du juge en cabinet, par. 12.
60 par. 33.
61 Motifs de la Cour d'appel, par. 10.
62 Motifs de la Cour d'appel, par. 10; transcription, p. 65 et 70-71.

and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

être le cas, le fardeau du ministère public n'était pas de présenter une preuve d'outrage criminel qui « penche » dans un sens ou dans l'autre, mais plutôt une preuve qui, au regard du droit et des éléments de preuve présentés, avait une *forte chance* d'entraîner son succès au procès. En outre, rien dans ses motifs — ni d'ailleurs dans les motifs des juges majoritaires — ne me convainc que, lorsqu'il a rejeté la demande d'injonction interlocutoire en l'espèce, le juge en cabinet a commis une des erreurs décrites dans l'arrêt *Hadmor* qui justifierait une intervention en appel.

[32] My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

[32] Ma conclusion sur ce point étant déterminante; il est inutile que j'examine tant la *mens rea* que les deux autres étapes du test établi dans l'arrêt *RJR — MacDonald*.

V. Conclusion

[33] I would allow this appeal.

Appeal allowed.

Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton; Canadian Broadcasting Corporation, Toronto.

Solicitor for the respondent: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Solicitors for the interveners: Linden & Associates, Toronto.

V. Conclusion

[33] Je suis d'avis d'accueillir le pourvoi.

Pourvoi accueilli.

Procureurs de l'appelante : Reynolds, Mirth, Richards & Farmer, Edmonton; Société Radio-Canada, Toronto.

Procureur de l'intimée : Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Procureurs des intervenants : Linden & Associates, Toronto.

Tab 2

Court of Queen’s Bench of Alberta

Citation: ACCEL Canada Holdings Limited v Pembina Pipeline Corporation, 2018 ABQB 1039

Date: 20181219
Docket: 1801 17415
Registry: Calgary

Between:

ACCEL Canada Holdings Limited

Applicant

- and -

Pembina Pipeline Corporation

Respondent

Reasons for Decision
of the
Honourable Madam Justice M.H. Hollins

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[1] ACCEL Canada Holdings Limited (“ACCEL”) is an oil and gas producer. In August of 2018, it acquired the assets of ARC Resources Ltd. (“ARC”) in the area of Redwater, Alberta, including 370 producing wells. The only pipeline available to ship oil out of Redwater (the “Redwater Line”) is owned and operated by Pembina Pipeline Corporation (“Pembina”).

[2] Pembina was previously shipping ARC’s oil from Redwater under the terms of a Transportation Agreement dated January 13, 1977 (the “Agreement”). However, Pembina does not accept ACCEL as an assignee under that Agreement and has notified ACCEL that it will not accept ACCEL’s oil for transport as of January 1, 2019.

[3] Pending its more fulsome application for an interlocutory injunction, ACCEL has applied for an interim injunction enjoining and restraining Pembina from refusing to accept its monthly crude oil nominations. That application is granted in part.

The Transportation Agreement

[4] The original parties to the Agreement were Imperial Pipeline Company Limited ("Imperial") and Alberta Oil Sands Pipeline Ltd ("AOS"). In 1977, Imperial, which had built the Redwater Line to service its own wells in that area, sold the pipeline to AOS. AOS thus acquired the Redwater Line and agreed to operate it pursuant to the terms of the Agreement.

[5] Subsequently, Pembina amalgamated with AOS and, as a result, became the owner and operator of the Redwater Line. Imperial assigned its rights under the Agreement to ARC in 2005. ARC sold the Redwater production assets to ACCEL in August, 2018. As part of that transaction, ARC assigned or purported to assign its rights and obligations under the Agreement to ACCEL.

[6] The Agreement obligates Pembina to accept oil from the Redwater fields at agreed-upon tariffs, originally set at $0.026 per barrel subject to increase with the consent of both parties. The last such adjustment, in 1981, increased the tariff to $0.42 per cubic metre. This remains the contractual rate, in contrast to market rates of just less than $12.00 per cubic metre.

[7] For some time, the costs of maintaining and operating the Redwater Line were paid by shippers on the Syncrude Pipeline System but Pembina assumed responsibility for these costs in 2014. Thereafter, it raised with ARC an issue as to whether ARC's assignment from OAS in 2005 was valid. It also stated that as the Redwater Line was aging, the low tariff revenues made the "cost-benefit analysis of future integrity work challenging".

[8] The compromise reached by Pembina and ARC in 2015 was to increase the tariffs for non-ARC producers in the Redwater area to market rates but maintain ARC tariffs at $0.42 per cubic metre. Although the evidence is not entirely clear at this stage, this agreement appears to have been struck with Pembina attempting to preserve its rights to challenge the validity of the assignment and ARC attempting to preserve its rights to later argue that the non-ARC producers should also have the benefits of the contractual tariff.

[9] On September 6, 2018, ARC notified Pembina of its sale to ACCEL, including its assignment of rights under the Agreement. By letter dated September 10, 2018, Pembina agreed to accept the October, 2018 nomination of oil to be shipped "as a gesture of goodwill" but said that Pembina did not accept the assignment to ACCEL as valid. Pembina indicated again that operating the Redwater Line was uneconomic. The reality, according to Pembina, was that it had been subsidizing the cost of ARC shipping on its pipeline with revenues from other ARC business. It said that ARC had been aware, since 2015, that this was not intended to be an indefinite arrangement.

[10] Pembina reiterated these points with another letter dated September 18, 2018 which also included its first reference to its intention to discontinue operation of the Redwater Line in November, 2018. When ARC nominated more oil for November (acting as ACCEL's agent pending some post-closing registrations), Pembina again agreed to extend one additional month to include November, 2018 and then again in respect of the December nomination, this time on a "without prejudice" basis.

[11] By letter of November 15, 2018, ARC formally denounced any of its interest in the Agreement and told Pembina to deal with ACCEL. Pembina refused and advised that it was

intending to decommission the Redwater Line, beginning with purging of the pipeline in January of 2019.

The Tri-Parte Test for Injunctive Relief

[12] The parties agree on the test which ACCEL must satisfy in order to obtain its interim injunction as that set out in *RJR – MacDonald Inc. v. Canada,* [1994] 1 SCR 311 at p.334:

1. Is there a serious question to be tried?;
2. Will the applicant suffer irreparable harm if the injunction is not granted?; and
3. Does the balance of convenience favour the applicant or the respondent?

[13] There is no weighing or balancing of the three parts of the test; they must all be satisfied by the applicant in order to obtain the relief sought. An interim or interlocutory injunction is characterized as extraordinary relief because it represents a preliminary determination of the rights of the parties before trial.

[14] Particularly at this stage, it is recognized that the Court has limited evidence on which to proceed. Accordingly, injunctions granted on an interim basis are intended to be in place for a short period of time until the interlocutory application can be heard, allowing for additional evidence, possibly including expert evidence, as well as the testing of each party's Affidavit evidence by cross-examination.

[15] It should also be understood that the findings and analysis necessary at this stage do not and cannot bind future judges considering these same issues with the benefit of the more fulsome evidence mentioned above.

Serious Question to be Tried; Mandatory versus Prohibitory Injunctions

[16] After *RJR-MacDonald, supra*, some jurisdictions applied the "serious question to be tried" test regardless of whether the applicant was applying for a mandatory or a prohibitive injunction. Other jurisdictions, including Alberta, held that a higher threshold ought to apply for mandatory injunctions, namely that the applicant had shown a "strong *prima facie* case". With the recent Supreme Court of Canada decision in *R v Canadian Broadcasting Corp*., 2018 SCC 5, the matter has been resolved in favour of an elevated threshold for the granting of mandatory injunctions; para.15.

[17] A mandatory injunction requires the non-moving party, usually the defendant, to undertake a positive course of action as opposed to simply refraining from doing something. The Court in *Canadian Broadcasting Corp, supra*, recognized that this is often costly or burdensome to the defendant and so equity resists the imposition of positive duties upon the defendant prior to trial; para.15. Part of the rationale is that rejecting the injunction preserves the status quo until trial, which will often mean inflicting less harm overall as between the parties.

[18] However, within these legal principles are some underlying determinations that, on close examination, can be more difficult than they would first appear. One is deciding whether the relief sought is truly mandatory or prohibitive and the other is identifying the status quo.

[19] For example, many, if not most, prayers for injunctive relief can be phrased in a way that sounds like a prohibition but provides the same result as a mandatory injunction. Accordingly,

the language used by the applicant is not determinative. In this case, ACCEL has asked for an Order enjoining and restraining Pembina from:

shutting down the Redwater Pipeline;

refusing to accept monthly crude oil nominations; and

refusing to ship the crude oil production so nominated.

[20] ACCEL says the injunction sought is prohibitive, not mandatory. It bases this argument on both its own contractual interpretation of the Agreement and what it says is the factual status quo.

[21] First, ACCEL's interpretation of the Agreement is that Pembina is obligated to take ACCEL's oil and therefore that is the legal status quo. ACCEL further relies on the fact that its oil, albeit through ARC as its agent, has been moving on the Redwater Line for the last few months. In other words, ACCEL argues that it is merely asking that Pembina not be allowed to change its course of action until at least the interlocutory hearing.

[22] Pembina says that the injunction sought is mandatory as the effect of it, if granted, will be to force it to remain operating and to take ACCEL's oil at $0.42 per cubic metre. Pembina says that it has never agreed to accept ACCEL's oil but only nominations made in ARC's name, and those only as a gesture of goodwill until the parties could get a preliminary adjudication from this Court. But for that compromise, Pembina says that the status quo would be that ACCEL would have had no oil moving since the moment Pembina learned of the assignment.

[23] Further, while this decision will require me to make some preliminary analyses of the provisions of the Agreement at issue, I remain mindful of the fact that the parties not only disagree about what the Agreement says but disagree about whether ACCEL even has standing to rely on the Agreement. Pembina says that for ACCEL to rely on Clause 9.1(b) of the Agreement as representing the status quo, ACCEL would need to be a party to the Agreement which Pembina says it is not.

[24] As I am directed to do in *Canadian Broadcasting Corp., supra* at para.16, I therefore rely more heavily on the factual status quo and the anticipated effect of the relief sought than the parties' respective contractual interpretations.

[25] Both parties agree that the test for determining whether the injunctive relief sought is mandatory versus prohibitive is one of substance over form. While the language of ACCEL's application is framed as prohibiting Pembina from doing something, the repeated use of the double negative suggests that what is sought is effectively the imposition of a positive obligation.

[26] This is similar to the situation in *Loan Away Inc. v Western Life Assurance Company*, 2018 ONSC 7229, in which the plaintiff sought an injunction to prevent the defendant from terminating its contract with the plaintiff. Notwithstanding the framing of the relief sought as restraining the defendant from terminating an existing contract, the Court found that this would require the continued provision of services by the defendant until trial which was mandatory injunctive relief; paras.37-41.

[27] I find that the injunctions sought here are mandatory injunctions, the effect of which would force Pembina to keep its Redwater Line open and to take ACCEL's oil at $0.42 per cubic metre. Stepping back from the contractual arguments, it is apparent that ACCEL wants this Court to force Pembina to provide its services to ACCEL. I also agree that Pembina should not be

punished for its “without prejudice” agreement to take the October to December nominations pending this hearing by treating that arrangement as the status quo.

[28] Accordingly, ACCEL must satisfy the higher “strong *prima facie* case” standard.

[29] Many variations of language used to describe a strong *prima facie* case were considered by Brown J in *Canadian Broadcasting Corp.*, *supra* who said:

> Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice; para.17

[30] Can ACCEL satisfy this Court that there is a strong likelihood that it will succeed at trial? First, I must, to the extent possible, identify the issues for trial. ACCEL’s Statement of Claim alleges breach of contract and unlawful interference with economic relations, both based on Pembina’s refusal to accept ACCEL’s oil. No defence has been filed yet. At a minimum, it appears that Pembina will argue ACCEL is not a valid assignee.

The Validity of the Assignment

[31] At this stage, and in fact, in correspondence prior to the litigation, Pembina has said that ACCEL is not a valid assignee under the Agreement and therefore has no ability to assert rights under the Agreement. Clause 12.10 reads as follows:

> This agreement shall enure to the benefit of and be binding upon the parties hereto and, to the extent expressly permitted herein, upon their respective successors and assigns.

[32] There are no other provisions in the Agreement which speak to assignment of rights under Clause 9.1(a). In other words, the Agreement says that the rights thereunder can flow to assignees to the extent permitted within but then says nothing further allowing or prohibiting the assignment of those rights, with the exception noted below. Pembina takes the position that this means no rights under the Agreement are assignable.

[33] There is some language in Clause 8.1 dealing specifically and only with the ability of the parties to the contract to alienate particular common rights of way, specifically easements. Even then, the Agreement simply provides that a party can surrender its common rights of way to the other by way of assignment. It does not deal, even generally, with assignment to a third party.

[34] The only other language that might be illustrative of the intentions of the parties to the contract is Clause 8.1(h), which expressly prohibits assignment of common rights of way by way of security for indebtedness.

[35] With the exception of the aforementioned allowable assignment to a counterparty and the express prohibition on an assignment to secure debt, the Agreement is silent as to which rights can or cannot be assigned.

[36] It seems common ground that, in the absence of a prohibition to that effect, there is an implied right to assign contractual rights and obligations. As an assignment to secure debt

apparently had to be expressly prohibited under Clause 8.1(h) to prevent that occurrence, the logical inference may be that other rights, absent a similar prohibition, are assignable as per the common law.

[37] Pembina's suggested interpretation would mean that every single right and obligation under the Agreement would need to be individually addressed as to whether it was assignable or not. That is not commercially reasonable. And if, as Pembina suggests, the default is that all rights are unassignable unless designated otherwise, then I would have expected that kind of limiting language in Clause 12.10. Again, I emphasize that these are initial interpretations and not intended to bind subsequent judicial consideration.

[38] Further, neither Imperial nor OAS are parties to this Agreement anymore. Pembina is a party through an amalgamation, a devolution of rights it says was contemplated by the Agreement. However, ARC was clearly an arms-length assignee of AOS' rights under the contract, which rights Pembina has continued to recognize for 13 years. Pembina says that the assignment from AOS to ARC may have been consented to and that the Agreement allows the parties to consent to vary its terms. However, that was mere conjecture – there was no evidence before me as to any consent, much less any variation to the Agreement in that regard.

[39] Frankly, it is hard to avoid the inference that the assignment to ACCEL is an issue at this point in time primarily, if not only, because of the significant difference in the contractual and market rates. This does not make it an illegitimate argument but not one that the Court can say would have a strong likelihood of success.

[40] While the interlocutory and/or trial judge may very well find that Clause 12.10 operates to invalidate ARC's assignment to ACCEL, at this stage, I find that ACCEL has a strong likelihood of success on this issue. However, there is a second issue on which ACCEL must satisfy that test, discussed below.

Obligation to Operate Pipeline

[41] Notwithstanding that I am accepting, for the purposes of this application, ACCEL's standing to argue about the effect of Clause 9.1(a) of the Agreement, I do not agree with its proposed interpretation of that provision.

[42] Clause 9.1(a) of the Agreement reads as follows:

> The Purchaser [OAS now Pembina] will accept for shipment in the pipeline facilities all crude oil tendered from time to time by all shippers of crude oil produced from the Redwater [ ] Fields of the Province of Alberta (hereinafter in this Clause called "Redwater crude"); provided, however, in no event will the Purchaser be obligated to accept hereunder for shipment in the existing pipeline facilities, more than that volume of Redwater crude set out in Schedule "C" Column I, during any year and Column II during any day, hereunto annexed and made a part hereof;

[43] ACCEL takes the position that this provision of the Agreement obligates Pembina to accept ACCEL's oil at the tariff prices discussed below and as part of that obligation, also requires Pembina to keep the Redwater Line operating. Presumably it ties those obligations together by saying that the line must be open in order for Pembina to satisfy its obligation to

accept oil, even though Clause 9.1(a) does not speak to any obligation to operate the line indefinitely.

[44] Of course, the other interpretation of this clause is that Pembina has an obligation to ship certain volumes of oil from certain shippers at certain prices, *as long as the line is operating*. The Redwater Line is Pembina's asset, acquired for value. ACCEL goes so far as to suggest that Pembina must obtain its consent to shut down this pipeline but there are no co-owner or co-operator arrangements by which other parties must consent to this, nor any contractual provisions that specifically address shutting down the line or otherwise terminating the Agreement, with or without the consent of the shippers.

[45] ACCEL argues that, although there is no termination provision in the Agreement, it was intended to run until the Redwater wells were dry, relying in this regard on a reference in the tariff schedule attached to the Agreement. This schedule set out tariff rates from the date of the Agreement to 1985 and thereafter "to depletion of oil reserves". However, that language does not change, amplify or clarify Clause 9.1(a). It does not contain any termination language nor expressly obligate the owner/operator to remain in business. Rather, the logical interpretation is that if and when oil is sent on the Redwater Line, the shippers will be charged these rates.

[46] The parties intimated that, in 1977, depletion was thought to be much closer than it turned out to be with the discovery and implementation of new technologies. That may be so, but the reliability and weight to be given to that theory will require evidence that is simply not before the Court at this juncture.

[47] ACCEL is quite right that it is not the Court's job to save parties from a voluntary but unwise bargain made. However disproportionately low the existing tariffs are under the Agreement, on its face that is the contractual arrangement that Pembina accepted, subject to arguments that it may make at trial.

[48] However, in my view, saying that Pembina must continue to accept oil at the low tariff rates is a completely different thing than saying that Pembina must continue to operate a pipeline at all. It acquired this asset subject only to the conditions that it needed to accept oil to maximum volumes and at tariff rates. There is nothing in the Agreement, beyond the imposition of conditions for accepting oil when it does, that says that Pembina must, against its will, maintain and operate a facility at a loss for the benefit of other parties.

[49] Therefore, at this point, on the issue of whether Clause 9.1(a) obligates Pembina to continue to operate the Redwater Line for ACCEL's benefit, ACCEL does not have a strong *prima facie* case.

Irreparable Harm

[50] ACCEL argues that it will suffer irreparable harm if the injunction sought is not granted. If it cannot ship oil on Pembina's Redwater Line, it will need to make arrangements to do so by truck or by rail. Both options require a great deal of time and money to pursue and ACCEL's wells would need to be shut in while that happens.

[51] ACCEL has deposed, via two Affidavits of Bobby Charles Nolen, that ACCEL has already looked at three alternate transportation methods; construction of its own pipeline, trucking and shipping by rail. All involve significant infrastructure investment and lengthy legal and regulatory approval processes. ACCEL is of the opinion that the most feasible option is

transport by railway but this will still require the construction of storage facilities and connecting rail lines, securing capacity on rail cars and, as mentioned, obtaining all the regulatory permits to transport crude oil by rail. Its preliminary estimate is that this would take approximately 2 years and cost $7-10M.

[52] Pembina filed the Affidavit evidence of Chad Rathwell, who opined that trucking the oil would be a better alternative for ACCEL. By way of aerial photographs, Pembina identified some existing infrastructure that it says could be employed for this, as well as the closest facilities to which ACCEL's oil could be trucked. Pembina also deposed to its belief that the volumes produced by ACCEL could be trucked with far fewer trucks needed than the 30-50 per day that ACCEL estimated.

[53] However, a reply Affidavit of Mr. Nolen said that many of the buildings identified by Pembina were not capable of use in the manner postulated by Mr. Rathwell. Mr. Nolen maintains that retrofitting its existing facilities to accommodate transportation by truck is not feasible in terms of time or cost. ACCEL also made the point that even if only 12 trucks per day were required to ship its roughly 3,000 barrels of production, the distances and volumes make this a less safe and less economical prospect than shipping by rail.

[54] With respect, at this stage of the proceedings, I must prefer the evidence of ACCEL over Pembina in terms of ACCEL's alternative methods of shipping oil. ACCEL is a producer with varied operations and is more familiar with its own existing infrastructure.

[55] Further, the ramifications of shutting in the ACCEL wells long-term are not limited to their loss of profits and the reduction of royalties paid to the Crown, which could likely be quantified, but also include:

(a) ACCEL would be in breach of its contractual obligations to deliver oil to its purchaser, Macquarie Oil Services Canada Limited;

(b) ACCEL risks permanently losing its contracts with other Redwater producers by which it was aggregating that production and charging those producers a fee to put oil through ACCEL's Redwater Crude Facility (in other words, these producers may make other arrangements that are not temporary);

(c) ACCEL's natural gas revenues would also be lost, at least temporarily. Even though its natural gas and natural gas liquids ("NGLs") are not shipped on the Redwater Line, if the wells are shut in, there is no production of NGLs;

(d) ACCEL would have to obtain regulatory approval to shut in its wells. Further, if they remain shut in for an extended period of time, ACCEL would have to apply to reinstate production from those wells, regardless of the outcome of these proceedings; and

(e) ACCEL has approximately 30 employees in the Redwater area, whose employment would be affected and indeed might be suspended or terminated, pending the outcome of these proceedings. The same is true, to an unknown extent, of the other Redwater producers.

[56] Even further, notwithstanding that lost profits over a short period of time are likely quantifiable, if the wells are shut in for a period of years, that calculation becomes much more difficult. We can always track historical commodity prices, but ACCEL makes the point that operating costs and even yield can fluctuate depending on the producer's operations, including

new technologies. All of these things cost money. The Redwater production accounts for approximately 25% of ACCEL's total revenue and, according to its evidence, is used to finance future business plans in this area and elsewhere. The impact of the loss of that cash flow to ACCEL's overall business would be difficult to quantify or to properly compensate.

[57] I am satisfied that ACCEL has established that it will suffer irreparable harm if both parts of the injunctive relief sought are not granted. However, given my findings on the injunction seeking to force Pembina to keep its line operating, this assists ACCEL only on the injunction sought to accept ACCEL's oil at the Agreement rates.

Balance of Convenience

[58] Lastly, I must consider whether the balance of convenience favours the granting of the injunction. Which party will suffer more, in relation to the other, if unsuccessful at this stage?

[59] The predicted effect on ACCEL of not granting the injunction was examined above in the analysis on irreparable harm. However, the effect on Pembina of granting the injunction is also potentially quite significant.

[60] Mr. Rathwell's Affidavit says that much of the Redwater Line was built in 1953 and is in urgent need of testing and maintenance in order to ensure pipeline integrity and thereby public and environmental safety. Approximately $1M of diagnostic testing is required as soon as possible and that Pembina anticipates another $1M in repairs will be required in the next few months, with additional repairs of approximately $2M over the course of 2019. Even if all this is done, Pembina says that the line will not be safely operable for more than a few years.

[61] It should be noted here that ACCEL does not accept this and points to the fact that the same concerns were raised in 2015 and yet nothing significant was done to address upgrading or repairing the Redwater Line between then and now. ACCEL also notes that Pembina's concerns regarding pipeline integrity have only been raised in conjunction with complaints about the contractual tariff rates.

[62] I accept that there is a connection between the low tariff rate and the costs of maintaining and repairing the pipeline and so do not fault Pembina for presenting its concerns as partially economic. Again, I come back to the fact that this is Pembina's asset. If it wishes to continue shipping any oil on the Redwater Line, I accept that it will need to conduct these inspections and repairs and those will indeed be "normal course" expenditures. However, if it truly intends to decommission this pipeline, then it should not be forced to incur those costs at this stage.

[63] ACCEL thinks Pembina is bluffing about the decommissioning. However, just as I preferred ACCEL's evidence regarding its options for transporting its own oil given its current business plans and infrastructure, so do I give preference to Pembina's evidence regarding the immediate steps necessary to ensure that this pipeline is safe. This is in part because of the seriousness of the potential consequences if the pipeline is not operated safely, which consequences would be visited primarily upon Pembina.

[64] If the interlocutory or trial judge determines that ACCEL's rights under Clause 9.1(a) are both rightly assigned to ACCEL and that those rights preclude Pembina from decommissioning the Redwater Line, he or she can force Pembina to incur those costs at that stage and get oil flowing again within a matter of months. The loss of a few months of production to ACCEL is

much less serious than the imposition of significant maintenance and repair costs, all of which may be wasted if the pipeline is permanently closed in the near future.

[65] I therefore find that the balance of convenience, at this early stage and in anticipation of a relatively quick interlocutory hearing, favours Pembina, not on the issue of pricing but only on the issue of the aforementioned costs of continuing to operate.

Conclusion

[66] If the injunction is granted, ACCEL says that it will not delay in getting this matter on to the interlocutory application stage and beyond that to trial. Of course, it would be shipping its oil at $0.42 per cubic metre while awaiting at least a further interlocutory decision.

[67] I prefer to leave the onus on ACCEL to move quickly. I will not order Pembina to incur the costs of inspecting and repairing the Redwater Line in order to keep it open for ACCEL's benefit. However, if Pembina does not decommission the line, it will have to accept ACCEL's oil at the contractual rate in order to stay open for business, including its more lucrative third-party production.

[68] I am therefore granting ACCEL's application in part. Specifically, Pembina is hereby enjoined and restrained from refusing ACCEL's monthly oil nominations pending the interlocutory hearing if the Redwater Line is in operation. However, I am not issuing an injunction requiring Pembina to continue operating the Redwater Line, if it chooses not to do so, pending the next hearing.

[69] Costs may be spoken to or reserved for the interlocutory hearing, as the parties wish.

Heard on the 14th day of December, 2018.
Dated at the City of Calgary, Alberta this 19th day of December, 2018.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Ms. T. Coates, QC
Mr. J.H. Selnes
Mr. Paulson
for the Plaintiff/Applicant, ACCEL Canada Holdings Limited

Mr. D. Tupper
Mr. I. Breneman
Ms. E. Cox
for the Defendant/Respondent, Pembina Pipeline Corporation

Tab 3

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

Indexed as: RJR — MacDonald Inc. v. Canada (Attorney General)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

Répertorié: RJR — MacDonald Inc. c. Canada (Procureur général)

N^os du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada.*

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada.*

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la prépondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé and in the prevention of the widespread and serious medical problems directly attributable to smoking.

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et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

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APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and *Yves Lebœuf*, for the respondent.

W. Ian C. Binnie, Q.C., and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by

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Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
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DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et *Yves Lebœuf*, pour l'intimé.

W. Ian C. Binnie, c.r., et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementante que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1er janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)*b*) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2*b*) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment*, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

étant dissident sur ce dernier point. Le juge Brossard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'interdiction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 $.

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent decision of this Court confirming the validity of *Tobacco Products Control Act*.

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(*b*) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2*b*) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2*b*) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

conclu que la preuve présentée par l'intimé selon laquelle l'interdiction totale de la publicité diminuait la consommation n'était pas fiable et n'avait aucune valeur probante parce qu'elle n'établissait pas que l'interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l'intimé n'avait pas démontré que l'interdiction de la publicité portait le moins possible atteinte à la liberté d'expression. Le juge Chabot a conclu aussi que la preuve d'un lien rationnel entre la prohibition de la publicité au Canada et l'objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d'ingérence sociale incompatible avec l'essence même d'une société libre et démocratique, qui ne pouvait être justifiée.

La Cour d'appel (relativement au sursis d'exécution du jugement)

En décidant si elle devait exercer son vaste pouvoir en vertu de l'art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d'appel a fait l'observation suivante relativement à la nature du redressement demandé:

> [TRADUCTION] Toutefois, ce qui est en cause en l'espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d'une part, la suspension de l'effet juridique d'une partie de la Loi et de l'obligation de s'y conformer pendant une période de 60 jours et, d'autre part, la suspension du pouvoir des autorités publiques responsables d'en assurer l'application. C'est une question sérieuse que de suspendre ou de retarder l'effet ou l'exécution d'une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l'application ou l'exécution d'une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d'empiéter dans les sphères législative et exécutive. [Souligné dans l'original.]

La cour a fait droit en partie au redressement demandé:

> [TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu'il existe une possibilité que les requérantes soient poursuivies en vertu de l'art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . .

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

. . .

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2*b*) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

rationnel et de l'atteinte minimale, du critère formulé dans l'arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l'article premier était satisfait puisqu'il se peut que l'interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d'après l'existence même d'un «corps d'opinions» favorables à l'adoption d'une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l'atteinte minimale en ce qu'elle n'interdît pas la consommation, n'interdît pas la publicité étrangère et n'écarte pas la possibilité d'obtenir de l'information sur les produits du tabac.

2. Le juge Brossard (dissident en partie)

Le juge Brossard a souscrit à l'opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu'elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement.

Cependant, le juge Brossard n'était pas d'avis que la violation de l'al. 2*b*) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu'elle n'établissait pas l'existence d'un lien, ou même l'existence d'une probabilité de lien, entre l'interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu'il est tout au moins possible que les buts visés soient atteints. Il n'a pas souscrit à l'opinion que la Loi satisfaisait au critère de l'atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu'il soit nécessaire d'imposer une prohibition totale.

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoi qu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

> **97.** . . .
>
> (*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale nº 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)*a*) de cette disposition prévoit que des règles peuvent être adoptées pour:

> **97.** . . .
>
> *a*) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé regulations constitute conduct under a law that has been declared constitutional by the lower courts.

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

> On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601:

> Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms.*
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:
   (i) There is a serious constitutional issue to be determined.
   (ii) Compliance with the new regulations will cause irreparable harm.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.
2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.
3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.
4. Les critères applicables à une suspension d'instance sont satisfaits:
   (i) Il existe une question constitutionnelle sérieuse à juger.
   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra.* If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

a

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

b

[TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que c la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été d refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

e

[TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être f tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant g l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le h fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première i instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à j caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

> b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

> [TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal . . . .

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. <u>The Status Quo</u>

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. *Summary*

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. <u>Le statu quo</u>

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. *Balance of Inconvenience*

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

> **3.** The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

> **3.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:
>
> *a*) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
>
> *b*) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
>
> *c*) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

> L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du vention of the widespread and serious medical problems directly attributable to smoking.

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.

Tab 4

CANADA

CONSOLIDATION

Bankruptcy and Insolvency Act

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

Current to June 14, 2026

Last amended on March 26, 2026

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

CODIFICATION

Loi sur la faillite et l’insolvabilité

L.R.C. (1985), ch. B-3

À jour au 14 juin 2026

Dernière modification le 26 mars 2026

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

Recovering proceeds if transferred

98 (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

R.S., 1985, c. B-3, s. 98; 2004, c. 25, s. 59(E).

General assignments of book debts ineffective

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

Foregoing provisions not to apply in some cases

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

Recouvrement du produit s'il a été transféré

98 (1) Lorsqu'une personne a acquis des biens du failli en vertu d'une transaction qui est nulle ou d'une transaction annulable qui est écartée, et a vendu, aliéné, réalisé ou perçu ces biens, ou une partie de ces biens, les montants d'argent ou autre produit, qu'ils soient de nouveau aliénés ou non, sont réputés être les biens du syndic.

Le syndic peut recouvrer

(2) Le syndic peut recouvrer ces biens ou leur valeur, ou l'argent ou le produit en provenant, de la personne qui les a acquis du failli, ou de toute autre personne à qui le failli peut avoir revendu, transféré ou versé le produit de ces biens, d'une manière aussi complète et efficace que le syndic aurait pu recouvrer ces biens s'ils n'avaient pas été ainsi vendus, aliénés, réalisés ou perçus.

Application du présent article

(3) Nonobstant le paragraphe (1), lorsqu'une personne à qui ces biens ont été vendus ou aliénés a payé ou donné de bonne foi à leur égard une contrepartie valable et suffisante, cette personne n'est pas assujettie à l'application du présent article, mais le syndic n'a recours que contre la personne qui a conclu cette transaction avec le failli en vue du recouvrement de la contrepartie ainsi versée ou donnée, ou de la valeur de celle-ci.

Subrogation du syndic

(4) Lorsque la contrepartie payable pour ou sur toute vente ou revente des biens, ou d'une partie de ces biens, n'a pas été acquittée, le syndic est subrogé aux droits du vendeur pour contraindre au paiement ou à l'acquittement.

L.R. (1985), ch. B-3, art. 98; 2004, ch. 25, art. 59(A).

Nullité des cessions générales de créances comptables

98.1 (1) Lorsqu'une personne se livrant à un métier ou commerce fait une cession de ses créances comptables actuelles ou futures, ou d'une catégorie ou d'une partie de ces créances, et devient par la suite en faillite, la cession des créances comptables est inopposable au syndic en ce qui concerne les créances comptables qui n'ont pas été acquittées à la date de la faillite.

Les dispositions précédentes ne s'appliquent pas dans certains cas

(2) Le paragraphe (1) ne s'applique pas dans le cas d'une cession de créances comptables enregistrée conformément à une loi provinciale pourvoyant à l'enregistrement de cette cession, si celle-ci est valide aux termes des lois de la province.

Tab 5

13 Eliz., c. 5.

An Act against Fraudulent Deeds, Alienations, &c.

Fraudulent deeds made to avoid the debts of others shall be void, and the penalties of the parties to such fraudulent assurances.

FOR the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: Which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

All fraudulent conveyances made to avoid the debt or duty of others shall be void.

1. All and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none

effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

The forfeiture of the parties to fraudulent deeds.

2. All and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, or being privy and knowing of the same, or any of them, which at any time . . . . . shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made *bonâ fide* and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons, or other profits of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond; the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the Queen's Courts of Record by action of debt, bill, plaint, or information, wherein none essoin, protection, or wager of law shall be admitted for the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half-year without bail or mainprize.

Who shall have the forfeiture, and by what means.

* * * * *

Estates made upon good consideration and *bonâ fide.*

5. Provided that this Act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration and *bonâ fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

* * * * *

Tab 6

Province of Alberta

FRAUDULENT PREFERENCES ACT

Revised Statutes of Alberta 2000
Chapter F-24

Current as of January 1, 2002

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Note

All persons making use of this document are reminded that it has no legislative sanction. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

FRAUDULENT PREFERENCES ACT

Chapter F-24

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Fraudulent transfers

1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,

is void as against any creditor or creditors injured, delayed or prejudiced.

RSA 1980 cF-18 s1

Intent to prefer

2 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

RSA 1980 cF-18 s2

Preferential effect

3 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,

is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

RSA 1980 cF-18 s3

What constitutes transaction

4(1) A transaction is deemed to be one that has the effect of giving a creditor a preference over other creditors, within the meaning of section 3, if by the transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security for the debtor's indebtedness to that creditor or a portion of it greater proportionately than could be realized by or for the unsecured creditors generally of the debtor or for the unsecured portion of that creditor's liabilities out of the assets of the debtor left available and subject to judgment, writ proceedings, attachment or other process.

(2) Independently of the intent with which the transaction was entered into or of whether it was entered into voluntarily or under pressure, the preferential effect or result of the impeached transaction governs, and no pressure by a creditor or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, avails to protect the transaction except as provided by sections 6 and 9.

RSA 1980 cF-18 s4;1994 cC-10.5 s126

Definition

5 In sections 2 to 4, "creditor" includes

(a) a surety, and the endorser of a promissory note or bill of exchange, who would, on payment by the surety or endorser of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of sections 2 to 4, and

(b) a cestui que trust or other person to whom liability is equitable only.

RSA 1980 cF-18 s5

Bona fide transactions

6 Nothing in sections 1 to 5 applies to

(a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,

if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

RSA 1980 cF-18 s6

Payment to creditor

7 When there is a valid sale of goods, securities or property and the consideration or part of it is paid or transferred by the purchaser to the creditor of the vendor under circumstances that would render the payment or transfer void if it were made by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

RSA 1980 cF-18 s7

Restoration of security to creditor

8 When a payment that is void under this Act has been made and a valuable security has been given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to the creditor before or as a condition of the return of the payment.

RSA 1980 cF-18 s8

Saving of payment to creditor

9 Nothing in this Act

(a) affects a payment of money to a creditor when the creditor by reason or on account of the payment has lost or been deprived of or has in good faith given up a valid security that the creditor held for the payment of the debt so paid, unless the value of the security is restored to the creditor,

(b) affects the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not lessened in value to the other creditors because of the substitution, or

(c) invalidates a security given to a creditor for the pre-existing debt when, by reason or on account of the giving of the security, an advance is made in money to the debtor by the creditor in the bona fide belief that the advance will enable the debtor to continue the debtor's trade or business and pay the debtor's debts in full.

RSA 1980 cF-18 s9

Proceedings by creditor

10(1) One or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of, or to have declared void, agreements, deeds, instruments or other transactions made or entered into in fraud of creditors or in non-compliance with this Act or by this Act declared void.

(2) If, in an action under subsection (1), an amendment is made to the statement of claim, the amendment relates back to the commencement of the action for the purpose of the time limited by section 3.

RSA 1980 cF-18 s10

Proceeds of unlawfully transferred property

11(1) If a gift, conveyance, assignment or transfer of any property, real or personal, that in law is invalid against creditors, was made to a person, and that person has sold or disposed of, realized or collected the property or a part of it, the money or other proceeds or that amount, whether further disposed of or not, may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, assignment, transfer, delivery or payment was made.

(2) The right of seizure and recovery exists in favour of all creditors of the debtor.

(3) When the proceeds are of such a character as to be seizable under writ proceedings, they may be seized under the writ of any creditor and shall be distributed among creditors under the *Civil Enforcement Act*.

(4) Whether the proceeds are or are not of such a character as to be seizable under writ proceedings, an action may be brought for them or to recover the amount of them by a creditor, whether a judgment creditor or not, on behalf of that creditor and all other creditors, or any other proceedings may be taken that are necessary to render the proceeds or the amount of them available for the general benefit of the creditors.

(5) This section does not apply as against innocent purchasers of any of the property.

RSA 1980 cF-18 s11;1994 cC-10.5 s126

Bankruptcy and Insolvency Act

12 This Act shall be read and construed subject to the *Bankruptcy and Insolvency Act* (Canada).

RSA 1980 cF-18 s12;1994 c23 s51

Tab 7

Court of Queen's Bench of Alberta

Citation: Questor Technology Inc v Stagg, 2020 ABQB 3

Date: 20200110
Docket: 1801 11473
Registry: Calgary

Between:

Questor Technology Inc.

Plaintiff/Applicant

- and -

Richard Stagg, also known as Ritchie Stagg
Jeffrey Nelson, also known as Jeff Nelson
Justin Bouchard and Emission Rx Ltd.

Defendants/Respondents

Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon

I. Introduction

[1] A summary of my decision in this case was given orally on November 25, 2019, from the bench. The detailed reasons and conclusions are provided below. If there are any discrepancies between the brief oral reasons provided and this written decision, this written decision takes precedence.

[2] Questor Technology Inc ("**Questor**") is the Applicant. It is an environmental technology company in the incinerator business. Questor designs and sells custom incinerators that are primarily used in the oil and gas industry. Its customers use custom incinerators to burn waste gas, such as methane.

[3] The individual respondents, Richard Stagg, Jeffrey Nelson, and Justin Bouchard (collectively, the "**Individual Respondents**"), are employees of Emission Rx Ltd ("**Emission**"). Emission is the sole corporate respondent (the "**Corporate Respondent**").

[4] The Individual Respondents were previously employed by Questor. Mr. Stagg conducted sales for Questor from 2007 until his departure in April 2018. Mr. Nelson was hired as a project engineer in 2013, and acted as Engineering Manager until his departure in June 2018. Mr. Bouchard was hired as a junior engineer in 2014, and remained in that role until his departure in May 2018.

[5] In September 2017, John Sutherland, the Chief Operating Officer of Questor, tasked Mr. Nelson and Mr. Bouchard to design and engineer a low-pressure waste gas combustion solution for Questor (the "**Questor LP Burner Technology**"). By the end of 2017, Mr. Nelson and Mr. Bouchard completed that project.

[6] After terminating their employment with Questor, the Individual Respondents began operating Emission. That entity now competes with Questor in the low-pressure waste gas combustion market, using their own low-pressure waste gas incinerator (the "**Emission LP Burner Technology**"). Sales of the Emission LP Burner Technology represent 99% of Emission's revenues.

[7] The Individual Respondents describe the Emission LP Burner Technology as a "novel combustor design". It was developed by building on an expired patent that Mr. Nelson discovered in June of 2017, apparently on his own time, but while he was still employed with Questor.

[8] The key issues in the underlying action can be summarized in three questions, which I frame as follows. First, whether the Individual Respondents developed the Emission LP Burner Technology in the course of their employment with Questor? Second, whether the Individual Respondents developed the Emission LP Burner Technology using Questor's confidential information? Third, whether Questor is the rightful owner of the Emission LP Burner Technology? While I will decide none of these questions in this Application, it is useful to keep them in mind as part of the context.

[9] Questor asserts ownership of the Emission LP Burner Technology, either through: (i) the terms of the employment agreements signed by the Individual Respondents; or (ii) the application of the common law.

[10] Questor seeks injunctive relief enjoining the Individual Respondents and the Corporate Respondent (collectively, the "**Defendants**") from, among other things, competing in the market against Questor and infringing Questor's intellectual property. Questor also claims intellectual property ownership in the Emission LP Burner Technology.

[11] Questor argues that if the Defendants are not enjoined from competing with Questor through selling their product, it will suffer irreparable harm through the loss of first mover advantage, permanent loss of market share, and loss of reputation and goodwill.

II. The Issue

[12] Should an interim injunction be granted in favour of Questor, as against the Defendants?

III. The Law – Interlocutory Injunctive Relief

[13] An interlocutory injunction is a discretionary and extraordinary remedy. It is typically granted before the Court has the opportunity to assess all of the evidence that the parties may rely on at trial. Given these circumstances, interlocutory injunctions should be granted with caution and restraint: see ***Griffiths McBurney & Partners v Ernst & Young YBM Inc***, 2000 ABCA 284 at paras 55-56; see also ***Allard v Shaw Communications Inc***, 2010 ABCA 316 at para 29.

[14] The tripartite test for an injunction was established in ***RJR-MacDonald Inc v Canada (AG)***, [1994] 1 SCR 311. The test requires Questor to demonstrate:

(a) that there is a serious issue to be tried;

(b) that Questor will suffer irreparable harm if the application is refused; and

(c) that the balance of convenience weighs in favour of granting the injunction.

A. Serious Issue or Strong *Prima Facie* Case?

[15] There is some debate between the parties as to whether Questor should be required to: (i) prove that there is a serious issue to be tried; or (ii) establish a strong *prima facie* case at the first stage of the tripartite test. I will address this particular debate first.

1. The Debate

[16] The Supreme Court has indicated that there is an exception to the general rule that a judge should not engage in an extensive review of the merits when the result of the application will, in effect, amount to a final determination of the particular action. This will be the case when the granting of an injunction will impose such hardship on one party so as to remove any potential benefit of going to trial: ***RJR-MacDonald*** at 338.

[17] While ***RJR-MacDonald*** stated that the circumstances in which this exception will apply are rare, I am satisfied that this is an appropriate case to apply the higher standard. My reasons are as follows.

[18] The Individual Respondents have invested at least $100,000 and countless hours into Emission. If the injunction is granted in favour of Questor, Emission will be prevented from selling the Emission LP Burner Technology in the waste gas combustion industry until a final hearing on the matter. If this is the case, Emission argues that it will be out of business.

[19] Further, the Defendants assert that they will not have sufficient funds or resources (either in their personal capacities or through Emission) to defend themselves at trial. They argue that if

the injunction is granted in favour of Questor, it effectively will amount to a final determination against the Defendants.

[20] Although I am confident that the Individual Respondents could obtain employment in another context if the injunction sought by Questor was issued, I am also cognizant of the complexity of this matter and the inevitable costs of proceeding to trial. That burden would include hours of preparation, the expense of obtaining expert evidence, and the delays associated with a trial.

[21] Overall, I accept the assertion by the Defendants that the granting of the injunction in favour of Questor would effectively end the action and impose such hardship that it would remove any potential benefit of going to trial. Given this context, I find that a more extensive review of the merits is warranted, and that the Applicant must demonstrate that it has a strong *prima facie* case.

2. Has the Applicant Proven it has a Strong *Prima Facie* Case?

[22] A strong *prima facie* case means one that will "probably prevail at trial" or is "likely to succeed at trial": ***Modry v Alberta Health Services***, 2015 ABCA 265 at para 37.

[23] Having determined that the higher threshold applies at the first stage of the tripartite test, I now conduct an analysis of the merits of each cause of action being advanced by Questor to determine whether it has established a strong *prima facie* case. This requires that I address the following questions:

a. Did the Individual Respondents breach their contractual duty of confidentiality?

b. Did the Individual Respondents breach their common law duty of confidentiality?

c. Did the Individual Respondents breach their contractual or common law duties not to compete with Questor?

d. Did the Individual Respondents breach fiduciary duties that they owed to Questor as key employees?

e. Does Questor own, through contract or common law, the Emission LP Burner Technology?

[24] I will address each of the above questions in sequence.

a. Did the Individual Respondents breach their contractual duty of confidentiality?

[25] The employment agreement signed by the Individual Respondents states the following:

> **1. Confidentiality**
>
> In the course of performing my work as an employee of Questor, I will have access to information and materials (including software and related manuals and documentation, and information contained in records, data and business documents), which are the property of Questor, its subsidiaries or affiliates, or the property of Questor's clients or other third parties and in the possession of

> Questor ("Confidential Information"). I acknowledge that such Confidential Information may constitute valuable information, know-how or trade secrets. I agree to hold all Confidential Information in confidence until its public disclosure by the owner of the Confidential Information, and
>
> a. Shall access only on a "need to know" basis,
> b. Shall copy or reproduce it only as needed to perform my work,
> c. Shall return all Confidential Information in my possession upon demand, and
> d. Shall not disclose it or make it available to any other party without the prior written consent of the owner of the Confidential Information.

[26] The evidence demonstrates that Mr. Nelson copied approximately 80,000 emails onto a personal hard drive shortly before his last day of employment with Questor. He testified that the emails were copied for reasons of professional liability, in case any accidents arose in the future wherein he might need to explain how he conducted himself.

[27] Mr. Stagg also testified that after his employment, he had a thumb-drive with some Questor documents in his possession (the "**Thumb-Drive Documents**"). The evidence is that he retained the thumb-drive after his Questor employment ceased. He also acknowledged that some of the Thumb-Drive Documents were included in his affidavit of records in this proceeding.

[28] The evidence is that Mr. Stagg copied the Thumb-Drive Documents during the course of his employment so that he would have them on hand in case of IT failures. He also had the Thumb-Drive Documents so that he could work from home.

[29] Since the confidentiality clause in the employment agreement requires that the Individual Respondents only "copy or reproduce" Confidential Information as needed to perform their work, I find that Questor has a strong *prima facie* claim: (i) that Mr. Nelson breached his contractual duty of confidentiality when he copied the emails onto his personal hard drive; and (ii) that Mr. Stagg breached his contractual duty of confidentiality by copying the Thumb-Drive Documents.

b. Did the Individual Respondents breach their common law duty of confidentiality?

[30] In addition to the employment agreement, the common law duty of good faith and loyalty prevents employees from making improper use of confidential information: ***RBC Dominion Securities Inc v Merrill Lynch***, 2008 SCC 54 at para 37, Abella J, dissenting on other grounds.

[31] The three-part test to determine whether a breach of confidence has taken place was established by the Supreme Court in ***Lac Minerals Ltd v International Corona Resources Ltd***, [1989] 2 SCR 574. That three-part test requires: (i) that the information conveyed was confidential; (ii) that it was communicated in confidence; and (iii) that it was misused by the party to whom it was communicated.

[32] Misuse of the confidential information is an essential component of the actionable wrong. For example, where Party A gives confidential information to Party B but Party B does nothing

with it, there is no breach: ***Seyedi v Nexen Inc***, 2016 ABCA 24 at para 14, citing ***Geophysical Service Inc v Nwest Energy Corp***, 2014 ABQB 205 at para 71.

[33] Questor argues that there is a serious issue to be tried with respect to whether its confidential information was used to develop the Emission LP Burner Technology. The Individual Respondents argue that the Emission LP Burner Technology is "fundamentally different" than Questor's technology, and that it was not developed with reference to any of Questor's confidential information.

[34] I agree that this question raises serious issues for trial. However, I find that Questor has not provided enough evidence for me to conclude they have a strong *prima facie* case.

[35] While both parties have provided some evidence on what they allege are technical differences or similarities between the two waste gas combustors and their underlying technologies, a final resolution of this question likely will require *viva voce* testimony and expert evidence. At this stage, I cannot say that Questor is likely to succeed at trial.

[36] I also note that Mr. Sutherland, Questor's main affiant on this issue, admitted in cross-examination: (i) that he has not examined the Emission LP Burner Technology; (ii) that he does not have knowledge of the technology; (iii) that he has not had anyone else at Questor examine the Emission LP Burner Technology; and (iv) that he does not know if the Emission LP Burner Technology relies on the same convection principle as the Questor LP Burner Technology. This supports my finding that Questor's allegations on this point remain speculative, and do not ground a strong *prima facie* case for purpose of this Application.

[37] Aside from the above allegation of breach of confidentiality, Questor has demonstrated that there was some Questor information, specifically language describing the purpose of waste water vaporization technology, used in a draft business plan for Emission that was produced in response to an undertaking. While Questor can establish that the Individual Respondents copied some information contrary to their employment contract, the evidence shows that the language was only used as a placeholder in an early version of the Corporate Respondent's business plan. Based on the evidence before me, I find that the subject information was subsequently removed and not included in the following six versions of the draft of the business plan, including the final draft. Importantly, the subject information was not included in any copy of the business plan shown to an investor.

[38] To give my finding further context, I note that the subject information used and subsequently removed from the business plan describes the background and purpose of waste water vaporization generally, rather than a technology or product. Additionally, Questor's own evidence is that it is not asserting a monopoly over the water vaporization market, and that the Defendants have not yet developed any waste water technology.

[39] For the purposes of the injunction analysis, I am willing to accept that the language that was copied was confidential. However, on review of the surrounding circumstances, I am not prepared to conclude that there is a strong *prima facie* case that the Defendants' misused the information. As I noted above, the evidence is that the subject information was ultimately removed from the draft business plan before it was shown to the public.

[40] Questor also argues that Emission, specifically through the Thumb-Drive Documents retained by Mr. Stagg, misappropriated Questor's contact and customer information. For example, there was a client list tendered as an exhibit to Mr. Stagg's questioning, which he agreed was copied as part of the Thumb-Drive Documents.

[41] Proof that Mr. Stagg retained the Thumb-Drive Documents, however, is not proof of misuse. The following reasons support the conclusion that Questor does not have a strong *prima facie* case concerning the alleged misuse of confidential client information by the Individual Respondents.

[42] First, the evidence provided by the Individual Respondents is that many of Questor's clients and their ongoing projects have been published on Questor's website or shared during client presentations. Where information is of public record, it is not protected by the common law duty of good faith which prevents employees from making improper use of confidential information.

[43] Second, the Individual Respondents do not deny that they have solicited some of the same clients as Questor. I accept their argument that large corporations in the oil and gas industry, such as Canadian Natural Resource Limited and Husky Energy, are customers that Emission would think to contact or make overtures to as a matter of common business sense rather than through misappropriating what Questor claims was confidential information. In drawing this conclusion, I also take guidance from the words of Justice Coutu in ***Spiderplow Canada Ltd v Lyons,*** 2004 ABQB 921 who stated that, "the longer an employee is in an industry and the more contacts he makes over the years, the more difficult it is for the Plaintiff to establish the activities of a Defendant employee, who left to start a competing business, constitute nothing more than permissible competition": ***Spiderplow*** at para 39. On this point, I also add that of all the customers that were solicited by Emission, Questor was only able to demonstrate that 18% of companies contacted by Emission had previously been contacted by Mr. Stagg while he was employed with Questor.

[44] Third, I note that there was a specific allegation raised in the affidavit of Ms. Audrey Mascarenhas that Emission had contacted Mr. Gordon Moore. Ms. Mascarenhas explained that Mr. Moore was not a customer of Questor's, but her own mentor.

[45] Ms. Mascarenhas asserted that Emission must have taken his contact information from Questor's contact list. However, in contrast to Ms. Mascarenhas' speculation, the evidence is that Mr. Stagg met Mr. Moore at a trade show, and that after that trade show Mr. Stagg added the contact information for Mr. Moore into his Emission sales log.

[46] Overall, while I accept that copying certain documents onto the thumb-drive was very likely a breach of Mr. Stagg's employment agreement, I do not find that there is strong evidence that Mr. Stagg misappropriated or misused confidential client information from Questor.

[47] In conclusion, I find that this cause of action presents some serious issues for trial, including some that will require expert evidence. However, on the whole of the evidence provided, I cannot conclude that Questor has a strong *prima facie* case of success in the allegations that fall under this particular cause of action.

c. Did the Individual Respondents breach their contractual or common law duties not to compete with Questor?

[48] The employment agreement signed by the Individual Respondents states the following:

> **2. Conflict of Interest**
>
> I recognize that Questor expects its employees to maintain the highest standard of ethical conduct and to that end I agree to exercise reasonable care and diligence to prevent any actions or conditions which could result in a conflict with Questor or Questor's clients. If at any time circumstances occur which might reasonably be seen to create a conflict with Questor or Questor's clients, I shall disclose the details of such conflict or perceived conflict to an officer of Questor.

[49] Questor argues that the Individual Respondents breached this conflict of interest clause by competing with Questor while employed. In addition to this contractual term, the common law duty of good faith and loyalty prevents employees from competing with their employer during the currency of their employment: ***RBC Dominion*** at para 37, Abella J, dissenting on other grounds.

[50] While I acknowledge the assertions of Questor, the law does allow some flexibility. Taking preliminary steps towards planning for new employment or the establishment of a new business (even one that may eventually compete with a former employer) does not amount to a conflict of interest. A caveat to this is that these activities should neither occur during normal working hours nor on the employer's premises: ***Torcana Valve Services Inc v Anderson***, 2007 ABQB 356 at para 54; ***Westcan Bulk Transport Ltd v Stewart***, 2005 ABQB 97 at paras 89-90.

[51] I also note that fiduciary employees have a duty not to compete with their employers until a reasonable period of time has elapsed following their employment. That separate cause of action will be discussed below. For the purpose of this analysis, I will assume that the Individual Respondents were not fiduciary employees.

[52] The evidence discloses that during their employment with Questor, the Individual Respondents: (i) incorporated Emission; (ii) obtained a website domain name; (iii) engaged in preliminary discussions about technological viability, potential business plans, and sources of funding; and (iv) conceptualized an experimental design.

[53] The Individual Respondents argue that these preliminary steps do not amount to conduct that put them in a conflict of interest with Questor because they were not competing with Questor at that time. The Individual Respondents further submit that they continued to act faithfully to perform their obligations at Questor to the best of their abilities during the time that they were employed. Concerning this last point, I note that Mr. Sutherland acknowledged in his affidavit that the Individual Respondents continued to successfully perform their assigned duties, and that the Questor LP Burner Technology would "not have been completed within 2017 without their involvement".

[54] The evidence of emails and text messages exchanged between the Individual Respondents demonstrates that their planning took place almost entirely outside work hours. I do accept that there are two or three emails and a handful of text messages that allegedly took place

during work hours. However, I accept the Individual Respondents' argument that most of these communications were sent over lunch breaks, which is evident from the time stamps on these records. To the extent that a few texts or emails fall within regular work hours, this is not enough evidence to convince me that Questor would have a strong *prima facie* chance of success of proving at trial that the Individual Respondents did something more than take reasonable steps toward planning new employment.

[55] I also acknowledge an email sent by Mr. Nelson stating that he had "broken off on a new venture". This email was sent outside of work hours, but was sent two days before he gave his actual notice of termination. This email was a request for a quote from a supplier where Mr. Nelson stated: "I would like to trial the HT2000 AL on a new product we are developing".

[56] Although it is somewhat troubling that Mr. Nelson misstated his employment status, this email requesting the trial of a piece of equipment does not convince me that he was doing anything more than taking reasonable steps toward planning for new employment.

[57] In conclusion, this is another cause of action where Questor has serious issues to raise at trial. However, I do not find there is a strong *prima facie* case that this conduct amounts to competing with Questor while employed.

d. Did the Individual Respondents breach fiduciary duties that they owed to Questor as key employees?

[58] After the end of an employment relationship, a former fiduciary employee may not do any of the following:

a. Use a former employer's proprietary information in a manner that is contrary to the former employer's best interests.

b. Use a former employer's corporate opportunity, unless the former employer has unequivocally decided not to pursue it.

c. Solicit customers of his or her former employer, until a reasonable period of time has elapsed following the end of their employment with the former employer.

d. Offer employment to employees of his or her former employer, until a reasonable period of time has elapsed following the end of their employment with the former employer.

See: ***ServiceMaster of Canada Limited v Meyer***, 2019 ABCA 130 at para 138.

[59] Before determining whether there is a strong *prima facie* case that the Individual Respondents breached fiduciary duties owed to Questor, I must first decide whether there is a strong *prima facie* case that those respondents were fiduciaries. Since the Applicant does not suggest that Mr. Bouchard, a junior engineer, was a fiduciary employee, I will only address this question with respect to Mr. Stagg and Mr. Nelson.

[60] Fiduciary duties do not arise from an employee's title, such as branch manager. Fiduciary duties arise from an employee's actual authority or control over the employer's operation: ***RBC Dominion*** at para 50.

[61] The test for finding a fiduciary duty was recently summarized in ***Abt Estate v Cold Lake Industrial Park GP Ltd,*** 2019 ABCA 16 at para 73:

> ... The test for a fiduciary relationship is well established, and has been summarized in cases like ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at para. 27, [2011] 2 SCR 261 and ***HRC Tool & Die Mfg Ltd. v Naderi***, 2016 ABCA 334 at para. 6, 43 Alta. L.R. (6th) 23:
>
> > (a) The fiduciary has scope for the exercise of some discretion or power;
> >
> > (b) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
> >
> > (c) The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power; and
> >
> > (d) The existence of an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.
>
> Mere vulnerability or reliance is not sufficient to create a fiduciary relationship: ***Elder Advocates*** at para. 28.

[62] Concerning fiduciary employees, the Alberta Court of Appeal has also stated that:

> [a] fiduciary employee usually makes important management decisions and plays a key role in the employer's business. His or her knowledge of the business would allow him or her to compete unfairly with the former employer until a reasonable period of time following the termination of his or her employment elapsed. Needless to say, the vast majority of employees are not fiduciaries: ***ServiceMaster*** at para 136.

[63] To the above judicial guidelines, I add that just because an employee is good, valuable, trusted, or even essential to the efficient operation of a business, does not transform them into a fiduciary. The key concept is the existence of the employer's vulnerability to the employee's ability to unilaterally affect their legal or practical interests: ***Jetco Heavy Duty Lighting v Fonteyne***, 2018 ABQB 345; see also ***Flag Works Inc v Sign Craft Digital (1978) Inc***, 2007 ABQB 434.

[64] Mr. Stagg was Director of Sales and Marketing at Questor. While he may have been a highly valued employee and a critical player in managing client relationships, based on the evidence before me, I find that Mr. Stagg did not have discretion to unilaterally bind Questor so as to affect their legal or practical interests. For example, he did not have signing authority, exercise any supervisory authority, have exclusive access to Questor clients without oversight of Questor management, or have any authority to "close" sales deals when he generated a lead. He was neither part of senior management nor did he make key decisions within the organization.

[65] Given this context, I do not find that there is a strong *prima facie* case that Mr. Stagg was a fiduciary employee.

[66] Mr. Nelson was not a part of the senior management team, although he held the title of "Engineering Manager". However, that observation does not determine the issue. Importantly,

Mr. Nelson knew of all of Questor's ongoing projects, including research and development. He also had access to confidential and proprietary information, such as lists of customers, potential customers, technical requirements, pricing, and engineered drawing packages.

[67] Mr. Nelson exercised considerable discretion on the technical specification of a majority of the proposals that Questor sent to customers, worked independently, and had authority to make decisions on engineering projects. He oversaw workflow amongst the engineering team, and oversaw the development of up to three engineers in training.

[68] While he was subject to oversight by Mr. Sutherland, I find that the significant role which Mr. Nelson played in the design and innovation of Questor's projects allowed him to unilaterally exercise power or discretion so as to affect Questor's legal or practical interests. Questor was vulnerable to that discretion or power and I find that implicit in Mr. Nelson's duty of good faith and loyalty, he undertook to act in Questor's best interest in the context of his employment. I make these findings based on the evidence before me, and for the purposes of this Application only.

[69] Given this context, I find that there is a strong *prima facie* case that Mr. Nelson was a fiduciary employee.

[70] Based on the evidence before me, there is no dispute that the Individual Respondents solicited some of the same customers of Questor with their Emission LP Burner Technology. Their technology was ready for production and marketing in September 2018, and the first unit was sold on January 11, 2019.

[71] Concerning the duty to refrain from competing, what constitutes a reasonable period of time will differ in the circumstances. Generally, the duty to refrain from competing would subsist for so long after the fiduciary's termination as is reasonable in the circumstances to enable the former employer to contact its clients and attempt to retain their loyalty: ***Anderson, Smyth & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd,*** 1996 ABCA 169 at para 32.

[72] I accept from the evidence that it took Questor a number of months to rebuild their operational capacity, after losing two engineers and a salesperson. In particular, it took three months for Questor to train a senior project engineer to replace Mr. Nelson and Mr. Bouchard.

[73] I found above that there is a strong *prima facie* case that Mr. Nelson was a fiduciary employee. Assuming he is ultimately found to be a fiduciary employee, I also find that there is a strong *prima facie* case that Mr. Nelson breached his fiduciary duty by competing with Questor because he pursued some of the same customers within three months of leaving his position at Questor.

[74] Additionally, I find there is a strong *prima facie* case that Mr. Nelson breached his fiduciary duty to Questor by engaging former Questor employers, namely Mr. Stagg and Mr. Bouchard, to work with him on his new venture.

[75] Lastly, I add that where a junior employee assists a more senior employee in breaching a fiduciary duty, there is authority that they will also be liable for the breach: ***Alberts et al v Mountjoy et al*** (1977), 16 OR 2(d) 682, 79 DLR (3d) 108 (Ont HC). That being the case, there is

a strong *prima facie* case that Mr. Bouchard also would be liable for competing with Questor in the low-pressure waste gas incinerator market without waiting for a reasonable period of time to pass.

e. Does Questor own, through contract or common law, the Emission LP Burner Technology?

[76] At common law, there is a presumption that all inventions belong to the inventor, unless there is an express contract to the contrary or the person was expressly employed for the purpose of inventing or innovating and creates something new in the course of their employment: see ***Comstock Canada v Electec Ltd*** (1991), 38 CPR (3d) 29 (FC) at 29; see also ***Seanix Technology Inc v Ircha*** (1998), 10 WWR 688, BCJ No 179 (BCSC) at paras 3-4.

[77] Questor asserts that under the “Copyright and Intellectual Property” provision of the employment agreement, it holds all proprietary rights and exclusive ownership in all works developed by the Individual Respondents in connection with their employment with Questor. Concerning this argument, the employment agreement signed by the Individual Respondents states the following:

> **4. Copyright and Intellectual Property**
>
> Questor shall have all proprietary rights and exclusive ownership, including, but not limited to, exclusive copyright, in and to all written, recorded or visual materials, compilations of information or data, and other works of authorship, furnished to Questor and developed by me in connection with my employment with Questor ("Employment Work Products"). I agree to fully cooperate and to do all things reasonably necessary to allow Questor to claim sole copyright ownership, including the execution of documents for that purpose. I agree to keep such Employment Work Products in confidence and to use them solely in the performance of my employment with Questor, unless expressly authorized in writing to do otherwise.

[78] This Copyright and Intellectual Property clause is a standard form clause that was signed by each of the Individual Respondents, engineers or not.

[79] The words of the contract suggest that the subject matter of the clause is that Questor holds property in all “written, recorded or visual materials, compilations of information or data, and other works of authorship”. While there is an emphasis on copyright, there is no reference to ideas or inventions which are the type of intellectual property protected through patent or common law.

[80] Absent clear language, and for the purposes of this Application only, I cannot accept that the Copyright and Intellectual Property clause is an express contractual term that would rebut the presumption that inventors own their ideas. This determination also conforms with the doctrine of *contra proferentum*, which allows the courts to restrict the scope of extremely broad provisions. *Contra proferentum* means that where a contract is ambiguous, the meaning least favourable to the author of the document prevails: ***Manulife Bank of Canada v Conlin***, [1996] 3 SCR 415.

[81] Given this context, I find that Questor does not have a strong *prima facie* case concerning the ownership of the Emission LP Burner Technology on the basis of its employment contract.

[82] That said, Questor may be the owner of the Emission LP Burner Technology if the Individual Respondents were expressly engaged for the purpose of inventing or innovating, and created the Emission LP Burner Technology during the course of their employment with Questor. While the Individual Respondents argue that Mr. Nelson and Mr. Bouchard were hired to *modify* existing Questor technology rather than to be inventors, *per se*, I accept that Mr. Nelson and Mr. Bouchard were employed with an express purpose of innovating and inventing within their role.

[83] In these circumstances, the key issue is whether the Emission LP Burner Technology was created in the course of the Individual Respondents' employment with Questor. The Emission LP Burner Technology is based on an expired patent that was discovered by Mr. Nelson in June 2017. Mr. Nelson asserts that this discovery occurred on his own time. The Individual Respondents also assert that the research and development of the Emission LP Burner Technology occurred outside of work hours, and was completed after they terminated their employment with Questor.

[84] In September 2017, Mr. Nelson and Mr. Bouchard were tasked with developing the Questor LP Burner Technology. Questor argues that the expired patent would have solved the issue they were tasked to solve in September 2017, whereas the Defendants argue that the assignment from Questor was to "retrofit" existing Questor technology rather than invent a novel combustor unit. Questor argues that Mr. Nelson had a duty to disclose his discovery of the expired patent.

[85] Although framed as a dispute over ownership, this argument also requires the Court to assess whether Mr. Nelson's duty of good faith required him to disclose the expired patent for the purpose of developing the Questor LP Burner Technology. This involves an assessment of whether the Questor LP Burner Technology and the Emission LP Burner Technology are substantially similar products, and whether the Emission LP Burner Technology was a viable solution to the assignment that was given to Mr. Nelson.

[86] As stated above, there is significant conflicting evidence on the technical issues underlying this Application. Questor's argument that Emission and Questor's technologies are the same rests on Mr. Sutherland's speculative evidence. The Individual Respondents, however, have testified that Emission's technology differs from Questor's concerning the use of a single burner, a different gas distribution mechanism, and a different mode of accepting air draft. The Individual Respondents also state that the Emission LP Burner Technology is not compatible with that of Questor.

[87] There is also conflicting evidence on what the purpose and scope of the assignment was when Mr. Nelson and Mr. Bouchard were tasked with developing the Questor LP Burner Technology. Mr. Nelson and Mr. Bouchard assert that they were neither tasked with inventing a novel combustor unit nor tasked with inventing a unit that was not based on underlying Questor technology.

[88] While there is some agreement between the parties that their technologies solve the same problem, the conflicting evidence is not enough to convince me, for purposes of this Application, that Mr. Nelson had a duty to disclose the expired patent in the course of developing the Questor LP Burner Technology. In addition, the evidence from both Questor and the Defendants is that Mr. Nelson and Mr. Bouchard successfully completed their assignment of developing the Questor LP Burner Technology while they remained employed with Questor. To emphasize this latter point, Mr. Sutherland acknowledged in has affidavit that the Individual Respondents had continued to successfully perform their assigned duties.

[89] While this cause of action raises important issues for the trial, the conflicting evidence leaves me without a proper foundation to determine whether Questor has a strong *prima facie* case concerning the ownership issue. Given this context, I do not find that Questor has a strong *prima facie* case concerning the ownership of the Emission LP Burner Technology on the basis of the common law.

B. Irreparable Harm

[90] Having established that Questor has established a strong *prima facie* case that (i) Mr. Stagg and Mr. Nelson breached their contractual duty of confidentiality; and (ii) that Mr. Nelson breached his fiduciary duty to Questor, I must now assess whether the Applicant has established that it will suffer irreparable harm.

[91] Even if I am incorrect in finding that Questor did not make out a strong *prima facie* case on *certain* causes of action that they have advanced, the following analysis concludes that Questor has not demonstrated that they will suffer irreparable harm if the injunction is not granted.

[92] Irreparable harm refers to the nature of the harm, rather than its magnitude: ***RJR-Macdonald*** at 341. Irreparable harm is harm that cannot be quantified in monetary terms or cannot be cured, and it can include permanent market loss or irrevocable damage to business reputations: ***RJR-MacDonald*** at 341.

[93] The evidentiary burden is on Questor to demonstrate, on a balance of probabilities, that it will suffer irreparable harm with clear, and not speculative, evidence: ***EnCharis Community Housing and Service v Alberta Securities Commission*,** 2019 ABCA 177 at para 23, citing ***Modry*** at para 82.

[94] Questor's argument is that:

> "Mr. Sutherland *believes* the individual Defendants are competing against Questor and soliciting work from Questor's long-standing customer and potential customers, and that Questor knows and has evidence of instances where the Defendant's approached Questor clients to use the relationship they developed while working for Questor, to market the [Emission] LP Burner Technology" (emphasis added).

[95] Questor argues that there is no indication that the Defendants will discontinue this conduct, which will contribute to irreparable harm to Questor.

[96] Based on the evidence before me, I find that there was no non-compete contractual agreement signed in this case. Based on the combination of this finding and the other evidence before me on this file, I further find that the only thing that would legally prevent Emission from soliciting customers from Questor is a fiduciary duty which blocks such solicitation. As reviewed above, the law in this area is established. A fiduciary employee must not solicit customers of his or her former employer or offer employment to employees of his or her former employer for a reasonable period of time. That allows the former employer to counteract the competitive threat that the former employee represents: ***ServiceMaster*** at para 141.

[97] Although there is a strong *prima facie* case that Mr. Nelson was a fiduciary employee, Questor has not demonstrated that irreparable harm will result if an injunction is not issued on this basis.

[98] In ***ServiceMaster***, Justice Wakeling found that any harm arising from the defendants' misuse of proprietary information or the taking advantage of any corporate opportunities had already occurred, and was irremediable by an injunction. In that case, 18 months had passed.

[99] In this case, 17 months elapsed between the date that Mr. Nelson terminated his employment with Questor and the date of my oral reasons for judgement. Given this context, I find that the reasonable period of time that Questor may have previously sought to restrain Mr. Nelson through an injunction has passed. Any harm that arose from Mr. Nelson's breach of fiduciary duty can now only be properly compensated through damages.

[100] Questor's remaining allegations of irreparable harm rest on its assertion that it is the rightful owner of the Emission LP Burner Technology. While I did not find that Questor has a strong *prima facie* case of ownership in that technology, I will nonetheless proceed to assess all of the arguments made by Questor in this stage of the tripartite test.

[101] Its further allegations can be divided into three categories. First, Questor says that the Defendants are depriving Questor of the first mover advantage in the market for low-pressure burners with natural air draft technology. Second, Questor argues that if the Defendants are permitted to continue to use intellectual property which was developed while the Individual Respondents were employed at Questor, then Questor will suffer a permanent market loss and loss of customers. Third, Questor alleges that the Defendants are depriving Questor of its industry reputation and goodwill as the pre-eminent innovator and leader in emissions incineration.

[102] I will address each of the above categories in sequence.

1. First mover advantage

[103] Questor argues that they would have had the first mover advantage in the market for low-pressure burners with "Natural Air Draft" technology, but for the Emission LP Burner Technology. Questor relies on Mr. Sutherland's assertions to prove this point. In contrast, the Defendants assert that Questor's allegation of losing the first mover advantage is untenable in light of the competitive nature of the waste gas incineration industry.

[104] The Defendants have provided uncontested evidence that the market is competitive. They assert that the waste gas combustor is a product offered by many companies. They offer evidence from affiant Brent Willey, who states that many other competitors have targeted the low-pressure end of the combustor market since Questor entered the market in 1999. These other competitors include Total Combustions Inc, Delta Incinerators, Tornado Combustion Technologies, John Zink Hamworthy Combustion, and Black Gold Rush Industries.

[105] The arguments advanced by the Defendants are supported by the cross-examination of Mr. Sutherland. In particular, during cross-examination, Mr. Sutherland agreed that the market for both high and low-pressure incinerators was very competitive by the end of 2017.

[106] In summary, the Defendants argue that neither Questor nor Emission's products can be described as "first to market".

[107] On the basis of the evidence provided, I find that Questor has not demonstrated, on the balance of probabilities, with clear and not speculative evidence, that they have lost, or will lose, a first mover advantage.

2. Market loss

[108] The evidence is that incinerator market is competitive. Given the competitive nature of the market that is in evidence, I accept that Questor may lose some share of the market if the injunction is not granted. However, if they are successful at trial, I do not find that there is clear and not speculative evidence that this loss of market share would be permanent, or that it would amount to irreparable harm that could not be remedied with damages.

3. Industry reputation

[109] While Questor argued that competition from Emission will lead to loss of Questor's reputation as an industry leader, it provided no evidence that it was a market leader within this competitive industry. Arguments to that effect are not evidence. Given that lack of evidence, I do not accept Questor's argument that it will suffer a loss of reputation if the injunction is not granted its favour.

4. Summary on irreparable harm

[110] As stated previously, all of these assertions of irreparable harm rest on the argument that Questor is the rightful owner of the Emission LP Burner Technology. If at trial Questor succeeds in proving that ownership, I see no reason why an accounting of profits cannot compensate Questor for the loss of being able to market the Emission LP Burner Technology themselves. In particular, since 99% of Emission's revenues come from sales of the Emission LP Burner Technology, calculating lost profits should not pose a significant challenge.

[111] In addition, if at trial Questor succeeds on a claim that the Individual Respondents breached a common law duty through the misuse of confidential information or through competing while they were still employed by Questor, this is the type of harm that can also be compensated through damages: see for example ***RBC Dominion***.

[112] In conclusion, I am not satisfied that Questor has proven, with clear and not speculative evidence, that they will suffer harm that is irreparable and that is not compensable through damages, should I refuse to grant the injunction.

C. Balance of Convenience

[113] I have found that Questor has demonstrated that it has a *prima facie* case with respect to its claim that the Individual Respondents breached their fiduciary duties and their contractual duty of confidentiality. However, Questor has not satisfied me that it will suffer irreparable harm if the injunction is not granted.

[114] I take guidance from Justice Sharpe, writing extra judicially in *Injunctions and Specific Performance,* (Aurora, ON: Canada Law Book, 1992) (loose-leaf updated 2019, release 27) at §2.600, who suggests that I should not take the tripartite test as three watertight categories:

> The terms "irreparable harm", "*status quo*" and "balance of convenience" do not have precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another.

[115] Although I accept that the tripartite test should be applied with some fluidity, I have also determined that the balance of convenience does not weigh in favour of granting the injunction. The evidence establishes that Questor is a successful publicly traded company. It had an annual revenue of $23.5 million in 2018. Given the circumstances of this case, Questor has failed to demonstrate that it will suffer irreparable harm if the injunction is not granted.

[116] On the other hand, the Individual Respondents have invested hundreds of thousands of dollars into Emission, and I accept that they will effectively have to shut down their operations if the injunction is granted. They would be forced to create a livelihood in some other context, and it is likely that they would not have the resources to proceed to trial.

IV. Conclusion

[117] Injunctions are an equitable remedy. On the basis of all of the evidence before me and a review of the tripartite test, I do not find that it would be fair and just to issue the injunction that Questor seeks.

[118] While I decline to issue the injunction, I order that the Defendants deliver to Questor any and all remaining Confidential Information belonging to Questor which the Individual Respondents took in breach of the employment contract, including the personal hard drive of emails taken by Mr. Nelson and the Thumb-Drive Documents taken by Mr. Stagg.

[119] The parties may speak to costs if they cannot otherwise agree.

[120] In addition, the parties were informed during my oral reasons on November 25, 2019 that I would consider a protective order in respect of the profits that may be earned and accumulated by Emission pending trial.

Heard on the 24th and 27th day of June, 2019, 4th day of July, 2019 and 30th day of September, 2019.
Oral Reasons for Judgment given on 25th day of November, 2019.
Written Reasons for Judgment dated at Calgary, Alberta this 10th day of January, 2020.

Justice D. Blair Nixon
J.C.Q.B.A.

Appearances:

Michael Theroux, Kelsey Meyer and Denise Brunsdon
Bennett Jones LLP
for the Plaintiff/Applicant

Frank Tosto, Evan Nuttall, Kamani Dowe and Matthew Schneider
Borden Ladner Gervais LLP
for the Defendants/Respondents

Tab 8

Court of Queen's Bench of Alberta

Citation: Medical Laboratory Consultants Inc. v. Calgary Health Region, 2003 ABQB 995

Date: 20031204
Docket: 0301 13302
Registry: Calgary

Between:

Medical Laboratory Consultants Inc. and Dr. Inderman H. Jadusingh

Plaintiffs

- and -

Calgary Health Region

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice A.G. Park

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[1] This is an application for a mandatory interlocutory injunction. The Applicants, Medical Laboratory Consultants Inc. ("MLC") and Dr. Inderman H. Jadusingh ("Dr. Jadusingh") seek to enjoin the Respondent, the Calgary Health Region ("CHR"), from terminating payments to MLC for medically necessary services performed by the Applicants.

I Undisputed facts

[2] MLC operates a private laboratory in downtown Calgary where it performs pathology and medical laboratory services. Dr. Jadusingh is the medical director of MLC and is employed by MLC as a medical pathologist. There is no question that Dr. Jadusingh is a highly qualified medical laboratory physician and is licenced to practice medicine in Alberta.

[3] The CHR is a corporation created pursuant to the ***Regional Health Authorities Act***, R.S.A. 2000, c. R-10. The CHR is responsible for administering the public health care system in the Calgary region.

[4] Since 1996, pathology and medical laboratory services have been "delisted" from the Alberta Health and Wellness Department's *Schedule of Medical Benefits*, which sets out the fees physicians are paid for performing specific medical procedures. Payments for pathology and medical laboratory services are now governed by s. 3.1 of the ***Medical Benefits Regulation***, Alta. Reg. 173/93, as amended:

> (1) The rates of benefits payable for laboratory medicine and pathology services provided to residents in Alberta shall be determined by the regional health authority.
>
> (2) Benefits referred to in subsection (1) are not payable unless they are provided by persons authorized by a regional health authority to provide laboratory medicine and pathology services.

[5] When the delisting of these services occurred, the CHR entered an agreement with Calgary Laboratory Services ("CLS"), whereby CLS would provide all medical laboratory and pathology services in Calgary, with the exception of those provided by MLC. At the same time, the CHR and MLC entered into an agreement whereby MLC would be paid a flat rate of $36,400 per month for performing its services. On January 14, 2000, the CHR proposed that this amount be increased to $40,000 per month, retroactive to April 1999. The proposal letter also set out the following caveats to the arrangement:

> CRHA [later renamed CHR] will agree to maintain funding until March 31, 2001. MLC accepts that funding for that period. Commencing January 2001 CRHA will discuss with MLC whether the arrangement will continue, and if so for how long, and for what monthly sum. As at present, the CRHA can make no commitment that any arrangement will continue past March 31, 2001.
>
> Notwithstanding CRHA's agreement to fund until March 31, 2001, that level of funding obligation will cease should MLC's laboratory cease to perform at a level acceptable to the College or otherwise operate unsatisfactorily in the opinion of CRHA's Senior Vice President and Chief Medical Officer or his or her delegate, if the volume of tests done in MLC's laboratory is materially lower than in the recent past. Volume will continue to be ascertained through reports to CRHA by Alberta Health or failing availability of those reports, through direct reports from MLC containing the same information.

[6] These terms were agreed to by Dr. Jadusingh on February 14, 2000, but he attached a letter to his endorsement in which he objected to the level of funding and the authority of the CHR to terminate funding. Since this time, the CHR has been paying MLC $40,000 per month for the medical laboratory and pathology services performed by MLC.

[7] Also in February 2000, Dr. Jadusingh commenced legal proceedings against the CHR and CLS. The Statement of Claim alleged that he had been wrongfully dismissed by the CHR from his previous employment as a pathologist at a Calgary hospital.

[8] In January 2001, Dr. Jadusingh requested that the CHR enter into a renewed contract with MLC, since the agreement between the parties was due to expire in March of that year. The CHR informed Dr. Jadusingh that until the outstanding litigation between the parties was resolved, it would be inappropriate for the CHR to enter into negotiations for a new contractual agreement with MLC.

[9] However, in February 2002, MLC was granted a court order in the nature of *certiorari* that quashed the decision of the CHR to refuse to negotiate until the conclusion of the wrongful dismissal litigation: ***Medical Laboratory Consultants Corp. v. Calgary Regional Health Authority*** (2002), 311 A.R. 6, 2002 ABQB 200.

[10] In November 2002, "without prejudice" negotiations between MLC and the CHR commenced in the form of a mediation/facilitation process chaired by an independent mediator. However, on July 11, 2003, the CHR terminated the negotiations and issued the following letter to the Applicants:

> With the unsuccessful conclusion of the Mediation/Facilitation process, the Region finds itself in the position it was in prior to the commencement of that process. The month-to-month contract between the Region and MLC is unsatisfactory from the Region's perspective. The Region does not believe the current flat monthly fee provides the value required to justify the continuation of that relationship.
>
> The Region has on many occasions invited MLC to advance a proposal which would be cost effective and responsive to the type and quantity of testing actually being performed. MLC has never taken up that invitation. Absent a business case, which demonstrates that MLC will provide value to the Region, the Region cannot justify the current business relationship.
>
> Accordingly, this letter shall serve as notice that the month-to-month contract between MLC and the Region is terminated effective 30 days from the date of this letter.

[11] On August 22, 2003, the Applicants filed a Statement of Claim requesting, *inter alia*, a permanent injunction prohibiting the CHR from implementing its plan to terminate MLC's funding.

[12] In this application, the Applicants seek an interlocutory injunction to prevent termination of MLC's funding pending a trial of the matter. In other words, the Applicants seek a mandatory injunction that would order the CHR to continue to pay MLC $40,000 per month until the Court renders a decision regarding the permanent injunction.

II The Test for an Injunction

[13] Section 13(2) of the ***Judicature Act***, R.S.A. 2000, c. J-2 gives the Court the discretion to issue an interlocutory injunction "in all cases in which it appears to the Court to be just or convenient" to do so. The test for an interlocutory injunction as set out in ***American Cyanamid Co. v. Ethicon Ltd.***, [1975] A.C. 396 (H.L.) is well known. The burden rests on the applicant to establish each of the following three elements on a balance of probabilities:

1. there is a serious issue to be tried,

2. irreparable harm would result to the applicant if the injunction was not granted, and

3. the balance of convenience between the parties favours granting the injunction.

All three elements of this sequential tripartite test must be met before an injunctive relief will be granted: ***RJR-MacDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311; ***Ominayak v. Norcen Energy Resources Ltd.*** (1985), 58 A.R. 161 (C.A.).

[14] The Applicants submit that the first element can be met merely by showing that the claim is not frivolous or vexatious. Normally, this standard would be sufficient to satisfy the first element. However, as the Respondent points out, the first element of this test is modified when the applicant seeks a *mandatory* interlocutory injunction, that is, an injunction that orders the defendant to carry out a positive act. In ***Wigglesworth v. Phipps*** (2001), 284 A.R. 322, 2001 ABQB 113 at para. 15, Sulyma J. described what is required:

> [T]he first step of the tripartite test is modified where the Applicant is seeking an interlocutory mandatory injunction. Then, a strong *prima facie* case must be demonstrated. I adopt the statements of Mr. Justice Ritter in ***Westpoint Mall Ltd. v. Kelsey Holdings Inc.*** [1998 ABQB 446 at para.11]:
>
>> It is still clear that there is a different standard with respect to the first question in the tripartite test when one is dealing with a mandatory injunction, as opposed to a prohibitory injunction. That is, in order to succeed, the Plaintiffs must demonstrate a strong case.

See also ***Amoco Canada Petroleum Co. v. Alberta and Southern Gas Co.*** (1992), 130 A.R. 252 (Q.B.); ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)*** (1997), 204 A.R. 24 (Q.B.); ***Pasar Micro Controls Ltd. v. Q-Tron Ltd.*** (1998), 215 A.R. 36, 1998 ABQB 182. Thus, the Applicants must first present a strong and clear *prima facie* case on a serious issue in order to satisfy the first element of the test.

[15] In determining if this element has been met in the case, I am limited to evidence that has been presented before me in the affidavits, the cross-examination on the affidavits, and the statements of undisputed facts.

[16] Based on this evidence, as outlined hereafter, I am satisfied that the Applicants have presented a strong and clear *prima facie* case on a serious issue.

[17] When addressing the *prima facie* merit of their claim, the Applicants submitted that the claim could succeed on two separate grounds. First, the Applicants argued that the CHR does not have authority under the applicable legislation to terminate MLC's funding. Second, the Applicants asserted that the CHR was prohibited on contractual grounds from terminating MLC's funding. For convenience, I will refer to the first ground as the "Statutory Ground" and the second ground as the "Contractual Ground." I will examine each in turn.

The Statutory Ground

[18] This ground of the Applicants' argument relies on the following sections of the ***Alberta Health Care Insurance Act***, R.S.A. 2000, c. A-20:

> 1. In this Act,
>
> ...
>
> (b) "basic health services" means
>
> (i) insured services,
>
> ...
>
> (n) "insured services" means
>
> (i) all services provided by physicians that are medically required,
>
> ...
>
> (t) "physician" means
>
> (i) with reference to medical services provided in Alberta, a person registered as a medical practitioner or as an osteopathic practitioner under the *Medical Professions Act*, ...
>
> ...
>
> (u) "Plan" means the Plan referred to in section 3;
>
> ...
>
> (x) "resident" or "resident of Alberta" means a person lawfully entitled to be or to remain in Canada, who makes the person's home and is ordinarily present in Alberta and any other person deemed by the regulations to be a resident, but does not include a tourist, transient or visitor of Alberta;

...

3(1) The Minister shall, in accordance with this Act and the regulations, administer and operate on a non-profit basis a plan to provide benefits for basic health care services to all residents of Alberta.

...

4(1) Subject to this Act and the regulations, the Minister shall pay benefits in respect of health services provided to residents.

(2) All claims for benefits are subject to assessment and approval by the Minister and the amount of the benefits to be paid and the person to whom the benefits are to be paid shall be determined in accordance with the regulations.

...

6(1) No physician or dentist may receive payments of benefits from the Minister for insured services provided in Alberta to a resident unless the physician or dentist was opted into the Plan when the insured services were provided.

...

8(1) Subject to this section, every physician is deemed to have opted into the Plan.

...

20 The Minister may enter into agreements or arrangements for the payment of benefits on a basis other than a fee for service basis.

[19] The Applicants maintain that sections 4 and 20 imply that physicians in Alberta that are opted into the Plan shall be paid either on a fee for service basis or pursuant to another arrangement. The Applicants point out that the statute does not permit the Minister to refuse to pay a physician at all.

[20] Furthermore, the Applicants submit that it is clear that neither the Minister nor the CHR has the authority to licence physicians in Alberta. The authority to do so has been conferred on the Alberta College of Physicians and Surgeons: ***Medical Profession Act***, R.S.A. 2000, c. M-11. There is no question that Dr. Jadusingh is a physician who has been licenced by the College to practice in this province. Thus, the Applicants maintain that the Minister is obliged to pay Dr. Jadusingh for his services, either on a fee for service basis or according to some other agreement or arrangement. In this instance, the CHR has purported to completely terminate funding to Dr. Jadusingh for any medical laboratory and pathology services he performs. This termination, the Applicants allege, is an action that is not permitted by the relevant legislation.

[21] However, the Respondent points out that since 1996, the Minister has instructed that fees for laboratory medicine and pathology services are to be paid on a basis other than a fee for service basis. The Respondent argues that the Minister has given full power to the health regions to determine who shall be authorized to receive payment for performing pathology and medical laboratory services. These changes are reflected in s. 3.1 of the ***Medical Benefits Regulation***, which I reproduce again for convenience:

> (1) The rates of benefits payable for laboratory medicine and pathology services provided to residents in Alberta shall be determined by the regional health authority.
>
> (2) Benefits referred to in subsection (1) are not payable unless they are provided by persons authorized by a regional health authority to provide laboratory medicine and pathology services.

[22] The Applicants acknowledge that s. 3.1 is the closest any legislation comes to conferring authority on the CHR to refuse to pay licenced physicians for performance of pathology and medical laboratory services. However, the Applicants argue that when this section is read in the context of other applicable legislation, its logical interpretation cannot go that far.

[23] The Respondent also contends that the actions of the CHR are entirely justified under s. 5 of the ***Regional Health Authorities Act***:

> 5. Subject to this Act and the regulations, a regional health authority
>
> (a) shall
>
> ...
>
> (iii) determine priorities in the provision of health services in the health region and allocate resources accordingly,
>
> ...
>
> (v) promote the provision of health services in a manner that is responsive to the needs of individuals and communities and supports the integration of services and facilities in the health region,
>
> and
>
> (b) has final authority in the health region in respect of the matters referred to in clause (a).

However, the Applicants maintain that this broad, overarching power is not absolute, but rather must be exercised only in conformity with the relevant statutes and regulations that the Applicants have highlighted.

[24] In my view, these arguments raise serious issues to be tried with respect to whether the CHR is statutorily permitted to refuse to pay Dr. Jadusingh and MLC for the medical services that they perform. Reading together the statutory authorities that were presented by the Applicants and the Respondent, I find that the Applicants have presented a strong *prima facie* case that the actions of the CHR went beyond the authority that has been statutorily delegated to them by the Minister.

The Contractual Ground

[25] For the purposes of argument under this ground, it must be assumed that a contract existed between MLC and the CHR. However, before proceeding with an analysis of this ground, I wish to state that it is not clear in this case whether or not a contract in fact exists between the parties. Furthermore, if a contract does exist, it is not clear what the terms of the contract are.

[26] In the letter of January 14, 2000, the CHR proposed an arrangement with MLC whereby the CHR would maintain funding to MLC until March 31, 2001. Dr. Jadusingh signed this letter stating that he agreed with this arrangement, but he also attached a letter expressing some reservations and disagreements with the arrangement. It is uncertain whether these transactions resulted in a legal contract and what the terms of such a contract were. It is also unclear whether the fact that the CHR maintained funding to MLC well beyond March 31, 2001 resulted in the establishment of a month-to-month contract between the parties. These are issues that can only be determined by this Court after a full trial and a hearing of all the relevant evidence. Therefore, I do not make any findings with respect to these issues.

[27] However, I will explore this ground on the assumption that a contract does exist between the parties. To describe the purported contract, I will use the word “contract,” “arrangement” and “agreement” interchangeably.

[28] On July 11, 2003, the CHR gave MLC notice that the January 14, 2000 arrangement would be terminated in 30 days. The Applicants argue that beyond the following condition, the contract between the parties contained no provision for termination of the arrangement:

> Notwithstanding CRHA’s agreement to fund until March 31, 2001, that level of funding obligation will cease should MLC’s laboratory cease to perform at a level acceptable to the College or otherwise operate unsatisfactorily in the opinion of CRHA’s Senior Vice President and Chief Medical Officer or his or her delegate, if the volume of tests done in MLC’s laboratory is materially lower than in the recent past.

The Applicants point out that the July 11, 2003 termination letter did not invoke this provision of the agreement.

[29] More specifically, it is argued that there is no provision in the contract that suggests that the payments to MLC can be terminated on 30 days' notice. The Applicants maintain that in order to terminate a contract where no provision for termination exists, reasonable notice must be provided. In these circumstances, the Applicants argue that nothing less than two years' notice would be reasonable. The Applicants cited the following cases in support of their argument: ***Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd.***, [1986] 1 S.C.R. 57; ***Clarke, Irwin & Co. v. George G. Harrap & Co.*** (1980), 9 B.L.R. 97 (Ont. H.C.J.); ***R.G.O. Office Products Ltd. v. Knoll North America Corp.*** (1996), 180 A.R. 1 (Q.B.); ***Inter-Rail Auto Handling Inc. v. Canadian Pacific Ltd.***, 2000 BCSC 1011.

[30] Alternatively, the Applicants submit that if the contract could be classified as a month-to-month contract, there is no legal authority for the proposition that only 30 days' notice is required to terminate such a contract, as the Respondent maintains.

[31] Clearly, the Applicant raises serious issues on which a trial could be held. Based on the evidence that has been presented before me, I am satisfied that the Applicants have also presented a strong and clear *prima facie* case on these issues.

Summary of Requirement 1

[32] I have found that on both the Statutory Ground and the Contractual Ground, the Applicants have demonstrated a strong and clear *prima facie* case on serious issues that can be tried. As a result, the first leg of the tripartite test for a mandatory injunction is met.

B. Requirement 2: Irreparable harm will result if the injunction is not granted

[33] The second leg of the test for an injunction requires the applicant to demonstrate that irreparable harm will result if the injunction is not granted. In ***RJR MacDonald*** at 341, Cory and Sopinka JJ. discuss what is meant by this requirement:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory injunction.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision [or] where one party will suffer permanent market loss of irrevocable damage to its business reputation ...

[34] The Applicants submit, and Dr. Jadusingh deposed in his Affidavit, that if the injunction is refused MLC will be forced to close in the near future. This is because the CHR is the only body authorized to pay MLC for medically necessary laboratory and pathology services. The Applicants

submit that if they were successful at trial after being denied the mandatory injunction, the harm would be irreparable, because the damages would not permit MLC to re-open.

[35] In their submissions, the Applicants set out specific examples of the irreparable harm that they claim will result to the Applicants and the public if MLC's funding is terminated. The following are ways that the Applicants submit that MLC will be irreparably harmed if the injunction is not granted:

1. MLC will not be able to pay its employees' salaries and will have to let them go.

2. They will most likely move on to new positions.

3. MLC will have to vacate its premises and would likely have to dispose of its equipment.

4. MLC will lose valuable relationships with referring physicians and patients because of its unavailability.

5. MLC's reputation with physicians, patients, and the general public will be damaged.

6. MLC will fall behind even further in technological advances.

7. The costs of setting up a new laboratory would be prohibitive.

8. The synthesis of particular techniques and methods of patient care developed through the combined experience of the physicians who have been involved in MLC would be lost.

9. Valued staff will have moved on to new positions, relationships with patients and referring physicians will have been severed, and equipment and premises will have been lost.

[36] The Applicants submit that Dr. Jadusingh will be irreparably harmed in the following ways if the injunction is not granted:

1. He will be prevented from practising his profession in Calgary and will at a minimum be forced to relocate.

2. He will lose goodwill built up over many valuable years of experience.

3. He will be deprived of his professional income and livelihood and the opportunity to keep his skills updated and honed.

4. He will suffer irreparable damage to his reputation, in particular because the defendant has taken the implicit position that his abilities as a pathologist are not of value to the region.

The Applicants also allege that the public is likely to suffer irreparable damage if funding is terminated:

1. Physicians will be deprived of the level of care to which they are accustomed to receiving from MLC, which is expedient, expert, and of exceptional quality.

2. If MLC closes down, continuity of care will be lost and [MLC's] patients' health may be compromised.

3. Patients will lose access to the consistently high quality laboratory and pathology services provided by MLC.

4. Patients and referring physicians will be deprived of choice in laboratory services, as the only other provider of laboratory services in Calgary is CLS.

5. MLC is the only laboratory in the region that is in compliance with the Principles of Ownership of the Alberta College of Physicians and Surgeons.

[37] To summarize, the Applicants argue that if the injunction is not granted, irreparable harm will result to MLC, Dr. Jadusingh, MLC's employees, and the public. The potential harm to these individuals is said by the Applicants to be "irreparable" because it could not be remedied by the awarding of damages in judgment.

[38] The Respondent acknowledges that some harm will result from the refusal of the Court to grant an injunction, but disagrees that such harm would be "irreparable." The Respondent argues that if MLC were successful at trial, the loss suffered by the Applicants could adequately be compensated through damages.

[39] First, the Respondent maintains that because the CHR is entitled to terminate the agreement between the CHR and MLC, any damages that result from inadequate notice of termination are to be compensated by damages paid to MLC. However, whether or not the CHR is entitled to terminate the agreement with MLC is a live issue that will not be resolved until a trial on this matter is heard.

[40] Second, the Respondent points out that the market is extremely competitive for pathologists and laboratory technologists in the CHR and elsewhere in Alberta. Thus, the Respondent submits that it would not be particularly difficult for Dr. Jadusingh and the other employees of MLC to find comparable employment and minimize the resulting harm to them. I hasten to add, however, that merely because open positions for pathologists and laboratory technicians exist in no way guarantees

that these jobs would be obtained by the former employees of MLC. This is particularly true if the job openings are primarily at CLS, the direct competitor of MLC.

[41] Finally, the Respondent submits that the effect on the public will be only marginal and transitory, as there are 18 CLS labs in Calgary that perform all of the services that are currently performed by MLC. The Respondent argues that it would in no way cause irreparable harm to require patients and doctors to change the laboratory that they commonly have dealings with.

[42] I do not intend to separately deal with each of the Applicant's alleged grounds of irreparable harm. However, I am satisfied on a broad analysis that MLC and Dr. Jadusingh would suffer irreparable harm if I were to refuse to grant a mandatory interlocutory injunction. If this Application is denied, MLC would undoubtedly be forced to close its laboratory and would also have to sacrifice employees, equipment, and relationships with doctors and patients. Dr. Jadusingh would not only lose his current source of income but would also suffer irreparable damage to his reputation and his professional skills if MLC was forced to close.

[43] In summary, I am satisfied that the Applicants would suffer irreparable harm if this application is not granted. The second leg of the tripartite test has been satisfied.

C. Requirement 3: The balance of convenience favours granting the injunction

[44] In its submissions, the Respondent conceded that if the Applicants are able to satisfy the first two requirements of the tripartite test, the balance of convenience would clearly lie with granting the injunction in order to preserve the *status quo*. I agree with the Respondent on this point. Therefore, the third and final leg of the tripartite test has been satisfied.

IV Conclusion

[45] Having satisfied all three requirements of the sequential tripartite test, the Applicants are entitled to a mandatory interlocutory injunction whereby the CHR is restrained from terminating payments to MLC and Dr. Jadusingh for medically necessary services provided by them to the residents of Alberta. The application is therefore granted.

Heard on the 15th day of October, 2003.
Dated at the City of Calgary, Alberta this 4th day of December, 2003.

A.G. Park
J.C.Q.B.A.

Appearances:

E. Groody
for the Plaintiffs

E. Halt
for the Defendant

Tab 9

2022 CarswellAlta 3816
Alberta Court of King's Bench

C2 Recycling Inc. v. All West Demolition Ltd.

2022 CarswellAlta 3816, [2023] A.W.L.D. 4711, 2022 A.C.W.S. 5838

C2 RECYCLING INC. (Plaintiff) and ALL WEST DEMOLITION LTD., 2057223 ALBERTA LTD., INNOVATIVE REDUCTION STRATEGIES INC. and CHRIS OLSON (Defendants)

Fagnan J.

Heard: November 29, 2022
Judgment: November 29, 2022
Docket: Edmonton 2203-02427

Counsel: K.T.H. Smith, for C2 Recycling Inc.
B.W. Mielke, for All West Demolition Ltd. and 2057223 Alberta Ltd.
No one for Innovative Reduction Strategies Inc.
No one for C. Olson

Subject: Civil Practice and Procedure; Contracts; Environmental
Headnote
Remedies --- Injunctions — Injunctions in specific contexts — Miscellaneous
Party to access and operator agreement seeking injunction in response to notice to vacate.
Proceeding
Motion/Application for Injunction.

APPLICATION by business operator for interim injunction preventing defendant from evicting it from property, restricting access, or interfering with quiet enjoyment.

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***Fagnan J.*:**

PROCEEDINGS

1 THE COURT: Is there anything in terms of updates before we start?

2 MR. SMITH: I don't believe so, My Lady. We had discussed the terms of an interim interim but hadn't reached anything so there will be no updates from last time around.

3 THE COURT: All right. Thank you. One thing that when I was going through my notes is I hadn't delved into which was raised, Mr. Smith, is the fact that the parties on the injunction application don't match the parties on the Statement of Claim, and I just wanted to get some clarification from you in that regard.

4 MR. SMITH: I don't have it pulled up. I am, as I mentioned last time, I am out of the office at the moment. Can you just help me, My Lady, on the difference?

5 THE COURT: Yes. So as far as I can tell the Statement of Claim had All West, 205, IRSI and Chris Olson as defendants. The injunction application, I believe, added J. Carr Holdings, Marjorie Carr, Daniel Carr, WF Fleming Holdings, etcetera. So quite a number of additional entities.

6 MR. SMITH: I apologize. We have been working on an amended Statement of Claim when this had come up so I apologize, I think my junior who had prepared those materials had just used the wrong headnote.

Reasons for Judgment

7 THE COURT: All right. Thank you very much. So we are here for the decision on the injunction application of C2 as against All West, 2057223 Alberta Ltd. and Innovative Reduction Strategies Inc. and Chris Olson. I will refer to Innovative Reduction Strategies Inc. as IRSI.

8 So by way of introduction, Ward Fleming is a director of All West and 2057223 Alberta Ltd. which I will refer to as 205. 205 owns property consisting of 17.6 acres on which there are nine buildings. There are 10 tenants, including All West. All West has been a tenant of 205 for four years conducting a general demolition business, including recycling metal and concrete. C2 operates its commercial recycling and disposal business on the property.

9 All West and C2 are parties to an access and operator agreement executed on August 1, 2020 which grants C2 a license to occupy a portion of the property and conduct its business thereon. The initial three-year term of the agreement expires on July 21, 2023 with an option to renew for a further three years exercisable by written notice delivered between two to three months prior to expiry.

10 I will refer to All West and 205 jointly as All West in this decision. Unhappy differences have arisen between All West and C2. All West has delivered a notice to vacate. C2 seeks an interim injunction prohibiting All West and 205 from evicting it, otherwise restricting its access to the site or interfering with its quiet enjoyment of the property.

11 As a preliminary matter, counsel for All West and 205 objected to C2's counsel relating facts during argument that were not contained in an affidavit. Not surprisingly, given the nature of the application, the applicant's and subsequently the respondents' filings in this matter were relatively last minute. I allowed C2's counsel to provide context in terms of C2's position on new issues raised by the respondents but asked him to take care to indicate what facts were not supported by filed affidavits. In reaching this decision, however, I have considered only the filed pleadings and affidavit evidence before the Court.

12 The Court has before it the affidavits of Shawn Samborsky, a director of C2, sworn on October 3, 2022 and November 14, 2022; the affidavit of Ward Fleming, director of All West and 205 sworn on November 17, 2022, and the affidavit of Chris Olson, director of IRSI described in the agreement as an affiliate of All West sworn on November 14, 2022.

13 I will start by outlining some of the relevant provisions in the agreement. The Access and Operator Agreement defines the various terms in paragraph 1.1.

14 "Services" means the services to be performed by the operator at the facility, being the sorting of C&D waste into residual waste, lumber waste, metal waste and concrete waste and subsequent handling in accordance with the terms of the agreement.

15 "C&D waste" defined as inert waste materials usually derived from construction and demolition activities but excluding unacceptable waste.

16 ["Inert waste" as defined by Alberta Environment means a solid waste that is not reasonably expected to undergo physical chemical or biological changes so as to produce substances that may cause an adverse effect.]

17 "Unacceptable waste" under the Agreement means hazardous waste as defined by Alberta Environment and Parks in the waste control regulation.

18 "Lumber waste" means wood waste component of C&D waste not limited to dimensional lumber, engineered wood or raw wood.

19 Paragraph 7.3 of the Agreement defines "contaminated lumber waste" as containing substances which are not wood in relative amounts too great to be recycled.

20 Finally, "residual waste" means C&D waste component not defined as lumber waste, metal waste or concrete waste.

21 Under paragraph 2.1(c)(i) senior representatives of the owners and the operator are to have continuous access by way of the access corridor. Under (ii) customers and other invitees of the owner and operator shall have access during regular business hours, (iii) outside of regular business hours the access point shall be secured by a locked chain link gate and (iv) an employee or other representative of the operator shall man the scale house as provided in section 3.2 and permit ingress to an egress from the access corridor therefrom. No rent is payable for use of the access corridor.

22 Under paragraph 2.2, C2 is to pay a certain amount per acre for exclusive access to and use of the sorting zone which the parties agreed was .6 acres in August 2020.

23 Under paragraph 2.3, C2 was to pay a certain amount for exclusive use of the office shack and its employees' representative and invitees were granted reasonable access in order to access and park in proximity to the office shack.

24 Paragraph 2.4 contemplates an option for an additional .4 acres immediately adjacent to the sorting zone known as the facility expansion exercisable on written notice by C2 on All West.

25 Paragraph 2.5 contemplates an option for a separate expansion being one contiguous area which may or may not be adjacent to the sorting zone called the storage expansion exercisable by written notice by C2 on All West. Rent on the storage expansion is set out.

26 Paragraph 4.3(e) provides that All West will keep the lands, excluding the sorting facility and storage expansion, in a clean and tidy condition and not permit snow, ice, waste paper, garbage, ashes, waste or objectionable material to accumulate thereon.

27 Paragraph 5 provides that all deliveries of C&D waste to the facility and the performance of the services in relation thereto by, or for any person, including All West, shall remain at all times subject to acceptance by C2.

28 Subject to section 7 and 8, C2 is responsible for removal of all C&D waste from the sorting zone and storage expansion.

29 Paragraph 6 requires All West and C2 to pay certain amounts per tonne of C&D waste which varies, depending on who directs the delivery and whether it includes residual waste.

30 Under 7.1, All West is to accept up to 1,000 tonnes of lumber waste per month from C2. C2 is to deliver it by making it available at the sorting zone or storage expansion for pick-up by All West, IRSI or a nominee of All West.

31 7.2 provides that if more than 1,000 tonnes of lumber waste are produced in any particular month, All West will shred the excess at its sole cost and expense and stockpile it outside the sorting zone and storage expansion. Parties are to market the excess and if sold by C2, All West is to pay a certain rate.

32 7.3 provides that All West may reject all or any part of the lumber waste if it is contaminated which is then to be retained by C2 and deemed to be residual waste.

33 [Chris Olson's affidavit explains that IRSI obtained a grant on behalf of All West in 2018 to produce biochar from lumber. All West was to provide IRSI with wood material, work space at the property and access to certain equipment. IRSI is not a party to the agreement between All West and C2.]

34 Under paragraph 9.2, either party may terminate the Agreement on delivery of written notice to the other party if, *inter alia*, (b) the defaulting party has committed a breach of the agreement and such breach continues for more than seven days after delivery of written notice, or, if such breach cannot reasonably be cured within seven days, the defaulting party fails to take commercially reasonable steps to cure such breach within seven days after delivery of written notice thereof by the terminating party or, (c) the defaulting party fails to pay any amount when due pursuant to this Agreement and such failure continues for more than 30 days after delivery of written notice thereof by the terminating party.

35 Paragraph 9.4 provides that upon expiry or termination of the term, C2 shall discontinue the operation of the facility within five business days and remove all of its equipment, materials and arrange for the removal of all its C&D waste from the sorting zone and storage expansion within 20 business days.

36 Paragraphs 11.2 to 11.4 provide that neither party shall compete with the other or interfere with the relationship of others engaged to perform services for, or who are customers or clients of the operator and that breach or threatened breach would cause the other party irreparable harm for which monetary damages would not be an adequate remedy. In the event of such breach or threatened breach, the party is entitled to relief, including an injunction without having to prove *inter alia* that damages are not an adequate remedy.

37 So I set those paragraphs out for context. I am not going to do an in-depth analysis of the arguments in relation to those paragraphs but they do provide context for the dispute.

38 The following is the relevant timeline:

39 July 2020: C2 moves to the property and commences operations.

40 August 1, 2020: The initial Agreement term commences.

41 September 2020: C2 says that it verbally requested one acre of storage expansion under the Agreement which was never given. C2 says there was a verbal agreement regarding use of bins in lieu of exercising the one-acre storage expansion option. All West says it is not aware of any such agreement having been made.

42 October 5, 2021: So 14 months into the three-year term, Capstone, the manager for 205 serves C2 with a notice to vacate claiming no valid lease agreement.

43 December 9, 2021: C2 files a caveat reflecting leasehold interest.

44 December 2021: All West begins refusing to accept delivery of lumber on the basis that it is too contaminated to be suitable for recycling.

45 February 18, 2022: C2 files a Statement of Claim against All West, 205, IRSI and Olson alleging *inter alia* interference with C2's business operations and breach by All West of the obligation to accept lumber and seeking, among other things, specific performance, injunctive relief and damages.

46 March 21, 2022: All West and 205 file a Statement of Defence but no counterclaim.

47 March 31, 2022: General manager of All West sends an email advising C2 of a unilateral rent increase to $7,000 per acre and an increase in price for space in the office shack. There is no rent increase contemplated in the Agreement.

48 April 2022: C2 says that All West and IRSI stopped processing waste as contemplated in the Agreement.

49 May 12, 2022: All West removes C2's client's bins.

50 May 27, 2022: IRSI and Olson file a Statement of Defence.

51 August 19, 2022: C2 requests the one acre for storage expansion under the Agreement to which it says it has not received a response to date.

52 August 21, 2022: C2 complains that All West attempted to block its client's bins.

53 August 20, 2022: C2 stops accepting C&D material from All West.

54 August 24, 2022: All West issues written demand to rectify various issues citing damage to the parking lot; C2 traffic outside of the access corridor; debris in the bins area; unauthorized bins; parking of vehicles in the access corridor, including overnight with oil changes; loading of trucks in the access corridor; environmental issues and dumping of unauthorized materials; after hours dumping, garbage and debris spreading to other parts of the property; expansion beyond the original area without notice to All West or payment; office use which was intended only to be temporary continued and was expanded, and the contaminated lumber pile.

55 September 2022: C2 receives written complaints of harassment by All West of C2's customers' drivers.

56 September 8, 2022: C2's lawyer sends an email responding to unilateral rules changes by All West and others.

57 October 14, 2022: There is a letter from Capstone regarding a unilateral change to site access. All existing fobs were to be replaced with two fobs to each tenant for access outside of 7 AM to 4:30 PM Monday to Friday.

58 October 14, 2022: C2 files the application for injunction with respect to All West abiding by the Agreement.

59 November 1, 2022: The scheduled injunction application date was adjourned sine die by consent at the request of the respondents to allow an opportunity to cross-examine Mr. Samborsky. The parties were setting dates for cross-examination on the affidavit. Defendants said they would decide if they intend to file responding materials after cross-examination.

60 On November 7, 2022, All West issued a letter to C2 indicating the intention to terminate the Agreement, demanding that C2 discontinue operations within five business days, remove all of its property within 20 business days and arrange for removal of all waste citing alleged continuing breaches, including: misuse of the property, including improper use of the access corridor; dumping of unauthorized non-C&D materials, including materials causing environmental issues; providing unauthorized access to third parties; after-hours dumping and excess garbage and debris from C2's activities blowing onto other parts of the lands and neighboring properties; use of additional space for the contaminated lumber pile; overdue and outstanding arrears for the storage expansion; unpaid royalty payments for services by IRSI for processing waste.

61 November 14, 2022: C2's Shawn Samborsky says his fob is no longer working for access to the site.

62 Determining whether to grant the interlocutory injunction which C2 seeks requires application of the three-part test set out in *RJR-MacDonald v. Canada (Attorney General)*, 1994, 1 SCR 311.

63 A Court is to rely on common sense and an extremely limited review of the case on the merits when making its preliminary assessment. The three requirements for injunction are to be considered as a whole when assessing their overall impact. The ultimate focus must be the justice and equity of the situation. The relative strength or weakness in one stage of the test may be offset by a relative weakness or strength in another. I am referring to *Potash Corporation of Saskatchewan v. Mosaic Potash Esterhazy Limited* 2011 SKCA 120 and *Corus Radio v. Harvard Broadcasting,*2019 ABQB 880 at paragraph 21.

64 C2 alleges breach of the Agreement by All West and seeks to maintain the status quo pending a determination on the merits. There are a number of serious issues arising in relation to the general dispute between C2 and All West, including:

1. What falls within the definition in the Agreement of residual waste? This then informs the definition of C&D waste.

2. Is C2 or is All West in breach of its respective obligations in relation to the lumber waste?

3. Are the rejected lumber waste pile and the C&D pile occupying C2's space or All West's space?

4. Is C2 operating on more than one acre?

5. Was there an agreement between All West and C2 regarding bins in lieu of expanded space?

6. Was, and is, C2 entitled to storage expansion space?

7. Are moneys due from C2 for expanded space?

8. Have All West and/or IRSI failed to provide the services in respect of which royalties are payable and are royalties currently due in relation to services to be provided by All West and/or IRSI?

9. Has either party been in breach of provisions relating to access to the site by C2 or its customers?

10. Has All West interfered with a relationship between C2 and any of its customers?

11. What was the environmental condition of the area in question in August 2020 and how does that compare to the recent testing results?

12. Has All West changed the rules, regulations or operating hours for the property without C2's agreement and is C2's agreement required under the Agreement?

65 Most of these questions relate to C2's Statement of Claim. Some relate to All West's allegations, many of which are the flip side of C2's allegations as well as All West's argument that C2 does not come to the Court with clean hands. All West alleges breaches of the Agreement by C2 which it says entitles it to terminate under the Agreement. The fact that these alleged breaches relate integrally to the serious issues begs the question as to whether C2 comes to the Court with unclean hands, as suggested by All West.

66 All West complains that the Agreement is generally one-sided in favour of C2. That may be true but that fact, assuming it to be true and without more is not particularly relevant.

67 On a limited review, it is the fair to say as a very general observation that some of the wording of the Agreement is quite broad and therefore subject to interpretation on a number of critical issues, for example, the definitions of residual waste and contaminated lumber waste. This lack of precision may well not be helpful to All West, at least on the limited evidence before the Court in this application in relation to its allegations that C2 is in breach of certain aspects of the Agreement.

68 In sum, the applicant has established that there are serious issues to be tried and as the allegations by All West relating to clean hands are integrally related to the serious issues to be tried, I do not consider that C2 is coming to the Court with unclean hands.

69 With respect to the factor of irreparable harm, "irreparable" refers to the nature of the harm rather than its magnitude. That comes from *RJR*. The issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. It is harm which either cannot be quantified in monetary terms or which cannot be cured.

70 C2 claims it would suffer irreparable harm, as an eviction would very likely put it out of business submitting that: it operates in only one location; it requires significant space with particular zoning and other site requirements that take time and monetary investment to locate and develop; it has heavy equipment on the property that could not be easily moved; it has thousands of tonnes of material onsite at the property that would need to be moved; C2's business would be interrupted for a minimum of six months assuming suitable land for new facility could be found immediately; it would likely lose most or all clientele during that time due to the constant streams of waste the customers require to be processed; a lengthy business interruption would expose C2 to lawsuits from clients for breaches of contracts; it would cost $600,000 to set up a new facility;

and a sudden and unplanned relocation would result in the loss of sunk costs incurred on C2's reliance on the Agreement which provided several more years of access to and use of the property.

71 In summary, C2 submits that an eviction would be a massive hit to its market position, goodwill and reputation, while the loss of clientele, legal liability and cost of relocation would present a significant threat to its business as a whole.

72 C2 notes that paragraphs 11.2 to 11.4 of the Agreement provide that neither party shall interfere with the relationship of others engaged to perform services for, or who are customers or clients of the operator; that breach or threatened breach would cause the other party irreparable harm for which monetary damages would not be an adequate remedy and, in the event of such breach or threatened breach, the party in question is entitled to relief, including an injunction without having to prove, among other things, that damages are not an adequate remedy.

73 All West submits that the evidence of harassment of C2 customers in the form of written communications received by C2 is hearsay and should not be given any weight in this application. All West further submits that this relates only to a small part of the overall alleged breaches.

74 There is case law to the effect that a clause deeming a breach to constitute irreparable harm does not usurp the jurisdiction of the Court to determine whether there is irreparable harm and whether injunctive relief is appropriate. I am referring to *Homestead House Paint Co. Inc. v. Jamieson*, 2019 ONSC 2660 at paragraphs 34 and 38 to 42 which cites *Stop 'N Cash v. 1553785 Ontario Ltd.*, (2006) 332 OAC 392 at paragraph 9, Divisional Court and *Brown v. First Contact Software Consultants Inc.*2009 CanLII 48504 at paragraph 61 (ONSC).

75 All West also notes that the Agreement itself contemplates that on expiration or termination of the Agreement, C2 will have five days to shut down its operation and 20 business days to vacate. All West submits that whether the Agreement was terminated or not renewed, C2 would have to incur the costs of a move in any event. C2 responds that termination under the Agreement requires an actual material breach of which C2 would have been aware and, therefore, it would have been in a position to rectify or to make plans to relocate.

76 All West argues strenuously that any loss to C2 would be measurable in damages. All West submits that there is no actual evidence that C2 cannot simply relocate; that the current site is unique; that suitable alternative sites are not available or C2 will suffer reputational harm. C2 counters that expert evidence is not required on an injunction application which is typically brought in emergent situations.

77 The Court in *Potash Corp.*, which I have already cited at paragraphs 51 and following, discussed the standard of proof for irreparable harm citing cases demonstrating that there is a wide spectrum in the case law and Canadian courts have no fixed view of how this matter should be approached. The Saskatchewan Court of Appeal said at paragraphs 58 and 59, the exercise involves a weighing of risks rather than certainties. The Court must evaluate the limited materials before it with a view to assessing the likely merits of the plaintiff's position. It can often do no more. The same applies to the possibility of harm being suffered by one or both parties if the injunction is granted or denied. The overall exercise is one involving probabilities and possibilities. The true overall risk of irreparable harm will always be a function of both the likelihood of the harm occurring and its size or significance should it occur.

78 The Court concluded at paragraph 61, (as read)

> Therefore, in the end, it is sufficient that, as a general rule, a plaintiff seeking interlocutory injunctive relief be required to establish a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted. This is a relatively low standard which will serve to fairly easily move the analysis into the balance of convenience stage of the decision-making. It is there that all of the relevant considerations can be read and considered with as much subtlety as the circumstances require. This said, I should add once again that I do not mean to deny any possibility of there being any exceptions to this rule. The approach being endorsed here is one of general, but not necessarily universal, practice.

79 There is case law to the effect that damage to customer relationships reputation and goodwill may qualify as irreparable harm. I cite as an example *Dreco Energy Services Ltd. v. Wenzel,*[2004] 6 WWR 54, (Alta CA), as may a serious risk of jeopardizing the survival of the applicant's business. I cite *Northwest Territories v. Sirius Diamonds*, 2001 FCT 702 at paragraph 57, *Quality Pallets v. Canadian Pacific Railway Company*, [2007] OJ 1567, (Sup Ct J) and *Golden Globe Pizza v. Domino's Pizza* 2015 Carswell B.C. 590 (SC).

80 A number of the specific harms evoked by C2 standing alone are quantifiable and compensable in damages. However, C2 would be required to shut down operations and vacate within what is an extremely short timeframe in all of the circumstances with no reasonable opportunity to find another suitable location. While it is true that the affidavit evidence of C2 in this regard is based on C2's experience, the Court can draw certain reasonable inferences that support C2's evidence to the effect that eviction, pursuant to the timeline in the Agreement would result in a business interruption that could very well put C2 out of business. Therefore, C2 has established there is a meaningful risk of irreparable harm.

81 With respect to balance of convenience, the Court in *Potash* that I have cited already summarized this factor at paragraph 113. (As read)

> The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.

82 This third factor is sometimes perhaps more appropriately referred to as the balance of inconvenience as it involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits.

83 All West has expressed concern about C2's ability to pay damages pursuant to its undertaking due to what All West perceives to be thin capitalization, C2's arguments on irreparable harm and lack of financial disclosure. C2 argues that All West's expressed concerns amount to mere speculation.

84 All West claims that C2 currently owes $35,000 in relation to the disputed expansion space as well as possibly some indeterminate amount in royalties.

85 As well, All West has provided an environmental report, however there is no baseline against which to compare this report to the state of the lands in August 2020. In any event, paragraph 14.1 of the agreement makes C2 responsible to make good any damage done by contaminated material.

86 All West has presented evidence regarding perceived breaches of the Agreement by C2. Aside from potentially temporarily foregoing the payment of the disputed $35,000 which has only relatively recently been demanded, All West has not presented evidence as to how All West would actually be prejudiced by the status quo beyond being forced to tolerate behaviour that it states is inconsistent with the Agreement, nor how any of the alleged breaches would not be compensable in damages.

87 In terms of equities, it does appear from the timeline and the limited evidence before the Court at this point that there have been steps taken since October 2021 by or on behalf of All West which could be interpreted as an overall escalating attempt to frustrate the Agreement or to bring it to an end. The notice to vacate delivered following the consent adjournment of C2's application for injunctive relief in order for All West to cross-examine on affidavit and decide whether to file materials is but the most recent example. The consent adjournment could be interpreted as an attempt to lull C2 sufficiently to give time for All West to preempt C2's ability to rely on its contractual rights and to ensure that the parties abide by the Agreement.

88 It is clear that C2 would suffer greater harm from the refusal of the injunction than All West would suffer from the granting of an interim injunction.

89 Given all of the circumstances of this case, including the numerous serious issues to be tried, the finding of a meaningful risk that eviction pursuant to the notice to vacate may well put C2 out of business, and the lack of clear evidence as to how All West would be significantly prejudiced by maintaining the status quo during an interim injunction, the balance of convenience factor weighs in favour of granting an interim injunction.

90 In conclusion, I grant an interim injunction to maintain the status quo restraining All West or 205 or anyone on their behalf from taking further steps in the eviction of C2 or interfering with C2's quiet enjoyment of the property in conducting the business operations of C2 on the following terms. C2's lease or license shall be permitted to continue and the terms of the Agreement continue to govern the relationship. C2 is to continue to make the payments under the Agreement which it has been making. C2 is to have continuous access to the site as per the Agreement. C2's customers are to have access only during C2's regular business hours which, in any event, will at a minimum not include the period from midnight to 5 AM. No C2 customers are to be onsite without C2 personnel also being present onsite. There is to be no parking or unloading by C2 or its customers in the access corridor.

91 In terms of duration, it should be sufficiently long to enable C2 to plan for contingencies in the event All West were to prevail on the merits. C2 has said it would require a minimum of six months to relocate. All West has countered that C2's evidence on this point is not sufficient.

92 As mentioned, the parties had originally agreed to adjourn sine die pending All West cross-examining Mr. Samborsky. Presumably C2 will also want to cross-examine Ward Fleming and possibly Chris Olson now that they have filed affidavits. While it is true that the clean hands requirements applies to the applicant and All West purports to simply exercise its contractual right to terminate, the logical result of the consent adjournment is that C2 would have been lulled into a sense that the urgency to plan for contingencies in the event it is unsuccessful in its action had abated for the foreseeable future.

93 In other words, C2 would not have reasonably anticipated and has had little time to react to the notice to vacate and the possibility that All West might ultimately prevail and C2 be forced to move to new premises. Now the holiday season is fast approaching which one might presume may well temporarily slow C2's efforts to plan for this contingency.

94 It is not possible to determine precisely the point in time after which the extraordinary remedy of an interim injunction can no longer be justified in the circumstances.

95 I conclude that a period of approximately six months from the date of the notice to vacate is reasonable in all of the circumstances to protect C2 against the risk described. The interim injunction shall remain in force until Friday, May 5, 2023 subject to the following: Any party can come back to Court on five days' notice to apply to have the injunction varied, partially lifted, lifted or extended. The injunction will expire 15 days after a final resolution of C2's action under a Statement of Claim, should that occur prior to May 5, 2023.

96 Are the parties wanting to speak to costs?

97 MR. SMITH: My Lady, I would propose that the parties attempt to reach an agreement on costs and if we cannot, that we would submit short written submissions on the point.

98 THE COURT: All right. I assume Mr. Mielke is not opposed to that?

99 MR. MIELKE: Sorry, I'm just (INDISCERNIBLE) on the mute button that my friend is — I think we could talk about costs. There is a couple of other issues that I would like to discuss.

100 THE COURT: Yes.

101 MR. MIELKE: There is two reasons for this. Number 1, I think injunctions by their nature need to be understood by the parties as well as the Court so that if there is a violation of the injunction, there is a predictability to it for both sides. That's one of the reasons I'm raising this.

102 The other reason I'm raising it is to hopefully reduce the amount of (INDISCERNIBLE) between the parties. I think my friend, Mr. Olson, will speak to this as well, there was a ticket dispenser that belongs to my client that was outside the scale house that was being used when the scale was being used by the rest of the people on the site. C2 has unilaterally moved that inside the building. We would like that reinstalled outside the building so that the scale can be used by the rest of the people including IRSI to prevent some issues from developing with respect to that.

103 The second issue that I think we need to have addressed is just the issue of the continued piling of wood on my client's side of the property line, if that's what is happening and according to my friend's argument, he is suggesting that that's outside their area and so it's affecting other people, including IRSI.

104 THE COURT: Mr. Smith?

105 MR. SMITH: On the first points, my friend did bring that up in a discussion last week. I had been away from the office. I spoke briefly with my clients about it. I don't think it would be proper to have it in any sort of order. I do think, however, my client had indicated that that probably would not be an issue to be able to move that back outside, but I would submit that's not really before the Court and that that should be something that the parties should deal with off the record.

106 In regards to the other aspects of the piling of the wood, as we did discuss during the application, my clients piled the wood in their portion of the property for as long as they could before starting to put it in the other portion of the property because my friends had not complied with their obligations under the agreement. Certainly my clients are — are content to deliver it however my friend wants to — to All West but we would submit that because it is a requirement under the agreement that All West accept this, that they should be putting it somewhere on their portion of the property. My clients only have limited portion of their own property to put this on and they have many months worth of what are already piled on their property before they started piling any on my friend's portion of the property.

107 MR. MIELKE: My Lady, if I might make a submission on this.

108 THE COURT: Yes.

109 MR. MIELKE: I believe the affidavit of Chris Olson deals with the point raised about the scale in that he has not been able to use the scale, and for the purposes of his business he has put that in his affidavit so we would be wanting the scale to be available. It is before the Court.

110 The other part is there is — his equipment is — access to his equipment is being prevented due to the piling of some of this material and we would be looking for that simply to be moved so he could have access to his equipment and use it. Those are my submissions.

111 MR. SMITH: I would just say briefly just for clarification and Mr. Mielke can potentially correct me if I'm wrong. I think what he's talking about, the ticket machine is different than the scale itself. The scale is quite a large piece of equipment. It is in the scale house. It doesn't go outside. The ticket machine is something different to my understanding, so I do acknowledge that the scale itself was addressed in my friend's material. The ticket machine that Mr. Mielke is mentioning was not.

112 I understand my friend's concerns on the second points in regards to access to the equipment. I would note that my friend hasn't sought any sort of injunction in regards to the wood affecting their access to equipment. It was filed in response to my client's injunction, not the other way around, so I don't believe that's the relief that my friend is talking about now is properly before the Court. Certainly my friend — my client is happy to discuss all these issues off the record but I don't think it would be proper to be addressing them in an order at this stage.

113 MR. OLSON: If I could just speak to the scale — I think the way this works, it's a piece of equipment where the trucks come in. They are weighed. They get a ticket or some evidence about how much weight there is and that's how they process this material. I'm not — whether it's the ticketing machine or the scale, the whole apparatus, I understand this equipment is owned by All West and I believe C2 uses it this way. They bring their trucks in, they weigh them. They get a weight amount and that's how records are kept and invoices are later prepared.

114 So I'm not — I'm glad Mr. Mielke brought this up, now that I have heard Mr. Smith's response. I don't want a ticket. I don't want a scale. My client just wants to be able to drive a truck on and weigh it. Get the information so that they can get the material delivered so they can run their equipment. So I'm glad he brought it up in that, you know, practically speaking, whether it is the ticket machine or the scale, it is my understanding this was All West's equipment in any event and my client who is a tenant just wants to use it so he can run his business.

115 MR. MIELKE: Well and perhaps I can (INDISCERNIBLE). I think Mr. Olson's description is correct. I think that the actual scale is located outside the scale house. I think the scale house is basically where the personnel sits inside and watches the people go through and sees what pops up on the read. The ticket machine is the thing that will dispense the weight, so whether it is C2 people or IRSI people they can get a ticket showing the weights on this scale. Those, as I understand it (INDISCERNIBLE) my client.

116 And finally, My Lady, on the issue of the (INDISCERNIBLE), this is (INDISCERNIBLE). My client has to respect and permit C2 to continue to carry on business. They have been carrying on the business from my client's perspective by piling wood that is unacceptable and therefore becomes residual waste that they have to deal with on my client's property, and I don't want this to be seen as a license for C2 just to continue to pile more and more material outside their area, if that's the position they are taking that this isn't inside their area, they don't have to pay for it. So I'm looking for clarity that comes out of the order itself, not as a separate issue or new issue.

117 THE COURT: All right. Well, I am going to include as a term of the injunction that the ticket machine be moved outside of the building. It seems to me that is a reasonable — reasonable request in terms of — and would potentially mitigate some of the friction between these parties.

118 With respect to the piling of wood, I have concerns about ordering anything in particular be done with it. I mean it is — there is an issue as to whether or not the lumber is contaminated which makes it a matter of evidence and so I am reluctant to — and there is also obviously a dispute as to whether or not the refusal is justified and what happens in the event of refusal and whose onus it is to remove the lumber.

119 So what I would encourage the parties to do is to try to come to some agreement as to who is responsible for moving it in the first instance at a minimum so that IRSI can access its equipment but, as I say, given that it is a central issue in relation to the dispute between the parties, I am not inclined to make a particular order in that regard. If the parties can come to some sort of agreement, that is fine.

120 Do you want me to run over — I realize this was a fairly long oral decision. Do you want me to run over the terms again just to make sure that there is nothing else that comes to mind for counsel?

121 MR. MIELKE: Sorry, My Lady, (INDISCERNIBLE) but just for clarity you are not ordering anything that will allow C2 to put (INDISCERNIBLE) on the property.

122 THE COURT: Sorry, I had a hard time hearing that.

123 MR. MIELKE: I'm assuming that you would not be ordering that C2 isn't allowed to put wood onto my client's areas on the property as part of the injunction.

124 THE COURT: Well, what I have said is that the parties are to abide by the terms of the Agreement. I don't recall seeing anything that would permit C2 expressly to do that but having said that, obviously there is a dispute as to whether they are

entitled to certain expansion areas as well so — I mean obviously this injunction doesn't resolve any of the fundamental issues between the parties but I am not inclined to wade into who should be moving piles of lumber at this point in time other than to encourage the parties to work — if it is impeding someone in terms of carrying on their business it seems to make sense that the parties should be able to come to some sort of agreement in the short term at least as to who would be responsible in the first instance to do something with that lumber that is impeding access.

125 So just briefly then, the terms again, C2's lease or their license shall be permitted to continue. The terms of the Agreement continue to govern the relationship. C2 is to continue to make the payments under the Agreement which it has been making. C2 is to have continuous access to the site as per the Agreement. C2's customers are to have access only during C2's regular business hours which, in any event, will at a minimum not include the period from midnight to 5 AM. No C2 customers are to be on site without C2 personnel also being present on site. There is to be no parking or unloading by C2 or its customers in the access corridor. The ticket machine is to be moved outside of the building in which it is currently kept.

126 And the duration is until May 5, 2023 subject to parties coming back on five days' notice for variation. The injunction will expire five days after final resolution if that occurs prior to May 5, 2023. Anything else?

127 MR. MIELKE: I think you had initially said 15 days after C2's action if it is resolved prior to May 15.

128 THE COURT: Yes, 15 days after final resolution of C2's action under Statement of Claim if that should occur prior to May 5. Anything else that comes to mind for the parties in terms of making this more workable in the near future?

129 MR. OLSON: My Lady, I just wanted to be clear on this scale again. Is that — what we are really looking for, what IRSI is looking for is to be able to use this scale to run it, to operate. And so just as long as it is understood that what your order is to result in, what the practical effect is that we will be able to use the scale with the trucks and the equipment, we will have reasonable access and reasonable use during business hours. That's all we're looking for.

130 THE COURT: And if the ticket machine — or the ticket — is it a ticket machine, if that is outside and accessible to all parties, I haven't heard anything — obviously I have no knowledge visually of how this place is set up and any restrictions but I haven't heard anything that would prevent IRSI from weighing its loads. Mr. Smith, you have more knowledge of the situation.

131 MR. SMITH: I'm not aware of anything that could prevent them from weighing their loads either.

132 THE COURT: All right.

133 MR. MIELKE: Well, and, My Lady, I think the provision on the scale house doesn't indicate that C2 has exclusive domain over the scale house. It's similar to the access area where it's basically — it will be allowed to use the scale house.

134 THE COURT: All right.

135 MR. MIELKE: So I think what my friend Mr. Olson is talking about, I think out of prudence for everybody so we are not making another trip back and harassing you about that is that what he's looking for makes sense that essentially whether it's the ticket machine by itself or in conjunction with the scale house, that other parties are allowed to use it so that they can also weigh their loads.

136 THE COURT: Mr. Smith, do you agree that the Agreement does not create an exclusive license for C2 in the scale house?

137 MR. SMITH: I don't believe it does. I also don't believe that C2 has been preventing anyone else from using. I don't have specific information about that but I'm not aware of any steps that my client has been taking to prevent anyone else's use of it so that's the extent of my knowledge in that regard.

138 THE COURT: All right. Well, the order does say that C2 is to abide by the terms of the Agreement — well all parties. So given the submissions today it seems that that would, a proper reading of that term would be that C2 does not have exclusive access to the scale house.

139 MR. SMITH: My Lady, just in terms of next steps on the action, we have got the timeframe for when the injunction, the interim injunction will stay in place. I'm just live to the issue that we do now likely have to amend our Statement of Claim in order to seek the proper relief to — to address this and hopefully have this matter heard before next May. Is this something where this matter can be put into case management or that, My Lady, you can be — remain on this matter in case we do need to deal with additional steps down the road to ensure that we can get a hearing of this matter before the injunction expires?

140 THE COURT: Certainly. And what I would suggest is that the parties attempt to come to an agreement regarding a litigation plan and if you have any difficulty agreeing to the terms of the litigation plan, I would be happy to meet with the parties to discuss that. Having said that, I am always wary about availability. I don't sit commercial duty very often so if the parties feel that it is urgent and I am not available, they are free to get that on before someone else, just in terms of the litigation plan. But I am happy to assist in that regard.

141 MR. SMITH: Thank you, My Lady. I appreciate it.

142 MR. MIELKE: My Lady, that raises one final point. We are on the commercial list for this motion by virtue of a request that my friend made to the Court. With respect to in the applications to vary or now change the order, are we still on the list?

143 THE COURT: Yes.

144 MR. MIELKE: Thank you.

145 THE COURT: And I believe there is a practice note that would make me more or less seized of the matter but, as I say, if the parties run into difficulties in terms of scheduling anything before me, they are at liberty to schedule applications before other judges, but I will make every effort to, if possible, schedule outside of Court hours such as today to try to accommodate the parties.

146 MR. MIELKE: We appreciate your time, My Lady.

147 THE COURT: All right. Well good luck to all of you. Thank you for your work on this.

148 MR. MIELKE: Thank you.

149 MR. SMITH: Thank you, My Lady.

Application granted.

End of Document

Tab 10

Alberta Court of Queen's Bench
Polesystems Inc. v. Martec Manufacturing Ltd.
Date: 1989-05-12

A.R. Robertson, for plaintiffs.

D. Steele, for defendants.

(Calgary No. 8801-18225)

May 12, 1989.

[1] VIRTUE J.:– On 9th December 1988 I granted an "Anton Piller Order" and an interim injunction upon the ex parte application of the plaintiffs (Polesystems), permitting Polesystems to enter the premises of the defendant (Martec) at 3131 – 57th Avenue S. E., Calgary, Alberta, for the search, detention and retention of certain specified documents related to the manufacture and supply of streetlight poles. The order also restrained Martec from using any data owned by Polesystems which had been obtained by the defendants in circumstances of confidence, during the time any of the defendants had been in the employ of Polesystems. As Anton Piller orders are still relatively new in this province, I have attached a copy of the order as App. "A" [post, p. 169].

[2] The order was carried out on 15th December 1988, and a number of documents were seized, a list of which was provided to the court as an exhibit to the affidavit of Gordon Milne sworn 21st December 1988. Part of the materials seized were a number of Polesystems' drawings. The defendants applied to set aside or vary the order. The application was adjourned for cross-examination on affidavits and completion of undertakings and came before me on 10th March 1989. Subsequently, counsel arranged for further evidence to be submitted on 26th April 1989.

[3] Counsel were agreed that if the order stands, it should be varied with respect to the interim injunctive relief, to read as follows:

> 1. The Defendants are hereby enjoined and restrained from:
> (a) using any:
> (i) sketches,
> (ii) shop drawings, or
> (iii) technical data
> which are not published in catalogues, and which are owned by the Plaintiffs or either of them…

The Anton Piller order

[4] The general nature of an Anton Piller order is set out by E. Myers, in a paper, "Search and Seizure in Civil Cases: The Anton Piller Order" (1984), 42 Advocate 41, as follows:

> Although this order has several variants its most stringent form, which is granted *ex parte,* is unique. It allows the Plaintiff, with its solicitor, to enter the Defendant's premises during normal business hours, show the Defendant a copy of the order and search the premises for the documents or materials mentioned in the order. If any of these materials are found, the plaintiff may remove them for safe keeping pending the normal discovery process and trial. The order is an extremely powerful one. It is of use where it is expected that the material sought to be seized may disappear or be secreted prior to discovery of documents. Although its primary use has been in copyright and related areas, it can and has been of use in any area where this suspicion justifiably arises. The order does not depend upon a proprietory [sic] interest. The *sine qua non* of the order is the need to protect vital material from possible destruction.

[5] The guidelines for the application of the order were set out by Ormrod L.J. in *Anton Piller K. G. v. Mfg. Processes Ltd.,* [1976] Ch. 55, [1976] 2 W.L.R. 162, [1976] 1 All E.R. 779 (C.A.). After observing that the order "is at the extremity of this court's powers", he stated [at p. 784]:

> There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

[6] It is essential that an applicant for an ex parte order fully disclose to the court all matters within his knowledge that are relevant to the application whether or not they support his case. The special significance of this requirement in an Anton Piller case is amply demonstrated in the following passage from the judgment of Browne-Wilkinson J. in *Thermax Ltd. v. Schott Indust. Glass Ltd.,* [1981] F.S.R. 289 at 294:

> As time goes on and the granting of Anton Piller orders becomes more and more frequent, there is a tendency to forget how serious an intervention they are in the privacy and rights of Defendants. One is also inclined to forget the stringency of the requirements as laid down by the Court of Appeal. In my judgment the rule of full disclosure to the court is almost more important in Anton Piller cases than in other ex parte applications. Since Anton Piller orders give compulsory rights of inspection: once those inspections have taken place the information procured from it is in the hands of the other side and the situation is irreversible. I therefore think it is very important indeed that in making application it should be in the forefront of everybody's mind that the court must be fully informed of all facts that are relevant to the weighing operation which the court has to make in deciding whether or not to grant the order.

[7] The defendants acknowledged (on their application to discharge or vary) that the material presented to the court on the initial ex parte application met the first of Lord Ormrod's requirements – the material disclosed a strong prima facie case. The evidence on the ex parte application amply supported that conclusion. Polesystems is in the business of manufacturing and selling streetlight standards and related equipment. While to the layman, a streetlamp appears to be a fairly simple product, it is in fact the result of a complex engineering design, particularly for those light poles which are so tall as to require a sophisticated raising and lowering device for changing lamps.

[8] The plaintiffs' material disclosed that Howard Davies, one of the defendants, had been a senior employee of Polesystems. He was summarily dismissed in November 1986 in circumstances where he was personally escorted out of his office. Davies brought a wrongful dismissal action which was settled in May 1987. The plaintiffs paid Davies $20,000 and mutual releases were exchanged.

[9] At the same time, Davies gave a confidentiality statement to the plaintiffs in the following terms:

> I agree not to disclose to anyone the proprietary, confidential or trade secret information of Polesystems Division and Bralorne Resources Limited and its subsidiaries and divisions and not to remove from the premises of Polesystems Division and Bralorne Resources Limited, either directly or indirectly, any document containing, embodying or disclosing any confidential or trade secret information of Polesystems Division and Bralorne Resources Limited and its subsidiaries and divisions and to immediately return any such documents, or the information contained therein, now in my possession.

[10] After leaving Polesystems, Davies set up a company, E.C.H. Co. Mfg. Ltd. ("E.C.H."), on 6th February 1987. On 16th May 1986 the defendant James Parisian's employment with the plaintiffs was terminated. On 9th October 1987 the defendant Case Locker left his position as plant manager of the plaintiffs' Calgary office, and on the same day the defendant Emilio Pizzal left his position as plant superintendent of the plaintiffs' Calgary office. On 16th May 1986 the defendant Paul Gouzecky's position as an engineer with the plaintiffs was terminated.

[11] Since 30th May 1986 the defendants Martec and E.C.H. have operated together in direct competition to Polesystems, and have placed the five individual defendants in senior management positions.

[12] In October 1988 documents came to the attention of Polesystems which clearly demonstrated that Martec was using documents originally drafted for, and which were the

property of, Polesystems (including blueprints of a double drum winch assembly and single ring assembly), for the purpose of designing, manufacturing and marketing the defendants' products. An examination of the exhibits submitted on the original application showed that in some cases Polesystems design documents had been reproduced by Martec, with Polesystems' name deleted and Martec's name inserted in an attempt to pass off the documents as being of Martec's original design. This and other evidence established a strong prima facie case that the defendants had taken confidential design and marketing materials from the plaintiffs and were using them to design and market products in direct competition with the plaintiffs. Further, the evidence showed that if the defendants were allowed to continue to use the plaintiff's confidential information, the plaintiffs might suffer irreparable harm and damage from the loss of business, market percentage and customer confidence, and thereby a loss of corporate strength. I was further satisfied that unless an order were granted ex parte permitting the plaintiffs to enter the defendants' premises and search and remove the offending materials, the materials might disappear or be secreted prior to discovery of documents once the defendants were served with the statement of claim.

[13] In short, I was satisfied first, that the plaintiffs had a very strong prima facie case (which is now conceded by the defendants), second, that the potential or actual damage to the plaintiffs could be very serious, and third, that the defendants had in their possession incriminating documents or things, and that there was a real possibility that they might destroy or hide away the materials before an application inter partes could be made. Accordingly, I granted the original order.

[14] I have already stated that the order was carried out on 15th December 1988. There is attached to the affidavit of George Milne, filed after the order was carried out, a list comprising seven type-written pages of materials seized from the defendants' premises; most of the drawings and other materials listed originated with Polesystems. In some cases the documents are tracings of Polesystems documents on which, for example, the name Polesystems has been removed with a knife or other sharp object and covered with a Martec Mfg. title block.

[15] It might appear reasonable to assume that when an Anton Piller order has been fully executed and has, in fact, produced materials of the type the order was designed to find and protect, no application to discharge the order is appropriate. However, *Thermax v. Schott,* supra, is authority for the view that it is open to the judge who granted the original

order to vary or discharge it, even after the order has been fully executed, if it is established that the order should not have been made.

[16] In this case, the defendants seek to discharge the order on the ground that it was not disclosed on the ex parte application that Howard Davies had obtained a general release from Polesystems when his employment was terminated.

[17] I have earlier stated that an applicant for an Anton Piller order has a duty to disclose all material and relevant information to the court. But the existence of the release referred to was neither relevant nor material to the application. It had reference to the settlement of the rights and obligations of the parties arising out of the termination of Davies' employment. The confidentiality agreement, which Davies signed at the time releases were exchanged, was intended to survive the release. Factual matters which occurred subsequent to the release provided the basis upon which the order was granted. The release did not affect the plaintiffs' right to an order protecting its confidential material. In my view, the plaintiffs discharged their duty of disclosure.

[18] The second ground upon which the defendants seek to vacate the order is that the evidence did not show a real possibility that documents or things would be destroyed if notice of the application were given to the defendants. This submission ignores the uncontradicted evidence of Robert Jack contained in para. 33 of his affidavit sworn 5th December 1988 in which he stated:

> I do verily believe that without the orders sought, the Defendants may destroy all evidence of the confidential information upon notice of the claim being brought by the Plaintiffs Bralorne and Polesystems.

[19] Courts are not blind to the realities of business life. Given the history of all the facts leading up to the application, it was, in my view, reasonable for the court to draw the inference that there was a real possibility that the object of the plaintiffs' litigation might be unfairly and improperly frustrated by the materials being destroyed or secreted away prior to discovery of documents.

[20] There being no grounds upon which the Anton Piller order should be vacated, it will remain in force. That aspect of the defendants' application is denied.

Interim injunction

[21] The defendants also moved to vary or discharge the interim injunction.

[22] The court's authority to grant an injunction is found in s. 13(2) of the Judicature Act, R.S.A. 1980, c. J-1 :

> (2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

[23] Guidelines as to when a court might consider it "just or convenient" to exercise its discretion in favour of granting an interlocutory injunction are set out in *Amer. Cyanamid Co. v. Ethicon Ltd.,* [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.), and more recently in *Ominayak v. Norcen Energy Resources Ltd.,* 36 Alta. L.R. (2d) 137, [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 58 A.R. 161 (C.A.), where, at p. 196, Kerans J.A. states:

> It is settled law that an applicant for an interim injunction must establish: (1) that he raises a serious issue to be tried; (2) that he will before trial suffer irreparable harm if no injunction is granted; and (3) that the balance of convenience between the parties favours relief to him.

[24] In *Man. (A.G.) v. Metro. Stores Ltd.,* [1987] 1 S.C.R. 110, [1987] 3 W.W.R. 1, 25 Admin. L.R. 20, 18 C.P.C. (2d) 273, 87 C.L.L.C. 14,015, 38 D.L.R. (4th) 321,46 Man. R. (2d) 241 (sub nom. *Metro. Stores (MTS) Ltd. v. Man. Food & Commercial Wkrs., Loc. 832*), 73 N.R. 341, Beetz J. is somewhat less positive in his statement of the first aspect of the tripartate test. He says at pp. 15-16:

> The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decisionmaking and I simply propose to give a bare outline of the three main tests currently applied.
>
> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: *Chesapeake &. Ohio Ry. Co. v. Ball,* [1953] O.R. 843 at 854-55, [1953] O.W.N. 801, per McRuer C.J.H.C. The House of Lords has somewhat relaxed this first test in *Amer. Cyanamid Co. v. Ethicon Ltd.,* [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the court that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J., speaking for himself and five other members of the court in a unanimous judgment, referred to but did not comment upon this difference in *Aetna Fin. Services Ltd. v. Feigelman,* [1985] 1 S.C.R. 2 at 9 and 10, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161,4 C.P.R. (3d) 145, 32 Man. R.(2d)241,56N.R.241.
>
> *Amer. Cyanamid* has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear

> to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance, Toronto (1983), at pp. 66-77.
>
> In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *Amer. Cyanamid* description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured: see Hanbury and Maudsley, Modern Equity, 12th ed., pp. 736-43. In my view, however, the *Amer. Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

[25] Having in mind the tests enunciated in those authorities, I am of the view that it was just and convenient to issue the interim injunction when it was originally granted, and that, subject to the change of wording agreed upon by the parties (as set out earlier), the injunction should remain in place until trial.

[26] The defendants concede that the first part of the tripartate test has been met by the plaintiffs, but say that the plaintiffs will not suffer irreparable harm because they can be compensated in damages. The defendants say further that the balance of convenience (or inconvenience) favours the defendants, as they may well lose business and suffer economic loss if the injunction remains in place until trial.

[27] In *Ominayak,* Kerans J.A. defines "irreparable harm", at p. 201:

> We accept the proposition in High on the Law of Injunction, 4th ed., vol. 1, p. 36, that:
>
> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."
>
> For the purposes of interim relief, and for the purposes of the test expressed by this court in *Law Soc. of Alta. v. Black,* [1984] 6 W.W.R. 755, 29 Alta. L.R. (2d) 326, 7 Admin. L.R. 55, 8 D.L.R. (4th) 347, this is what we mean by irreparable harm: it is harm for which no fair and reasonable redress would be available after trial.

[28] In the case before me, the evidence discloses that if the defendants are allowed to use the plaintiffs' designs and marketing information, the plaintiffs' relationship with its customers will be impaired and the core of the plaintiffs' business irretrievably harmed. To my mind, this is harm for which no fair and reasonable redress would be available after trial. Customers, once lost, may never come back. Financial stability, once lost, may never be recovered.

[29] Weighing all the relevant factors, including the strength of the plaintiffs' case, the extent of the harm that will be suffered by the plaintiffs, and the inconvenience caused to the defendants, the balance favours leaving the injunction in place until trial. The defendants' business surely does not depend upon its use of the plaintiffs' designs and sales information, and if it does, it seems inequitable to allow the defendants to continue using those materials to the plaintiffs' great disadvantage, pending the conclusion of what may well be a long trial process.

[30] A further matter was raised upon the application to set aside the order. This is a case of violation of copyright, and in such cases questions of irreparable injury and balance of convenience do not arise. In *Jeffrey Rogers Knitwear Productions Ltd. v. R.D. Int. Style Collections Ltd.,* [1985] 2 F.C. 220, 6 C.I.P.R. 263, 6 C.P.R. 409 (T.D.), Dubé J. (as she then was) states at p. 266:

> … in matters of clear violations of copyrights registered under the Copyright Act, R.S.C. 1970, c. C-30, the jurisprudence of the Federal Court has been to grant interlocutory injunctions without concerning itself with irreparable injury or the balance of convenience.

[31] I adopt this as a correct statement of the law in copyright cases.

[32] The tripartate test, generally required in cases of interlocutory injunctions, having been met, and because this is a copyright case, it appears to me that the interim injunction as amended should remain in place until trial.

Counter application for contempt

[33] The plaintiffs seek an order declaring that certain of the defendants are in contempt of court. It does not seem to me to be necessary to make such a declaration at this time. The search of the defendants' premises has been carried out and the documents in question have been recovered and placed in the protective custody of the plaintiffs' solicitors. The terms of the injunctive relief have been clarified and the status of the interim injunction has been reconfirmed. The court expects that the order will be honoured.

[34] The plaintiffs are, however, at liberty to renew their counter application should it appear that the order is not being observed.

[35] The parties are at liberty to apply further as to costs if required.

Applications dismissed.

APPENDIX "A"

December 9, 1988. ORDER.

UPON THE APPLICATION of counsel on behalf of the Plaintiff; AND UPON READING the Affidavits of Robert Jack and Gordon Milne, sworn; AND UPON having heard the submissions of counsel for the Plaintiff; AND UPON the Plaintiff undertaking:

(a) to abide by any Order that this Court may make as to damages if it shall hereafter appear that the Defendants or others have sustained any damages resulting from the granting of this Order, which the Plaintiffs ought to pay;

(b) that any document obtained as a result of this Order shall be retained in safe custody in the offices of Macleod Dixon, Barristers and Solicitors;

(c) not to use any document or information obtained as a result of the execution of this Order except for the purposes of civil proceedings related hereto without leave of this Honourable Court;

(d) that the Plaintiffs' solicitor will serve this Order upon the Defendant Martec Mfg. (Alta. Div.) and explain its meaning and effect to the said Defendant at the time of enforcing paragraphs 1 to 4 hereof, and advise the said Defendant of its right to forthwith obtain legal advice before disclosing the information required by the Order;

(e) to proceed with all diligence to prosecute its claim against the Defendants.

THIS COURT DOES HEREBY ORDER THAT:

1. The Defendants (which term in this Order shall include the Defendant's employees, officers, servants, agents, representatives, assigns or anyone else acting on their instructions or behalf) upon being served with a copy of this Order, do forthwith permit entry to the premises specifically set out below for the search, detention and retention of documents and things as hereinafter specifically set out The premises to which the Defendants are to permit entry in accordance with this Order are those premises used by Martec Mfg. (Alta. Div.) at 3131 – 57th Avenue S.E., Calgary, Alberta, including any storage space associated with those premises and any motor vehicles used by the Defendants at those premises.

2. Entry to the said premises and vehicles may be conducted on any business day between the hours of 9:00 a.m. and 5:00 p.m.

3. The Defendants shall grant entry to each of the following persons in respect of the search referred to above at each of the aforesaid premises and vehicles, one of whom shall be a solicitor for the Plaintiffs, (such persons hereinafter referred to as "the Plaintiffs' authorized persons"):

(a) up to two (2) employees, officers, directors or representatives of the Plaintiffs or any other individuals for the purposes of searching for and identifying documents and things; and

(b) one (1) solicitor who is employed by, or a partner of, the law firm of Macleod Dixon, solicitors for the Plaintiffs; and

(c) a representative of the office of the Sheriff of the Judicial District in which the said premises and vehicles are located, or;

(d) as an alternative to (c) above any Peace Officer or law enforcement officer in the Province of Alberta as may be required by the Plaintiffs' solicitors to forthwith enter on the premises and do all things necessary to assist in the implementation of this Order.

In the event that a representative of the Sheriff or his office is present, it is not necessary that any Peace Officer or law enforcement officer as described in this paragraph also be present.

4. At the time of entry to the premises and vehicles, the Defendants shall grant access to and shall operate any computer or such equipment for the authorized persons for the purposes of searching and removing into the custody of the representative of Macleod Dixon as aforesaid the following things:

(a) any documents or things of the Plaintiffs or copies of documents or things of the Plaintiffs containing confidential information or documents or things derived thereof including, but not limited to, all papers and materials of a confidential nature including sourcing information, inventory control data, inventory description data, supplier lists, engineering data and designs, and other written materials required and necessary for the construction and supply of lighting poles and related equipment, and any medium containing such confidential information of the Plaintiff.

5. The Defendants shall forthwith deliver up to the Plaintiffs within 24 hours of service of this Order upon each of them all documents and things of any kind containing confidential and proprietary information of the Plaintiffs wherever located.

6. The Defendants shall forthwith disclose to the Plaintiffs' authorized persons the whereabouts of any of the Plaintiffs' documents, things or copies thereof not in the Defendants' possession or control nor on the Defendants' premises or in such vehicles on said premises.

7. The Defendants are hereby enjoined and restrained from:

(a) parting with possession, custody or control otherwise than to the Plaintiffs' authorized persons, or

(b) hiding, defacing or destroying

any documents or things as referred to herein and from disclosing to others the contents of said documents or things.

8. The Defendants are hereby enjoined and restrained from using any information or engineering data derived from or owned by the Plaintiffs or either of them, which was obtained in the course of or arising out of the employment of any of the defendants with Polesystems, A Division of Bralorne Resources Limited or otherwise obtained in circumstances of confidence.

9. The Defendants or any of them are at liberty to apply to this Court to discharge or vary this Order upon giving twenty-four (24) hours notice to the Plaintiffs' solicitors of their intention to do so.

10. The Plaintiffs shall serve a copy of the Statement of Claim and Notice to the Defendants upon the Defendants when they serve this Order.

11. The costs of this application shall be in the cause.

Tab 11

Azco Mining Inc. *Appellant*

v.

Sam Lévy & Associés Inc. *Respondent*

Indexed as: Sam Lévy & Associés Inc. *v.* Azco Mining Inc.

Neutral citation: 2001 SCC 92.

File No.: 27876.

2001: May 15; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Courts — Jurisdiction — Trustee presenting petitigon to Quebec Superior Court sitting in bankruptcy seeking to "recuperate" assets held by company with office in British Columbia — Company bringing motion to transfer petition to British Columbia — Whether Superior Court lacked subject matter jurisdiction over petition — Whether Superior Court erred in exercising discretion against making transfer order — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-1, s. 187(7).

The appellant is a company incorporated under the laws of Delaware, offering venture capital services from its office in British Columbia. In 1996, a deal involving the financing of an African gold mine was struck between the appellant and Eagle, a company with offices in Quebec. The parties reduced their agreement to a series of documents, each of which contained a clause stating that the agreement was to be governed by the laws of British Columbia. In September 1997, Eagle was adjudged bankrupt by the Quebec Superior Court sitting in bankruptcy and the respondent firm was appointed trustee in bankruptcy. In January 1999, the respondent trustee presented a petition seeking to "recuperate" the assets of Eagle, including the monetary value of numerous shares held or controlled by the appellant. The appellant then brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy

Azco Mining Inc. *Appelante*

c.

Sam Lévy & Associés Inc. *Intimée*

Répertorié : Sam Lévy & Associés Inc. *c.* Azco Mining Inc.

Référence neutre : 2001 CSC 92.

N° du greffe : 27876.

2001 : 15 mai; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Tribunaux — Compétence — Présentation à la Cour supérieure du Québec siégeant en matière de faillite d'une requête du syndic visant à « recouvrer » des biens retenus par une société ayant un bureau en Colombie-Britannique — Présentation par la société d'une requête sollicitant le renvoi en Colombie-Britannique de la requête en recouvrement de biens — La Cour supérieure était-elle incompétente ratione materiae pour entendre la requête en recouvrement de biens? — La Cour supérieure a-t-elle commis une erreur en exerçant son pouvoir discrétionnaire pour refuser de renvoyer l'affaire? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-1, art. 187(7).

L'appelante est une société constituée sous le régime des lois du Delaware, offrant du capital de risque à partir de son bureau en Colombie-Britannique. En 1996, l'appelante et Eagle, une société ayant des bureaux au Québec, ont conclu une opération concernant le financement d'une mine d'or africaine. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait une clause portant que le contrat était régi par les lois de la Colombie-Britannique. En septembre 1997, Eagle a été déclarée en faillite par la Cour supérieure du Québec siégeant en matière de faillite et la société intimée a été nommée syndic de la faillite. En janvier 1999, le syndic intimé a présenté une requête visant à « recouvrer » des biens de Eagle, y compris la valeur pécuniaire de nombreuses actions détenues ou contrôlées par l'appelante. L'appelante a alors présenté une requête sollicitant le renvoi de la requête en recouvrement de biens « à la Division des faillites de la Cour suprême de

Division of Vancouver". The appellant's motion was dismissed. The Court of Appeal unanimously upheld that decision.

Held: The appeal should be dismissed.

The bankruptcy petition was properly filed in the Quebec Superior Court sitting in bankruptcy. A creditor is required to file a bankruptcy petition in the court having jurisdiction in the judicial district of the locality of the debtor. Eagle carried on business in Quebec and its only connection to British Columbia was that the agreements between itself and the appellant referred to the law of that province. Nothing in the evidence suggested that the bankruptcy court in Quebec lacked subject matter jurisdiction over the petition or personal jurisdiction over Eagle when it made the receiving order. The bankruptcy court thereby acquired jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia. The *Bankruptcy and Insolvency Act* establishes a nationwide scheme for the adjudication of bankruptcy claims. Section 188(1) ensures that orders made by the bankruptcy court sitting in one province can and will be enforced across the country.

The bankruptcy court does not lack subject matter jurisdiction over the dispute because it is a contract case. While a trustee's claim in relation to a "stranger to the bankruptcy" or lacking the "complexion of a matter in bankruptcy" should be brought in the ordinary civil courts, if the contractual dispute properly relates to the subject matter of the bankruptcy proceedings, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction. Here, far from being a "stranger" to the bankruptcy, the appellant is potentially the most significant player in the role of either creditor or debtor, as the case may be. Further, while the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases, the trustee's claim is not properly characterized as a claim in damages but as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant.

The *Bankruptcy and Insolvency Act prima facie* establishes one command centre or "single control" for all proceedings related to the bankruptcy. "Single control" is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" under s. 187(7) to send the trustee scurrying to multiple jurisdictions. The

la Colombie-Britannique à Vancouver ». La requête de l'appelante a été rejetée. La Cour d'appel a confirmé cette décision à l'unanimité.

Arrêt : Le pourvoi est rejeté.

La requête en faillite a été déposée à bon droit devant la Cour supérieure du Québec siégeant en matière de faillite. Le créancier doit déposer une requête de mise en faillite auprès du tribunal compétent dans le district judiciaire de la localité du débiteur. Eagle faisait affaire au Québec et son seul lien avec la Colombie-Britannique tenait au fait que les contrats entre elle et l'appelante renvoyaient aux lois de cette province. Aucun élément de preuve ne laissait croire que le tribunal de faillite du Québec n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre. Le tribunal de faillite a ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique. La *Loi sur la faillite et l'insolvabilité* établit un régime national de règlement des demandes en matière de faillite. Le paragraphe 188(1) prévoit que les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

Le tribunal de faillite ne perd pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. Bien qu'une demande du syndic qui est dirigée contre un « étranger à la faillite » ou qui n'est pas de la « nature d'une affaire de faillite » doive être présentée aux tribunaux civils ordinaires, si le litige contractuel se rapporte bel et bien à la faillite, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite. En l'espèce, loin d'être une « étrangère » à la faillite, l'appelante en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice, selon le cas. De plus, même si le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat, on ne peut qualifier la demande du syndic de simple demande en dommages-intérêts, car il s'agit plutôt d'une demande de recouvrement de biens précis du failli que l'appelante retient sans droit.

La *Loi sur la faillite et l'insolvabilité* établit à première vue un centre de commandement ou un « contrôle unique » pour la totalité des procédures liées à la faillite. Le « contrôle unique » n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant » au sens du par.

motions judge was entitled to conclude that the facts of this case do not show "sufficient cause" to require the transfer to British Columbia.

The relevant agreements to which the appellant and Eagle were parties contained choice of law, not choice of forum provisions, and the Quebec courts are perfectly able to apply the law of British Columbia. Furthermore, arts. 3148 and 3135 of the *Civil Code of Québec* would only apply in bankruptcy court "[i]n cases not provided for in the Act or . . . Rules". Since s. 187(7) of the Act specifically provides that a transfer will not be ordered unless there is satisfactory proof that a proceeding will be "more economically administered" in another division or district or "for other sufficient cause", these particular provisions of the Code can have no application. Where, unlike in this case, a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge under s. 187(7) but it is not binding.

Cases Cited

Followed: *Stewart v. LePage* (1916), 53 S.C.R. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; **distinguished:** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; **referred to:** *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87; *Boily v. McNulty*, [1928] S.C.R. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246; *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; *Excavations Sanoduc inc. v. Morency*, [1991]

187(7), justifiant que le syndic doive accourir dans plusieurs ressorts. Le juge des requêtes pouvait conclure que les faits ne faisaient pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique.

Les contrats pertinents auxquels l'appelante et Eagle étaient parties contenaient une clause exprimant le choix des lois applicables, et non une clause d'élection de for, et les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Par ailleurs, les art. 3148 et 3135 du *Code civil du Québec* ne s'appliqueraient dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les [. . .] règles ». Étant donné que le par. 187(7) de la Loi prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district ou « pour un autre motif suffisant », ces dispositions particulières du Code ne s'appliquent pas. Lorsqu'un défendeur, contrairement au défendeur en l'espèce, bénéficie d'une clause d'élection de for, le juge des requêtes doit examiner cette clause avec soin en application du par. 187(7), mais il n'est pas lié par elle.

Jurisprudence

Arrêts suivis : *Stewart c. LePage* (1916), 53 R.C.S. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; **distinction d'avec l'arrêt :** *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; **arrêts mentionnés :** *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87; *Boily c. McNulty*, [1928] R.C.S. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31; *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246; *Geoffrion c. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, R.D.J. 423; *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, leave to appeal refused [1997] 2 S.C.R. xiv; *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, aff'd (1992), 9 O.R. (3d) 755, leave to appeal refused [1992] 3 S.C.R. v; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), aff'd 240 F.3d 148 (2001); *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (1989).

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2(1) [am. 1997, c. 12, s. 1], 17(1), 30(1)(*d*), 43(5) [rep. & sub. 1992, c. 27, s. 15], 72(1), 183(1)(*b*), (*c*), 187(7), 188(1), (2).
Bankruptcy and Insolvency General Rules, C.R.C., c. 368 [am. SOR/98-240], s. 3.
Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3148.
Code of Civil Procedure, R.S.Q., c. C-25.
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[1990] R.J.Q. 6; *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423; *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143, autorisation de pourvoi refusée [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, conf. par (1992), 9 O.R. (3d) 755, autorisation de pourvoi refusée [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), conf. par 240 F.3d 148 (2001); *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109; *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co c. Merrill Lynch*, 885 F.2d 1149 (1989).

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POURVOI contre un arrêt de la Cour d'appel du Québec, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), rejetant l'appel interjeté par l'appelant judgment of the Superior Court, [1999] R.J.Q. 1497. Appeal dismissed.

Yves Martineau, for the appellant.

Jean-Philippe Gervais, for the respondent.

The judgment of the Court was delivered by

1 BINNIE J. — The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties

à l'encontre d'un jugement de la Cour supérieure, [1999] R.J.Q. 1497. Pourvoi rejeté.

Yves Martineau, pour l'appelante.

Jean-Philippe Gervais, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — La Cour supérieure du Québec siégeant en matière de faillite a le bras long au point d'avoir atteint l'appelante à Vancouver (Colombie-Britannique) concernant une demande d'actions, de bons de souscription et de paiement d'autres créances auxquels le failli prétend avoir droit et que le syndic de faillite évalue à plus de 4,5 millions de dollars. L'appelante a rétorqué que le litige, qui porte sur le financement d'une mine d'or en Afrique, n'a rien à voir avec le Québec. Elle prétend que la demande du syndic de faillite intimé constitue une demande civile ordinaire, entièrement fondée sur des contrats qui doivent être interprétés en conformité avec les lois de la Colombie-Britannique. Selon elle, ce motif et d'autres raisons de commodité et d'efficacité font en sorte que la demande devrait être entendue en Colombie-Britannique. Le tribunal de faillite et la Cour d'appel du Québec ont rejeté ces arguments et je suis d'avis que le pourvoi interjeté auprès de notre Cour devrait aussi être rejeté.

I. Les faits

L'appelante Azco Mining Inc. (« Azco »), une société constituée sous le régime des lois du Delaware, offrait du capital de risque à partir de son bureau de Vancouver (Colombie-Britannique). En 1996, on l'a mise en contact avec Eagle River International Limited et Eagle River Exchange and Financial Services Inc. (ci-après appelées collectivement « Eagle »), qui avaient des bureaux à Gatineau (Québec). Eagle faisait des démarches en vue d'exploiter des mines d'or prometteuses dans une région de 500 milles carrés située au Mali (Afrique occidentale). Il a été convenu que Eagle continuerait à mettre son expertise au profit de la mise en production de reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

<u>June 7, 1996 financing agreement</u>

28. The agreement shall be governed by the law of British Columbia.

<u>June 12, 1996 management services agreement</u>

13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

. . .

20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

<u>West African Gold & Exploration S.A. Debenture dated August 9, 1996</u>

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either

ces mines par l'entremise de filiales au Mali et que Azco fournirait le financement. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait l'une des dispositions suivantes que l'appelante qualifie de clauses d'élection de for, mais qui, selon l'intimée, exprimaient simplement leur choix quant aux lois applicables :

[TRADUCTION]

<u>Contrat de financement conclu le 7 juin 1996</u>

28. Le contrat est régi par les lois de la Colombie-Britannique.

<u>Contrat de services de gestion conclu le 12 juin 1996</u>

13. **Arbitrage** : Les parties conviennent de soumettre à l'arbitrage toute question litigieuse relative au présent contrat conformément à ses stipulations.

. . .

20. **Lois applicables** : Le présent contrat a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci.

Azco invoque en outre les stipulations suivantes du contrat d'emprunt sous forme de débenture qu'elle a conclu avec la filiale de Eagle au Mali (la West African Gold & Exploration S.A.) : 3

[TRADUCTION]

<u>Contrat d'emprunt sous forme de débenture de West African Gold & Exploration S.A. conclu le 9 août 1996</u>

17. Le présent contrat d'emprunt sous forme de débenture a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci. En outre, la société convient expressément de signer sans délai tous les documents nécessaires pour que le présent contrat d'emprunt sous forme de débenture devienne exécutoire et soit enregistré valablement à l'égard des biens grevés conformément aux lois en vigueur dans la province de la Colombie-Britannique et aux lois en vigueur dans la République du Mali; sans limiter la portée générale de ce qui précède, la société convient en outre de reconnaître, le cas échéant, la juridiction des tribunaux compétents de la province de la Colombie-Bri-

administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

tannique pour l'application et l'interprétation du présent contrat d'emprunt sous forme de débenture en conformité avec les lois en vigueur dans la province de la Colombie-Britannique.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

Il était prévu qu'en bout de ligne, en cas de succès du projet, Azco détiendrait une participation majoritaire dans la Sanou Mining Corporation (« Sanou »), que le syndic a qualifié de société de gestion en coentreprise et dans laquelle Eagle obtiendrait une participation minoritaire.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of US$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

Entre le 16 mai 1996 et le 1er mai 1997, Azco a versé au total à Eagle la somme de 3 844 858 $US. Pour chaque versement, Eagle a signé un billet à ordre par lequel elle s'engageait à rembourser Azco si elle manquait à ses obligations contractuelles.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

Le 12 septembre 1997, Eagle a été déclarée en faillite. La société intimée a été nommée syndic de la faillite. Malgré la faillite de Eagle, le projet du Mali s'est poursuivi et, selon Azco, il est toujours en cours. Le syndic affirme que l'appelante contrôle maintenant la société de gestion Sanou et retient illégalement les 3,5 millions d'actions et les 4 millions de bons de souscription auxquels Eagle avait droit — et auxquels elle a toujours droit.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares of Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN$337,500 and the Sanou interest at US$1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

Le 18 janvier 1999, le syndic intimé a présenté à la Cour supérieure du Québec siégeant en matière de faillite (le « tribunal de faillite ») une requête visant à « recouvrer des biens » de Eagle, y compris la valeur pécuniaire de 125 000 actions de Azco même, ainsi que de 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il considère comme des biens du débiteur retenus illégalement. Le syndic intimé évalue les actions de Azco à 337 500 $CAN et la participation dans Sanou à 1 875 000 $US. Le syndic fait également valoir certaines demandes pécuniaires relativement à diverses créances alléguées.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., based principally" on the financing agreements to recover about US$3.85 million in the

Le 24 février 1999, l'appelante a présenté une requête sollicitant le renvoi de la requête en recouvrement de biens [TRADUCTION] « à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver ». À l'appui de sa requête, l'appelante a déclaré : [TRADUCTION] « Azco déposera assurément une demande reconventionnelle d'un montant de plus de 5 000 000 $CAN fondée payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

principalement » sur les contrats de financement en vue de recouvrer les versements susmentionnés d'environ 3 850 000 $US remis à Eagle, qui étaient garantis par des billets à ordre, comme je l'ai déjà expliqué. Azco a soutenu que, selon les contrats, en cas de non-respect de certaines conditions, les avances de fonds seraient considérées comme un prêt à demande. D'après elle, ces conditions n'ont pas été remplies et elle a droit au remboursement immédiat de toutes les avances de fonds. Azco a prétendu que [TRADUCTION] « [l]a division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande contractuelle contre Azco ». Elle plaide que le dossier doit être renvoyé à la Division des faillites de Vancouver.

9

Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?

A. Yes, it is.

Q. For what amount?

A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.

Q. That's U.S. currency?

A. That is U.S. currency.

Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?

A. Exactly.

Le vice-président aux Finances de Azco, Ryan Modesto, qui vit aux États-Unis, a témoigné à l'appui de la requête en renvoi que Azco est un créancier de la faillite :

[TRADUCTION]

Q. Donc, Azco Mining plaide-t-elle qu'elle est le créancier dans le cadre de cette faillite de Eagle River?

R. Oui, c'est ça.

Q. Pour quel montant?

R. Pour trois millions huit cent quarante-quatre mille huit cent cinquante-huit dollars (3 844 858 $) plus les intérêts courus.

Q. C'est en devises américaines?

R. C'est en devises américaines.

Q. Et vous mentionnez les intérêts. Faites-vous référence aux intérêts stipulés dans le billet à ordre?

R. Exactement.

10

Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

Le juge Isabelle de la Cour supérieure du Québec a rejeté la requête de Azco le 6 mai 1999. La Cour d'appel du Québec a confirmé cette décision le 21 février 2000.

II. Judicial History

A. *Quebec Superior Court*, [1999] R.J.Q. 1497

II. Historique des procédures judiciaires

A. *Cour supérieure du Québec*, [1999] R.J.Q. 1497

11

Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with

Le juge Isabelle a conclu que la Cour supérieure du Québec siégeant en matière de faillite avait the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

compétence pour entendre la requête en recouvrement de biens présentée par l'intimée. Les dispositions pertinentes de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (la « Loi »), étaient claires et il n'y avait pas lieu d'invoquer le *Code civil du Québec*, L.Q. 1991, ch. 64, ni le *Code de procédure civile* du Québec, L.R.Q., ch. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

Azco n'a pas prétendu que les affaires du failli pouvaient être administrées d'une manière plus efficace en Colombie-Britannique. Il a plutôt soutenu qu'il y avait d'autres motifs « suffisants » de renvoyer l'instance dans cette province, notamment certaines clauses du contrat (reproduites précédemment) qui, selon Azco, exigeaient que le litige soit tranché en Colombie-Britannique. Le juge Isabelle a conclu qu'il s'agissait de clauses portant sur le choix des lois applicables plutôt que de clauses d'élection de for et que, de toute manière, elles n'avaient aucun caractère « impératif ».

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

Le juge Isabelle a reconnu qu'il pouvait renvoyer l'instance à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver en vertu du par. 187(7) de la Loi. Il n'était pas nécessaire d'appliquer les règles particulières régissant les situations de *forum non conveniens* édictées par l'art. 3135 du *Code civil du Québec*. Compte tenu de l'ensemble des circonstances, toutefois, le juge Isabelle a estimé que le renvoi de l'instance n'était pas justifié. Le législateur a conféré au syndic le pouvoir de gérer les affaires du failli de la façon la plus pratique et la plus économique possible. Vancouver pouvait être commode pour l'appelante, mais l'intérêt de l'ensemble des créanciers l'emportait sur ce qui était commode pour un seul créancier. La requête de l'appelante a donc été rejetée.

B. *Quebec Court of Appeal*, [2000] R.J.Q. 392

B. *Cour d'appel du Québec*, [2000] R.J.Q. 392

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(*d*) of the Act which empow-

La Cour d'appel a rejeté à l'unanimité l'appel de Azco. Le juge Robert, avec l'appui des juges Proulx et Rousseau-Houle, a confirmé que la Cour supérieure du Québec avait compétence sur la faillite de Eagle, soulignant que la société faisait affaire au Québec lorsque la procédure de faillite a été engagée. La requête en recouvrement de biens présentée contre Azco était autorisée par l'al. 30(1)*d*) de la ers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

III. Relevant Statutory Provisions

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

2. (1) In this Act,

. . .

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

Loi, qui confère au syndic le pouvoir d'intenter une procédure judiciaire se rapportant aux biens du failli avec la permission des inspecteurs.

Le juge Robert a convenu avec le juge des requêtes qu'il était plus efficace et équitable qu'un seul tribunal supervise l'administration de l'actif du failli malgré le fait que cette centralisation pouvait causer certaines difficultés et certains inconvénients aux parties résidant dans des provinces éloignées du lieu de la faillite. Toutefois, à l'instar du juge Isabelle, il a souligné le caractère discrétionnaire du pouvoir que le par. 187(7) confère aux tribunaux de renvoyer une affaire à une autre division lorsque la preuve établit que l'actif du failli y serait administré d'une façon plus économique ou qu'un autre motif suffisant le justifie. En l'espèce, le juge Robert a conclu que Azco n'avait pas démontré qu'il serait plus économique de s'adresser au tribunal de faillite de la Colombie-Britannique. Quant aux autres circonstances, le juge Robert s'est dit d'avis que les dispositions contractuelles que Azco avait qualifiées de clauses d'élection de for ne liaient pas le syndic de faillite, qui représente l'ensemble des créanciers et qui agit dans leur intérêt collectif. Les clauses en question ne constituaient pas des clauses attribuant une compétence exclusive. Même si tel avait été le cas, la Loi est une loi d'ordre public et ses dispositions doivent être appliquées rigoureusement compte tenu de leurs conséquences sur les droits des débiteurs et des créanciers. 15

III. Les dispositions législatives pertinentes

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 16

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« localité d'un débiteur » Le lieu principal où, selon le cas :

a) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

b) le débiteur a résidé au cours de l'année précédant sa faillite;

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. . . .

(5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

187. . . .

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

30. (1) Avec la permission des inspecteurs, le syndic peut :

. . .

d) intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

43. . . .

(5) La pétition est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

183. (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

187. . . .

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

188. (1) Une ordonnance rendue par le tribunal, sous le régime de la présente loi, est exécutée dans les bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

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.

Civil Code of Québec, S.Q. 1991, c. 64

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

. . .

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

IV. Analysis

17 Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original,

tribunaux ayant juridiction en matière de faillite ailleurs au Canada, de la même manière, à tous les égards, que si l'ordonnance avait été rendue par le tribunal tenu par les présentes de l'exécuter.

(2) Tous les tribunaux, ainsi que les fonctionnaires de ces tribunaux, doivent s'entraider et se faire les auxiliaires les uns des autres en toutes matières de faillite; une ordonnance d'un tribunal demandant de l'aide, accompagnée d'une requête à un autre tribunal, est censée suffisante pour permettre au dernier tribunal d'exercer, en ce qui concerne les affaires prescrites par l'ordonnance, la juridiction que le tribunal qui a présenté la requête ou le tribunal à qui la requête a été présentée, pourrait exercer relativement à des affaires semblables dans sa juridiction.

Règles générales sur la faillite et l'insolvabilité, C.R.C., ch. 368 (mod. DORS/98-240)

3. Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

Code civil du Québec, L.Q. 1991, ch. 64

3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

. . .

3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :

. . .

5° Le défendeur a reconnu leur compétence.

Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

IV. Analyse

Le Parlement a conféré au tribunal de faillite la capacité et le pouvoir d'exercer « la juridiction auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi » (par. 183(1)). Il est évident que cette disposition vise à conférer au tribunal de faillite les pouvoirs et les obligations correspondant à la compétence qui appartient au législateur fédéral en matière de « faillite » en vertu du par. 91(21) de la *Loi constitutionnelle de 1867*, sauf dans la mesure où le législateur a lui-même limité la compétence du tribunal ou l'a expressément attribuée autrement.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

Bien que l'appelante ait demandé simplement dans sa requête que le litige soit renvoyé à la Division de Vancouver de la Cour suprême de la Colombie-Britannique siégeant en matière de faillite (semblant ainsi reconnaître que le litige était considéré à bon droit comme une affaire de faillite), elle a aussi allégué que les demandes du syndic étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). De plus, une bonne partie des arguments avancés oralement par l'appelante laissaient entendre que le litige devait être tranché par les tribunaux civils ordinaires. L'appelante soutient en outre que le Québec n'est pas le lieu où il convient que ce litige soit tranché et que la Cour supérieure du Québec siégeant en matière de faillite n'a pas le bras suffisamment long pour contraindre Azco à amener ses témoins dans l'Est pour débattre du litige. Elle prétend que le lieu approprié est la Colombie-Britannique, car il n'existerait absolument aucun lien important entre la présente affaire et la province de Québec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?

2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?

Il convient d'examiner dans l'ordre suivant les questions de droit que l'appelante a soulevées :

1. La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?

2. Dans l'affirmative, cette cour a-t-elle ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?

3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?

4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?

5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. *Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?*

Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91 of the *Constitution Act, 1867*, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87, *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

The "locality of the debtor" is defined under s. 2(1) as the "principal place"

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

3. Dans l'affirmative, les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?

4. Dans la négative, cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?

5. Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?

1. *La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?*

Le Parlement a décidé d'utiliser les cours supérieures des provinces et des territoires pour exercer sa compétence en matière de faillite (art. 183). Il est établi depuis longtemps que, dans les domaines relevant des chefs de compétence énumérés à l'art. 91 de la *Loi constitutionnelle de 1867*, [TRADUCTION] « le Parlement du Canada peut donner compétence aux cours provinciales et réglementer au maximum les procédures devant ces cours » : *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87, le juge Rinfret, p. 100. Les cours mentionnées à l'art. 183 conservent leur statut de cour supérieure de compétence inhérente, mais je les appellerai ici tribunaux de faillite, quoique cette expression soit quelque peu imprécise. 20

Le créancier qui désire obtenir une ordonnance de séquestre contre un débiteur doit déposer une requête de mise en faillite « auprès du tribunal compétent dans le district judiciaire de la localité du débiteur » (par. 43(5)). 21

Le paragraphe 2(1) définit la « localité du débiteur » comme le « lieu principal » où, selon le cas : 22

a) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. *Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?*

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186: [TRANSLATION] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved

b) le débiteur a résidé au cours de l'année précédant sa faillite;

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

Le paragraphe 43(5) exprime une règle de compétence qui attribue à l'un ou l'autre des tribunaux nommés au par. 183(1) le pouvoir judiciaire de statuer sur les requêtes de mise en faillite. La preuve a permis de constater que Eagle faisait affaire au Québec, même si elle n'avait pas obtenu de permis le lui permettant. Les contrats entre Azco et Eagle (ainsi que les billets à ordre fondant la demande reconventionnelle de Azco) précisent que Eagle a un bureau au 212, boulevard Labrosse, à Gatineau (Québec). Cette adresse figure dans l'en-tête de son papier à lettres. Le vice-président aux Finances de Azco a témoigné que les rencontres relatives au financement ont été tenues à ce bureau. Rien ne laisse entendre que Eagle ait quitté les lieux avant sa faillite, ni qu'elle ait eu d'autres bureaux au Canada.

Le seul lien apparent entre Eagle et la Colombie-Britannique tient au fait que les contrats susmentionnés renvoient aux lois de cette province. Il est clair que le par. 43(5) n'aurait pas permis le dépôt de la requête de mise en faillite en Colombie-Britannique pour un tel motif. J'estime qu'aucun élément de la preuve ne laisse croire que le tribunal de faillite à Hull n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre le 12 septembre 1997.

2. *Le tribunal de faillite a-t-il ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?*

La Loi établit un régime national de règlement des demandes en matière de faillite. Comme le juge Rinfret l'a souligné dans l'arrêt *Boily c. McNulty*, [1928] R.C.S. 182, p. 186 : « Il s'agit d'une loi fédérale qui concerne tout le pays, et elle envisage le territoire à ce point de vue ». C'est par l'intermédiaire du réseau d'entraide des cours supérieures des provinces et des territoires prévu par l'art.

through the cooperative network of superior courts of the provinces and territories under s. 188: *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (Que. C.A.), *per* Rivard J.A., at p. 246, [TRANSLATION] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S.C.A.), at p. 314, and *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), at p. 1389.

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be

188 que les décisions rendues par un tribunal siégeant dans une province donnée sont exécutées à l'échelle nationale : *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (C.A. Qué.), le juge Rivard, p. 246 : « La *Loi de faillite* est fédérale, et les ordonnances de la Cour Supérieure de la province de Québec, siégeant en vertu de cette loi comme Cour de Faillite, sont exécutoires [en] Ontario ». Voir également : *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada*, *Local 1015* (1996), 39 C.B.R. (3d) 311 (C.A.N.-É.), p. 314, et *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), p. 1389.

Les syndics auront souvent (et peut-être de plus en plus) à composer avec des débiteurs et des créanciers résidant dans différentes régions du pays. Ils ne pourront pas s'acquitter efficacement de leurs fonctions, pour reprendre les mots du juge Idington dans l'arrêt *Stewart c. LePage* (1916), 53 R.C.S. 337, p. 345, [TRADUCTION] « si tous peuvent s'interposer et invoquer leurs propres perceptions de leurs droits quant à la présentation d'une demande en justice ». L'arrêt *Stewart* portait sur la liquidation d'une société de fiducie constituée sous le régime des lois fédérales en Colombie-Britannique. Par suite de la liquidation, un client de l'Île-du-Prince-Édouard a présenté devant la Cour supérieure de cette province une demande de jugement déclaratoire portant que certains des fonds détenus par la société de fiducie faillie étaient détenus en fiducie et que cette société devait être déchue de sa qualité de fiduciaire. Notre Cour a conclu qu'en dépit de son lien très étroit avec l'Île-du-Prince-Édouard, le litige ne pouvait pas être soumis à la cour de cette province sans l'autorisation de la Cour suprême de la Colombie-Britannique. Le juge Anglin a fait remarquer, à la p. 349 :

[TRADUCTION] Il ne fait pas de doute que des inconvénients surgiront dans les cas exceptionnels où, comme en l'espèce, la liquidation de la société a lieu dans une province du Dominion très éloignée de la province de résidence des personnes intéressées en qualité de créancières ou de demanderesses. Mais le législateur a probablement jugé nécessaire dans l'intérêt d'une liquidation prudente et économique que la cour chargée de la liquidation ait le contrôle non seulement de l'actif et des biens se trouvant en la possession de la société mise en involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remain-

liquidation, mais aussi de l'ensemble des litiges dans lesquels cette société pourrait être engagée. De façon générale, la prépondérance des inconvénients milite probablement en faveur de ce genre de contrôle unique, bien qu'il puisse comporter des désavantages dans certains cas.

Comme je l'ai mentionné, l'arrêt *Stewart* portait sur la liquidation d'une société, mais la politique législative favorisant le « contrôle unique » s'applique également en matière de faillite. Il y va du même intérêt public à la gestion expéditive, efficace et économique des retombées d'un effondrement financier. Par application du par. 188(1), les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

J'ai conclu que les créanciers qui ont demandé la mise en faillite ont fait appel à bon droit à la compétence de la Cour supérieure du Québec siégeant en matière de faillite, mais l'avocat de l'appelante affirme que sa cliente, qui a un bureau en Colombie-Britannique, échappe à la compétence de cette cour. Il plaide, notamment que, quel que soit le pouvoir du Parlement de conférer une compétence nationale à la cour supérieure d'une province, il demeure que cette cour est constituée par la province et que la loi grâce à laquelle elle a le bras long doit être respectée en ce qui concerne la signification des actes de procédure. Les faits révélés par le dossier n'indiquent pas précisément de quelle manière la requête en recouvrement présentée par le syndic a été signifiée à l'appelante, mais si Azco avait des arguments à faire valoir relativement à la validité de la signification de cette requête introductive d'une instance contre elle, elle y a renoncé en ne les soulevant pas dans la requête qu'elle a présentée à Hull. En appel, une bonne partie de l'audience a été consacrée aux arguments portant sur la question de savoir comment un tribunal québécois pouvait acquérir la compétence *ratione personae* sur une société située en Colombie-Britannique et si les règles québécoises de signification *ex juris* s'appliquaient. Je rejette la prétention selon laquelle la Cour supérieure du Québec siégeant en matière de faillite ne peut exercer la compétence *ratione personae* sur les créanciers d'une autre province en vertu de la Loi, et ce pour les motifs déjà exposés qui tiennent à la compétence nationale de la cour. Aucune objection ing issue with respect to *in personam* jurisdiction was thereby waived.

liée à la signification des actes de procédure ne saurait subsister, étant donné que Azco a non seulement comparu au Québec, mais aussi invoqué la compétence de la Cour supérieure du Québec siégeant en matière de faillite en lui demandant de renvoyer l'instance au tribunal de faillite siégeant à Vancouver par application du par. 187(7). Elle a ainsi renoncé à soulever toute question irrésolue concernant la compétence *ratione personae*.

Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

Bien entendu, Azco n'a pas renoncé à contester la compétence *ratione materiae* sur l'objet du présent litige. Il s'agissait d'un élément prépondérant de sa requête. J'aborderai maintenant cette question. 29

3. *Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?*

3. *Les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?*

The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

> [TRANSLATION] Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the BIA such as the application to have preferential payments declared void (see sections 91 to 100 BIA). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

Dans sa requête, l'appelante a prétendu que les demandes du syndic contre elle étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). La théorie qui sous-tend ces arguments est apparemment la suivante : comme les demandes contractuelles ont trait à « [l]a propriété et [aux] droits civils » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, ces actions en justice ne relèvent pas de la compétence du tribunal de faillite. Au paragraphe 42 de son mémoire, par exemple, l'appelante soutient que : 30

> Contrairement à ce qu'affirme la Cour d'appel, le recours du syndic est donc une affaire purement contractuelle, de droit civil. Il ne s'agit pas d'un recours spécifiquement prévu par la LFI tel le recours en annulation de paiement préférentiel (voir articles 91 à 100 LFI). Le simple fait que le demandeur soit un syndic ne change pas la nature du recours et n'en fait pas un litige en matière de faillite.

Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *In re Morris Lofsky* (1947), 28 C.B.R. 164 (Ont. C.A.), *per*

Bien entendu, la plupart des questions liées à la faillite concernent de près ou de loin la propriété et les droits civils. Il est cependant vrai que certains des arrêts qui nient la compétence du tribunal de faillite s'appuient sur des motifs à connotation constitutionnelle, p. ex., *In re Morris Lofsky* (1947), 28 C.B.R. 31

Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (B.C.C.A.), at p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (Que. Sup. Ct.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

164 (C.A. Ont.), le juge Roach, p. 167; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (C.A.C.-B.), p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (C.S. Qué.), le juge Bernier, p. 94, et *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "Bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

Il faut donc se demander ce qu'englobe le terme « faillite » au sens du par. 91(21) de la *Loi constitutionnelle de 1867*.

33 In *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31, it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

Dans l'arrêt *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31, p. 46, le juge Rand a déclaré ce qui suit :

> [TRADUCTION] La faillite est une procédure bien connue par laquelle les biens d'un débiteur insolvable passent de façon coercitive sous administration judiciaire principalement dans l'intérêt des créanciers.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, Lord Selborne, speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

Ce concept-clé d'administration coercitive est apparu dès les premiers arrêts de notre jurisprudence en matière de faillite. Dans l'arrêt *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31, le lord Selborne a dit ce qui suit à la p. 36, en parlant des lois de portée générale régissant la faillite et l'insolvabilité : [TRADUCTION] « Les mots décrivent dans leur sens juridique connu les dispositions légales portant sur l'administration des biens des faillis et des personnes insolvables, conformément aux règles et aux définitions prescrites par la loi, y compris, bien sûr, les conditions d'application de la loi, sa procédure d'application et l'effet de son application ».

35 More helpful still was Lord Selborne L.C.'s description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83, at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special

La description que lord chancelier Selborne a donnée de la faillite dans le contexte de la loi anglaise dans l'arrêt *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83, p. 86, est encore plus utile :

> [TRADUCTION] Ce qu'il y a à faire en cas de faillite, c'est l'administration de la faillite. Le débiteur et les créanciers, en qualité de parties à l'administration de la faillite, sont assujettis à cette juridiction. Les syndics ou les cessionnaires, en qualité de personnes chargées de l'administration, sont assujettis à cette juridiction. Les éléments d'actif qui leur sont remis et leur mode d'administration sont assujettis à cette juridiction; et il peut exister, comme je le crois, des catégories particulières

clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Re Ireland*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (Que. C.A.); *In re Martin* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246 (Ont. S.C.), and *Re Morris Lofsky*, *supra*, at p. 169.

The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in

d'opérations qui, en vertu de disposition législatives particulières, reçoivent un traitement particulier en ce qui a trait aux tiers. Mais la proposition générale selon laquelle c'est la Cour des faillites qui doit entendre les demandes que peuvent faire valoir en common law ou en equity, contre un étranger à la faillite, les cessionnaires ou syndics de faillite, ou les fiduciaires ainsi nommés par acte formaliste, me paraît dénuée de tout fondement légal et de toute trace de fondement jurisprudentiel. [Je souligne.]

Malgré le fait que l'Angleterre soit un État unitaire libre des restrictions constitutionnelles qu'impose notre partage des compétences, les tribunaux canadiens adhèrent généralement depuis 1874 à la division fondamentale entre les litiges liés à l'administration de l'actif du failli et les litiges impliquant des « étrangers à la faillite ». Le principe veut que si le litige a trait à une matière que même une interprétation généreuse de l'administration d'une faillite ne peut englober ou si la Loi ne prévoit pas la réparation visée, le syndic doit demander réparation aux tribunaux civils ordinaires. Ainsi, dans l'affaire québécoise *Re Ireland*, précitée, le syndic avait intenté une procédure pour faire décider qui avait droit au produit des polices d'assurance qu'il avait souscrites relativement à des biens faisant partie de l'actif du failli. Le juge Bernier a conclu que la Cour supérieure du Québec siégeant en matière de faillite n'avait pas compétence quant à l'objet du litige. Ce dernier soulevait purement des questions de droit civil et aucune disposition de la Loi ne conférait au tribunal de faillite une compétence spéciale lui permettant de trancher ces questions. Les tribunaux ont retenu des arguments similaires dans les décisions *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Qué.); *In re Martin* (1953), 33 C.B.R. 163 (C.S. Ont.), p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (C.S. Ont.), p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (C.S. Ont.); *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246 (C.S. Ont.), et *Re Morris Lofsky*, précitée, p. 169. 36

La Cour d'appel du Québec a peut-être pavé la voie à une interprétation plus large de ce qui constitue un litige relevant du droit de la faillite et ressortissant donc au tribunal de faillite : *Geof-* 37 the bankruptcy court: *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; and *Excavations Sanoduc inc. v. Morency*, [1991] R.D.J. 423. See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, *supra*, and *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (Que. Sup. Ct.); but the push is not confined to Quebec: *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (N.S.S.C.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (B.C.C.A.), at p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Re Reynolds*, *supra*, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Re Morris Lofsky*, *supra*, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Re Galaxy Interiors*, *supra*, and *Sigurdson*, *supra*), as can claims for relief specifically granted by the Act (*Re Ireland*, *supra*, and *Re Atlas Lumber*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L. W. Houlden and G. B. Morawetz observe:

frion c. Barnett, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; et *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423. Voir aussi les motifs dissidents du juge LeBel, maintenant juge de notre Cour, dans l'arrêt *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, précité, et *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (C.S. Qué.), mais cette tendance ne se manifeste pas uniquement au Québec : *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (C.S.N.-É.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (C.A.C.-B.), p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (C.S. Ont.), p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (B.R. Man.).

La jurisprudence semble reconnaître que le mot « faillite » figurant au par. 91(21) de la *Loi constitutionnelle de 1867* doit être interprété de façon large pour réaliser son objet. Une interprétation moins libérale compliquerait et entraverait inutilement la liquidation économique et expéditive de l'actif du failli. L'établissement d'une compétence nationale en matière de faillite se révélerait inutile si une interprétation étroite et restrictive de cette compétence constitutionnelle en entravait continuellement l'exercice. Par l'adoption du par. 183(1) de la Loi, le législateur fédéral a transmis au tribunal de faillite une vaste compétence équivalente à celle qu'il a reçue.

Il y a évidemment des limites. Si la demande du syndic est dirigée contre un étranger à la faillite, c.-à-d. [TRADUCTION] « des personnes ou des questions ne relevant pas de [la] Loi » (*Re Reynolds*, précité, p. 129), ou si elle n'est pas de la [TRADUCTION] « nature d'une affaire de faillite » (*Re Morris Lofsky*, précité, p. 169), elle doit être présentée aux tribunaux civils ordinaires, et non au tribunal de faillite. En revanche, on peut manifestement saisir le tribunal de faillite d'une demande de recouvrement d'un bien particulier (*Re Galaxy Interiors*, précité, et *Sigurdson*, précité) tout comme d'une demande sollicitant une réparation prévue par la Loi (*Re Ireland*, précité, et *Re Atlas Lumber*, précité). Cela dit, il est parfois difficile de percevoir le « fil d'or » particulier qui lie les décisions. L. W. Houlden et G. B. Morawetz font remarquer que :

There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.

(*Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4)

The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. *Does This Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?*

In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns West African Gold & Exploration S.A., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly

[TRADUCTION] Il y a eu de nombreux litiges sur cette question et il n'est pas toujours facile de concilier les décisions. La difficulté découle du partage des compétences constitutionnelles au Canada, la faillite et l'insolvabilité étant de compétence fédérale et la propriété et les droits civils ainsi que l'administration de la justice étant de compétence provinciale.

(*Bankruptcy and Insolvency Law of Canada* (3^{e} éd. (feuilles mobiles)), I§4)

40 En bref, toutefois, la réponse à l'argument fondé sur « la propriété et les droits civils » est que l'appelante pose la mauvaise question. La question est de savoir si le litige contractuel entre l'appelante et le syndic intimé se rapporte bel et bien à la faillite. Dans l'affirmative, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite.

4. *Cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?*

41 En l'espèce, le syndic intimé a intenté, avec la permission des inspecteurs, une « procédure judiciaire se rapportant aux biens du failli » devant le tribunal de faillite en vertu de l'al. 30(1)*d*). Le syndic prétend que, outre les actions de Azco et de Sanou, la définition de « biens » figurant à l'art. 2 inclut les « droits incorporels », ce qui, selon lui, englobe ses demandes pécuniaires.

42 Quant aux actions et aux bons de souscription, le syndic allègue au par. 108 de sa requête que Azco est [TRADUCTION] « reconnue comme la propriétaire nominale de 100 % de Sanou Mining Corporation », qui est propriétaire de West African Gold & Exploration S.A., laquelle exploite les concessions minières au Mali. En fait, le syndic prétend que Azco détient les actions et les bons de souscription de Sanou qui font partie à bon droit de l'actif du failli et que Azco est en mesure de les lui transférer si le tribunal de faillite l'exige.

43 Comme je l'ai mentionné, on ne peut pas sérieusement prétendre que le tribunal de faillite n'a pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. De façon plus étroite,

defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

la question est de savoir si le tribunal de faillite n'a pas compétence (i) parce que l'appelante est à juste titre considérée comme une « étrangère à la faillite » ou (ii) parce que le tribunal de faillite ne peut pas accorder la réparation que le syndic sollicite.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

(i) L'appelante est-elle une « étrangère à la faillite »?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

Si un défendeur potentiel est un « étranger » à la faillite, il se peut que le tribunal de faillite n'ait pas compétence sur l'objet du litige (parce que celui-ci ne fait pas partie de la faillite) même si l'« étranger » réside dans le ressort du tribunal.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for US$3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

Au moment de la requête en recouvrement présentée par le syndic, l'appelante n'avait déposé aucune preuve de réclamation dans le cadre de la faillite. Elle semble avoir adopté une « attitude attentiste », c'est-à-dire qu'elle entendait déposer une réclamation seulement si le syndic déposait une demande contre elle. Le syndic *a* finalement *déposé* une demande contre elle, dans sa requête en recouvrement du 18 janvier 1999, et l'appelante lui *a donné avis* de sa demande reconventionnelle dans sa requête du 24 février 1999, et notamment du fait qu'elle détenait des billets à ordre d'une valeur de 3 844 858 $US signés par le failli et payables sur demande, lesquels constituaient des obligations éventuelles dont le syndic avait hérité.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

Dans l'arrêt *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, rendu simultanément, nous avons confirmé la décision de la Cour fédérale du Canada de statuer sur les demandes des titulaires de privilèges maritimes grevant un navire dont le propriétaire avait été déclaré failli après la saisie du navire, mais avant qu'il soit statué sur l'action réelle. Nous avons conclu que la Cour fédérale n'avait pas perdu compétence sur l'objet du litige à la suite de la faillite du propriétaire du navire. Nous avons statué que la Cour fédérale *aurait pu* surseoir à l'instance par déférence envers le tribunal de faillite, mais qu'elle n'était pas obligée d'y surseoir dans les circonstances.

The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

La question en litige en l'espèce est quelque peu différente. L'appelante conteste une demande du syndic de faillite et menace de présenter contre l'actif du failli une demande reconventionnelle fondée sur la même série de contrats commerciaux. L'appelante a sollicité uniquement le renvoi de l'instance à une autre division du tribunal de faillite au Canada. 47

In *Re Morris Lofsky*, *supra*, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

Dans l'arrêt *Re Morris Lofsky*, précité, la Cour d'appel de l'Ontario s'est penchée sur une affaire dans laquelle le syndic avait sollicité un jugement déclaratoire portant que la cession d'une automobile du failli à son épouse était frauduleuse et inopposable au syndic et que cette automobile faisait partie des biens du failli. L'épouse a contesté la demande en faisant valoir que l'automobile n'avait jamais appartenu au failli (même si elle était immatriculée au nom de ce dernier). À la page 169, le juge Roach a conclu que l'épouse était une étrangère à la faillite : 48

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

> [TRADUCTION] J'estime qu'on doit conclure que la question en litige entre le syndic et l'appelante n'est pas une affaire de faillite, mais bien une pure affaire de propriété et de droits civils. Elle ne comporte aucun élément susceptible d'en faire une affaire de faillite. Elle ne soulève aucune question opposant débiteur et créancier dans la répartition de l'actif du failli. L'appelante ne revendique pas le titre de l'automobile par l'entremise du failli. En effet, elle affirme que le failli n'a jamais détenu le titre et qu'elle en a toujours été la propriétaire. Je ne peux voir aucun aspect de la question qui lui conférerait la nature d'une affaire de faillite sauf, peut-être, le fait que le failli a fait immatriculer le véhicule au nom de l'appelante au cours de la faillite. Cette immatriculation ne transforme pas la question en affaire de faillite, la seule question se posant étant de savoir qui, du failli ou de l'appelante, a toujours été le véritable propriétaire.

See also *Re Reynolds*, *supra*, at p. 131.

Voir également l'arrêt *Re Reynolds*, précité, p. 131.

On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the

Dans le dossier qui nous est soumis, toutefois, l'appelante plaide qu'elle est la créancière la plus importante de l'actif du failli et qu'elle déposera « assurément » une demande reconventionnelle en réponse à la requête du syndic. Pour sa part, le syndic considère l'appelante comme la débitrice la plus importante de l'actif du failli. Loin d'être une 49 most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

50 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. In *Sigurdson*, *supra*, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Re Ireland*, *supra*.

51 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

> The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

« étrangère » à la faillite, Azco en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice.

(ii) Le tribunal de faillite a-t-il compétence pour accorder la réparation sollicitée par le syndic?

Il est bien établi que le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat. Sa compétence et son pouvoir de réparation se limitent à ce que prévoit la Loi. Dans *Sigurdson*, précité, le syndic de faillite avait poursuivi deux anciens administrateurs du failli pour fraude devant la Cour suprême de la Colombie-Britannique. Dans une partie de ses motifs portant sur un autre point, la Cour d'appel a fait remarquer que si le syndic avait intenté sa poursuite devant le tribunal de faillite, [TRADUCTION] « il se serait trouvé devant le mauvais tribunal » car « [i]l doit s'adresser aux tribunaux civils ordinaires pour engager une poursuite en dommages-intérêts » (p. 102). Voir également *Re Ireland*, précité.

Je suis toutefois d'avis qu'on ne peut pas, en l'espèce, qualifier la demande du syndic de simple demande en dommages-intérêts, même s'il a tenté de déterminer la valeur pécuniaire des actions qui, selon lui, reviennent à l'actif du failli et que l'appelante retient sans droit. Je ne pense pas qu'il soit interdit au tribunal de faillite d'envisager une ordonnance dans laquelle de l'argent serait substitué au bien revendiqué, lorsque celui-ci ne peut être remis. Il faut rappeler que le syndic réclame essentiellement 125 000 actions de Azco même, plus 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il prétend contrôlée entièrement par l'appelante. La requête du syndic dit ce qui suit, au par. 65 :

> [TRADUCTION] La société débitrice a également droit aux 3 500 000 actions et aux 4 000 000 bons de souscription de Sanou, conformément au contrat, comme l'a reconnu l'intimée elle-même dans son rapport annuel destiné à la *Securities and Exchange Commission* des États-Unis pour l'exercice financier se terminant le 30 juin 1997, déposé comme pièce R-24;

As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

> [TRANSLATION] It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Re Galaxy Interiors*, *supra*, *per* Houlden J., at p. 144; *Mancini*, *supra*, *per* Catzman J., at pp. 250-51; *Re Atlas Lumber*, *supra*, *per* Rinfret J., at p. 234.

It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

Quant aux actions de Azco, le syndic déclare au par. 101 de sa requête qu'il réclame [TRADUCTION] « 125 000 actions de Azco Mining Corporation qui avaient une valeur de 2,70 $CAN l'action ». 52

Il est tout aussi important de noter que l'appelante reconnaît que l'action intentée contre elle vise essentiellement la remise des actions et déclare ce qui suit au par. 25 de son mémoire : 53

> Il semble que le recours du syndic est une action réelle plutôt qu'une action personnelle puisque le syndic cherche principalement à se faire reconnaître des droits sur 125 000 actions d'Azco et 3 500 000 actions et 4 000 000 bons de souscription de la compagnie Sanou (voir notamment les paragraphes 95, 98, 99 et 102 de la requête du syndic).

Malgré l'emploi de termes qui laissent perplexe dans la requête du syndic, les parties semblent donc s'entendre pour dire que la demande du syndic doit essentiellement être qualifiée de demande de recouvrement de biens précis du failli que l'appelante retient sans droit. Par conséquent, le syndic a le droit de réclamer les actions et les bons de souscription (par. 17(1)) et, avec la permission des inspecteurs (qu'il a obtenue), d'intenter une procédure judiciaire se rapportant à ces biens devant le tribunal de faillite (al. 30(1)*d*)). En invoquant ces dispositions législatives et les réparations qu'elles prévoient, le syndic situe manifestement sa réclamation dans le cadre de la Loi. Voir *Re Galaxy Interiors*, précité, le juge Houlden, p. 144; *Mancini*, précité, le juge Catzman, p. 250-251; *Re Atlas Lumber*, précité, le juge Rinfret, p. 234. 54

Lorsque les faits seront connus et que la position des parties sur les questions en litige seront précisées, il incombera au tribunal de faillite de Hull d'examiner la requête en recouvrement de biens pour déterminer si un élément particulier des diverses demandes du syndic échappe à sa compétence. Pour le moment, il suffit de conclure que la demande du syndic se rapporte essentiellement à la faillite, pour les motifs que j'ai déjà exposés. Dans l'état actuel du dossier (il s'agit d'une requête préliminaire), nous ne pouvons aller plus loin. 55

5. *Even if Fully Clothed with Jurisdiction to Hear This Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?*

56 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district or division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

57 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, *supra*, released concurrently.

58 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (Que. Sup. Ct.), and *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (Que. Sup. Ct.).

59 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Civil Code of Québec* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040 (Sup. Ct.), and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

5. *Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?*

Le tribunal peut, (i) s'il est convaincu que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division des faillites ou (ii) pour « un autre motif suffisant », renvoyer « des procédures » en cours devant lui à l'autre district ou division de faillite (par. 187(7)).

Le paragraphe 187(7) établit une méthode pour renvoyer des procédures entre différents tribunaux de faillite au Canada. On verra plus loin que ce paragraphe soulève des questions différentes de la situation internationale particulière en cause dans *Holt Cargo Systems*, précité, rendu simultanément.

Le juge des requêtes a exercé son pouvoir discrétionnaire en refusant d'ordonner le renvoi en l'espèce. L'appelante doit donc démontrer que cette décision est entachée d'une erreur de droit ou de principe ou de l'omission de prendre en considération un élément prépondérant : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588. Les décisions *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (C.S. Qué.), et *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (C.S. Qué.), ont reconnu la portée de ce pouvoir discrétionnaire en matière de faillite.

L'appelante affirme que les cours d'instance inférieure ont commis une erreur, tant sur le plan du droit que sur celui des principes. Selon l'appelante, elles ont commis une erreur de droit parce que l'art. 3148 du *Code civil du Québec* obligeait le tribunal de faillite à se déclarer incompétent vu les clauses « d'élection de for ». Par ailleurs, elles ont commis une erreur de principe parce qu'il n'existe aucun lien important entre le litige et la province de Québec. À cet égard, l'appelante invoque les décisions *Bourque Consumer Electronics (Syndic de)*, J.E. 91-1040 (C.S.), et *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897.

(i) Choice of Forum Clause

The appellant's point is that the applicable rules are found in the *Civil Code of Québec*, and in particular art. 3148 which provides in part that:

. . . a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management services agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold & Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

As to the legal issue, the question is whether arts. 3148 or 3135 of the *Civil Code of Québec* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Civil Code of Québec*. But this is incorrect. Resort is to be had to the provincial rules only "[i]n cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Civil Code of Québec*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Civil Code of Québec*

(i) La clause d'élection de for

60 L'appelante tente de démontrer que les règles applicables se trouvent dans le *Code civil du Québec*, notamment à l'art. 3148, qui prévoit en partie que :

. . . les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

61 L'argument fondé sur l'élection de for est malheureusement mal fondé, tant en fait qu'en droit. Pour ce qui est des faits, les seuls contrats pertinents sont ceux auxquels Eagle était partie. La clause 28 figurant au contrat de financement du 7 juin 1996 et la clause 20 du contrat de services de gestion ne constituent rien de plus que l'expression du choix des lois applicables. Les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Le sens de la clause 17 du contrat d'emprunt sous forme de débenture de la West African Gold & Exploration S.A. conclu le 9 août 1996 est moins clair, mais, comme Azco n'y était pas partie et ne peut donc pas être poursuivie en vertu de ce contrat, ses stipulations ne sont pas pertinentes.

62 Pour ce qui est du droit, il s'agit de savoir si les art. 3148 ou 3135 du *Code civil du Québec* s'appliquent de quelque manière à la présente instance. Ces dispositions ne trouvent application dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les présentes règles » (*Règles générales sur la faillite et l'insolvabilité*, art. 3). Le paragraphe 187(7) prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district, ce que l'appelante n'a pas soutenu, ou pour « un autre motif suffisant ». L'appelante prétend qu'il faut « préciser » ces mots de portée générale au moyen des dispositions plus particulières du *Code civil du Québec*. Mais, cela est inexact. Il faut recourir aux règles provinciales seulement « [d]ans les cas non prévus ». En l'espèce, le cas est prévu. On ne peut donc pas faire appel aux dispositions particulières

applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

du *Code civil du Québec*. Cette interprétation de l'art. 3 est non seulement inévitable, mais souhaitable. Le *Code civil du Québec* s'applique à un vaste éventail de matières. Lorsque le par. 187(7) parle de « motif suffisant », il le fait dans le contexte particulier de la faillite.

63 Leaving aside, then, the inapplicable directives of the *Civil Code of Québec*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), *per* Huddart J.A., at p. 153 (leave to appeal refused, [1997] 2 S.C.R. xiv); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Gen. Div.), aff'd (1992), 9 O.R. (3d) 755 (C.A.) (leave to appeal refused, [1992] 3 S.C.R. v); *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S.C.A.).

Il faut donc laisser de côté la prescription inapplicable du *Code civil du Québec* et se poser la question de savoir si une clause d'élection de for constituerait un « motif suffisant » au sens du par. 187(7), de sorte que le juge des requêtes aurait commis une erreur de droit en ne lui donnant pas effet dans les circonstances. D'après moi, un juge des requêtes devrait examiner avec soin une clause d'élection de for (lorsqu'il en existe réellement une), mais il n'est pas lié par une telle clause : J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 262-263. Voir *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), le juge Huddart, p. 153, autorisation de pourvoi refusée, [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (C.A. Alb.), le juge Kerans, p. 381; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Div. gén.), conf. par (1992), 9 O.R. (3d) 755 (C.A.), autorisation de pourvoi refusée, [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (C.A.N.-É.).

(ii) Public Policy Considerations

(ii) Considérations d'intérêt public

64 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).

Il serait possible de prétendre que le principe d'intérêt public favorisant le « contrôle unique » des instances en matière de faillite et s'opposant à leur fragmentation commande qu'on attribue moins de poids à une clause d'élection de for en matière de faillite que dans le contexte des litiges commerciaux ordinaires : *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), conf. par 240 F.3d 148 (2d Cir. 2001).

65 In *Re Moratorium Act*, *supra*, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

Dans l'arrêt *Re Moratorium Act*, précité, le juge Rand a parlé des objectifs d'« ordre public » importants des dispositions législatives en matière de faillite, à la p. 46 :

> To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may

> [TRADUCTION] À cette procédure peuvent se rattacher non seulement la stigmatisation de la personne mais des

result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120.

In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

> [TRANSLATION] The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.

(*Faillite et insolvabilité* (1992), vol. 1, at p. 48)

The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

contraintes restreignant sa liberté dans ses activités commerciales futures. La réparation pour le débiteur consiste à annuler ses dettes, qui pourraient autrement faire obstacle à sa réadaptation économique et sociale.

Voir aussi *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109, p. 120.

66 Dans son traité sur la faillite, le professeur Albert Bohémier dit ce qui suit au sujet de l'objectif de la Loi :

> La *Loi sur la faillite* a pour but de protéger le débiteur, ses créanciers et l'intérêt public. Ces objectifs ont toujours été présents, mais avec une intensité variable. On peut affirmer sans craindre de se tromper que plus une société favorise le crédit et donc l'endettement, plus la législation aura tendance à faire primer le souci d'atténuer le sort des débiteurs honnêtes et infortunés. Un régime qui repose sur l'endettement doit comporter un système auto-régulateur de sorte que les débiteurs défaillants puissent éventuellement être réintégrés dans le système et redevenir des éléments productifs.

(*Faillite et insolvabilité* (1992), vol. 1, p. 48)

67 En cas de conflit, on pourrait s'attendre à ce que la mise en œuvre de ces principes d'intérêt public ait priorité sur les conventions privées d'élection de for, comme l'a effectivement conclu le juge Robert de la Cour d'appel du Québec. Une opinion semblable est exprimée dans I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 47, note 73 :

> [TRADUCTION] [L]es arrangements contractuels privés entre les parties ne peuvent avoir préséance sur l'exercice de la compétence en matière de faillite, qui est du domaine de l'ordre public et sert une plus vaste gamme d'intérêts y compris, en bout de ligne, ceux de la société dans son ensemble.

Il existe toutefois aux États-Unis un courant jurisprudentiel contraire portant que, règle générale, un syndic de faillite qui engage un recours fondé sur une convention comportant une clause d'élection de for devrait être lié par cette clause dans la même mesure que les parties qui l'ont stipulée : voir *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), et *Hays and Co. c. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

68 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

Selon moi, pour les motifs déjà exposés, la clause d'élection de for constituerait un facteur important pour l'application du par. 187(7), mais il ne serait pas déterminant dans le contexte des principes d'intérêt public exprimés dans la Loi.

69 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against *Amchem*, *supra*, and public interest factors within the framework of s. 187(7) of the Act.

Vu ma conclusion que l'appelante ne bénéficie pas d'une clause d'élection de for en l'espèce, il n'y a pas lieu que j'entreprenne l'examen de la question de savoir s'il y a ici conflit entre le choix privé et l'intérêt public et, le cas échéant, quel poids doit être accordé à l'élection de for en regard des facteurs d'intérêt public énoncés dans *Amchem*, précité, dans le cadre du par. 187(7) de la Loi.

70 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

En bout de ligne, l'appelante est incapable de démontrer que le juge des requêtes a commis une erreur de droit en refusant de renvoyer l'instance à Vancouver.

(iii) Error of Principle

(iii) L'erreur de principe

71 The appellant, relying on *Amchem*, *supra*, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

Se fondant sur l'arrêt *Amchem*, précité, l'appelante prétend que le litige actuel a son lien le plus réel et le plus important avec la Colombie-Britannique et que le juge des requêtes a commis une erreur de principe en ne prenant pas en considération certains facteurs pertinents pour tirer la conclusion inverse.

72 Again, with respect, I do not think this position is sustainable on the law or the facts.

Encore une fois, j'estime que cette position est indéfendable en fait et en droit.

73 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, *supra*, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

En premier lieu, comme je l'ai déjà dit, il faut appliquer en l'espèce la méthode suivie dans l'arrêt *Amchem* en tenant pleinement compte du contexte de la législation canadienne en matière de faillite. Le présent pourvoi porte sur l'attribution d'une affaire de faillite particulière à un tribunal à l'intérieur d'un seul régime national de faillite créé par la Loi. Comme le démontre l'arrêt *Holt Cargo Systems*, précité, l'examen de l'attribution d'une affaire comportant différents aspects (p. ex., un aspect de droit maritime et un aspect de droit de la faillite) entre les tribunaux canadiens et les tribunaux étrangers, assujettis à des régimes fort différents, notamment sur le plan législatif, peut soulever divers problèmes.

Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, *supra*, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within

En deuxième lieu, l'arrêt *Amchem* et les arrêts qui l'ont suivi portaient sur des litiges privés. Le présent pourvoi, tout comme cela a été expliqué dans l'arrêt *Holt Cargo Systems*, précité, comporte l'aspect important de l'intérêt public mentionné précédemment. Notre Cour ne peut s'en tenir seulement aux facteurs énoncés dans *Amchem*; elle doit s'efforcer de donner effet à l'intention manifeste du législateur, exprimée dans la Loi, de créer un système national économique et efficace d'administration de l'actif des faillis. 74

Il est dans l'intérêt public de faciliter la résolution rapide des retombées d'un effondrement financier. Comme nous l'avons souligné dans l'arrêt *Holt Cargo Systems*, on ne retrouvait pas ce facteur dans la situation factuelle en cause dans *Amchem*. En fait, il existe des considérations de principe plus fortes en l'espèce que dans l'affaire *Holt Cargo Systems*. Dans cette affaire, il fallait choisir entre, d'une part, une action de droit maritime intentée à Halifax portant sur les réclamations de créanciers *garantis* qui avaient déjà obtenu un jugement par défaut et, d'autre part, l'exercice de sa compétence par la Cour supérieure du Québec siégeant en matière de faillite à la demande du tribunal de faillite de la Belgique, dans une affaire qui en était encore à ses étapes préliminaires. Dans ces circonstances, la Cour fédérale du Canada a refusé d'ordonner la suspension de la procédure de droit maritime et la Cour d'appel fédérale ainsi que notre Cour ont confirmé sa décision discrétionnaire. 75

En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (*Stewart*, précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts. Le législateur a jugé que la preuve des faits visés par la définition de l'expression « localité d'un 76 the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

77 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

78 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual

débiteur » figurant au par. 2(1) établit un lien suffisamment important pour rattacher une instance de faillite à un district ou à une division en particulier. Le syndic de cette localité est chargé de « recouvrer » les biens, et c'est le tribunal de faillite de ce ressort qui contrôle les procédures connexes. La Loi vise l'économie de la liquidation des biens du failli, même au prix de frais additionnels pour les créanciers et les débiteurs.

Le « critère de la pondération » que l'appelante préconise en s'appuyant sur les facteurs énoncés dans *Amchem* et sur les principes généraux du droit international privé ne tient pas compte de ces importants principes d'intérêt public. La Cour supérieure du Québec siégeant en matière de faillite constitue un véritable tribunal national.

Enfin, sur le plan des faits, même si les principes du droit international privé s'appliquaient sans qu'il soit nécessaire de les adapter au contexte de la faillite, il est difficile de discerner quelque lien que ce soit entre le litige et Vancouver, sauf le fait que Eagle a signé certains contrats comportant une clause selon laquelle les lois applicables étaient celles de ce ressort. Les liens entre l'appelante et Vancouver ne sont pas particulièrement étroits. L'appelante a, parmi ses bureaux, une adresse à Vancouver, mais la plupart des activités en cause en l'espèce ont eu lieu à l'extérieur de la Colombie-Britannique. Son employé clé, M. Ryan Modesto, réside aux États-Unis. Le contrat de services de gestion du 12 juin 1996 précise que le siège social de Azco est situé en Arizona. Le communiqué de presse du 17 septembre 1996 par lequel Azco a annoncé ce projet à l'échelle mondiale émanait de l'Arizona. De plus, l'appelante n'a aucun avantage sur le plan juridique à exercer ses recours en vertu du même régime de faillite à Vancouver plutôt qu'à Hull. Dans un cas comme dans l'autre, les lois de la Colombie-Britannique peuvent être appliquées. Il serait peut-être légèrement plus commode pour l'appelante et pour certains de ses témoins que l'affaire soit entendue à Vancouver, mais c'est tout ce qu'on peut dire en faveur de ce lieu. De son côté, le syndic se plaint du fait que si le pourvoi est accueilli, il sera obligé, suivant le même raisonnement, d'intenter d'autres actions (sans lien avec Azco) à Chicoutimi, support for his decision to retain the case in Hull.

I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart*, *supra*, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

I would dismiss the appeal with costs.

Toronto, Halifax, Winnipeg, Charlottetown et Calgary. De nombreux faits étayent la décision du juge de première instance de poursuivre l'instance à Hull.

79 Je ne veux toutefois pas que mes motifs soient interprétés comme rendant impossible toute application du par. 187(7). Les faits de l'espèce ne font pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique, mais il peut évidemment surgir d'autres affaires dans lesquelles le renvoi sera justifiable. Même dans l'arrêt *Stewart*, précité, qui a établi le paradigme du « contrôle unique », le juge Anglin a pris la peine de dire que l'affaire aurait probablement dû être entendue à l'Île-du-Prince-Édouard. Le problème des parties demanderesses dans cette affaire tenait au fait qu'elles n'avaient pas demandé l'autorisation du tribunal de la Colombie-Britannique avant d'introduire l'instance à l'Île-du-Prince-Édouard. Juste avant le passage sur le « contrôle unique » déjà cité, le juge Anglin a affirmé ceci (à la p. 349) :

> [TRADUCTION] Je refuse de tenir pour acquis que la Cour suprême de la Colombie-Britannique ne rendra pas d'ordonnance de renvoi, précédée ou accompagnée de l'autorisation requise par l'art. 22, s'il lui est démontré — comme cela semblerait être le cas d'après les éléments qui nous ont été soumis — qu'il est possible d'instruire plus efficacement à l'Île-du-Prince-Édouard les questions portant sur l'existence de la fiducie alléguée par la partie demanderesse et sur l'affectation de certains biens détenus par le liquidateur à titre de biens de la fiducie.

Pour sa part, le juge Brodeur a dit ce qui suit (à la p. 352) :

> [TRADUCTION] Il me semble que l'intérêt de la justice serait mieux servi en l'espèce si les tribunaux de l'Île-du-Prince-Édouard statuaient sur la question soulevée en l'instance. Toutefois, il incombait aux parties intimées d'obtenir l'autorisation de la cour de la Colombie-Britannique, et elles ne l'ont pas obtenue.

80 Le fait est que Azco devait démontrer l'existence d'un « motif suffisant » à la lumière des faits de la *présente* affaire et elle n'y est pas parvenue.

V. Conclusion

81 Je suis d'avis de rejeter le pourvoi avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman Elliott, Montréal.

Solicitors for the respondent: Gervais & Gervais, Montréal.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Stikeman Elliott, Montréal.

Procureurs de l'intimée : Gervais & Gervais, Montréal.

Tab 12

Court of King's Bench of Alberta

Citation: Blade Energy Services Corp (Re), 2024 ABKB 100

Date: 20240221
Dockets: B301 037330; B301 037334
B301 037338; B301 037340
Registry: Calgary

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037330

Between:

FTI Consulting Canada Inc

Applicant

- and -

Blade Energy Services Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037334

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Energy Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037338

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Holdings GP Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037340

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Royalties Limited Partnership

Respondent

Reasons for Judgment
of
Honourable Justice M. J. Lema

I. Introduction

[1] Is the arrears-triggered disconnection (or lockout) of a gas producer by a gas-plant operator a continuing remedy and accordingly one stayed under the producer's notice-of-intention proceedings under the *Bankruptcy and Insolvency Act*?

[2] The producer seeks an order declaring that the stay applies and directing reconnection to the gas-gathering system and processing of its production on certain payment terms.

[3] The operator characterizes the lockout as a completed step and thus, not offside the *BIA* stay. Alternatively, if the stay applies and reconnection follows, the operator seeks going-forward terms including immediate payment, a critical-supplier's charge, and payment of some of the existing arrears.

[4] I find that the lockout was a continuing remedy, that it was stayed when the *BIA* notice of intention was filed, that reconnection is required, and that, with the stay not applying to any post-NOI arrears that may accrue, the parties' existing agreements will govern future services and payments for them i.e., without the Court setting such terms.

II. Background

[5] Razor and Conifer are oil and gas producers. Conifer is also the operator of a gas plant in the South Swan Hills area in which both are producing natural gas.

[6] Per Conifer, Razor owes approximately $8 million to it, relating in part to processing-charge and capital-cost shortfalls. Razor disputes that figure.

[7] After long-running attempts to negotiate the clearance of those arrears, Conifer notified Razor that, relying on a right in their operating-procedure agreement, it intended to disconnect Razor from the gas-gathering system if it did not clear its arrears or agree to a satisfactory payment arrangement.

[8] Neither happened, eventually leading to Conifer disconnecting Razor from the system, Razor shortly afterwards filing a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*, and the current debate over the scope of the resulting stay and its impact (if any) on the lockout.

III. Issues

[9] The first issue is whether the lockout constitutes a continuing debt-collection remedy. If so, it is stayed by the *BIA* stay. The second is the appropriate remedy in such case. Assuming it includes reconnection, the third is on what term(s) should future services be provided by Conifer.

IV. Analysis

A. Stay provision

[10] Here is the applicable *BIA* provision (para 69(1)(a)):

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6 [none of which apply here, at least not currently], on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has **any remedy** against the insolvent person or the insolvent person's property, or shall commence or continue **any** action, execution or **other proceedings**, for the recovery of a claim provable in bankruptcy[.] [emphasis added]

[11] Conifer did not argue, and it could not plausibly have argued, that Razor is not an insolvent person, that a notice of intention has not been filed, or that its claim for contractual amounts owing by Razor through to the lockout is not a claim provable in bankruptcy i.e. would not fall within the scope of s 121 *BIA* if a bankruptcy had occurred on the NOI filing date.

[12] Leaving the questions of whether the lockout constitutes a remedy or other proceeding (or both) and, if so, whether the stay captures the lockout when it occurred before the NOI was filed.

[13] I start by examining the scope of the key terms here.

B. Broad scope of “remedy” and “other proceedings”

[14] The scope of “remedy” and “other proceedings” is broad, including both judicial and extrajudicial debt-collection steps. Per ***Vachon v Canada Employment and Immigration Commission***, [1985] 2 SCR 417:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", **giving to it and to the words "*autres procédures*" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black’s Law Dictionary* (5th ed. 1979), defines "remedy":
>
> > The **means by which a right is enforced** or the violation of a right is prevented, redressed, or compensated.
>
> and below:
>
> > Remedy means **any remedial right** to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt’s Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
> > **the means by which the violation of a right is prevented, redressed, or compensated**. Remedies are of four kinds: (1) by act of the party injured . . .; (2) by operation of law . . .; (3) **by agreement between the parties** ...; (4) by judicial remedy, *e.g.* action or suit. **The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.**
>
> The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act* **very broadly**.
>
> [discussion of cases involving distress for unpaid municipal taxes, incomplete seizures, and bids to cut off utilities].
>
> This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion **the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.**

> As Houlden and Morawetz wrote in *Bankruptcy Law of Canada*, vol. 1, p. F-70.1, under s. 49 of the *Bankruptcy Act*:
>
> > **An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.**
>
> The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that **the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.**
>
> Accordingly, I consider that s. 49(1) of the *Bankruptcy Act* is sufficiently broad to include recovery by retention from subsequent [unemployment-insurance] benefits, such as the recovery at issue here. [paras 21-31] [emphasis added]

[15] Recall as well that para 69(1)(a) refers to "**any** remedy" and "**any** … other proceedings", without any limitation to legal remedies or proceedings.

[16] Further examples of extrajudicial steps found to constitute "remedies" or "proceedings" include:

- **setting off** current payments (for coal deliveries) against pre-existing arrears: ***Quintette Coal Ltd v Nippon Steel Corp***, 1990 CanLII 430 (BCCA), found to fall within the scope of a s 11 *CCAA* stay of "proceedings" (see paragraph beginning "Quintette continued to make coal deliveries …" and paragraphs from that beginning with "It is evident from the above that …" .. up to and including that beginning with "As Thackray, J. has not been shown to have erred …"]
- "**sweeping [the debtor's] operating account** and **[capping]** the amount available to [the debtor] [under a **revolving credit facility**]: ***Heritage Flooring BIA Proposal (Re)***, 2004 NBQB 168 (para 82);
- **distraining** for unpaid rent: ***Ford Credit Canada Ltd v Crosbie Realty Ltd***, 1992 CanLII 7132 (NLCA) (paras 21-26) and ***Durham Sports Barn Inc (bankruptcy proposal)***, 2020 ONSC 5938 (42-49);
- **registering a caveat** as a prelude to enforcing a condominium levy: ***Condominium Plan No 78R15349 v Fayad***, 2001 SKQB 104 (paras 23 and 24); and
- seeking an **injunction to enforce continued business operations** in leased premises: ***Golden Griddle Corp v Fort Erie Truck & Travel Plaza Inc***, 2005 CanLII 81263 (ONSC) (paras 11-15).

[17] The focus of such steps is collection or attempted collection of existing indebtedness i.e. "remedies" or "other proceedings" for the "recovery of claims provable in bankruptcy."

[18] By contrast, **terminating an agreement** was found to fall outside the scope of s. 69: ***Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd***, 2010 BCCA 469 (paras 20, 28

and 29). For the same (outside scope of s 69) treatment of **contract termination**, see also ***Hutchingame Growth Capital Corporation v Independent Electricity System Operator***, 2020 ONCA 430 (paras 32-26) (leave denied: 2021 CanLII 2823 (SCC)). Examples of the same treatment in a landlord-tenant context include ***Peel Housing Corp v Siewnarine***, 2008 CanLII 31815 (ONSC DC) (paras 12-26) and ***BCIMC Realty Corporation v Fernandes***, 2021 CanLII 140640 (ON LTB) (determinations 1-7).

[19] The distinction with termination is the focus on ending the commercial relationship, not on recovery of outstanding arrears.

[20] I note that Conifer does not argue that the agreement in question has terminated, whether because of Razor's defaults or otherwise.

[21] Other "outside scope" examples noted in ***Canadian Petcetera*** are seeking *Criminal Code* **compensation orders**, pursuing a **contempt order**, or **enforcing post-bankruptcy indebtedness** (paras 30 and 31), all found not to involve claims provable in the insolvency proceeding. (I discuss the latter aspect later, with "post-bankruptcy" translated to "post-NOI".)

C. Purpose of stay

[22] ***Golden Griddle*** (cited above) accurately describes the purpose of staying such remedies and proceedings in a proposal setting:

> While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, **giving**, in the words of E.B. Leonard and K.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 – Stays of Proceedings, under the *Bankruptcy and Insolvency Act"* (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."**
>
> A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the **impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed**, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.
>
> The nature of the injunctive relief sought here is to restrain the defendants from operating a restaurant other than a Golden Griddle and a convenience store other than a Nicholby's, and to restrain the defendants from terminating the lease arrangements. It is, in a sense, a **mandatory injunction that is sought to continue to have the defendants operate the outlets as a Golden Griddle restaurant and as a Nicholby's**. To operate as a Golden Griddle restaurant

> requires compliance by the defendants with the franchise agreement provisions such as meeting certain standards and operating procedures, selling only approved products and services, purchasing food products and supplies from designated suppliers and maintaining adequate inventory and adequately trained personnel.
>
> **To enforce such provisions during the proposal period, in my view, would be a remedy which would interfere with the "breathing space" that section 69(1)(a) was meant to create, and, could have implications for and could impair the debtor's ability to restructure and put forth a proposal.**
>
> I, therefore find that the **nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of section 69(1)(a) and is, therefore, stayed**. [paras 11-15] [emphasis added]

D. Nature of lockout per Conifer

[23] Conifer itself recognizes the remedial nature of its lockout step. Per the February 15, 2024 Affidavit of its deponent (Heather Wilkins – Conifer's VP Finance):

> On or around December 23, 2023, **after multiple attempts to get Razor to address its arrears**, Conifer exercised its rights under section 602(b)(ii) of the [Construction, Ownership and Operation Agreement], and **stopped receiving and processing Razor's gas by physically closing and locking valves** at 16 separate points within the South Swan Hills Gas Gathering System **on the basis of close to $8 million in unpaid arrears**. [para 8]
>
> Conifer has not received any payments and **no further enforcement steps** were taken following the disconnecting of services. [para 9]
>
> **Due to Razor's unwillingness to address its obligations**, on or about November 2, 2023, conifer notified Razor that Conifer would **revoke Razor's privileges and disconnect services** at the Judy Creek Gas Plant in seven days … **if Razor failed to remedy its arrears and bring its account into good standing.** … [para 28]
>
> … Conifer reiterated that **it would disconnect Razor's Services within seven days if Razor did not implement a monthly payment plan to bring its account into good standing**. [para 31]
>
> On December 20, 2023, Conifer wrote … to Razor that [a certain] proposal was not acceptable, and that **Conifer would follow through with Service Disconnection if Conifer did not receive at least $2.5 million to pay towards Razor's arrears** by December 22, 2023. … [para 34]
>
> On December 29, 2023 …, Conifer completed the Fuel Disconnection. At that time, **service to Razor's South Swan Hills Unit assets was completely disconnected from the fuel supply at the Judy Creek Gas Plant** with the exception of one generator running for building heat and pipeline tracers to preserve infrastructure integrity. [para 42]

> I confirm that **Conifer has taken no further steps to enforce payment of Razor's arrears since the Fuel Disconnection** on December 29, 2023. [emphasis added]

[24] Conifer did not argue that its exercise of the described disconnection step, one its contractual rights under the agreement in question with Razor (and other parties), was not a "remedy" or "other proceeding" within the meaning of para 69(1)(a).

[25] Nor could it plausibly have done so, given the above-described breadth of the provision and the clearly acknowledged use of the lockout right to recover, or try to recover, Razor's arrears. Per ***Vachon***, this was undoubtedly "[a] kind of attempt at recovery, judicial or extrajudicial" of amounts qualifying as a "provable claim in bankruptcy."

[26] By invoking the lockout provision of its agreement with Razor (and others), Conifer was attempting to extract payment from Razor of the approximately $8 million in arrears claimed by Conifer (not all of which are acknowledged by Razor) or some subset satisfactory to Conifer and accompanied by a satisfactory payment arrangement for the balance.

[27] As was acknowledged by Conifer's counsel in the bolded passages below:

> … Conifer is preserving the *status quo*, which as of the date of Disconnection means **no further Services will be provided without the substantial past accounts being paid or satisfactory arrangements being reached.**
>
> The key question in determining this [legitimacy-of-disconnection] issue is whether or not Conifer **already exercised its rights** prior to Razor filing its NOI. If it has, the issue is moot; **Conifer cannot breach the stay for an action taken prior to the existence of the Stay**, which was only triggered by the filing of the NOI.
>
> Conifer agrees that the Stay was created pursuant to section 69(1)(a) of the *BIA*; however, Razor's submissions fail to acknowledge two key points: (1) **the remedy, in this case the Disconnection and cessation of the Services, was exercised on notice and prior to January 30, 2024 when Razor filed the NOI**; and (2) the Disconnection was implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. …
>
> Conifer reasonably exercised its rights by ceasing to provide Services at a loss through implementing the Disconnection when Razor failed to provide a viable plan to address its arrears. **The Disconnection was not a continuing action as characterized by Razor but rather a one-time permanent step** taken in December 2023 resulting from the disconnection at 16 separate points within the South Swan Hills Gas Gathering System. [Conifer brief, paras 12-15] [emphasis added]

[28] As seen here, Conifer is not arguing that its lockout step was not a remedy or other proceeding per para 69(1)(a), instead that the remedy was taken *and completed* before the NOI was filed and, having no ongoing effect, is thus beyond the reach of the NOI-triggered stay. (It also anchors the lockout in the anticipated avoidance of further losses, which I discuss later.)

[29] It is common ground that the lockout occurred, or at least began, before the NOI was filed.

[30] It is also common ground that the para 69(1)(a) stay does not have retroactive effect, in the sense of undoing completed steps. For instance, the stay did not reach back to undo Conifer's accomplished set-offs (pre-NOI) of amounts owing to Razor against the latter's debts to Conifer. Same if Conifer had obtained a judgment against Razor, obtained proceeds from execution, and applied them to Razor's debts. Or Conifer had otherwise taken and completed a collection step before the NOI was filed.

[31] It is also common ground, or at least cannot be disputed, that para 69(1)(a) captures, and stays, both the commencement *and continuation* of proceedings to recover provable claims. (Per ***Vachon***, "remedies" and "other proceedings" are effectively synonymous, at least in the case of extrajudicial recovery steps i.e. the bar on commencing or continuing "other remedies" is equally a bar on commencing or continuing extrajudicial "remedies" generally.)

[32] Was the lockout here a completed remedy?

E. Lockout a continuing remedy

[33] The answer is no: it was an ongoing (i.e. continuing) remedy.

[34] Despite Conifer's characterization of the lockout as a "one-time permanent step", it was anything but. Per Conifer's counsel's February 6, 2024 letter to Razor:

> **Should Razor desire access** to the Judy Creek Facility, **Razor must make acceptable provisions to address its arrears** and provide pre-payment for all costs associated with obtaining access to the facility, fuel gas and processing costs going forward. We have been advised by Conifer that **should an acceptable arrangement be met, … it would take approximately 3 business days for its to reinstate production for Razor**. [emphasis added]

[35] That paragraph reflects the true nature of the lockout: a reversible step designed to stay in place until Razor cleared or otherwise addressed its pre-NOI debt to Conifer's satisfaction.

[36] It was the very ongoing effect of the lockout – daily preventing Razor from producing from the field(s) in question – that constituted Conifer's (contractually-permitted) leverage here.

[37] This was not a completed step i.e. a *former* remedy no longer providing leverage or pressure to pay.

[38] It was a continuing step, creating ongoing leverage and resulting in or contributing to Razor's decision to pursue a *BIA* proposal, starting with filing a NOI and triggering the para 69(1)(a) stay of proceedings.

[39] How can the lockout fairly be regarded as a completed remedy, having no ongoing effect, when its express purpose – clearance of Razor's arrears or at least some portion (with a satisfactory payment arrangement for the balance) – was not achieved to any degree? And when (per the quoted letter) Conifer stood ready to reverse the lockout i.e. following a hoped-for clearance of Razor's arrears or a subset with a satisfactory payment arrangement for the balance? And until that happened, Conifer continued the lockout?

[40] The lockout is functionally equivalent to a judgment creditor seizing and removing the judgment debtor's key equipment and advising that will restore the equipment if the judgment debt is cleared in full or satisfactory payment arrangements are made.

[41] The common feature is a creditor step interrupting the debtor's business operations, designed to pressure the debtor to clear or arrange to clear the debt.

[42] In both cases the genesis of the pressure is a legal right i.e. a contractual right in the first case and a judgment-enforcement right in the second.

[43] The question is not whether the creditor has the given right or whether it was appropriate to exercise it.

[44] It is whether the remedy pursued was completed (in which case the stay does not reach it) versus being an ongoing step (in which case it does), with the *BIA* aiming to quell such creditor actions pending (at minimum) preparation and circulation of a proposal.

[45] I return to this point after examining two other arguments from Conifer defending its lockout step.

F. Continuing lockout not a permissible status quo

[46] Conifer argued that continuing the lockout after post-NOI simply maintained the pre-NOI status quo.

[47] But that ignores para 69(1)(a)'s bar on commencing *or continuing* debt-collection steps. Given that bar, an in-progress collection action cannot be the status quo to be preserved. Otherwise, the only question would be whether the collection action had started pre-NOI. If that were right, any already-started collection action would be permitted to continue e.g. an ongoing effort to seize the debtor's property via writ, an in-progress auction to sell seized property, a garnishment continuing to attach a periodic receivable, and so on.

[48] But (as explained earlier) para 69(1)(a) shuts down in-progress collection actions, leaving no room for preservation of a "continuing action status quo."

[49] For an example of status-quo-maintaining step not breaching a *BIA* stay, see ***BNS v Avramenko***, 2020 SKQB 54 (Elson J.), where an unsecured creditor sought to renew its judgment despite the bankruptcy of the debtor:

> I am compelled to add, perhaps in *obiter*, that I would have granted the renewal [of the unsecured creditor's judgment under SKQB rules], even if the trustee had not been discharged. In my view, and construing s. 69.3(1) purposively**, the stay of proceedings does not apply to steps a judgment creditor takes to <u>preserve</u> a position it already enjoys**. As much as s. 7.1 of *The Limitations Act* and Rule 10-12 contemplate active steps by commencing a proceeding on the judgment, **the reality is that these are steps to preserve a judgment. They are neither new proceedings nor are they steps to execute on the judgment.** To conclude otherwise would be to force a judgment creditor to stand aside while its judgment expires through circumstances that may well be beyond its control. [para 17] [bold emphasis added]

[50] The renewal step so authorized allowed the judgment creditor to continue as such; it did not extend to enforcing the judgment, which would have offended the stay.

[51] Conifer did not point to this kind of status-quo-maintaining step here, only to its ongoing collection action via the lockout.

G. Conifer not a secured creditor in this context

[52] At the application, Conifer's counsel argued that Conifer is a secured creditor of Razor, pointing to a lien and charge provision (s 602(a)) in the operating agreement.

[53] Per that provision, Conifer indeed has a lien and charge "with respect to the **Functional Unit Participation** of each Owner in the **Facility** and such Owner's share of Facility Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by the Operator for the Joint Account."

[54] "**Functional Unit Participation**" means "with respect to any **Functional Unit**, the percentage interest ownership of each Owner in such Functional Unit as set forth opposite such Owner's name under the Appendix entitled "FACILITY AND FUNCTIONAL UNIT PARTICIPATION"[.]

[55] "**Functional Unit**" means a separate component of the Facility described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC", and all real and personal property of every nature and kind attached to, forming part of or used in connection with the operation thereof"[.]

[56] "**Facility**" means "all real and personal property of every nature and kind attached to, forming part of or use in connection with Joint Operations, maintained and held by Operator in accordance with this Agreement and as described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC"[.]

[57] The lien and charge, focused on Razor's ownership stake in the described oil and gas assets, is not the root of Conifer's lockout right. The latter arises under a separate provision (s 602(b)(ii)) and focuses on denial of one of Razor's "privileges" under the operating agreement.

[58] In any case, Conifer did not argue that its lockout right arises from or is otherwise a feature of the lien and charge.

H. No difference if Conifer secured

[59] Instead, Conifer appeared to argue that its status as a secured creditor (arising from the lien and charge) conferred general immunity from the stay i.e. even if the lockout right is not security-based itself.

[60] However, the stay analysis would remain the same, whether Conifer is a secured creditor "at large" or even if the lockout right itself should be characterized as or stemming from security.

[61] Paragraph 69(1)(a) applies to "creditor[s]" generally, whether secured, preferred, or unsecured.

[62] Subsection 69(2) contains an exception to the stay in para 69(1)(a) for secured creditors; however, it is limited to the following circumstances:

> **(2)** The stays provided by subsection (1) do not apply
>
> > (a) to prevent a **secured creditor who took possession of secured assets of the insolvent person for the purpose of realization** before the notice of intention under section 50.4 was filed from dealing with those assets;
> >
> > (b) to prevent a **secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person** more than ten days before the notice of intention under section 50.4 was filed, **from enforcing that security**, unless the secured creditor consents to the stay; [or]
> >
> > (c) to prevent a **secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security** if the insolvent person has, under subsection 244(2), **consented to the enforcement action**[.]

[63] Conifer did not "[take] possession of secured assets of [Razor]" here or, if it did, did not do so "for the purpose of realization" of such assets. Conifer was exercising its lockout right, not attempting to somehow dispose of that right to others for proceeds.

[64] Neither did Conifer issue a prescribed form notice under ss 244(1) *BIA*. (See *BIA* General Rule 124 and Form 88 for the prescribed form.)

[65] Accordingly, even if characterized as a secured creditor for the purposes of para 69(1)(a), Conifer still falls within its scope, with no ss 69(2) or other secured-creditor exception applying.

I. Conclusion on stay and lockout

[66] For these reasons, I find that the lockout step was a continuing remedy or "other proceeding", that it accordingly fell within the scope of the para 69(1)(a) stay, that continuing that remedy was not a defensible status quo, and that Conifer's actual or possible secured-creditor status makes no difference here.

[67] The net result is that Conifer's lockout step, commenced before the NOI stay began, was a continuing collection remedy and was thus stayed when the NOI was filed.

[68] Conifer's continuation of the lockout since then has been in breach of the stay.

[69] The question becomes: what can and should be done in response?

J. Parties' positions on appropriate response

[70] Per Razor:

> … the appropriate relief , in the circumstances is to cure the breach of the Stay by ordering Conifer to: (i) **permit Razor … to access the Judy Creek Gas Plant**; and (ii**) resume providing Services on terms** that include Conifer continuing its practice of marketing [Razor's] production, setting off the revenue against post-filing amounts, and calling upon $200,000 security if there is a shortfall [as particularized in Razor's counsel's February 1, 2024 letter]

[71] Per Conifer (making alternative submissions i.e. "if Conifer must supply"):

> If this Court holds that Razor's rights under the Ownership Agreement compel Conifer to continue processing and selling their products, then Razor must **pay for those Services up front and in advance.** The *BIA* is clear that a party providing post-filing services may **require immediate payment for those services** and that service providers are not required to advance further money or credit. Specifically, section 65.4(1) states:
>
> > … Nothing in subsections (1) to (3) shall be construed
> >
> > (a) as prohibiting a person from **requiring immediate payment for** goods, **services**, use of leased or licensed property or other valuable consideration provided after the filing of
> >
> > (i) the notice of intention, if one was filed … or
> >
> > (b) as requiring the further advance of money or credit ….
>
> … Forcing Conifer to provide the Services without guaranteeing payment up front is equivalent to forcing Conifer to provide the Services on credit, a requirement that is expressly prohibited under [para] 65.1(4)(b).
>
> As Razor is seeking a declaration [that the stay applies], which is an equitable remedy, this Court must consider the equities of both parties. [bold emphasis added]

[72] Conifer also seeks a "critical suppliers" charge and repayment of some "cure costs" (i.e. some of the pre-NOI arrears, as detailed in paras 29-42 of its brief.

K. Remedies for stay breach

1. Court's power to remedy breach of stay

[73] The *BIA* does not expressly endow the Court with powers to remedy a stay breach.

[74] However, many examples exist of courts granting orders undoing or reversing a stay-breaching action or pulling the proceeds of such actions into the proposal or bankruptcy estate (as applicable): see the cases summarized in 5:289 – Proceedings Taken Without Leave in Bankruptcy and Insolvency Law of Canada, 4th Edition (online edition), which feature remedial orders such as reversing a property seizure, barring further proceeding in offside actions, and turning over garnishment recoveries,

[75] I find that para 69(1)(a) implies a power for the Court to grant such orders i.e. to enforce the stay and, as much as possible, restore the parties to their pre-breach position.

2. Remedy appropriate here

[76] In this case, the stay breach did not generate any proceeds.

[77] The clear remedy for the breach here – continuing an arrears-collection lockout in the face of the stay – is an order directing Conifer to discontinue the lockout i.e. restoring the system connections Razor had before the lockout.

[78] Given Conifer's estimate of "approximately 3 business days" to reconnect Razor, I direct Conifer to perform the reconnection work by 6 pm on Friday, February 23, 2024 or such other deadline as the parties may agree on.

3. Payment terms for future services

[79] The other relief suggested by the parties (alternatively, in Conifer's case) goes to the **terms on which future services are to be provided by Conifer**.

[80] As noted, Razor suggested continuation of the pre-lockout set-off arrangement or situation, bolstered by a $200,000 deposit. Conifer argued in favour of immediate payments, a critical-supplier charge, and payments towards arrears.

[81] I do not see any role for the Court when it comes to the parties' going-forward arrangements.

[82] Paragraph 69(1)(a) focuses on shutting down collection steps on pre-NOI arrears, as reflected in the above order reversing the lockout.

[83] It says nothing about the terms on which services must, should or may be provided going forward.

4. Section 65.1 inapplicable

[84] As noted, Conifer invokes s. 65.1. However, that section does not apply here. Per ss 65.1(1), it only applies where a person "terminate[s] or amend[s] any agreement … with the insolvent person, or claim[s] an accelerated payment, or a forfeiture of the term, under any agreement … with the insolvent person", limiting the moving party's rights to take any such steps in certain circumstances.

[85] In invoking its lockout right, Conifer did not engage in any of the noted activities.

[86] As a result, nothing in s. 65.1 applies here.

[87] That includes ss. 65.1(4) (quoted above). The purpose of that provision is to shelter a creditor's immediate-payment right (if it exists) from limitations imposed by one or more of ss. 65.1(1), (2) and (3). As noted, ss. 65.1(1) does not apply here. And neither does ss. 65.1(2) (leases and licensing agreements) or 65.1(3) (public utilities).

[88] If (for example) we were dealing with a public utility, and the utility had the right under its contract with its customer to require immediate payment (versus extending credit) for services provided, ss. 65.1(4) tells us that that right survives the imposition of no-discontinuance-for-arrears limitation imposed under ss. 65.1(3).

[89] In other words, while the utility cannot discontinue service for arrears, it can rely on its immediate-payment-required term for ongoing utility services.

[90] In yet other words, ss. 65.1(4) does not create a freestanding right in a creditor to insist on immediate payment post-NOI.

[91] It depends on whether the creditor has that right under its contract with the debtor.

[92] I cannot tell from the materials filed whether Conifer has the right to require immediate payment for future services, whether under the Accounting Procedure described in s 902 of the Ownership and Operation Agreement, Article VI of the Operating Procedure (Accounting Measures), or otherwise.

5. Conifer's enforcement rights not stayed re debts for future services

[93] The critical point here is that Conifer's use and enforcement of its timing-of-payment and enforcement-of-payment rights, relating to future services, are not subject to the para 69(1)(a) stay.

[94] The reason is simple: the NOI filing created two distinct eras, the period leading up to the filing and the period after. Claims existing in the first era are subject to the stay; claims arising in the second are not.

[95] Here see ***Canadian Petcetera Limited Partnership*** (cited above):

> [An earlier-described] interpretation of s. 69(1) is also demonstrated by the jurisprudence dealing with **new indebtedness incurred by a debtor after he or she has gone bankrupt**. It has been held that leave is not necessary for a creditor to have a remedy against the debtor because the **new indebtedness is not a claim provable in the bankruptcy**. (See *Richardson & Co. v. Storey* (1941), 1941 CanLII 334 (ON SC), 23 C.B.R. 145, [1942] 1 D.L.R. 182 (Ont. S.C.); *Re Bolf* (1945), 26 C.B.R. 149 (Que. S.C.); *Venneri v. Bomasuit* (1950), 31 C.B.R. 150 (Ont. S.C.); and *Greenfield Park Lumber & Builders' Supplies Ltd. v. Zikman* (1967), 12 C.B.R. (N.S.) 115 (Que. S.C.). Also see *Wescraft Manufacturing Co. (Re)* (1994), 1994 CanLII 2883 (BC SC), 27 C.B.R. (3d) 28 (B.C.S.C.), which appears to have held, correctly in my view, that **s. 69.1(1) (the stay provision triggered upon the filing of a proposal) did not stay the termination of a lease on account of arrears of rent due after the filing of a proposal** ….[para 31] [emphasis added]

[96] And ***Schendel Mechanical Contracting (Re)***, 2021 ABQB 893 (Mah J.):

> … it is known that Hatch **supplied goods** to various Schendel projects **during the post-NOI period** to the tune of $34,476.75. Hatch advised the Receiver of which specific invoices to which the $40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.
>
> **The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy"** per section 69(1): ***Wosk's Ltd Re***, 1985 CanLII 624 (BC SC), 1985 Carswell BC 807 (SC), 58 CBR 312; ***728835 Ontario Ltd., Re***, 1998 CanLII 2019 (ON CA), 1998 CarswellOnt 2576, 3 C.B.R. (4th) 214.; and ***Jones, Re***, 2003 CanLII 21196 (ON CA), 2003 CarswellOnt 3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258. [paras 25 and 26] [emphasis added]

[97] Accordingly, when it comes to future services, Conifer and Razor have the same rights and liabilities under their agreements as before i.e. without any limitations arising from or otherwise affected by the stay of proceedings.

[98] It may be that Conifer will choose to proceed on the basis suggested by Razor (setoffs accompanied by deposit). Conifer might choose to rely on other payment-enforcement rights it

has under the agreements i.e. as they may be triggered by Razor's payment performance or non-performance. The parties may end up agreeing to new or varied payment arrangements.

[99] It is not the Court's role, in a stay-enforcement context, to get involved in those going-forward business decisions.

6. Critical-supplier charge and "cure" payments

[100] While Conifer requested a critical-supplier charge, it did not apply for such relief. I recognize that the application heard last Friday (February 16th) was brought forward with very tight timing and that Conifer was already dealing with accelerated timelines.

[101] I simply note that I did not have the benefit of any written submissions from Razor on the critical-supplier aspect, with none required i.e. with no application for such cross-relief.

[102] As well, I am not convinced that every gap or difference between the *BIA* (which does not provide for critical-supplier charges, at least expressly) and the *CCAA* (which does) is necessarily answered by filling in the gap i.e. by finding that a feature or aspect in one is necessarily to be read into the other. I would (ideally) have more fulsome submissions from each side on this point before considering such a charge further.

[103] Same for Conifer's request for payment of a portion of Razor's pre-NOI arrears. This is at odds with the equality-of-unsecured-creditors approach under the *BIA*. It too would benefit from an application and more fulsome submissions from both sides.

[104] If Conifer continues to seek either or both forms of relief, I invite its counsel to so advise, following which I will provide procedural directions for a follow-up application (with which I am seizing myself), on accelerated timelines, if necessary.

7. Lockout to avoid anticipated future arrears

[105] As noted, Conifer attempted to explain its lockout decision in part by a wish to avoid or pre-empt anticipated future arrears. Per its brief (para 14):

> … the Discontinuance was [also] implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. [I added "also" given the clear evidence, recited earlier, that Conifer was also seeking, via the lockout, to enforce collection of all or at least some of the pre-NOI arrears.]

[106] I do not see anything in the agreements here authorizing a lockout for *anticipated* arrears, even with Razor's arrears history.

[107] As explained above, the parties are effectively back to square one when it comes to future services. If Razor allows new arrears to accrue, it faces the prospect of Conifer taking any, some or all of the enforcement steps available to it under the agreements, without any impediment from the para. 69(1)(a) stay.

[108] Absent further defaults, I do not see Conifer having any lockout power.

V. Closing note

[109] I thank the parties for their excellent written materials and oral submissions.

[110] On costs, if either side seeks a ruling other than "bear own costs", on which ***Goldenkey Oil Inc (Re)***, 2023 ABKB 365 may provide some guidance, I invite counsel to contact my

assistant to arrange for a phone conference to discuss and set procedural directions for costs submissions.

Heard via Webex in Edmonton, Alberta the 16th day of February, 2024.
Dated at the City of Calgary, Alberta this 21st day of February, 2024.

M.J. Lema
J.C.K.B.A.

Appearances:

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Tab 13

Court of Queen's Bench of Alberta

Citation: Athabasca Minerals Inc v Syncrude Canada Ltd, 2017 ABQB 47

Date: 20170124
Docket: 1201-13727
Registry: Calgary

Between:

Athabasca Minerals Inc.

Plaintiff/Respondent

\- and -

Syncrude Canada Ltd.

Defendant/Applicant

Reasons for Judgment
of the
Honourable Mr. Justice C.M. Jones

I. Introduction

[1] This matter involves two participants in the Alberta oil sands and concerns the rights conferred on them under various agreements with and approvals issued by the Province of Alberta.

[2] The participants are Syncrude Canada Ltd. ("Syncrude") and Athabasca Minerals Inc. ("AMI"). Syncrude carries on an oil sands extraction and processing operation. AMI manages the removal of sand and gravel on behalf of the Province from a deposit in northern Alberta known as "the Susan Lake pit".

[3] In 2012, AMI commenced an action against Syncrude, alleging an outstanding debt in the approximate amount of $620,000.00. AMI asserts that Syncrude removed surface materials from the Susan Lake pit and failed to pay for those materials and for the full amount of management fees payable to AMI.

[4] Syncrude responded with a counterclaim in the amount of $68 million, alleging that AMI wrongfully permitted excavation, removal and use of reclamation material from an area of Syncrude's mineral lease that overlaps with the area under management by AMI (the "Overlapping Area"). Syncrude asserts a right to exclusive use and possession of that material

for purposes of meeting its reclamation obligations. The resulting litigation will require interpretation of various agreements, directions, approvals and licences.

[5] Syncrude seeks prejudgment relief. Briefly, it wants the Court to attach AMI's assets and management fees. With certain exceptions described below, it also wants the Court to prohibit further extraction of sand and gravel from the Overlapping Area.

[6] AMI claims that Syncrude's request is a litigation tactic designed to put it out of business and deprive it of the financial resources it will need to advance its action against Syncrude.

A. Syncrude's Application

[7] Syncrude seeks the following interim and interlocutory orders:

1. Preserving all reclamation soil – *in situ* and stockpiled subsoil and overburden - within the boundaries of Mineral Surface Lease 973220 granted by the Province in favour of Syncrude pending trial and judgment (the "Preservation Order");
2. Alternately, directing AMI to pay $55 million or such other amount as the Court deems just, into Court, and delivering possession of the reclamation soil to Syncrude;
3. Attaching the assets of AMI pursuant to s. 17 of the *Civil Enforcement Act, RSA 2000, c-15* ("*CEA*"), pending trial and judgment (the "Attachment Order");
4. Enjoining AMI from dealing with, conveying, selling, encumbering or otherwise disposing of any interests in personal or real property or assets in its possession or control and wherever located, without further order of the Court, pending trial and judgment (the "Mareva Injunction"); and
5. Costs.

B. Arrangements with Other Parties

[8] Syncrude's application was attended initially by representatives of five entities that engage with AMI for removal of sand and gravel from the Susan Lake pit ("G5"). Syncrude had not named the G5 as Respondents nor had the G5 sought intervener status. The Court was advised that the G5 do not represent all of the entities actively engaged with AMI.

[9] The Court was advised that Syncrude had arrived at an understanding with the G5. They would neither consent to nor actively oppose the relief sought by Syncrude, provided that relief did not go beyond the provisions of an Order (the "Draft Order") that they apparently had worked out with Syncrude.

[10] The Draft Order narrowed somewhat the scope of relief sought by Syncrude in its original application. Subject to certain exceptions, the Draft Order contemplates, *inter alia*: (1) directions for preservation of any material currently *in situ* in the Overlapping Area; (2) an Order prohibiting AMI from dealing with cover soil stockpiled within the Overlapping Area; (3) an Order prohibiting AMI from dealing with stockpiled sand and gravel within the Overlapping Area; (4) payment into Court of management fees collected by AMI at a specified rate for sand and gravel to be removed by specified persons; and (5) attachment of any legal or beneficial interest in all real and personal property of AMI.

[11] Syncrude's counsel acknowledged that the scope of the attachment provisions of the Draft Order, if granted, would render the Mareva Injunction sought in Syncrude's application redundant.

[12] AMI expressed the view that Syncrude's application should not proceed unless the Province was named as a Respondent. One line of argument is that the Province's conflicting grants to Syncrude and to AMI have created uncertainty regarding the parties' respective rights to sand and gravel in the Overlapping Area.

[13] I was advised that the Province was made aware of Syncrude's application and had indicated in writing that it would not participate. It is the prerogative of the Province, the G5 and others who may have an interest in sand and gravel in the Susan Lake pit to decline to take part in Syncrude's application. As the Court advised the G5, they do so at their own risk.

II. Factual Background and Applicable Documents

[14] As alluded to above, the dispute between these parties arises from their potentially competing rights under a series of leases, agreements and approvals. Accordingly, it is necessary to consider the terms of the applicable documents.

A. Syncrude Mineral Surface Lease

[15] Syncrude produces oil sands bitumen from lands encompassed by Mineral Surface Lease 973220 (the "Syncrude MSL") initially issued on November 28, 1997 by the Alberta Department of Environmental Protection, Land and Forest Service, Land Administration Division and subsequently amended on March 15, 2002, April 5, 2005 and November 28, 2008.

[16] The 2008 amendment to the Syncrude MSL included the following provision:

> 4. The holder shall ensure that its operations do not conflict with the recovery of aggregate materials by AMI in their operation of the Susan Lake Pit under SML 980110. Accordingly, the holder shall consult with AMI on an ongoing basis to discuss the status of their operating plan and completion schedule for removal of aggregate resources within the affected lands and provide written confirmation to the department prior to proceeding with any mining activity.

[17] Attached to the original Syncrude MSL as Schedule A are "Conditions" setting out Syncrude's reclamation obligations, both ongoing and at the end of operations. Paragraphs 23, 41, 38, 39 and 43 of these Conditions are of special interest.

[18] Paragraph 23 requires Syncrude to strip and pile topsoil separately from any woody material and subsoil in such a manner that it can be distributed evenly over the disturbed area when operations have been completed. Paragraph 41 prohibits Syncrude from selling, removing or carrying away sand and gravel found *in situ* or from using any such sand and gravel in connection with any construction work except under authority granted by the Minister. Paragraph 38 requires that sand and gravel discovered during mining activity and not used for ancillary/construction purposes must be stockpiled while paragraph 39 provides that Syncrude

must stockpile sand and gravel deposits greater than 1000 m^3 in size and greater than 1m in depth. Finally, paragraph 43 requires Syncrude to obtain a surface materials license to use sand and gravel for construction purposes. These Conditions were carried through to the most recent version of the Syncrude MSL.

[19] Syncrude asserts that the Syncrude MSL gives it "exclusive possession and use of all reclamation soil in the Syncrude MSL". It also asserts that reclamation materials include subsoil and that subsoil, in turn, includes sand and gravel.

B. AMI Surface Materials Lease

[20] AMI asserts that the Province granted it Surface Materials Lease 980110 (the "AMI SML") on March 17, 1998. Despite attempts to acquire a copy from the Province, AMI cannot produce the AMI SML. Nevertheless, there is sufficient indirect evidence to satisfy me that it exists and is currently in force. Indeed, Syncrude acknowledged in argument that the AMI SML exists. However, Syncrude would have me draw the adverse inference that the AMI SML does not convey any property rights to AMI.

[21] Syncrude alleges that an Encroachment Agreement between AMI and Syncrude entered into on October 14, 2008 was to permit Syncrude to enter the Overlapping Area to excavate, stockpile and use materials, including sand and gravel, in Syncrude's mining operations. It takes the form of a letter from Syncrude to AMI's predecessor, Aggregates Management Inc., and provides that Syncrude may encroach on the AMI SML subject to two conditions. The conditions are (1) Syncrude shall ensure that its operations do not conflict with the recovery of aggregate materials by AMI in its operation of the Susan Lake pit under the AMI SML and (2) Syncrude shall consult with AMI on an ongoing or at minimum annual basis to discuss the status of their operating plan and completion schedule for the removal of aggregate resources within the affected lands and to provide written confirmation to the Department.

[22] I find this Encroachment Agreement noteworthy because:

1) Syncrude acknowledges the existence of the AMI SML;
2) Whatever right to encroach on the AMI SML Syncrude may have been granted is subordinated to AMI's right to recover sand and gravel; and
3) Syncrude agreed to consult with AMI regarding "their" plans and completion schedule. It is not clear on the face of the Encroachment Agreement if this means Syncrude's plans or AMI's.

C. First Management Contract

[23] AMI manages the Susan Lake pit on lands owned by the Province. It collects a fee from all users and ensures that a royalty is paid to the Province as the owner of the sand and gravel. AMI entered into its first management contract with the Province on March 17, 1998.

D. Second Management Contract

[24] AMI entered into its second management contract ("Second Management Contract") with the Province on December 1, 2007, for a term of 10 years, expiring in 2017. Clause 2(1) of the

Second Management Contract provides that AMI is to "manage removal of surface materials for public use, and reclaim the tendered location in accordance with Schedule 'A'."

[25] Schedule "A" sets out several of AMI's obligations. Clause 8 provides that AMI is to manage and operate the Susan Lake pit so as to maximize utilization of the surface material resource. Clause 5 provides that AMI is to collect a royalty from all users and pay it to the Minister. Clause 2 provides that AMI and its affiliates shall not use the Susan Lake pit as a source of surface materials for their own purposes or to meet any contractual obligations made with third parties, other than for maintaining the Susan Lake pit and access roads. Clause 25 provides that AMI can permit users to establish and maintain stockpiles of material on the Susan Lake pit location while clause 33 provides that all surface material on the Susan Lake pit location, whether stockpiled or otherwise, remains the property of the Department until removed from that location and paid for by the user. Clause 3 provides that the term "surface material" has the meaning defined in s. 8 of the *Dispositions and Fees Regulation*, Alta AR 541/2000, as amended, which includes sand and gravel.

[26] Schedule "A" deals extensively with reclamation obligations. Clause 4 provides that AMI is responsible for reclamation and re-forestation of the Susan Lake pit in accordance with applicable legislation and standards. Clause 10 states that "The Minister reserves the right to permit exploration and development of the oilsands resource on land within the tendered location. The Minister may, without compensation to [AMI], withdraw that portion of the lands from this Agreement by notice in writing to [AMI]. That portion of the lands withdrawn shall cease to be the responsibility of [AMI] with respect to reclamation. The reclamation plan shall be amended accordingly."

[27] This withdrawal appears to have occurred by virtue of a letter dated May 29, 2008 from Alberta Sustainable Resource Development, Land Division, to AMI's predecessor, Aggregates Management Inc., stating that:

> The area covered by [AMI] SML – 980110, referred to as the Susan Lake Gravel Pit, is an area that is scheduled to be part of an oil sands strip mining operation in the near future. The Department will therefore not require you to conduct reclamation activity on any area of your lease that will be part of the mine or affiliated infrastructure.

[28] The letter appears to implement a shift in reclamation obligations. Syncrude asserts that, notwithstanding this removal of AMI's reclamation responsibility, AMI had an obligation to stockpile sand and gravel for use by Syncrude in its reclamation efforts. Syncrude asserts that AMI had such an obligation in recognition of the exclusive use and possession of sand and gravel conferred by the Syncrude MSL. AMI disputes that it had any such obligation or that Syncrude has any such right.

[29] Clause 1 of Schedule "A" provides that AMI is to manage the removal of surface materials from the Susan Lake pit for public use in accordance with the Conservation and Reclamation Plan dated May 2006. Further, clause 32 requires AMI to submit an annual report and operating plan, including a summary of reclamation activities and a reclamation plan. Documents on this application included AMI's plan dated March 1, 2015 and entitled "Susan Lake Gravel Pit SML 980110 2015 Operational Plan" (the "2015 Operational Plan").

E. Syncrude Approvals

[30] Syncrude's activities also are governed by approvals issued under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12. Syncrude's materials included one such approval dated June 24, 2007. Parts 3.2 and 6 of the "Terms and Conditions Attached to Approval" deal with "Land Conservation" and "Land Reclamation," respectively.

[31] Clauses 3.2.13 and 3.2.14 require Syncrude to place "coversoil" on disturbed land and to salvage "upland surface soil" to specified depths on disturbed land. Clauses 3.2.16 through 3.2.27 address salvage issues and provide, first, that Syncrude must reclaim the land so that the reclaimed soils and land forms are capable of supporting a self-sustaining, locally common boreal forest, regardless of the end land use and second, that Syncrude is to "place in reclamation" all coversoil and subsoil salvaged in accordance with Part 3. Clause 3.2.15 provides that where there is insufficient upland surface soil to meet the reclamation objectives in the approval, Syncrude must salvage other coversoil.

[32] The definitions set out in Part 1 of the approval are relevant to this dispute. Clause 1.1.2(t) defines "coversoil" as (i) peat-mineral mix, (ii) organic horizon, or (iii) upland surface soil. Clause 1.1.2(jjj) defines "peat-mineral mix" in part as "a mixture of an organic horizon and the underlying mineral soil, or an organic horizon and mineral soil from another source". Clause 1.1.2(hhh) defines "organic horizon" as "the surface soil horizon in Organic soils containing more than 17% organic carbon by weight." Clause 1.1.2(cccc) defines "upland surface soil" as "a stratum salvaged from an upland soil that includes the LFH, A horizon and in some cases part or all of the B horizon". All of these definitions make reference in some manner to "soil" which is defined in clause 1.1.2(sss) as "the naturally occurring, unconsolidated mineral or organic material at least 10 cm thick that occurs at the earth's surface and is capable of supporting plant growth." Syncrude alleges that coversoil includes sand and gravel.

F. Syncrude Surface Materials Lease

[33] The current version of the Syncrude Surface Materials Lease (the "Syncrude SML") is dated July 17, 2014. The following provisions of the Syncrude SML are relevant to this application.

[34] The second recital states that "…the director may grant a lease of public land for removal of clay, marl, sand, gravel, silt, topsoil and peat." Clause 1 provides that the Syncrude SML carries with it …. "the right to work and remove out of the surface thereof Sand and Gravel…". This grant does not expressly refer to a right to exclusive use and possession.

[35] Clause 6 provides that Syncrude "…shall pay the royalties, specified by the Regulation in force at the time the surface materials are removed…".

[36] Clause 20 provides that the Minister may, by order, authorize the Minister of Infrastructure, the Minister of Transportation or any other person to enter the land under a lease and remove surface materials required for the construction or maintenance of public roads or other public works. This would suggest that use of surface materials, including sand and gravel, is not exclusive to Syncrude.

[37] Schedule “A” to the Syncrude SML sets out a number of conditions. Notably, clause c) states as follows:

> Schedule “B”, attached, lists any prior and subsisting authorizations and dispositions (prior rights) issued on the quarter sections included in this authority. The holder shall not conduct any activity on the land where prior rights have been issued without the consent of the holder of these prior rights.

[38] Oddly, Schedule “B” does not list any prior authorizations. However, clause 7 of Schedule “A” provides that the “…purpose of this authority is for Surface Materials Extraction on lands under the related disposition indicated.” The related disposition referenced is the Syncrude MSL. Clause 9 provides that Syncrude shall ensure that operations and reclamation for the Syncrude SML is consistent with the Syncrude MSL. As noted above, the 2008 amendment to the Syncrude MSL specifically provides that Syncrude’s operations may not conflict with the activities of AMI.

[39] As noted above, the Encroachment Agreement entered into by Syncrude and AMI on October 14, 2008, just before the current version of the Syncrude MSL was issued, provides that:

> The holder (Syncrude) shall ensure that its operations do not conflict with the recovery of aggregate materials by AMI in their operation of the Susan Lake Pit under Agreement with the crown and SML 980110.

[40] In addition, in a letter from Alberta Sustainable Resource Development to AMI dated November 25, 2011, the Province notes the issue between AMI and Syncrude regarding Syncrude’s removal of aggregate materials from the Susan Lake Pit and states, *inter alia*:

> AMI can charge Syncrude user fees for the 432,948 1cm of mixed aggregate material deemed to be reclamation material…
>
> As AMI’s Agreement/SML with the Crown does constitute a prior and existing activity and in respect of that AMI requires access to all lands affected by it, Syncrude must ensure AMI has unlimited access, subject to agreed upon terms and coordination of activities…
>
> Syncrude has been advised of the clause noted determinations…
>
> As AMI manages these lands as a public pit on behalf of the Crown there should be no reason for AMI to refuse requests for aggregate materials from any operation.

III. Issues Arising in the Overlapping Area

[41] The parties take the position that the existence of a shortfall in reclamation materials available to Syncrude and the scope of its right to exclusive use and possession of reclamation material are “threshold” issues which ultimately will determine the outcome of the litigation.

[42] Syncrude’s request for prejudgment relief depends upon its claim that its “obligations” under the Syncrude MSL are, of necessity, accompanied by the “right” to exclusive use and possession of sand and gravel to satisfy its reclamation obligations. Syncrude asserts that

exclusive use and possession flows as a necessary incident of its obligation to stockpile and reclaim.

[43] However, none of the documents discussed above appear to grant Syncrude exclusive use and possession of sand and gravel in the Overlapping Area. Indeed, some of the provisions of those documents would seem to undermine Syncrude's position. Interestingly, clause 1 of the 2008 amendment to the Syncrude MSL required Syncrude to provide an "Aggregate Management Plan" that identifies the location, quality and quantity of all gravel resources. This obligation seems consistent with the notion that the Province continues to assert ownership of sand and gravel. It would seem strange for Syncrude to be required to inventory gravel it discovers if it has exclusive use and possession.

[44] Syncrude argues in its brief that "AMI has created a shortfall of reclamation materials, contrary to AMI's reclamation requirements arising from its agreement with the Province …". Syncrude asserts that AMI has failed to preserve adequate reclamation materials in the Overlapping Area which means that AMI is in breach of its obligations to the Province and that Syncrude must assume responsibility for AMI's alleged default.

[45] Syncrude states that the Alberta Energy Regulator ("AER") has concluded that Syncrude presently suffers a deficit of 8.51 million cubic meters of reclamation material and points to an unsigned draft letter from the AER dated December 22, 2015. This deficit, Syncrude asserts, arises from AMI's activities in Overlapping Area.

[46] It is significant that the AER expressed the following view in the unsigned draft letter:

> The Alberta Energy Regulator recognizes that overlap between Surface Material Lease (SML 980110) of Athabasca Minerals Inc. (AMI) and dispositions (SML 000002 and Mineral Surface Lease; MSL 973220) of Syncrude Canada Ltd. (Syncrude) at the Aurora North mine has created a shortfall of reclamation material in stockpile for Syncrude.

[47] The AER does not state that unlawful activity by AMI has created this shortfall, but that the "overlap" between various grants made by the Province has "created a shortfall of reclamation material…". This suggests to me that, while the Province recognizes a possible shortfall of reclamation material, it at least leaves open the question of who, if anyone, is at fault. It could even be seen as implicit recognition that the Province's grant of coincident rights has created the problem.

[48] This recognition may be evidenced by this comment in the unsigned AER letter:

> The AER will accept reclamation to an end-pit lake (without fluid tailings) for the area that overlaps with Syncrude's MSL.

[49] This would appear to solve the reclamation problem, but Syncrude asserted in argument before me that fluid tailings cannot be placed in an end-pit lake and would have to be spread over a large area, with further disturbance to surface areas, requiring additional reclamation material.

[50] AMI argues that any concerns about Syncrude's obligations should be addressed with the Province. Further, AMI takes the position that there is no shortfall in any event and points to the

data contained in the 2015 AMI Operational Plan. Clause 2.1.2 states that there is “suitable coversoil” on the Syncrude MSL lands sufficient to provide coversoil thickness of 0.32m and that test results indicate “very conservatively” that there are 11,965,259 m^3 of overburden available on the Syncrude MSL for a minimum 1.2 m depth of material suitable for reclamation.

[51] Appendix G to the 2015 AMI Operational Plan is entitled Susan Lake Public Pit, Reclamation Materials Assessment May 2015. This assessment is extensive, detailed and supported by sampling. It concludes that even when the strictest criteria and most conservative assumptions are applied in areas without data points, it is estimated that the Overlapping Area has sufficient coversoil and overburden to meet its reclamation obligations.

[52] Clause 2.3 of the 2015 AMI Operational Plan provides that AMI has agreed with various oil sands companies that AMI shall salvage and stockpile “coversoil” but that it will remain stockpiled until it is ready to be used by the oil sands companies for reclamation. I deduce from this that AMI does not consider coversoil to include sand and gravel. This view is bolstered by clause 2.2.9 of the 2015 AMI Operational Plan entitled “Gravel Extraction” which provides that “AMI is required to sell aggregate used for its highest end use and to maximize the yield of the resource.” I note that this is also consistent with my view of the definition of “coversoil” in the Syncrude Approvals.

[53] The 2015 AMI Operational Plan goes on to state that “The reclamation strategy has been developed to harmonize the future mining development plans of oil sands leases that overlap the pit lease with AMI development and reclamation plans. AMI will continue to progressively mine aggregates in a sequence that will maximize the resource while at the same time being consistent with the plans of oilsands companies in the immediate area.”

[54] Interestingly, the Volume Calculation included in the 2015 AMI Operational Plan indicates that “Aggregate includes gravel, mixed sand and gravel and sand. Aggregate is not considered suitable material for reclamation.” Clearly, AMI takes the position that sand and gravel are not, at least primarily, to be harvested for reclamation purposes.

[55] It is important to note that the 2015 AMI Operational Plan is extensive and detailed and that its conclusions regarding the availability of coversoil and overburden suitable for reclamation in required quantities were based on a series of soil material testing projects.

[56] AMI’s claim that Syncrude has sufficient reclamation material is supported by evidence of detailed analysis. By contrast, Syncrude’s shortfall claim is not. The AER’s expression of opinion in the unsigned draft letter provides no indication of what analysis underlies its conclusions regarding a shortfall of reclamation material. Accordingly, AMI’s evidence is to be preferred in this regard.

IV. Principles Governing Prejudgment Remedies

[57] As noted above, Syncrude asserts that the Syncrude MSL gives it exclusive use and possession of sand and gravel in the Overlapping Area for reclamation purposes and that AMI’s operation of the Susan Lake pit has interfered with that right, notwithstanding that AMI has been conducting these operations pursuant to the Second Management Contract. Accordingly, the trial of this matter will involve, as a “threshold” issue, a determination of what rights, if any, the

Syncrude MSL grants with respect to sand and gravel. Resolution of this issue will require reconciliation of the terms and provisions of the Syncrude MSL, the Syncrude SML, the AMI SML and the Second Management Contract.

[58] The Court's task at this juncture is to determine what, if any, prejudgment relief should be granted to Syncrude. While this will require consideration of the documents referred to above, some restraint must be shown. The matter did not proceed before me as a trial, but only as an interlocutory application. I am deciding neither AMI's claim nor Syncrude's counterclaim. While I am to assess the evidence before me for purposes of determining if injunctive relief is justified, I am not to make determinations that would fetter the discretion of the trial judge.

[59] I turn now to the legal principles underlying the granting of preservation orders, attachment orders and Mareva injunctions.

[60] There appears to be no dispute between the parties regarding the extraordinary nature of prejudgment relief. In one of its briefs, AMI asserts that "The Court exercises extreme caution in granting prejudgment relief. In fact, prejudgment relief is such an extraordinary remedy that there is a general rule against granting it." In support of this proposition, AMI cites ***Aetna Financial Services Ltd v Feigelman***, [1985] 1 SCR 2 and quotes as follows from that case at para 43:

> There is ... a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award for far less than the caged assets.

[61] AMI also cites this Court's comment in ***Rea v Patmore***, 1999 ABQB 759 at para 4 that "...the court will be guided by the 'judicial abhorrence for prejudgment execution.'"

V. Preservation Order

[62] This Court's authority to make a preservation order is derived from Rule 6.25 of the *Rules of Court*, which provides that, on application, the Court may make an order for the preservation or custody of property that is in dispute or that may be evidence in an action. However, judicial restraint must be exercised when deciding, first, whether to grant a preservation order and, second, the appropriate scope of the order.

A. Test

[63] The parties disagree on the appropriate test for the granting of a preservation order.

[64] Syncrude argues that a preservation order is interlocutory injunctive relief and therefore the test is the well-known tripartite test established in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311. I note that in ***RJR-MacDonald***, the Supreme Court of Canada adopted the tripartite test set out in ***American Cyanamid Co v Ethicon Ltd*,** [1975] 1 All ER 504 (HL); whether one cites ***RJR-MacDonald*** or ***American Cyanamid***, the test is the same:

1. there is a serious issue to be tried;
2. the applicant will suffer irreparable harm in the absence of relief; and

3. the balance of convenience favours granting relief.

[65] AMI submits that the test for granting a preservation order is more onerous than the tripartite test. In addition to meeting the tripartite requirements, the applicant must also meet the requirements of the *CEA*. AMI relies on ***Interclaim Holdings Ltd v Down***, 1999 ABCA 329, 250 AR 94 at paras 82-83:

> It is also arguable that [sections 16 and 17 of the *CEA*] are a codification of the requirements of the case law, without categorizations such as a Mareva injunction, a preservation order, or other like remedies at common law or in equity. Section 17 of the Act refers to an "attachment order," a term not defined in the legislation.
>
>> "Attachment" has been defined as (t)he act or process of taking, apprehending or seizing a person or property by virtue of a writ, summons or other judicial order and bringing the same into custody of the court for the purpose of securing satisfaction of the judgment ultimately to be entered in the action. ...
>
> We proceed on the basis that the existence of the [*CEA*] does not preclude the grant of a Mareva injunction or, by analogy, a preservation order, but we do not decide this is so. This issue was never squarely put before us or the learned chambers judge. But in granting either a Mareva injunction or a preservation order, a court should be guided by the principles of the [*CEA*]. Were it otherwise, the will of the Legislature might be thwarted. The following observation is apt:
>
>> The best way to obtain a coherent, consistent system of prejudgment remedies for unsecured claimants is to replace the various existing prejudgment relief mechanisms with a single, well thought-out procedure for obtaining provisional relief. Our recommendations are intended to accomplish this result. Every claimant seeking a prejudgment remedy would be required to follow the same basic procedure and to satisfy the same general considerations in order to obtain relief. Once the claimant had made out a case for a remedy, the court could provide it by making what we shall call an "attachment order." The proposed attachment order should not be confused with the present writ of attachment. The attachment order would be a flexible device by means of which the court, subject only to broad legislative constraints, could grant whatever sort of relief seemed most appropriate in the circumstances. ... [Citations omitted.]

[66] AMI also relies on ***Gilks v Green Clean Squad Inc***, 2015 ABQB 83, 610 AR 186 in which Veit J. stated at para 4 that "[a]t a minimum, an applicant for a preservation or attachment order must satisfy the requirements of s. 17 of the [*CEA*]." Veit J. held at para 6 that an applicant for a preservation or attachment order must meet a higher standard than that for an interlocutory injunction:

> Moreover, every application for pre-judgment relief asks for exceptional relief and must meet general standards. For example, an applicant for an interlocutory injunction must satisfy a tri-partite test. When one party is, prior to a trial, asking the court to prevent another party from dealing with property which they could ordinarily dispose of, the application should be assessed in light of the requirements of an interlocutory injunction. Statutorily, an applicant for an attachment order must meet a higher test than the one set for an interlocutory injunction. An applicant for the latter type of relief must satisfy the court only that there is a serious issue to be tried, that they will suffer irreparable harm if the relief is not granted and that the balance of convenience favours the granting of the relief. An applicant for relief in the nature of a preservation or attachment order must satisfy the last two tests, but must satisfy a higher standard on the first test, i.e. that "there is a reasonable likelihood that the claimant's claim against the defendant will be established".

[67] AMI's position is that an applicant for a preservation order must establish the following:

1. there is a reasonable likelihood that the claim against the defendant will be established;
2. the applicant will suffer irreparable harm if the relief is not granted;
3. the balance of convenience favours the granting of the relief; and
4. there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,
   (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and
   (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[68] In ***Interclaim*** at para 39, the Court of Appeal said this about the test for a preservation order:

> There is some authority for the proposition that an injunction sought in a bankruptcy court is not subject to the requirements for a common law injunction such as irreparable harm and balance of convenience. ... This was not the position taken by the IR during the appeal, however. Accordingly, we proceed on the assumption that the test to be applied in relation to a preservation order is the tripartite test set out in [***American Cyanamid***], which requires firstly that there be a serious issue to be tried. ... [Emphasis added.]

[69] Interpretation of this comment has given rise to two conflicting lines of authority.

[70] The first, cited by Syncrude, is that ***Interclaim*** is authority for the proposition that the tripartite test applies to a preservation order: ***HF1 Fuels Ltd v Olsen***, 2001 ABQB 117, 10 CPC (5^{th}) 385 at para 13, cited in ***Ridge Development Corp v Crestwood Condominiums Inc***, 2008 ABQB 599, 463 AR 341 at para 25; ***Peregrym v Peregrym***, 2015 ABQB 176, 608 AR 340 at paras 379-80.

[71] I note that in ***518152 Alberta Ltd v Helmut Berndt Professional Corp***, 2005 ABCA 151, the Court of Appeal, at para 2, took no position on whether the tripartite test is the appropriate test, but assumed that it was and proceeded with the analysis on that basis.

[72] Subsequently, Veit J. held in ***Gilks*** at para 23 that it is "appropriate" on a preservation order application to weigh an applicant's compliance with s.17 of the *CEA*. She relied on the Court of Appeal's statement at para. 83 of ***Interclaim*** that all prejudgment remedies ought to be guided by the principles of the *CEA*, though at para 29 she acknowledged the Court of Appeal in ***Interclaim*** "left open the issue of the existence of a preservation order application which is not governed by s.17 of the CEA".

[73] I adopt the first line of analysis because the Court of Appeal in ***Interclaim*** did not require expressly that the provisions of s.17 of the *CEA* formed part of the test for a preservation order. Rather, the Court of Appeal said only that in granting preservation orders, courts ought to be guided by the principles of the *CEA*.

[74] The trial judge in ***Interclaim*** had erred, not in granting a preservation order on the basis of the tripartite test, but in granting an order that was too broad. The Court of Appeal relied on the common law principle that prejudgment remedies should not tie up more assets than necessary to respond to the applicant's claim. The Legislature has codified this principle in s. 17(6) of the *CEA*. The Court of Appeal stated at paras 84-85:

> Our function is not to re-weigh the evidence before the learned chambers judge, but to determine whether she made an error of law or principle or a palpable and overriding error of fact.
>
> In our view, she did not. She was entitled to grant the order. For reasons already mentioned, however, she did not address s. 17(6) of the Act in the context of the Statement of Claim. To recapitulate, that section provides:
>
>> (6) An attachment order shall not attach property that exceeds an amount or a value that appears to the Court to be necessary to meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective.
>
> Section 17(6) reflects a principle underlying the law prior to the enactment of the [*CEA*], namely, that a preservation order should only attach property of a value which reflects the value of the claim in relation to which there is a serious issue to be tried.

[75] Accordingly, I find that ***Interclaim*** does not require an applicant for a preservation order to meet the provisions of the *CEA*, specifically s. 17(2). I note that s. 17(2) of the *CEA* refers to the "defendant's exigible property". A preservation order applies to property ownership of which is yet undetermined. Therefore, s. 17(2) of the *CEA* cannot apply to the type of property targeted by a preservation order.

B. Analysis

[76] It is important to recall that an applicant for interlocutory relief must satisfy each of the three requirements of the tripartite test. If any one of the three elements is missing, the application will fail.

1. Serious Issue to be Tried

[77] First, Syncrude argues that there is serious issue to be tried. Syncrude's alleged entitlement to exclusive use and possession of sand and gravel in the Overlapping Area remains to be litigated. In essence, its argument is that its reclamation duty under the Syncrude MSL engenders a right to exclusive use and possession of reclamation material. AMI's position is that the various agreements, grants, approvals and licenses do not operate to vest that right in Syncrude and it disputes that Syncrude's claim to exclusive use and possession of sand and gravel constitutes a serious issue to be tried.

[78] AMI asserts that the Province is the owner of the sand and gravel in the Overlapping Area and that Syncrude's obligation to stockpile sand and gravel resources in accordance with the Syncrude MSL does not mean that the public no longer has rights to those resources.

[79] Further, AMI argues that the absence of any right to exclusive use and possession vested in Syncrude in respect of sand and gravel in the Overlapping Area undermines Syncrude's assertions that AMI has committed trespass in respect of sand and gravel or wrongfully converted sand and gravel.

[80] The threshold for determining that there is a serious issue to be tried is low, requiring only that I am satisfied on a preliminary assessment of the merits of the case that the claim is not frivolous or vexatious; see ***RJR-MacDonald*** at para 49 and ***Foundation Capital Corp v Saxon***, 2011 ABQB 102, 60 Alta LR (5th) 31 at para 9. Given the uncertainty arising from the interplay of the above-discussed documents, I find that there is a serious issue to be tried.

2. Irreparable Harm

[81] Syncrude initially sought an order preserving all reclamation soil *in situ* and stockpiled, including sand and gravel, within the boundaries of the Overlapping Area. It argues that refusal to grant a preservation order will cause it irreparable harm in that its interests will be adversely affected in a manner that cannot be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application: ***RJR-MacDonald*** at para 58.

[82] As noted above, this request was modified in the Draft Order negotiated among Syncrude and the G5. The Draft Order lists corporations that are to be permitted to purchase and remove sand and gravel currently stockpiled within the Overlapping Area. Further, those corporations are to be permitted to continue to excavate, process and stockpile sand and gravel *in situ* within the Overlapping Area. Essentially therefore, the Draft Order purports to allow a select group of users to continue their activities in the Overlapping Area provided any management fees otherwise payable to AMI are paid into Court or attached.

[83] Syncrude asserts a proprietary claim to reclamation material, including sand and gravel and argues that there will be a permanent loss of this material if a preservation order is not granted. While Syncrude may lose access to such material without a preservation order, it has not been established that such access is exclusive to Syncrude. The sand and gravel are owned by the Province, subject to various grants it may have made.

[84] With respect to the potential for permanent loss of natural resources, AMI argues that sand and gravel is not unique or irreplaceable and that an award of monetary damages would be sufficient, obviating the risk of irreparable harm.

[85] Syncrude argues that if the Susan Lake pit becomes exhausted in 2017, its shortfall in reclamation material will rise from 8.5 million cubic meters to 10.2 million cubic meters. The increase in shortfall from 8.5 to 10.2 million cubic meters is not trivial and the deficit cannot be recovered from users who have removed sand and gravel. Thus, a preservation order securing stockpiled or *in situ* sand and gravel would be of some value to Syncrude. This value, however, seems to me to be diluted by Syncrude's agreement to allow the G5 to extract significant volumes of sand and gravel.

[86] Further, Syncrude argues that sand and gravel in the required quantities cannot simply be purchased to fulfill its reclamation obligations. Yet the evidence before me is that Shell and Suncor have done exactly that, entering into agreements with AMI to purchase sand and gravel in the areas representing an overlap between their respective mineral surface leases and land governed by the Second Management Contract. Moreover, in a letter dated November 25, 2011, Alberta Sustainable Resource Development refers to Syncrude paying user fees to AMI for mixed aggregate material at a price of $1.49 per cubic meter. Accordingly, it would appear that Syncrude could purchase reclamation material from AMI to the extent there remains sand and gravel capable of extraction from the Susan Lake pit. AMI asserts that the report appended to the 2015 Operational Plan, which found that Syncrude had adequate access to reclamation material to meet its obligations, took into account new reclamation obligations resulting from removal of reclamation material from other parts of the Syncrude MSL or SML.

[87] I appreciate that Syncrude would prefer to utilize sand and gravel from the Overlapping Area, rather than purchasing reclamation material or acquiring it from other locations in the Syncrude MSL and SML. Nevertheless, I find that the sand and gravel in dispute is not an irreplaceable natural resource akin to the old growth forest at issue in ***MacMillan Bloedel Ltd v Simpson***, [1996] 2 SCR 1048.

[88] Syncrude also sought a direction that management fees otherwise payable to AMI under the Second Management Contract be paid into Court as part of a preservation order. This request is premised on the notion that these monies represent proceeds of sale of sand and gravel over which Syncrude asserts a proprietary claim. In oral argument, Syncrude described these monies as "liquidated funds of sand and gravel that is removed from existing stockpiles".

[89] This characterization raises the appropriateness of a preservation order in these circumstances. A preservation order is intended to maintain the status quo pending determination of the ownership of an asset. If Syncrude has a proprietary interest in sand and gravel, that

interest would extend to the proceeds of sale thereof: see ***Quikjets Inc v Q Private Jets Limited Partnership***, 2015 ABCA 158, 600 AR 229 at para 17.

[90] In my view, that analysis is not appropriate in this case. The Province, not AMI, owns the sand and gravel. AMI does not sell its sand and gravel to users, but facilitates removal of the Province's sand and gravel from the Susan Lake pit, for which those users pay a royalty to the Province. AMI is not entitled to a royalty; it is paid a user fee "in consideration for services" pursuant to clause 8 of the Second Management Contract.

[91] Accordingly, I do not believe that an order intended to preserve access to an asset pending determination of its ownership should be granted with respect to AMI's management fees. Management fees are compensation for services rendered, not for transfer of an asset.

[92] Further, since Syncrude takes the position that it cannot simply purchase sand and gravel for reclamation, the value attaching AMI's cash flow is questionable. AMI notes that Syncrude has abandoned its request for a preservation order relating to stockpiled material, but continues to seek payment into Court of management fees arising from the sale of these materials.

[93] AMI argues that this request effectively amounts to a request for security for Syncrude's claim against AMI. Citing ***1400467 Alberta Ltd v Adderley,*** 2014 ABQB 439, 591 AR 40 at paras 51-53, AMI asserts that none of the three exceptional circumstances where security for judgment can be posted exists in this situation:

1) Security as a condition of being able to appeal;

2) Assets are being dealt with so as to escape judgment;

3) Where the court is "almost, but not quite, satisfied that the defendant has no defence".

[94] Syncrude asserts that it is trite law that harm is irreparable where damages cannot be collected, citing ***Moses v Weninger,*** 2006 ABCA 52, 380 AR 230. AMI admits that it does not have sufficient funds to pay the $68 million Syncrude seeks in its counterclaim, but Syncrude goes further, arguing that it will not be able to enforce any award because AMI is impecunious.

[95] Of course, Syncrude's argument on this front rests on the premise that its counterclaim is valid and that a Court will agree with its calculation of damages. The Supreme Court of Canada held in ***RJR-MacDonald*** at para 59 that one party's impecuniosity does not automatically determine the application in favour of the other party, though it may be a relevant consideration.

[96] AMI's position is that its inability to pay $56 million into Court or to satisfy a judgment in that amount does not render it impecunious, especially given that Syncrude's counterclaim remains to be adjudicated. The magnitude of Syncrude's counterclaim compared to AMI's assets cannot be allowed to overwhelm a reasoned consideration of the equities inherent in Syncrude's request for prejudgment relief. Care must be taken to ensure the quantum of damages sought by counterclaim is not allowed to lead the Court inexorably to the conclusion that an unsatisfied judgment is inevitable. Further, given AMI's admission that its resources would fall vastly short

of discharging so large a damage award, one might conclude that the incremental value to Syncrude of a preservation order is *de minimus*.

[97] Syncrude makes much of the irreparable harm its reputation will suffer if it cannot meet its reclamation obligations. Based on Syncrude's representations, I fail to see how having what would otherwise be AMI's cash flow from the Overlapping Area will address that concern, if it cannot purchase the necessary reclamation material elsewhere.

[98] AMI argues that Syncrude must do more than merely assert the possibility of irreparable harm to its reputation and quotes as follows from ***Centre Ice Ltd v National Hockey League*** (1994), 166 NR 44 (FCA) at para 11:

> Loss of good will, of reputation, of distinctiveness, if established after a full hearing at trial may well constitute irreparable harm and lead to the issuance of a permanent injunction. However, as this Court's jurisprudence has shown, in the absence of clear evidence that irreparable harm would result at this juncture, an interlocutory injunction should not be issued.

[99] In addition, AMI argues in its brief that if it is responsible for Syncrude's inability to meet its reclamation obligations, that should not reflect adversely on Syncrude's reputation. Conversely, if AMI is not responsible for Syncrude's inability to reclaim, then any damage to Syncrude's reputation is not caused by AMI.

[100] Taking all of the foregoing into account, the evidence does not establish to my satisfaction that Syncrude will suffer irreparable harm if I do not grant a preservation order.

3. Balance of Convenience

[101] With respect to the balance of convenience, Syncrude argues that the harm it will suffer if prejudgment relief is not granted, as outlined above, outweighs the harm to AMI if relief is granted. For its part, AMI asserts that a preservation order will put it out of business and points to para 59 of ***RJR-MacDonald*** where the Supreme Court of Canada held that a party put out of business has suffered irreparable harm.

[102] Syncrude attempts to justify potentially putting AMI out of business on the basis that it may be heading that way in any event. AMI may indeed encounter difficulties continuing operations if its cash flow is attached by a preservation order. The evidence of AMI's Chief Financial Officer, William Woods, suggests that operation of the Susan Lake pit is central to AMI's economic survival. However, Syncrude has not provided persuasive evidence that AMI's business is in jeopardy in the absence of a preservation order. In contrast to the case before the Court in ***Greater Vancouver (Sewerage & Drainage District) v Ambassador Industries Ltd*** (1982), 41 BCLR 292 (BCCA), I am not satisfied that AMI is not a going concern. I have not been presented with evidence to suggest that AMI's contract regarding the Susan Lake pit will not be renewed when the Second Management Contract expires on November 30, 2017. Neither has Syncrude provided any persuasive evidence to support its assertion that AMI has no other potentially viable prospects.

[103] Syncrude suggests in its brief that AMI is considering responding to a preservation order by “walking away from the management contract” or “selling any other assets”. Syncrude’s claim that these actions do not give rise to significant harm to AMI seems to ignore AMI’s claims that the impact of such an order cannot be overstated.

[104] The cases cited by Syncrude suggesting that it is acceptable to force an entity to cease operations by means of an interlocutory injunction involved respondents that had acted in flagrant breach of some proprietary interest belonging to the applicant: ***Bell ExpressVu Ltd Partnership v Tedmonds & Co,*** [1999] OJ No 3679 (SCJ) at para 25; ***3058354 Nova Scotia Co v OnSite Equipment Ltd***, 2007 ABQB 695, 84 Alta LR (4th) 358; ***Adler Firestopping Ltd v Rea***, 2008 ABQB 95, 441 AR 18. It is by no means established that that has occurred in this case.

[105] An additional factor is that, as AMI points out, the Second Management Contract requires it to manage the removal of surface materials from the Susan Lake pit for public use. Noting the Supreme Court’s comments at para 71 of ***RJR-MacDonald***, AMI takes the position that when the authority involved is charged with protecting the public interest and the impugned action was taken pursuant to that responsibility, the court should in most cases assume that irreparable harm to the public interest would result from restraint of that action.

[106] The evidence satisfies me that a preservation order that attaches AMI’s cash flow from its operations at the Susan Lake pit would adversely impact AMI’s ability to perform its duties under the Second Management Contract. That may operate to frustrate the Province’s intention that sand and gravel be made available for public use. It would indeed be ironic if the Province engaged AMI to make sand and gravel available to the public but prevented AMI from fulfilling that objective by granting Syncrude exclusive use and possession of that sand and gravel.

[107] Based on the foregoing analysis, I find the requirements of the tripartite test for injunctive relief are not satisfied in this case. Further, as indicated earlier, I do not consider it appropriate to grant a preservation order attaching AMI’s management fees.

[108] AMI asserts that, since a preservation order is inappropriate here, payment into Court in lieu of a preservation order is also inappropriate. In support of its view, AMI cites ***Vaccaro v Twin Cities Power Canada***, 2013 ABCA 252, 97 Alta LR (5th) 193 at para 16. There, the Court of Appeal noted that orders requiring the posting of security for judgments must meet the requirement for a strong *prima facie* case as well as the requirement for a real risk that assets within the jurisdiction are about to be removed, rendering nugatory any judgment obtained.

[109] I agree and decline to grant an order for payment into Court in lieu of a preservation order.

VI. Attachment Order

[110] Syncrude attempts to overcome the objection to a preservation order in respect of management fees by seeking attachment under the provisions of the *CEA* of all of AMI’s assets, including management fees.

[111] The purposes of preservation orders and attachment orders are different. A preservation order targets property the ownership of which is in dispute. Attachment orders target property

that belongs to the respondent. This distinction recently was made by O'Ferrall J.A. in ***Gemba LLC v Nixious Investments Inc***, 2016 ABCA 241 at paras 20-21:

> As explained in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology* …, a "proprietary" injunction is one granted to preserve an asset in the possession of a defendant which the plaintiff says belongs to it. The authority for making such an order in Alberta may be found in Rule 6.25(1)(a) which provides that the court may make an order for the preservation of property which is in dispute. The purpose of a proprietary injunction is to preserve the disputed property until trial so that the property will be available to be returned to the plaintiff if successful at trial.
>
> Other types of injunctions (for example, *Mareva* injunctions) do not involve a claim to ownership to the asset sought to be the subject of the injunction. The *Mareva* injunction typically restricts a defendant from dealing with assets which he or she clearly owns. Injunctions prohibiting a defendant from dealing with his own property are governed by section 17 of the [*CEA*]. Such injunctions represent an exception to the rule that the civil courts ordinarily have no jurisdiction to attach the assets of an alleged debtor for the protection of the claiming creditor prior to the creditor obtaining judgment: *Lister & Co. v. Stubbs* ... [Citations omitted.]

A. Test

[112] The parties disagree on the appropriate test for granting an attachment order. The issue is whether a common law test applies in addition to the statutory test.

[113] Syncrude's position is that the test for an attachment order is encompassed within the four corners of s. 17(2) of the *CEA*. Sections 17(1) and 17(2) of the *CEA* provide:

> 17(1) A claimant may apply to the Court for an attachment order where
>
> > (a) the claimant has commenced or is about to commence proceedings in Alberta to establish the claimant's claim, or
> >
> > (b) the claimant has commenced proceedings before a foreign tribunal to establish a claim if
> >
> > > (i) a judgment or award of the foreign tribunal could be enforced in Alberta by action or by proceedings under an enactment dealing with the reciprocal enforcement of judgments or awards, and
> > >
> > > (ii) the defendant appears to have exigible property in Alberta.
>
> (2) On hearing an application for an attachment order, the Court may, subject to subsection (4), grant the order if the Court is satisfied that

> (a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and
>
> (b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,
>
> > (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and
> >
> > (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[114] AMI's position is that the tripartite test is only the starting point for an attachment order and that an applicant also must establish the requirements of s. 17(2) of the *CEA*. AMI submits that the four-part test it argued for a preservation order also applies to an attachment order. AMI argues that an attachment order is a form of injunctive relief, so it would be inappropriate not to consider the two branches of the tripartite test that are not included in s. 17 of the *CEA*: balance of convenience and irreparable harm.

[115] I do not accept AMI's argument that the requirements of s. 17(2) of the *CEA* are to be augmented with the tripartite test. In my view, s. 17(2) of the *CEA* is the complete test for an attachment order, though I note that it is discretionary. The Court in ***Rea v Patmore*** held at para 4:

> Although pre-judgment relief is incorporated into the [*CEA*], it remains an extraordinary remedy. Even a litigant who meets all the statutory prerequisites for the remedy may be denied the remedy: the court retains discretion to grant the remedy. While there is no catalogue of factors that will necessarily apply in all situations, when deciding whether to grant the remedy, the court will be guided by the "judicial abhorrence for prejudgment execution". In this case, while it is true that Mr. Patmore has dealt with the truck in a surreptitious and underhanded way, there is nothing to suggest that he is operating all of his business and personal affairs in such a way. The mere fact that Mr. Rea probably has a good action against Mr. Patmore is not reason enough to tie up a substantial amount of Mr. Rea's property until judgment.

[116] AMI did not cite any authority other than ***Gilks*** for its position. ***Gilks*** was an application for a preservation order, which Veit J. held was not appropriate. Her comments about the test for an attachment order are *obiter* and rely on a single sentence from ***Interclaim***. As discussed above, ***Interclaim*** is not authority for AMI's position nor, with respect, does it support the *obiter* comments in ***Gilks***.

[117] Further, in ***Chipewyan Prairie First Nation No 470 v Kent***, 2008 ABQB 157, 443 AR 56, Veit J. cited ***Industrial Rewind & Supply Inc v Kuntz & Kramer Services Inc***, 2001 ABQB 123, 11 CPC (5^{th}) 76, where the Court found that the balance of convenience favoured the

applicants even though they had not met the requirements of s. 17(2) of the *CEA*. Nevertheless, she held at paras 65-66 that the tests for an injunction and for an attachment order are distinct, though possibly similar in application.

[118] Much like AMI, the respondent in ***Alberta (Treasury Branches) v Pocklington***, 1998 ABQB 810, 231 AR 84 argued that the Court is not compelled to grant an attachment order where the balance of convenience test is not met. At paras 34-36, the Court noted the discretion afforded by s. 17(2) of the *CEA* but left open the question of whether it compelled a consideration of irreparable harm or the balance of convenience.

[119] The Court of Appeal, however, has taken a narrow view of the discretion afforded by s. 17(2). In ***Tycholis v Teem Energy Ltd***, 2007 ABCA 219, 417 AR 135, the Court of Appeal reversed Veit J.'s decision to deny an attachment order on the basis of "dissipation". The Court of Appeal stated at para 35 that as the *CEA* does not make dissipation a requirement, it is irrelevant in a technical and legal sense. This suggests that s. 17(2) of the *CEA* is a complete code.

[120] Similarly, in ***1773907 Alberta Ltd v Davidson***, 2016 ABQB 2, one party sought to rely on a common law exception to obviate the requirement in s. 17(2)(b)(i) of the *CEA***.** At para 83, this Court declined to adopt the common law exception because "the requirements for an attachment order are set out in statutory form and not in the common law".

[121] Finally, AMI argued that attachment orders are a form of injunctive relief and therefore the tripartite test cannot be ignored. This argument must fail as the Court of Appeal has held that attachment orders are not injunctions. In ***Proprietary Industries Inc v Workum***, 2006 ABCA 225, 397 AR 243, the Court of Appeal held that a Master had jurisdiction to issue attachment orders under the *CEA* and stated at para 22:

> Though attachment orders have an injunctive element to them, they differ from injunctions in several material respects. Attachment orders are limited in that they are designed to preserve property and are of limited duration; until the matter goes to trial. They cannot restrain underlying wrongful conduct or compel a defendant to action unrelated to preservation of property. In addition, the legal test and the proof required to obtain an attachment order differs from the requirements for an injunction order.

[122] Accordingly, I accept Syncrude's position that the test for an attachment order is contained entirely in s. 17(2) of the *CEA*. There is no additional requirement that an applicant meet the tripartite test established in ***RJR-MacDonald***.

B. Application

[123] Turning to the criteria in s. 17(2) of the *CEA*, Syncrude asserts that it is reasonably likely that its claim in conversion against AMI will be established. Syncrude states in its brief that conversion may be described as a "wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession". As noted above, Syncrude asserts that it has an exclusive right to use and possess reclamation material.

[124] Syncrude also asserts in its brief that there is a reasonable likelihood that its counterclaim against AMI in trespass to chattels will be established. It cites ***Sprung Instant Structures Ltd v Royal Bank of Canada,*** 2008 ABQB 30, 439 AR 334 at para 15 for this proposition:

> A trespass to a chattel will be established where the plaintiff has possession or an immediate right of possession and that right of possession is wrongfully interfered with, physically, by the defendant, but without the intention or effect of denying or negating the plaintiff's title.

[125] I note, however, that while the Syncrude MSL requires Syncrude to stockpile reclamation material, including sand and gravel, I can find no reference therein to an exclusive right to use and possess sand and gravel. Rather, the evidence before me suggests that Syncrude's rights have been subordinated to AMI's right to operate the Susan Lake pit.

[126] Regarding the second criterion, Syncrude asserts that there are reasonable grounds for believing that AMI is dealing with its exigible property, or is likely to deal with that property, other than for the purpose of meeting its reasonable and ordinary business expenses.

[127] AMI denies this and explains decreases in its total assets, retained earnings and equity as the result of "one off" events, including the writing down of certain inventories and other assets.

[128] Syncrude also asserts that there are reasonable grounds for believing that AMI's dealings with its property are likely to seriously hinder Syncrude's ability to enforce judgment against AMI, but it has provided no evidence to support this assertion.

[129] AMI asserts that these claims must be supported by evidence beyond merely Syncrude's belief: ***First Mortgage Fund (V) Inc (Receiver Manager of) v Boychuk***, 2003 ABQB 217, 336 AR 319 at para 30. It cites this Court's comments in ***1482221 Alberta Ltd v Haney Farms (1985) Ltd***, 2009 ABQB 760, 486 AR 12 at para 58:

> However, an attachment order cannot be granted simply on the basis that the defendant may not later be solvent enough to satisfy a judgment that may ultimately be awarded; the requirements of the Act must still be met: [***First Mortgage***], para 30. The Court must examine the debtor's situation to determine whether the creditor is likely to be seriously hindered in the enforcement of its Judgment as a result of the manner in which the debtor is, or is likely to, deal with its property.

[130] Syncrude asserts that AMI does not have sufficient funds to satisfy a judgment of $68 million and that it cannot raise such funds. AMI readily acknowledges that it does not have the resources to satisfy a $68 million judgment. However, I believe there is danger in forging too strong a link between the quantum of an applicant's claim for damages and a respondent's balance sheet.

[131] The fact that Syncrude's counterclaim so vastly overwhelms AMI's ability to satisfy that claim should not in itself be viewed as justification for attaching AMI's assets. The reality here is that if Syncrude is only moderately successful in its counterclaim it will put AMI out of business.

An attachment order at this stage of the action would not appear to significantly enhance Syncrude's chances of recovery.

[132] In the result, I decline to grant an attachment order.

VII. Mareva Injunction

[133] A Mareva injunction would have essentially the same effect as an attachment order, ensuring that management fees are secured pending trial. Syncrude acknowledged that if I granted an attachment order, a Mareva injunction would not be necessary. Given that I have declined to grant the attachment order, however, Syncrude's request for a Mareva injunction remains a live issue.

[134] Authority to order a Mareva injunction derives from the Court's equitable jurisdiction to grant injunctive relief pursuant to the ***Judicature Act***, RSA 2000, c J-2, s 13(2): ***1007374 Alberta Ltd v Ruggieri***, 2013 ABQB 420, 565 AR 329 at para 23. As with the attachment order application, the parties disagree on whether the tripartite test is relevant for a Mareva injunction.

A. Test

[135] Syncrude's position is that an applicant for a Mareva injunction must establish: (i) a strong *prima facie* case and (ii) a real and substantial risk that the respondent will dispose of its assets such that the applicant would be hindered or delayed in the recovery of judgment. Syncrude relies on ***Aetna*** at para 30 and on ***Agrium Inc v Pocha***, 2000 ABCA 296 at para 2.

[136] AMI's position is that the applicant must establish: (i) a strong *prima facie* case, (ii) irreparable harm, and (iii) a real risk that the defendant will remove assets from the jurisdiction or dissipate those assets to avoid the possibility of a judgment. AMI relies on ***Aetna*** at para 30 and on ***Cho v Twin Cities Power-Canada***, 2012 ABCA 47 at para 5.

[137] Both AMI and Syncrude cite ***Aetna*** as authority for the proposition that the applicant must establish a strong *prima facie* case. On a close reading, ***Aetna*** actually does not stand for that proposition. In ***Aetna***, the Court surveyed U.K. and Canadian authority on Mareva injunctions and noted at para 29 that the Ontario Court of Appeal in ***Chitel v Rothbart*** (1982), 39 OR (2d) 513 chose a different threshold from that in the U.K. The U.K. authorities required a "good arguable case"; see Lord Denning in ***Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*** [1977] 3 All ER 324 (CA). The Ontario Court of Appeal held that the appropriate threshold was whether the applicant demonstrated a strong *prima facie* case. In ***Banco Ambrosiano Holdings SA v Dunkeld Ranching Ltd***, [1987] 85 AR 278 (CA), an early Alberta Mareva injunction case, the Court declined to adopt the strong *prima facie* case threshold and held that ***Aetna*** had not decided the standard of proof required. In subsequent cases, however, Alberta has adopted the strong *prima facie* case threshold: ***Agrium*** at para 2; ***Cho*** at para 5; ***Vaccaro*** at para 16. Moreover, a strong *prima facie* case versus a good arguable case is likely a difference in words without practical consequences: ***Tracy v Instaloans Financial Solutions Centres (BC) Ltd***, 2007 BCCA 481, 48 CPC (6^{th}) 157 at para 54.

[138] The purpose of creating the attachment order remedy under the *CEA* was to eliminate the uncertainty surrounding the circumstances in which a Mareva injunction could be obtained:

Alberta Institute of Law Research and Reform, *Prejudgment Remedies for Unsecured Claimants*, Report No 50 (Edmonton: ALRI, 1988) at 146-47. After the creation of the attachment order it was thought by some that while the Mareva injunction remained in existence in Alberta it would be granted in very rare occasions: Ray Rutmen et al, *Creditors' Remedies in Alberta*, loose-leaf, 2d ed (Carswell, 1999), 6-2. This has not proved to be the case and Alberta courts continue to grant Mareva injunctions: ***Interclaim*** at para 83; ***Ruggieri*** at para 24.

[139] Mareva injunctions are granted, however, on the basis of a test that differs from that in s. 17(2) of the *CEA*. In ***Metalworks Canada Ltd v Warrack***, 2014 ABCA 389, 588 AR 54 at para 25 the Court of Appeal held that the grounds for obtaining a Mareva injunction differ from those for obtaining an attachment order in two ways: (i) the strength of the plaintiff's claim, and (ii) how probative the evidence must be that the respondent has dealt or will deal with the subject assets.

[140] First, the strength of the applicant's claim required for a Mareva injunction is higher than for an attachment order: ***1498587 Alberta Inc v Devani***, 2012 ABQB 324, 540 AR 335 at para 22 citing ***Osman Auction Inc v Belland***, 1998 ABQB 964, 235 AR 180 at para 39; see also ***Lyons v Creason***, 2008 ABQB 550 at para 10. An applicant for a Mareva injunction must show a strong *prima facie* case, whereas an applicant for an attachment order must show only that there is a reasonable likelihood that he will establish his claim against the defendant.

[141] Second, Alberta courts require evidence that the respondent intends to remove, hide or dissipate assets in order to avoid judgment: ***Cho*** at para 10; ***Vaccaro*** at para 16. By contrast, s. 17(2)(b) of the *CEA* does not require intent to defeat judgment: ***Pocklington*** at para 25.

[142] This brings me to the question of whether the tripartite test applies to Mareva injunctions. AMI relies on the following statement from ***Cho*** at para 5:

> The tests for a Mareva injunction are not new. There are a number of procedural requirements, and the usual tripartite test for ordinary injunctions probably also must be satisfied. On the merits, the plaintiff must show a strong *prima facie* case for his suit, and also that there is a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, in order to avoid execution (enforcement) under a judgment. See [***Aetna***] (para 30); *Clark v. Nucare PLC*, 2006 MBCA 101, 208 Man R (2d) 102 (para 41); *Eli Lilly Can v. Novopharm*, 2010 FC 241, 364 FCR 265, 82 CPR (4th) 401; Sharpe, *Injunctions and Specific Performance*, para 2.880 (looseleaf, Dec 2011 issue).

[143] The Federal Court stated in ***Eli Lilly Canada Inc v Novopharm Ltd***, 2010 FC 241, 364 FTR 265 at paras 19-20:

> In summary, in Canada the following requirements for a *Mareva* injunction must be established:
>
>> 1. The plaintiff must establish a strong prima facie case for potential success at trial: [***Aetna***] at 27;
>>
>> 2. The plaintiff must meet the five guidelines set out in *Third Chandris Shipping* as re-articulated and modified in *Chitel*, namely

> (a) full and frank disclosure, (b) particulars of the claim, (c) assets within the jurisdiction, (d) risk of removal or dissipation of assets in order to frustrate judgment, and (e) an undertaking as to damages; and
>
> 3. The plaintiff must satisfy the regular tripartite test for an interlocutory injunction described in [***RJR-MacDonald***] at 334, namely (a) the presence of a serious question to be tried, (b) irreparable harm should the injunction not be granted, and (c) that the balance of convenience favours the moving party.

If the applicant fails to meet any of these, the Court should refuse the *Mareva* injunction.

[144] AMI has not pointed to any authority since ***Cho*** where an Alberta court applied the tripartite test to a Mareva injunction. In fact, it is unclear whether the Court of Appeal has followed ***Cho***. In ***Vaccaro***, decided after ***Cho***, O'Ferrall J.A. said at para 16 that the test for a Mareva injunction required only two things: a strong *prima facie* case and a risk of removal or dissipation of assets in order to frustrate any judgment. However, ***Vaccaro*** was a security for costs case, not an application for a Mareva injunction.

[145] In ***1007374 Alberta Ltd v Ruggieri***, 2013 ABQB 278, the respondent relied on ***Cho*** to argue that the tripartite test must be satisfied for a Mareva injunction. Hawco J. held at para 25 that requiring that the tripartite test be met in addition to the two-part Mareva injunction test did not result in a higher test. His reasoning is consistent with the general consensus that if the applicant establishes a strong *prima facie* case, it will have met the "less exacting" test of a serious issue to be tried: ***Interclaim*** at para 46 citing ***Aetna***; see also ***Interclaim Holdings Limited v Down***, 1999 ABCA 214 at para 6. There is no authority, however, on whether the tests of irreparable harm and balance of convenience are subsumed within the Mareva injunction test.

[146] In ***Cho*** and ***Eli Lilly***, the Courts did not have to determine whether the tripartite test was met. In ***Eli Lilly***, the applicant had not provided an undertaking as to damages. In ***Cho***, the applicant failed to show that the respondents were removing, hiding or dissipating assets to avoid execution.

[147] Interestingly, in ***Front Carriers Ltd v Atlantic & Orient Shipping Corp***, 2006 FC 18, the Federal Court held at paras 33-37 that the serious issue to be tried test is subsumed within the requirement that an applicant set out the particulars of the claim. The Court held at para 15 that the three branches of the tripartite test "are merged with the separate distinct criteria of a Mareva injunction". The Court granted a Mareva injunction without explicitly addressing balance of convenience and irreparable harm. Perhaps this is because if there is a real risk that the assets will be dissipated or moved to avoid judgment, the applicant has established irreparable harm and the balance of convenience favours granting the order.

[148] In summary, I find that an applicant for a Mareva injunction in Alberta must establish (a) a strong *prima facie* case for potential success at trial, and (b) a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, in order to avoid a judgment. Further, the

applicant must meet procedural requirements: (a) full and frank disclosure, (b) particulars of the claim, (c) assets within the jurisdiction, and (d) an undertaking as to damages. Finally, the applicant must satisfy two branches from the tripartite test: irreparable harm and balance of convenience.

B. Application

[149] I note the comments of the Court of Appeal in ***Modry v Alberta Health Services***, 2015 ABCA 265, 606 AR 373 at para 37:

> For a definition of "strong *prima facie* case", see ***IBM Canada Ltd v Almond***, 2015 ABQB 336 at para 29 (a strong *prima facie* case is one that will "probably prevail at trial" or is "likely to succeed at trial"), …

[150] Syncrude asserts that it has a strong *prima facie* case premised on its claim to exclusive use and possession of reclamation material. Can it be said at this stage that Syncrude will probably prevail at trial in its claims of conversion and trespass to chattels?

[151] In my view, there is more than sufficient doubt about the outcome of the trial Court's attempt to reconcile the various agreements impacting on the Overlapping Area to prevent me from concluding that Syncrude will probably prevail at trial.

[152] Consequently, I find that Syncrude has not established a strong *prima facie* case. Further, I am not, from the evidence submitted, prepared to find that there is real risk that AMI will dissipate assets.

[153] Syncrude's request for a Mareva injunction is denied.

VIII. Conclusion

[154] To summarize, Syncrude's applications for a preservation order, for an attachment order and for a Mareva injunction are denied. If the parties are unable to agree on costs they may submit written argument within thirty days of the date of these Reasons.

[155] I mention in passing that AMI pointed out that a prejudgment preservation order should not be used as a tactical weapon against a defendant who has a valid defence to the claim: see ***1773907 Alberta Ltd v Davidson*** at para 73. I have had some disquiet at the fact that Syncrude's response to AMI's action against it included a counterclaim for more than one hundred times the amount sought by AMI. To be sure, Syncrude is free to assert a counterclaim in whatever amount it thinks fit. Nevertheless, the Court must exercise great care to ensure that the quantum of an as yet unproven claim does not, by itself, influence the assessment of the merits of the application for prejudgment relief. Prejudgment relief, especially when it has the potential to limit the respondent's ability to carry on business and to proceed with litigation, must not be allowed to be used improperly.

Heard on the 13th and 14th days of October, 2016.
Dated at the City of Calgary, Alberta this 24th day of January, 2017.

C.M. Jones
J.C.Q.B.A.

Appearances:

Marco Poretti
Reynolds Mirth Richards & Farmer LLP
for the Plaintiff/Respondent

Joshua A. Jantzi
Dentons Canada LLP
for the Defendant/Applicant

Tab 14

Hoff v. Gerk, 1999 ABQB 744

Date: 19991006
Action No. 9804-00030

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF GRANDE PRAIRIE

BETWEEN:

JODY HOFF, JORDAN RUECKER, DRY POLE COULEE INC.
AND B.R.M. HOFF ENTERPRISES INC.

Plaintiffs
(Appellants)

- and -

CONRAD GERK AND CE-JAY RANCH INC., DOUG BURLOCK,
DIANE BURLOCK, BURLOCK HOLDINGS INC.,
KLESKUN HILLS PONDEROSA LIMITED, PHIL MUNDY
AND DAVE ROWE, PETER GERK AND MARGARET GERK

Defendants
(Respondents)

REASONS FOR JUDGMENT

OF THE HONOURABLE MADAM JUSTICE J.C. COUTU

INTRODUCTION:

[1] In January 1998, the Plaintiffs sued the Defendant Conrad Gerk and Ce-Jay Ranch Inc. for $600,000.00 damages arising out of an agreement for the raising of buffalo. In mid February 1998, the Plaintiffs removed 188 buffalo from the Ce-Jay Ranch location to Mr. Hollingworth's ranch. On June 10, 1999, the Defendants applied for a preservation order pursuant to Rule 467. The Master ordered that all the buffalo moved to the Hollingworth ranch must remain on the ranch and cannot be sold, butchered or otherwise disposed of. The Plaintiffs appeal that decision.

ISSUES:

[2] The Plaintiffs submit the Master should have denied the application for the following reasons:

(a) At the time of the application, the Defendants, in their pleadings, had not claimed ownership to the buffalo.

(b) Conrad Gerk and Ce-Jay Ranch Inc., filed bankruptcy or receivership and had no capacity to carry on with the action and had no capacity to make the Court application.

(c) Mr. Seymour and Mr. Gerk are not lawyers therefore they cannot represent other Defendants and ought not to have a right of audience.

(d) The Defendants did not provide an undertaking for damages.

HISTORY OF ACTION:

[3] On January 13, 1998, the Plaintiffs sued the Defendant Conrad Gerk and Ce-Jay Ranch Inc. for $600,000.00 damages. The Statement of Claim alleges that the Defendant Conrad Gerk convinced the Plaintiffs to purchase buffalo and Mr. Gerk and Ce-Jay Ranch Inc. would care for the buffalo in return for a 50 percent share of live offspring. It is alleged that the Defendants failed to properly care for the buffalo, resulting in many buffalo dying and few offspring. The Plaintiffs allege the Defendants breached their fiduciary duty by keeping monies that belonged to the Plaintiffs. The Plaintiffs also seek an injunction allowing them to take over the care of the buffalo.

[4] In early February 1998, the Burlocks, Burlock Holdings Inc., Kleskun Hills Ponderosa Limited, Phil Mundy and Dave Rowe claimed that some of the buffalo were their buffalo. Until that time, the Plaintiffs were not aware that the Defendants were caring for other owners' buffalo.

[5] In mid-February 1998, as a result of an agreement reached between the Plaintiffs' counsel and Defendants' counsel, the Plaintiffs removed most of the buffalo from the Defendants' ranch and moved them to the Hollingworth ranch. Pursuant to the agreement, approximately 18 buffalo were left in the possession of the Defendants as these were the buffalo other owners (Burlocks etc.) were claiming ownership of.

[6] In mid February 1998, the 18 buffalo that were left in the Defendants' possession were seized by the S.P.C.A. because they were in poor physical condition. The S.P.C.A. moved these buffalo to the Hollingworth property. However, not long after, these 18 buffalo were moved back to the Defendants' ranch.

[7] On the 12th of March, 1998, the Plaintiffs filed a motion to amend their Statement of Claim to bring in as Defendants the individuals who were claiming ownership to the 18 buffalo (the Burlocks etc.) and to seek a declaration as to the ownership of these buffalo. (On April 16, 1998, an Order allowing this amendment was granted.)

[8] On April 3rd, 1998, Conrad Gerk and Ce-Jay Ranch Inc. retained a lawyer who then filed a Statement of Defence. The defence denies the Defendant Gerk was in a position of fiduciary trust, denies that the Defendants made a secret profit, denies the poor care of the buffalo, denies that the Defendants sold any of the Plaintiffs' buffalo without the Plaintiffs' consent, and denies that the Defendants were prohibited from selling their share of the offspring. Paragraph 14 of the defence alleged "That on the 11th of February, 1998, the Plaintiffs and Defendants entered into an agreement to divide the buffalo whereby the Defendants would take 16 heifers plus all tagged buffalo not owned by the Plaintiffs and the Plaintiffs would be entitled to remove all remaining buffalo."

[9] In June 1998, the Defendants Doug and Diane Burlock and Burlock Holdings Inc. retained lawyers and filed a Statement of Defence. The defence alleges they paid Ce-Jay Ranch Inc. to purchase 8 buffalo. They claim ownership to these buffalo as bona fide purchasers for value. They also issued a counterclaim against the co-Defendants Conrad Gerk and Ce-Jay Ranch Inc. to recover the cost of the buffalo in the event the Court held they were not entitled to the buffalo.

[10] In June 1998, the Defendant Kleskun Hills Ponderosa Limited retained the same counsel and filed a similar defence and counterclaim against Conrad Gerk and Ce-Jay Ranch Inc.

[11] Later, the Plaintiffs discovered that Conrad Gerk filed bankruptcy. They also discovered he was advertising to sell the buffalo ranch and the buffalo on the ranch. The Plaintiffs went to court to obtain a preservation order with respect to the buffalo on the Gerk ranch.

[12] July 3rd, 1998, the Master ordered that the 18 buffalo on the Gerk ranch would remain on the Gerk ranch and that no party to the action, pending trial, could sell any of the 18 buffalo.

[13] Shortly before that application, the parents of Conrad Gerk, Peter and Margaret

Gerk, filed a lien under the *Livery Stable Keepers Act* alleging they were owed monies for the care of the buffalo. The Master's Order of July 3rd, 1998, ordered that this *Livery Act* lien would be determined at the same time the main action went to trial.

[14] In August 1998, the lawyer acting for the Defendants Gerk and Ce-Jay Ranch Inc. filed a Notice of Ceasing to Act. These Defendants then retained new lawyers. However, in March of 1999 these new lawyers also filed a Notice of Ceasing to Act.

[15] April 12th, 1999, the lawyer representing the Burlocks and Burlock Holdings Inc. and Kleskun Hills Ponderosa Limited filed a Notice of Ceasing to Act.

[16] May 17th, 1999, Mr. Seymour, as agent for the Defendants Burlock, Burlock Holdings Inc. and Kleskun Hills Ponderosa Limited, filed a discontinuance of their action against Conrad Gerk and Ce-Jay Ranch Inc. Mr. Seymour has a business relationship with Mr. Gerk. Mr. Seymour and Mr. Conrad Gerk are directors of Conrad Gerk Corporation, Burlock Holdings and Kleskun Hills. (However, there is no information disclosing when they became directors of those companies.) Neither Mr. Gerk nor Mr. Seymour are lawyers.

[17] May 21st, 1999, Mr. Seymour, on behalf of all of the Defendants, filed a Notice of Motion and Affidavit. The Defendants were seeking an order that all of the buffalo on the Hollingworth ranch be kept on the Hollingworth ranch and that no party to the action could sell these buffalo pending the trial of the action. In support of that application there was an Affidavit by Conrad Gerk. In that Affidavit, *and for the first time*, Conrad Gerk alleges that on September 14th, 1996, Ce-Jay Ranch Inc. purchased some buffalo from the Plaintiffs.

[18] Prior to the Master hearing the application, Plaintiffs' Counsel objected to the application being made by telephone conference as the Master, who was in Edmonton, would not have the file. The file is a very thick file with hundreds of documents and pleadings. Despite the Plaintiffs' objection, the application was heard by way of telephone conference.

[19] June 10th, 1999, the Master issued an order which provided:

(1) All of the bison (buffalo) which were the subject of the application on Thursday, June 10th, 1999, will remain where they presently are pending further order of the Court.

(2) None of the said bison will be sold, butchered or otherwise disposed of.

[20] On June 28th, 1999, the Plaintiffs filed a Notice of Appeal of the Master's Order. One of the listed reasons for appeal, was that the Defendants, Gerk and Ce-Jay Ranch Inc., never raised in their defence or issued a counterclaim alleging they were owners of some of the buffalo. (The Notice of Appeal was returnable for July 12, 1999.)

[21] Four days later, on July 2nd, 1999, Statements of Defence were filed by Peter Gerk and Margaret Gerk, Phil Mundy, Conrad Gerk and Ce-Jay Ranch Inc. and Kleskun Hills Ponderosa Limited. All of these Statements of Defence were filed by Conrad Gerk.

[22] As to the defence by Conrad Gerk and Ce-Jay Ranch Inc., the Statement of Defence is almost identical to the first Statement of Defence, filed by their counsel, except for two important changes. Paragraph 14 (in the first Statement of Defence) was deleted. That paragraph had acknowledged that on the 11th of February, 1998, the Plaintiffs and Defendants agreed to divide the buffalo whereby the Defendants would take the buffalo not owned by the Plaintiffs and the Plaintiffs would be entitled to remove all the remaining buffalo. Further, the second Statement of Defence, in Paragraph 16, alleges that the Plaintiffs removed the buffalo without legal authority to do so and converted the buffalo by falsifying ownership, or, in the alternative, converted buffalo belonging to the Defendants. There is no counterclaim alleging ownership or damages for any of the buffalo.

[23] The Plaintiffs examined Mr. Gerk at Examination for Discovery on June 15, 1999. Mr. Gerk testified he filed bankruptcy and is now discharged. Ce-Jay Ranch Inc. filed for receivership but it was not concluded yet. Mr. Gerk was asked whether the Trustee in Bankruptcy for Ce-Jay Ranch Inc. granted consent or approval for the Court applications. Mr. Gerk replied that he did not have anything in writing. Mr. Gerk was asked whether the Bankruptcy Trustee (for himself personally) provided any consent or approval for litigation being carried on in his name. Mr. Gerk replied that he was discharged. He was then asked whether, prior to being discharged, the Trustee had provided him with approval or consent for this action being carried on in his own capacity. Mr. Gerk replied that he had never talked to the Trustee about it. Mr. Gerk confirmed that he never made any application to the bankruptcy court for consent or approval to continue this litigation in his own capacity. Similarly, Ce-Jay Ranch Inc. did not apply to the Bankruptcy Trustee for consent or approval to continue the litigation.

DECISION:

[24] In my view, bringing this application in front of the Master by way of telephone conference was inappropriate and unfair to the Master because of the complexity of the issues and the number of documents pertaining to this action. The matter should have been brought in special chambers.

[25] With all due respect to the learned Master, I allow the Appeal and set aside the Order he granted on the 10th of June, 1999.

[26] Prior to dealing with my Reasons I point out that neither Mr. Gerk nor Counsel for the Appellant provided the Court with any authorities so the authorities referred to in these Reasons are those of the Court.

[27] The application should have been denied for the following reasons:

A. At the time of the application, the Defendants, in their pleadings, had not claimed ownership to the buffalo.

[28] Rule 476 of the *Rules of Court* provides:

Where there is a dispute respecting the title to any property, the Court may make an order for the preservation or interim custody of the property.... (italics added)

[29] Clearly, Rule 467 sets out that to obtain a preservation order there must be a dispute respecting title to the property. Court cases confirm this principle. **Echo Valley Farms v Alta** (1998) A.J. No. 659 and **J.R. Paine and Assoc. Ltd. v Cairns** (1987) 55 Alta. L.R. (2d) 293.

[30] In this case, at the time of the application, in the pleadings, there is no claim by Mr. Gerk or Ce-Jay Ranch Inc. to any buffalo. Mr. Gerk filed an affidavit in support of his motion *and for the first time* alleged the purchase of 40 buffalo. However, an affidavit is not a pleading.

[31] In fact, in mid February 1998, the parties, through Counsel, agreed that, except for 18 buffalo, the Plaintiffs could take the buffalo to the Hollingworth ranch. This agreement was carried out. In the first Statement of Defence the Defendants acknowledge this agreement. *Subsequent* to the Master's Order the Defendants *purportedly* filed a second Statement of Defence and removed the paragraph which acknowledged the agreement. Although the Court clerks filed the second Statement of Defence it should not have been filed. There already was a Statement of Defence by these Defendants. A defendant cannot have two Statements of Defence. The second Statement of Defence does not indicate it is an Amended Statement of Defence. Further, Mr. Gerk, not being a lawyer, should not be representing other defendants in a Court of Queen's Bench action. I will refer to that matter later on in these Reasons. Even when the Defendants purportedly filed a second Statement of Defence they did not file a Counterclaim claiming ownership of the buffalo. If they have such a claim it should be clearly set out in a Counterclaim with the particulars as to how many buffalo they claim and the value.

[32] In any event, the order purports to preserve all buffalo on the Hollingworth ranch yet, even in his Affidavit, Mr. Gerk only claims to have purchased 40 buffalo. Further, because there is no counterclaim the Court is unable to determine if Mr. Gerk is claiming title to the buffalo or claiming damages for the buffalo. Where the claim is for damages a preservation order is not required as there is no dispute as to title of property. Further, the Court may decline to grant an injunction (which a preservation

order is) if damages are an adequate remedy.

B. Conrad Gerk and Ce-Jay Ranch Inc. filed bankruptcy or receivership and had no capacity to carry on with the action and no capacity to make the Court application.

[33] Section 70(2) of the *Bankruptcy Insolvency Act*, R.S.C. 1985, c.B-3 provides:

> (2) On a Receiving Order being made or an Assignment being filed with an Official Receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the Trustee named in the Receiving Order or Assignment, and in any case of change of Trustee the property shall pass from Trustee to Trustee without any conveyance, assignment or transfer.

[34] "Property" is defined in s.2(1) to include "Choses in Action." Therefore, the within action is property and Mr. Gerk and Ce-Jay Ranch Inc. having filed bankruptcy and receivership ceased to have capacity to deal with this property.

[35] In **Rahall v McLennan** (1997) 1 W.W.R. 316, Belzil J. extensively reviewed the law in this area and, by operation of the *Bankruptcy and Insolvency Act,* a bankrupt individual or corporation is precluded from bringing any actions except personal ones. In this case, the action is not a personal action and Mr. Gerk and Ce-Jay Ranch Inc. have no capacity to carry on with the action or make the Court application.

[36] The Trustee in Bankruptcy is to continue this action. As s.70(2) of the *Bankruptcy and Insolvency Act* provides, a bankrupt ceases to have any capacity to dispose of or deal with his property as that right passes to and vests in the Trustee in Bankruptcy.

[37] I refer to **Long v Brisson** (1992) 3 Alta. L.R. (3rd) 79 wherein the Alberta Court of Appeal held that if there is an assignment into bankruptcy, causes of action are vested in the Trustee at that time and the bankrupt person has no status to deal with the action.

[38] It is immaterial that the Trustee and the bankrupt have been discharged. **C.I.B.C. v Woodgrove Hills Developments Ltd.** (1982), 43 C.B.R. (N.S.) 239 (Ont. H.C.).

[39] If the Trustee refuses to bring an action, the bankrupt or a shareholder of the bankrupt may bring an application under s.37 for permission to bring the action. In this case, the Applicants did not have the permission of the Trustee to continue with the action and made no s.37 application. In **Churchill Pulpmill Ltd. v Manitoba** (1977) 3 W.W.R. 581 (Man. Q.B.), affirmed (1977) 6 W.W.R. 109 (Man. C.A.) the Court held that

the plaintiff had no status to maintain an action as it had not applied for leave to commence an action as a shareholder for the benefit of the corporate bankrupt. A shareholder of a company in bankruptcy has no status to either prosecute or defend an action for or on behalf of the bankrupt. The shareholder could apply for leave to pursue the action but this was not done.

[40] If, prior to bankruptcy, the bankrupt has commenced an action for damages for breach of contract, the Trustee can apply to the Court for leave to continue the action. **Brenner v American Metal Company** (1920), 1 C.B.R. 375 (S.C.).

[41] For the above reasons, Conrad Gerk and Ce-Jay Ranch Inc., have no capacity to carry on with the action and had no capacity to make the application to the Master and the Order should be set aside.

C. Mr. Seymour and Mr. Gerk are not lawyers therefore they cannot represent other Defendants and ought not to have a right of audience.

[42] Rules 5.2 to 5.4 of the *Rules of Court* state:

> 5.2 Subject to this part, a person shall only be represented before Court by a solicitor.
> 5.3 An individual may represent himself before the Court.
> 5.4 With the permission of the Court, a person may be represented before the Court by an Agent other than a solicitor.

[43] Section 103 of the *Legal Profession Act*, S.A. 1990, c. L-9.1 regulates the practice of law in the province of Alberta. The relevant parts of s.103 are as follows:

> (1) No person shall, unless he is an active member of the Society,
>
> (a) practice as a barrister or as a solicitor,
> (b) act as a barrister or as a solicitor in any Court of civil or criminal jurisdiction,
> (c) commence, carry on or defend any Action or proceeding before a Court or Judge on behalf of any other person, or,
> (d) settle, or negotiate in any way for the settlement of any claim for loss or damage founded in tort.
>
> (2) Subsection (1) does not apply to the following:
>
> (c) a professional corporation in respect of services performed while it holds a permit under Part 8 that is not under suspension;

(h) a person who acts on his own behalf in an Action, matter or proceeding to which he is a party;

(j) an officer or employee of a corporation, partnership or unincorporated body in respect of the preparation of a document for the use of the corporation, partnership or unincorporated body or to which it is a party;

(l) a person permitted by statute to appear as the Agent of another person before a Justice of the Peace, the Provincial Court or a Provincial Judge in respect of services provided by that person as an Agent.

[44] Section 74 of the *Provincial Court Act*, R.S.A. 1980, c. P-20 expressly permits non-lawyers to represent others, including corporations, in proceedings in the Civil Division of the Provincial Court, but does not extend this permission to appeals from the Civil Division to the Court of Queen's Bench.

[45] In **Professional Sign Crafters** (1993) 137 A.R. 784 the Plaintiff company was represented by Mr. Stanley, the sole director and shareholder. Mr. Stanley was not a lawyer. Master Alberstad held the director was not able to represent the Plaintiff company (in an application by the Defendant to strike the claim) as he was not a lawyer. Pursuant to s.103 of the *Legal Profession Act* only a lawyer could do that. Mr. Stanley applied under Rule 5.4 for permission to represent the company. The Master dismissed the application and held that Rule 5.4 is a nullity as it is a procedural rule and it cannot s.103 of the *Legal Profession Act*. An appeal to the Court of Queen's Bench was dismissed without recorded reasons.

[46] Later, in that same action, the Defendant applied to strike the Plaintiff's Statement of Claim as it was filed by a non-lawyer. Master Alberstad struck the claim and the Plaintiff appealed. O'Leary J. in **Professional Sign Crafters (1988) Ltd. v Wedekind** (1994), 19 Alta. L.R. (3rd) 53 (Q.B.) heard the appeal and held Rule 5.4 is not a nullity. O'Leary J. held that a superior Court judge has discretion to permit a non-lawyer to appear physically in court as a representative of another (right to audience.) However, such discretion should be exercised with care. However, non-lawyers cannot act for or represent another person in litigation. Since Mr. Stanley was not a lawyer he could not file the Statement of Claim. The action was stayed instead of struck.

[47] O'Leary J. thoroughly reviewed the law and at p.57 outlined it:

> The Right of Audience
>
> In order to place the issues in perspective it is important to distinguish between the inherent discretion of a superior Court to

permit a non-lawyer to appear physically in Court or before a judge as the representative or advocate of another person (the "right of audience"), and the right of an individual to represent another person in respect of legal matters generally, that is, the right to practice law.

Unless clearly taken away or modified by statute, the Court of Queen's Bench, as a superior Court, has, by virtue of its inherent jurisdiction to control its own procedure, a discretion to permit an individual other than a member of the Law Society of Alberta to appear in Court as an agent or advocate on behalf of another person: **Collier v. Hicks** (1831), 2B. & Ad.663, 109 E.R. 1290; **Abse v. Smith**, [1986] Q.B. 536 (C.A.).

Rule 5.4 is a recognition and confirmation of the Court's inherent discretion. It manifests an intention on the part of the Judges of the Court of Queen's Bench to retain the right to control who may appear in Court on behalf of parties to litigation. It is one of three Rules promulgated in 1992 as Pt. 1.1 of the *Rules of Court* under the heading "Audience Before the Court" (Alta. Reg. 87/92). It is preceded by R. 5.2 and 5.3:

5.2 Subject to this Part, a person shall only be represented before the Court by a Solicitor.

5.3 An individual may represent himself before the Court.

The Court's inherent discretion may, of course, be modified or taken away completely by statute. If the Act affects the Court's inherent jurisdiction, then the discretion must give way to the extent that it is inconsistent with the legislation. The wording of s.103(1)(*c*) must be examined since, at first glance, it appears to remove the discretion by prohibiting anyone but a lawyer from representing another person "before a court of judge":

(1) No person shall, unless he is an active member of the Society,

(*c*) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person,

To effectively take away or modify the Court's inherent jurisdiction the legislature must do so in clear and unequivocal terms: **Cook v. Ip** (1985), 22 D.L.R. (4th) 1 (Ont. C.A.), **Jahnke v. Wylie** (1993), 13 Alta. L.R. (3rd) 31 (Q.B.).

In my opinion, s.103(1)(*c*), properly construed, does not remove or diminish the Court's inherent discretion to decide who it will permit to address it and is not in conflict with Rule 5.4. The Legislature could not have used the word "before" in the sense of a physical presence in a courtroom in front of a judge. Subsection (1)(*c*) would not make sense if that were the case. One does not "commence" an action or proceeding in a courtroom or in the presence of a judge. The words "carry on or defend any action or proceeding" are equivocal. They may refer to physical attendances in Court in the course of civil or criminal litigation, or to steps in an action or proceeding taken entirely outside a courtroom and away from the presence of a judge.

A secondary meaning must be given to the words "before a court or judge". The expression "before the court" is commonly used interchangeably with "in court" where the word "court" refers to the institution rather than the place. For example, "before" and "in" appear to have the same meaning in s.19 of the *Judicature Act*, R.S.A. 1980, c. J-1, and neither word refers to a physical presence in a courtroom or otherwise in front of a judge. Section 19 (1) provides that no proceeding "pending in the Court" may be restrained by prohibition or injunction. Subsection (2) then says:

(2) Nothing in subsection (1) disables the Court from directing, if it thinks fit, a stay of proceedings in a proceeding pending *before* it, and any person, whether a party or not to any proceeding at any time pending *in* the Court... [emphasis added]

In my view, the expression "before a court or judge" in s.103(1)(*c*) means "in a court" in the institutional rather than the physical sense. Subsection (1)(*c*) therefore means that a non-lawyer cannot act for or represent another person in respect of litigation, that is, in respect of matters "in" or "before" a Court. The prohibition is general and extends to all aspects of acting for or representing another person in connection with litigation. In my opinion, more precise language than that used in subs. (1)(*c*) would be required in order to displace the inherent and fundamental jurisdiction of a superior Court to control its own procedure. The purpose of the provision is to regulate the practice of law for the benefit of the public and not to restrict the right of audience. The continued existence of the Court's inherent discretion does not conflict with this purpose. My interpretation of s.103(1)(*c*) leaves intact the inherent jurisdiction of the Court to control the right of audience as expressed in Rule 5.4. A corporation may, therefore, be

> represented in Court by any individual to whom the Court grants permission in the exercise of its inherent jurisdiction.
>
> An individual has the right to commence and conduct litigation on his own behalf. Section 103(2)(*h*) recognizes that right by excluding "a person who sues on his own behalf in an action, matter or proceeding to which he is a party" from the restrictions contained in s.103(1). The Courts have traditionally accorded the right of audience to an individual appearing on his own behalf. Rule 5.3 confirms that practice and complements s.103(2)(*h*).

[48] At p.62 O'Leary J. continued:

> Section 103(1)(*c*) clearly forbids anyone but a member of the Law Society from commencing and carrying on an action or proceeding on behalf of another person. Unless Stanley can bring himself within an exception in subs. (2) his conduct in preparing and issuing the Statement of Claim as agent of the plaintiffs was a violation of s.103(1)(*c*).

[49] O'Leary J. held that Mr. Stanley violated the Act when he prepared, issued, and served the Statement of Claim on behalf of the Plaintiffs. Similarly, here, Mr. Gerk and Mr. Seymour violated s.103 of the *Legal Profession Act* in filing and preparing documents for other defendants and representing them in this action.

[50] I now go on to consider whether the Master should have permitted Mr. Seymour or Mr. Gerk to appear on the application as agent or advocate of other Defendants. Though the Court has discretion to allow this, the Court's discretion should be exercised with care. There are valid policy reasons for restricting the right of audience to qualified members of the Law Society of Alberta.

[51] These policy concerns were expressed in **Abse v. Smith**, (1986) Q.B. 536 (C.A.), at p.555:

> First, I have no doubt that it is essential for the proper administration of justice in the courts of this country and the maintenance of the rule of law throughout the land that every court must retain the untrammelled power of regulating its own proceedings at least in all cases where these are not already regulated by ancient usage or statute.
> Secondly, from the accumulated wisdom of the courts, as exemplified in the authorities ... as well as from my own experience both as advocate and judge, I think that it is essential that those who act as advocates in our courts, particularly in the higher courts ... should be members of a profession or professions subject to a strict code of discipline and etiquette and who have been thoroughly trained and practiced in the skills

> of advocacy, in the proper and expeditious conduct of litigation and in the law. One of the most important factors tending not only to the just, but also to the swift, determination of litigation, which is so desirable, is that those who act as advocates for the litigants concerned have been thoroughly trained and are indeed adequately experienced to do so.

[52] In **Rangelander Holdings Ltd. v Calgary (City)** (1997), 196 A.R. 127 (C.A.) the Court refused to allow a non-lawyer to appear before the Court. Hetherington J. (C.A.) agreed with O'Leary J. in **Professional Sign Crafters** that there is an inherent discretion in the Court to control who may appear in Court on behalf of parties to litigation. Hetherington J. in refusing to allow a non-lawyer to appear referred to the policy concerns which come into play when exercising the inherent discretion as set out in **Abse v Smith,** supra.

[53] In **Rahall v McLennan** (1997) 1 W.W.R. 316 Belzil J. refused to allow a non-lawyer to represent the corporate litigants.

[54] In **Pobran-Jorgenson v Grey Nuns Hospital** (1997) 215 A.R. 197 (Q.B.) Mr. Jorgenson, who was not a lawyer, purported to represent three plaintiffs in a medical malpractice action in Queen's Bench. Perras J. refused to allow Mr. Jorgenson to carry on with the action. The action was stayed until the Plaintiffs retained counsel to carry their case forward.

[55] In **Professional Sign Crafters (1988) Ltd. v Wedekind,** supra, the Court held that the proper remedy is to direct a stay of proceedings until such time as the defendants are properly represented. This remedy was also exercised in **Pobran-Jorgenson**, supra, and **Rahall v McLennan,** supra.

[56] Mr. Seymour and Mr. Gerk, neither of whom are lawyers, should not have been allowed to appear in Court for the other Defendants or Ce-Jay Ranch Inc. This is a $600,000.00 lawsuit which requires some knowledge of legal procedure. The problems in allowing non-lawyers to conduct complex litigation has already surfaced in this file. The purported filing of a second Statement of Defence, making an application by telephone conference when the matter should have been set for Special Chambers and the refusal to answer questions on examination without providing a legal basis for the refusal. Neither Mr. Gerk nor Mr. Seymour possess the training or the experience to adequately advocate for the co-defendants in this complex lawsuit. Under the circumstances it will impede adequate progress in advancing this lawsuit through the Court system. Further, Mr. Gerk and Mr. Seymour are not subject to the lawyers' code of ethics and discipline. This is why they now ignore the agreement made that the Plaintiffs were entitled to move the buffalo to the Hollingworth ranch. Also, the other Defendants, for whom Mr. Gerk and Mr. Seymour purport to act, will suffer for their lack of legal experience.

[57] Therefore, there shall be a stay of any further proceedings by the Defendants until such time as they are represented on the record by a lawyer. If the Defendants do not take such action within one month of the date of this judgment the Plaintiffs are at liberty, on notice to the Defendants, to apply for the appropriate remedy.

D. The Defendants did not provide an undertaking for damages;

[58] A preservation order under Rule 467 is pre-trial injunctive relief. It is an extraordinary remedy that should be granted only in exceptional circumstances. To be entitled to such relief, the Plaintiff must establish a prima-facie case and a real and substantial risk of the dissipation or disposal of assets. The Plaintiff must also give an undertaking for damages which other parties may suffer if the relief is held to have been improperly granted. **McAllister and Jack Prothroe v The Norman J. McAllister Family 1996 Trust** (1998) A.J. 843 and **Hamza v Hamza** (1997) 53 Alta. L.R. (3d) 80, Alta. C.A. and **Echo Valley Farms Inc. v Alberta** (1998) A.J. No. 659. Here the Defendants did not provide an undertaking for damages and for that reason, as well, the application should have been denied.

Case Management:

[59] The Plaintiffs, in their Notice of Motion, request that a Case Management Justice be appointed. This is an appropriate case for Case Management, and I so order.

COSTS:

[60] Costs were not argued. If there is no agreement, the matter may be brought back in
front of me.

DATED at Grande Prairie, Alberta this 6th day of October, 1999.

J.C.Q.B.A.

APPEARANCES

B. Hougestol, Q.C.
for the Appellants

Mr. Conrad Gerk
representing himself

Tab 15

Court of King's Bench of Alberta

Citation: Holmes v Holmes, 2023 ABKB 1

Date: 20230104
Docket: 4803 196027
Registry: Edmonton

Between:

Susan Marie Holmes

Applicant

\- and -

Peter Leigh Holmes

Respondent

**Reasons for Decision
of the
Honourable Justice Kevin Feth**

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[1] Susan Holmes and Peter Holmes are married and jointly own their matrimonial home. They have been separated since 2018 when Mr. Holmes vacated the house.

[2] Mr. Holmes reportedly has a history of mental health issues. Since the separation, he has not maintained steady employment.

[3] The parties' debts substantially outweigh their assets, although the matrimonial home is mortgage free. Ms. Holmes estimates the value of the debts at $600,000.

[4] The parties have two significant assets – the matrimonial home and a 2011 motorhome. Ms. Holmes values the house at $320,000 and the motorhome at $40,000.

[5] In August 2022, Amex Bank of Canada registered a writ against the title to the matrimonial home for a claim of $10,745 plus costs. Ms. Holmes learned of the writ a few days later and believes it relates to credit card debt incurred by Mr. Holmes.

[6] Ms. Holmes is concerned that Mr. Holmes is accumulating further debt and that his creditors will seek to place other charges on his interest in the matrimonial home.

[7] Ms. Holmes seeks interim relief under s 9 of the *Matrimonial Property Act*, RSA 2000, c M-8 (*MPA*). First, she requests that title to the matrimonial home be transferred to her but accompanied by a preservation order directing her not to sell the property. She submits that this step will protect her interest in the matrimonial home from Mr. Holmes' creditors. Second, she asks for an Order transferring ownership of the motorhome to her so that she may sell it and apply the proceeds to matrimonial debt, specifically repair expenses and an ATB Financial loan for the motorhome exceeding its value. Third, she proposes that Mr. Holmes be removed as a director and shareholder of the parties' two companies, transferring control to her, but with a direction that she preserve the companies subject to ordinary business operations.

[8] For the reasons to follow, the application is dismissed.

Preliminary issues

[9] This application suffers from three preliminary concerns: no matrimonial property action has been filed, permission was not granted to Ms. Holmes in Family Docket Court to apply for an interim distribution of property, and Mr. Holmes might not have received proper notice of the relief being sought.

a) No underlying matrimonial property action

[10] In January 2022, Ms. Holmes filed a Statement of Claim seeking a divorce from Mr. Holmes. The Statement of Claim contains no action for the division of matrimonial property. Mr. Holmes was noted in default in August 2022.

[11] Section 4 of the *MPA* directs: "An application for a matrimonial property order shall be made by statement of claim." The requirement is repeated in Rule 12.8 of the *Alberta Rules of Court*, Alta Reg 124/2010 and was confirmed in ***Coyle v Coyle*** (***Estate of)***, 2005 ABQB 436 at para 28, ***Mew v Mew***, 2011 ABQB 531 at para 11 (varied on other grounds), and ***NLZ v JDV***, 2019 ABQB 720 at paras 25-26.

[12] Section 1(d) of the *MPA* defines "matrimonial property order" as "a distribution by the Court under section 7 and an order under section 9" of the *Act*. Section 7 permits the Court to make a distribution between the spouses of all the property owned by both spouses and by each of them.

[13] Section 9 appears to authorize an interim distribution of matrimonial (or family) property. In ***McLeod v McLeod***, 2017 ABQB 581, at paras 10-18, Justice Khullar (as she then was) reviewed the prevailing case law and concluded that the authority to grant an interim matrimonial property order may be found in s 9(3)(j) of the *MPA*:

> 9(3) To give effect to an order under this section [to distribute property] the Court may do any one or more of the following: ...
>
> (j) make any other order that in the opinion of the Court is necessary.

[14] Justice Khullar observed that an expansive interpretation of s 9(3)(j) is supported by the objects of the *MPA* and s 10 of the *Interpretation Act*, RSA 2000, c I-8:

> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[15] That conclusion has been endorsed repeatedly since then: ***Blume v Blume***, 2022 ABQB 539 at para 17 [***Blume***]; ***BDM v MMM***, 2020 ABQB 288 at para 111; ***Wolf v Wolf***, 2019 ABQB 200 at para 45 [***Wolf***].

[16] I note the Alberta Court of Appeal declined to squarely resolve whether this Court has jurisdiction to make an interim distribution of property in ***Garnett v Garnett***, 2019 ABCA 282 at para 23 [***Garnett***]. However, without answering the general question, the Court of Appeal held that a chambers judge has clear jurisdiction to order the sale of a jointly owned matrimonial home under both Rule 6.25(1)(c) and s 15 of the *Law of Property Act*, RSA 2000, c L-7.

[17] Here, Ms. Holmes filed a Statement of Claim seeking a divorce. A divorce action is governed by the *Divorce Act*, RSC 1985, c 3 (2d Supp), which is Federal legislation. Under the *Divorce Act*, the relief that may be requested and received is a divorce, spousal support, child support, custody of children, and access to children.

[18] Under the *MPA*, which is Provincial legislation, the court has jurisdiction to deal with the division of matrimonial property. By virtue of ss 3(2) and 4 of the *MPA* and Rule 12.9 of the *Rules of Court* the two actions may be joined, but they remain separate actions: ***Lord v Bell-Lord***, 2007 ABQB 274 at para 30. See also Rules 12.7 and 12.8 of the *Rules of Court*.

[19] Ms. Holmes does not seek relief under Rule 6.25(1)(c) or the *Law of Property Act* and no application is before me to amend the Statement of Claim to add an action for the division of matrimonial property.

[20] Absent a Statement of Claim for Division of Matrimonial Property, this Court is precluded from transferring title to the matrimonial home, the registration of the motorhome, or the shares in the companies into the sole name of Ms. Holmes utilizing s 9 of the *MPA*. I therefore cannot exercise any discretion to order an interim distribution of matrimonial property.

b) No permission to apply for an interim distribution of matrimonial property

[21] Once an action for the distribution of matrimonial property is in place, an application for an interim distribution can be brought by a Family Application, after an initial appearance in Family Docket Court.

[22] The parties appeared in Family Docket Court on November 25, 2022. Ms. Holmes obtained permission to file an application for a "property – preservation order." The Court's Endorsement is silent about an interim transfer of property. The Endorsement also says nothing about amending the pleadings to add a matrimonial property claim.

[23] When the Family Application was filed on December 7, 2022, the remedies sought were more extensive than a preservation order. Generally, the Application sought the following:

a) the transfer of title to the matrimonial home into Ms. Holmes' name alone and a direction that she preserve the property;
b) the transfer of the registration of the motorhome into Ms. Holmes' name alone, authority to sell the motorhome without Mr. Holmes' consent, and a direction to pay the registered debt against the motorhome with the sale proceeds and that any

remaining proceeds be held in trust pending an agreement between the parties or a Court Order; and

c) an Order directing that Mr. Holmes be removed as a shareholder and director of two companies operated by Ms. Holmes.

[24] Permission to seek an interim distribution of matrimonial property was not granted by the Family Docket Justice. I decline to consider this part of the application for that reason as well.

c) Inadequate notice

[25] This Family Application was heard in morning Chambers. Mr. Holmes was told about a possible application for a preservation order when he appeared in Family Docket Court, but I have no Affidavit of Service confirming whether or when he was served with the Family Application.

[26] In Chambers, counsel for Ms. Holmes noted that Mr. Holmes informed her two days earlier that he was in a hospital. However, he did not expressly request an adjournment.

[27] Counsel informed me that Mr. Holmes, who is self-representing, delivered some response materials to her. The Court has no record of anything being filed by him, but the unfiled material was delivered to me by counsel. The information contains an unsworn statement from Mr. Holmes in which he disputes some of Ms. Holmes' evidence. He denies taking out loans against the matrimonial home and asserts that he will seek legal representation in the New Year. Nothing in the information suggests that he consents to the interim transfer of the matrimonial home, the motorhome, or the corporate shares. While the information is not properly in evidence, it demonstrates the risk of proceeding without proof of service and hearing from Mr. Holmes.

[28] The Family Docket Court Endorsement does not suggest that a possible interim distribution of property was discussed in Mr. Holmes' presence. The Family Application was not filed until 9 days before the hearing date. The specific date of service has not been provided (if he was served at all). Mr. Holmes' apparent hospitalization shortly before the Chambers appearance was for an unknown duration. Until then, he was engaging in the litigation, notwithstanding that he was noted in default. The pleadings did not inform him about the possibility of distributing matrimonial property.

[29] Ms. Holmes' evidence asserts that Mr. Holmes has a history of mental health issues. His unsworn information (although not properly in evidence) confirms that he suffers from anxiety. I have substantial concerns about his ability to adequately understand and respond to the Application on short notice. No urgency is demonstrated. After more than fours years of separation, only one writ totalling $10,745 plus costs is registered against the title to the matrimonial home. No imminent harm to the motorhome or the companies is identified. In these circumstances, the application should be adjourned in any event so that Mr. Holmes may obtain legal advice or representation, properly prepare himself, and appear when he is well enough to do so.

The merits of the interim distribution application

[30] While I decline to determine the merits of the application for an interim distribution, Ms. Holmes' counsel invited my guidance in assisting the parties with any future request for an interim distribution or an order preserving property. I therefore offer a few comments.

a) Interim distribution of property

[31] An interim distribution means that matrimonial property is distributed to one or both parties prior to trial, pending the final resolution of the property division. The distribution is "effectively an advance on the party's ultimate entitlement to their share of the matrimonial property under the *Matrimonial Property Act* as determined at trial": ***Fleming v Fleming***, 2016 ABCA 88 at para 22.

[32] The interim distribution of property may be re-addressed at the conclusion of the trial: ***SLT v AKT***, 2007 ABQB 81 at para 22 [***SLT***].

[33] The Alberta Court of Appeal has encouraged parties "not to settle matrimonial property by installment, but rather in a cohesive manner, as expeditiously and economically as possible": ***Garnett*** at para 24.

[34] An interim distribution is an extraordinary remedy. Generally, it should not be made if doing so will affect the final property rights of the parties: ***Melik v Ducholke***, 2003 ABQB 924 at para 4; ***Wolf*** at para 47.

[35] The Court's discretion to grant an interim distribution of matrimonial property is guided by balancing several non-exhaustive factors, including:

a. The potential benefit to each party;
b. The potential prejudice to each party, including tax implications and the risk of dissipation;
c. Whether the distribution will determine the final disposition of property, including for specific assets;
d. The extent to which any potential prejudice is mitigated by the availability of other matrimonial assets to equalize the final distribution of matrimonial property;
e. Whether the value of the net assets for final distribution substantially exceeds the amount sought for an interim distribution;
f. Whether the final distribution of property is subject to exemption claims pursuant to ss 7(2) and 7(3) of the *MPA*;
g. Whether and to what extent an unequal distribution of property is possible at trial after considering the matters indicated in s 8 of the *MPA*;
h. Whether urgency has been demonstrated;
i. Whether the piecemeal distribution of property invites unnecessary litigation and expense, undermines judicial economy, or dissuades a litigant from advancing the claim in a diligent manner; and
j. Whether a fundamental imbalance exists between the parties in their ability to protect their respective interests absent an interim distribution.

See: ***Blume*** at para 17-19; ***Wolf*** at paras 46-48; ***McLeod*** at paras 10-18; ***Grant v Grant***, 2010 ABQB 553 at paras 34-38; ***SLT*** at paras 40 and 47; ***Bennett v Stoppler***, 2003 ABQB 723 at paras 15 and 17; ***Gartner v Ewasiuk***, 2002 ABQB 797 at para 8 [***Gartner***]; ***Conley v Conley*** (1985), 44 Sask R 76 (QB), leave to appeal to Sask CA refused (1985), 47 Sask R 279 (CA); ***Geransky v Geransky***, 2012 SKQB 218 at paras 32-33.

[36] The Court may make related Orders to implement the interim distribution and to preserve a party's interests: ***Blume*** at para 20.

[37] Ms. Holmes' evidence does not currently address the relevant factors with specificity. For example, little justification is offered for transferring title to the matrimonial home into her name alone. Only one writ from a creditor is identified after more than four years of separation. The amount is modest. Scant evidence is provided of Mr. Holmes accumulating additional debt since separation resulting in more charges against the home. No evidence is presented showing that creditors are demanding the house be sold. Ms. Holmes does not explain why her financial interest in the matrimonial home will be compromised if the house is sold to meet the demands of Mr. Holmes' creditors. No urgency is presented. Moreover, Ms. Holmes has not explained why the Court should assist her in frustrating the collection efforts of Mr. Holmes' creditors.

[38] As for the motorhome, Ms. Holmes has not established that the asset is rapidly or significantly depreciating in value. She alludes to the borrowing costs and wanting to pay down the loan secured against the motorhome, but no details are provided. Repair expenses are mentioned, but no prejudice is identified if payment is delayed.

[39] For the corporate shares, Ms. Holmes provides no evidence about the value of the companies or the nature of the business. A draft Matrimonial Property Statement attached to her Affidavit indicates the value is "nominal". She suggests that the companies have lines of credit with a bank and the debts exceed the value of the companies. However, she does not explain whether additional borrowing is available on the credit lines, nor how removing Mr. Holmes as a shareholder protects any remaining credit.

[40] Mr. Holmes is a director and shareholder, but Ms. Holmes apparently runs the companies. She deposes that since the separation, Mr. Holmes has contacted her clients and tried to sabotage and terminate her contracts. She does not indicate whether any of that behaviour occurred recently. She does not explain why removing him as a shareholder would stop any attempted interference with the business.

[41] Ms. Holmes argues that Mr. Holmes' shareholder status has allowed him to access the companies' bank account and remove money, but she fails to identify the amount or when it was withdrawn. In September 2022, Mr. Holmes obtained unspecified statements from the bank, resulting in a charge of $770 against the companies' bank account. No other details are provided.

[42] If a Statement for Claim for Division of Matrimonial Property is filed, this Court has the jurisdiction to make an interim order distributing shares in the two corporations: ***SLT*** at paras 3 – 6, 22. However, compelling Mr. Holmes to relinquish his status as a director of either company is not a distribution of property. Concerns about a director's misconduct might be addressed through the oppression remedies under s 242 of the *Business Corporations Act*, RSA 2000, c B-9, but no such application has been filed.

[43] Without deciding the merits of any proposed interim distribution of property, the application raises concerns about the piecemeal distribution of some property with no plan for resolving the balance of the parties' dispute in a timely and efficient manner. The parties might be better served by adopting a Litigation Plan that moves the division of matrimonial property to a Summary Trial. I therefore grant permission for Ms. Holmes to bypass Family Docket Court to bring an application in Family Chambers, on notice, to amend her Statement of Claim by adding a division of matrimonial property claim and to seek an order imposing a Litigation Plan on the parties to move the amended action towards a trial. A proposed Litigation Plan shall accompany the application.

b) Preservation order

[44] The Court's authority to grant an order preserving property pending a final resolution of the parties' family property issues is set out in Part 6, Division 3 of the *Rules of Court*. The relevant provisions of Rule 6.25(1) provide:

> 6.25(1) On application, the Court may make one or more of the following orders:
>
> (a) an order for the preservation or custody of property that is in dispute or that may be evidence in an action; ...
>
> (c) an order for the sale of property and payment of the proceeds into Court if the property is perishable, likely to deteriorate or likely to lose its value, or for any other reason should be sold;
>
> (d) if property is sought to be retained or attached under a lien or otherwise as security for money, an order
>
> (i) that the person otherwise entitled to possession of the property be given possession,
>
> (ii) that possession of the property be given to a party pending the outcome of the action on payment of an amount into Court or on security being given to the Court, or
>
> (iii) that possession be given to a person named by the Court in a form and manner satisfactory to the Court;

[45] Rule 6.25(1) grants "fairly broad powers to the Court to make an order preserving property in dispute": ***Hong v Hong***, 2020 ABQB 349 at para 21.

[46] Subsection 9(3)(j) of the *MPA* might also provide authority to grant a preservation order: ***SFM v MRM***, 2020 ABQB 302 at paras 44-50 [***SFM***]; ***Gartner*** at paras 1, 2 and 7. However, the power to "make any other order that ... is necessary" can only be used "to give effect to an order under [section 9]": ***SFM*** at para 48. I have no authority to grant an order under s 9 in this case given the lack of a filed matrimonial property claim.

[47] A preservation order is a form of prejudgment relief and should be granted only in rare instances: ***Athabasca Minerals Inc v Syncrude Canada Ltd***, 2017 ABQB 47 at paras 57–62 [***Athabasca***]. The Court must exercise restraint when: (i) deciding whether to grant a preservation order; and (ii) determining its appropriate scope: ***Athabasca*** at para 62.

[48] A preservation order is "a form of proprietary injunction because it requires a respondent to do something": ***Questor Technology Inc v Stagg***, 2021 ABQB 644 at para 35 [***Questor***]. The property sought to be preserved is "the property actually claimed in the proceeding": ***Reddick v MacInnis***, 2018 NSSC 201 at para 10.

[49] The law concerning preservation orders was summarized in ***Hoff et al v Gerk et al*** (1999), 252 AR 86 at 98-99 (QB):

> A preservation order under rule 467 [now Rule 6.25] is pretrial injunctive relief. It is an extraordinary remedy that should be granted only in exceptional circumstances. To be entitled to such relief, the plaintiff must establish a prima facie case and a real and substantial risk of the dissipation or disposal of assets. The plaintiff must also give an undertaking for damages which other parties may suffer if the relief is held to have been improperly granted.

[50] The purpose of a preservation order is to "preserve the disputed property until trial so that the property will be available to be returned to the plaintiff if successful at trial": ***Gemba Fund One LLC v Tolosa Development Corp***, 2016 ABCA 241 at para 20; ***Athabasca*** at para 111.

[51] Here, Ms. Holmes is seeking a preservation order in respect of the matrimonial home and the parties' two companies. However, no claim has been commenced respecting this property, so there is technically no property in dispute to be preserved.

[52] In exercising its discretion, a Court may grant a preservation order if it is satisfied the applicant has met the customary tripartite test for an interlocutory injunction set out in ***American Cyanamid Co v Ethicon Ltd***, [1975] 1 ALL ER 504 (HL):

1. there is a serious issue to be tried,
2. risks to the property in question create the potential for irreparable harm, and
3. the balance of convenience favours the party who seeks preservation of the property.

See: ***Questor*** at para 37; ***Athabasca*** at paras 64, 70 and 73; ***Peregrym v Peregrym***, 2015 ABQB 176 at para 380; ***SJB v RDBB***, 2019 ABQB 624 at para 108, affirmed by 2020 ABCA 108.

[53] Even if a matrimonial property claim was in place, the evidence is currently insufficient for this Court to undertake an analysis of the tripartite test.

Conclusion

[54] The application for an interim distribution of matrimonial property and the preservation of property is dismissed.

[55] If Ms. Holmes wishes to amend her Statement of Claim to add a division of matrimonial property claim, permission is granted to bypass Family Docket Court and to proceed to Family Chambers on notice to Mr. Holmes. Further, if she wants a Litigation Plan imposed on the parties to move this action towards trial, including a Summary Trial, she may include that request in the Family Chambers application, accompanied by the proposed Litigation Plan.

Heard on the 16th day of December, 2022.
Dated at the City of Edmonton, Alberta this 4th day of January, 2023.

Kevin Feth
J.C.K.B.A.

Appearances:

Noori Sidhu
Verhaeghe Law
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Did not appear

Tab 16

Court of Queen's Bench of Alberta

Citation: Questor Technology Inc v Stagg, 2021 ABQB 644

Date: 20210813
Docket: 1801 11473
Registry: Calgary

Between:

Questor Technology Inc.

Plaintiff/Applicant

- and -

Richard Stagg, also known as Ritchie Stagg
Jeffrey Nelson, also known as Jeff Nelson
Justin Bouchard and Emission Rx Ltd.

Defendants/Respondents

Endorsement
of the
Honourable Mr. Justice D.B. Nixon

I. Introduction

[1] Questor Technology Inc ("**Questor**") is applying for an order under section 6.25 of the *Alberta Rules of Court* (the "**2021 Preservation Application**")[1]. The 2021 Preservation Application is against Emission Rx Ltd ("**Emission Rx**").

[1] *Alberta Rules of Court*, Alta Reg 124/2010 [**"Rule" or "Rules"**].

[2] The underlying litigation concerns an intellectual property dispute (the "**Action**"). The four defendants in the underlying litigation are Ritchie Stagg ("**Mr. Stagg**"), Jeff Nelson ("**Mr. Nelson**"), Justin Bouchard ("**Mr. Bouchard**" and, collectively, the "**Individual Defendants**") and Emission Rx (collectively, the "**Defendants**").

[3] The remedy sought by Questor is pre-judgment relief in the form of an order requiring Emission Rx to pay all or a portion of its profits into trust until after trial. The 2021 Preservation Application is actually framed as being a protective order in respect of profits earned and accumulated, although the underlying submissions referred to both profits and revenue.

II. Issue

[4] As framed by Questor, the issue is whether an order should be granted for the protection of Emission Rx profits earned pending trial?

III. Background

A. Context

[5] Questor is in the waste gas combustion business. It is a publicly-traded company with $23.5 million in profits in 2018: ***Questor Technology Inc v Stagg***, 2020 ABQB 3 at para 115 [***Questor 2020***].

[6] Each of Mr. Stagg, Mr. Nelson and Mr. Bouchard are former employees of Questor. While reading about various technologies used elsewhere within the combustion industry in or about June or July 2017, Mr. Nelson came across an expired United States patent for an interesting combustion air delivery design (the "**Expired Patent**").

[7] Emission Rx was incorporated on November 14, 2017. The Individual Defendants left the employment of Questor in or about the April-June, 2018 timeframe. They all subsequently commenced employment with Emission Rx.

[8] Emission Rx alleges that it developed a combustor prototype, based in part on the Expired Patent. Emission Rx succeeded in developing a marketable product around September 1, 2018: ***Questor 2020*** at para 70. It sold its first combustor to a customer approximately five months later.

[9] On August 14, 2018, Questor sued the Defendants. Questor alleged a variety of causes of action, and seeks various forms of relief. The relief sought by Questor includes a determination that it is the rightful owner of any Emission Rx intellectual property developed while the Individual Defendants were employed at Questor ("**ERx Technology**")[2].

[10] In a prior application, Questor sought an injunction against the Defendants to prevent them from participating in the waste gas combustion business (the "**2019 Injunction Application**"). This Court denied the 2019 Injunction Application: ***Questor 2020*** at para 117.

[11] In denying the 2019 Injunction Application, this Court remarked that Questor's evidence of similarity between Questor and Emission Rx's technology was "speculative": ***Questor 2020*** at paras 36 and 86. More generally, the Court denied the 2019 Injunction Application because: (i) Questor failed to lead "clear and not speculative evidence" proving irreparable harm: ***Questor***

[2] See para 37 of Second Amended Statement of Claim ("**Second ASOC**").

2020 at para 112; and (ii) the Defendants likely "would not have the resources to proceed to trial" if the injunction was granted: ***Questor 2020*** at para 116.

B. Alleged Improprieties and Credibility Issues

1. Preliminary Steps and Initial Plans

[12] The Individual Defendants have always maintained that they were entitled to make initial plans for Emission Rx while still employed at Questor. The Court agreed that "[t]aking preliminary steps towards planning for new employment or the establishment of a new business (even one that may eventually compete with a former employer) does not amount to a conflict of interest": ***Questor 2020*** at para 50.

[13] I am not making any further determination concerning these preliminary steps at this time. That is for the subsequent hearing to consider.

2. Nelson Backup Email

[14] Mr. Nelson disclosed that he possessed a backup copy of his Questor email account (the "**Nelson Backup Email**"). Mr. Nelson testified that he had retained his emails for reasons of professional liability, in case any regulatory investigation ever arose involving his work at Questor.

[15] Questor did not lead any evidence or argue that the Defendants had made any use of the Nelson Backup Email. Further, Questor did not put any questions to Mr. Nelson in cross-examination concerning the Nelson Backup Email. The Nelson Backup Email has since been returned to Questor.

[16] I am not making any determination concerning the Nelson Backup Email at this time. That is for the subsequent hearing to consider, if appropriate.

3. Prototype Timeframe

[17] The Individual Defendants explained the timeframe. Based on the Expired Patent, Mr. Bouchard began assembling components to construct a prototype in April 2018. He assembled the prototype in mid-to-late-May 2018, after he left Questor. In early June 2018, Mr. Nelson and Mr. Bouchard began to consider ways to modify the prototype to make it patentable.

[18] On or about June 15, 2018, AGAT Laboratories tested Mr. Bouchard's prototype. The results were not favourable.

[19] The Individual Defendants continued to modify the prototype on the shop floor over the summer of 2018. In particular, they tested many different burner elements.

[20] The Individual Defendants resubmitted their combustor to AGAT Laboratories for testing. Much better results were received in August 2018. This Court found that the ERx Technology was subsequently ready in or about September, 2018: ***Questor 2020*** at para 70.

[21] I am not making any determination concerning the prototype timeframe at this time. That is for the subsequent hearing to consider, if appropriate.

4. Dr. Moore Contact

[22] Dr. Moore's name first appeared in the records in evidence in an updated version of Mr. Stagg's Undertaking Response #1. That updated version was served on Questor's counsel on June 28, 2019.

[23] Dr. Moore was recorded by the Defendants as a contact on a Lloydminster Heavy Oil Show spreadsheet. Questor alleges that Dr. Moore was not at the Lloydminster Heavy Oil Show, and that the Defendants must have sourced his contract details from the Plaintiff's records.

[24] Clearly there is conflicting evidence concerning Dr. Moore. However, the evidence of neither Mr. Stagg nor Dr. Moore has been tested in cross-examination.

[25] I am not making any determination concerning Dr. Moore at this time. That is for the subsequent hearing to consider, if appropriate.

5. Credibility Issues

[26] There is a general duty on counsel to put a matter directly to a witness if counsel is going to later adduce evidence to impeach the witness' credibility or present contradictory evidence. If counsel fails to satisfy certain procedural steps (such as ***Browne v Dunn)***, the failure may be used to assess credibility and the contradictory evidence led by the opposing party: see ***R v Pasqua***, 2009 ABCA 247 at para 17; see also ***Browne v Dunn***, 1893 CanLII 65 (FOREP).

[27] Generally, a Chambers hearing cannot determine credibility merely by reading affidavits which conflict on primary facts: ***Charles v Young***, 2014 ABCA 200 at para 4-5. An exception exists where one of the two affidavits has been "destroyed on cross-examination": ***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2019 ABQB 732 at para 39.

[28] Where credibility determinations need to be made, evidentiary questions must be left for trial. There are a number of credibility issues that are inherent in the evidence that underlies aspects of this litigation.

[29] I am not making any determination concerning credibility issues. That is for the subsequent hearing to consider.

IV. Analysis

A. The 2021 Preservation Application

[30] Rule 6.25 allows the Court to issue an order for the "preservation or custody of property that is in dispute".

[31] As framed, the 2021 Preservation Application asks this Court to compel Emission Rx to put aside "profits earned and accumulated". I infer that Questor is making this request in order to fund anticipated damages. That is, Questor is seeking a preservation order to protect an anticipated future damage award. It is common ground that no damages have yet been awarded.

[32] Notwithstanding the manner in which the 2021 Preservation Application is framed, the submissions advanced by Questor speak to a broader set of remedies. Those submissions seek general security for damages, a partial freezing of Emission Rx's funds, and the right to supervise and limit the manner in which Emission Rx conducts its business. In my view, these submissions go beyond the boundaries of pleadings which underlie the 2021 Preservation Application.

B. The Law and Application

1. Preservation Orders

[33] A preservation order is a form of prejudgment relief. It should be granted only in rare instances: ***Athabasca Minerals Inc v Syncrude Canada Ltd***, 2017 ABQB 47 at paras 57-62 [***Athabasca***].

[34] In considering the possible application of a preservation order, the Court should be guided by a judicial abhorrence for prejudgment execution: ***Giammarco & Co. (Western) Division Ltd v TRL Real Estate Syndicate (05) Ltd***, 2014 ABQB 424 at paras 21 and 37. Further, the Court must exercise restraint when: (i) deciding whether to grant a preservation order; and (ii) determining its appropriate scope: ***Athabasca*** at para 62.

[35] A preservation order is a form of proprietary injunction because it requires a respondent to do something: ***Stevens (Estate) v Morrisroe***, 1999 ABQB 643 at para 24; and ***Gemba Fund One LLC v Tolosa Development Corp***, 2016 ABCA 241 at para 20 [***Gemba***]. A preservation order can include a directive that the respondent: (i) pay a portion of its profit, on an ongoing basis, into trust or into Court; and (ii) refrain from using those underlying funds for its own purposes.

[36] A preservation order should only be "granted to preserve an asset in the possession of a defendant which the plaintiff says belongs to it": ***Gemba*** at para 20. The purpose of a preservation order is to "preserve the disputed property until trial so that the property will be available to be returned to the plaintiff if successful at trial": ***Gemba*** at para 20; ***Athabasca*** at para 111.

[37] In exercising its discretion, a Court may grant a preservation order if it is satisfied that applicant has met the customary tripartite test for an injunction. The Tripartite Test is whether: (i) there is a serious issue to be tried; (ii) the applicant will suffer irreparable harm in the absence of relief; and (iii) the balance of convenience favours granting relief (collectively, the "**Tripartite Test**"): ***Athabasca*** at paras 64, 70 and 73; see also ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC), [1994] 1 SCR 311. I turn to consider the Tripartite Test in the context of this 2021 Preservation Injunction.

2. The Tripartite Test

[38] In its submissions, Questor describes the 2021 Preservation Application as a "security order" or "security application" on numerous occasions.[3] As I construe its argument, Questor does not seek to merely preserve Emission Rx property over which it asserts a proprietary interest; it goes further. In particular, it seeks a proprietary interest in Emission Rx's general revenue stream by order of the Court. It seeks this interest as a security.

[39] Given the nature of the pleadings in respect of the 2021 Preservation Application, any Order in this case must relate to the property in evidence. Based on my review of the facts, the property in evidence concerns a line of combustors, the boundary of which is not yet defined. While I make no ruling on the issue, the Respondents seem to concede that the "R-Line" is in dispute, whereas the Applicant may ultimately be arguing that the disputed property includes an interest in the E-Series, C-Series and an EF-Series. For purposes of the 2021 Preservation Application, there are a bundle of associated products in dispute (all with an alleged connection to

[3] See Questor Application Brief, filed on July 17, 2020, at paras 1, 5, 6, 8, 10, 32, 38 and 46.

the ERx Technology), and that collective pool represents the property in issue (collectively, the "**Allegedly Infringing Products**").

[40] Notwithstanding the absence of evidence concerning additional products or services, the preservation order sought by Questor would effectively entitle it to security over any future products and endeavours. At this point, there is no evidence of an ownership interest in the fruits of any other endeavours. As a result, the analysis below focuses only on the Allegedly Infringing Products.

[41] I now turn to consider each component of the Tripartite Test. Both parties to this action agree that the Tripartite Test applies to the 2021 Preservation Application.

[42] If Questor establishes that it has satisfied all three elements of the Tripartite Test, then I will need to consider whether a preservation order should be issued. The reason for that second stage of analysis is because additional issues need to be considered. There are boundaries to the application of a preservation order. For example, a preservation order cannot issue in support of a general claim for money damages or for services rendered: ***Ridge Development Corporation v Crestwood Condominiums Inc***, 2008 ABQB 599 at paras 19-21; and ***Athabasca*** *at para* 91. On the other hand, if Questor does not satisfy all three elements of the Tripartite Test, then there is no need for further analysis because the preservation order will not be justified.

a. Serious Issue to be Tried

[43] To meet the first stage of the Tripartite Test, Questor must establish that there is a serious issue to be tried with respect to "property that is in dispute": Rule 6.25; and ***Athabasca*** at para 77.

[44] Questor claims ownership of the Allegedly Infringing Products. Its underlying assertion is that these products were developed while the Individual Defendants were employed at Questor.

[45] The case law suggests that an employer has ownership rights to an employee's inventions in certain circumstances: ***Questor 2020*** at para 76. Questor thus alleges ownership of the Allegedly Infringing Products.[4]

[46] Following this argument to its logical conclusion, Questor effectively asserts ownership over profits derived from the Allegedly Infringing Products. Indeed, that seems to be the basis of the 2021 Preservation Application.

[47] This Court has previously considered Questor's argument for ownership of the Allegedly Infringing Products: ***Questor*** 2020 at paras 76-89. The Court noted that this "cause of action raises important issues for trial": ***Questor 2020*** at para 89. However, this Court also described Questor's evidence in support of this argument as "speculative": ***Questor 2020*** at para 36.

[48] Concerning Questor's argument that the ownership of the Allegedly Infringing Products equates to a "serious issue for trial", I find that it does, albeit by the narrowest of margins.

[49] Based on the facts and analysis, I find Questor has proved, on a balance of probabilities, the "serious issue to be tried" element. This addresses first element of the Tripartite Test.

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[4] Second ASOC at para 37.

b. Irreparable Harm

[50] To succeed in this application, Questor also must demonstrate that it will suffer irreparable harm.

[51] In an earlier application, I determined that Questor would not suffer irreparable harm if the 2019 Injunction Application was not granted: ***Questor 2020*** at paras 90-112. I was considering a different question in that 2019 Injunction Application. The question at this juncture is whether Questor will suffer irreparable harm if the Defendants are not compelled at this time to set aside a portion of their profits for Questor's later contingent use.

[52] In considering this question, I acknowledge that "[i]rreparable harm refers to the nature of the harm, rather than its magnitude...Irreparable harm is harm that cannot be quantified in monetary terms or cannot be cured": ***Questor 2020*** at para 92.

[53] The "evidentiary burden is on Questor to demonstrate, on a balance of probabilities, that it will suffer irreparable harm with clear, and not speculative, evidence": ***Questor 2020*** at para 93. The question is what irreparable harm Questor might suffer as a consequence of its assertion that it is the rightful owner of ERx Technology: ***Questor 2020*** at para 100. In the 2019 Injunction Application, I found none.

[54] A simple belief as to various circumstances does not establish "with clear and not speculative evidence" that if the injunction did not issue: (i) Questor would suffer loss of first mover advantage; (ii) Questor would suffer market loss; or (iii) Questor would suffer reputational damage: ***Questor 2020*** at paras 103-109. There must be a proper evidentiary foundation.

[55] At the hearing of the 2019 Injunction Application, I concluded that the ownership issue could be dealt with through a remedy of an accounting for profits, and the remaining claims could be dealt with through an award of money damages: ***Questor 2020*** at paras 110 and 112. As a result, the second element of the Tripartite Test was not satisfied in the 2019 Injunction Application.

[56] Questor now advances two new arguments. First, that Questor will be irreparably harmed because Emission Rx may not be able to afford to pay Questor the damages it seeks. Second, that the Court should infer a "legitimate risk" that the Defendants will dissipate their assets to avoid execution.

[57] In considering these two arguments, the evidentiary burden remains on Questor to demonstrate, on a balance of probabilities, that it will suffer this harm, and that such harm will be irreparable. Further, Questor has the burden of demonstrating this to me "with clear, and not speculative, evidence": ***Questor 2020*** at para 93. In my view, Questor has not met this standard for the following two reasons.

i. Must take the Defendants as Found

[58] Questor asserts that it will be irreparably harmed due to the risk that Emission Rx will default on its debts at some point between now and the time the Court hypothetically issues a judgment against the Defendants. Based on my review of what is before the Court, the only evidence Questor references in support of its "belief" in this risk is Emission Rx's balance sheet as of May 31, 2019.

[59] I reiterate: (i) the evidentiary burden is on Questor; and (ii) the evidence must be "clear and not speculative". To address this burden, Questor asks the Court to draw unspecified

"adverse inferences" concerning the financial affairs of Emission Rx, and to do so based on the May 2019 financial statements of Emission Rx.

[60] To meet this second component of the Tripartite Test, Questor must show that it will suffer irreparable harm unless this Court grants the 2021 Preservation Application. Contrary to the assertions of Questor, I infer that if the 2021 Preservation Application is granted, the litigation risk to Questor is likely to increase because Emission Rx will be starved of the cash flow that is typically necessary for a start-up business to pursue its entrepreneurial business endeavours.

[61] Questor asserts that Emission Rx appears to be a "high risk and highly leveraged business venture", which is at risk of default. Questor's proposed solution to the risk that Emission Rx will not survive until trial is to deprive Emission Rx either of: (i) 15% of its revenues; or (ii) 33% of its profits.

[62] In my view, starving Emission Rx of either of these flows of funds will harm its financial condition, and will increase the risk to the corporate Defendant. Further, if Emission Rx continues to be as unprofitable as the evidence suggests to date, then, if the 2021 Preservation Application is granted, the value of any funds set aside for Questor's benefit will be negligible in comparison to the quantum of damages it seeks.

[63] Questor's situation will be little improved by obtaining security over the "profits" of an unprofitable business, especially if the form of the preservation order further decreases the prospect of Emission Rx ever being profitable. Leaving aside the issue of its entitlement to money damages, Questor seeks an accounting of profits accumulated from the intellectual property over which it asserts ownership. If Emission Rx were to cease operations, there likely would be no profits and, therefore, no need for an accounting.

[64] The size of the claim for damages made by Questor is not relevant to my assessment of the merits of the 2021 Preservation Application: ***Athabasca*** at para 96. Further, I understand the Defendants accept the evidence before the Court which indicates that Emission Rx does not have the $5 million or more that Questor seeks as damages. That said, this cannot mean that a preservation order must issue: see ***Athabasca*** at paras 96 and 100.

[65] Indeed, if I accept Questor's argument, I would be sanctioning a litigation tactic against defendants with limited means. In these circumstances, I must exercise great care to ensure that an unproven claim does not influence the assessment of the merits of the application for prejudgment relief.

[66] Prejudgment relief must not be allowed to be used improperly, especially when it has the potential to constrain the ability of Emission Rx to: (i) carry on its business; and (ii) impede its ability to address this litigation: ***Athabasca*** at para 155. This is a classic case where a plaintiff must accept the defendant as he finds him, for better or for worse: ***1400467 Alberta Ltd v Adderley***, 2014 ABQB 439 at para 13.

ii. No Evidence of Asset Dissipation

[67] Questor asserts it will suffer irreparable harm because there is a risk of Emission Rx dissipating the intellectual property (*i.e.*, the ERx Technology), in which it claims ownership, and the resulting profits. A likelihood of asset dissipation can be relevant to a decision to grant a preservation order. In particular, a preservation order may be available where there is "an

evidence-based reason to believe that the [defendant] is dissipating assets, or moving assets offshore, or will be defiant of the court process": ***Frank v Beaver***, 2016 ABCA 35 at para 20.

[68] In my view, asset dissipation equates to an appropriation of property to, or for the benefit of, others. While such an action by Emission Rx would not be appropriate, Questor has led no evidence of dissipation.

[69] Questor has only asserted its "reasonable belief that Emission Rx profits may be disposed of." Notwithstanding the lack of direct evidence, Questor asks the Court to take two steps. First, to make a negative finding of credibility against the Defendants on affidavit evidence. Second, to extrapolate a possible future intent by Emission Rx to engage in improper business transactions to render itself judgment proof. The job of the Court is to make decisions on the basis of the evidence before it. These points, raised by Questor, are not in the nature of evidence. In my view, these points are better characterized as being in the nature of argument. Further, to the extent that they touch on evidence, they have not been subjected to cross-examination.

[70] Based on the facts and analysis, I find there is no evidence that the Defendants have engaged in any attempt to dissipate assets to evade potential judgement. Importantly, each of the Defendants is resident in Alberta, and there is no evidence that any one of them is planning to move out of this jurisdiction.

[71] As a final comment concerning irreparable harm, there are many disputed facts in this Action. It continues to be fought with "considerable intensity". This is its second injunction application, and the litigation has not even reached Questioning.

[72] Based on the facts and analysis, I find Questor has not proved, on a balance of probabilities, that it will be irreparably harmed in the circumstances of this case. As a result, Questor has not met the "irreparable harm" threshold, with the result that the 2021 Preservation Order should not be granted. This addresses the second element of the Tripartite Test.

c. Balance of Convenience

[73] The balance of convenience comprises a "determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction": ***Manitoba (AG) v Metropolitan Stores Ltd***, 1987 CanLII 79 (SCC) at para 36.

[74] I weighed the balance of convenience as between Questor and the Defendants in the 2019 Injunction Application. In that decision, I found that the balance of convenience favoured Emission Rx, and the 2019 Injunction Application was denied.

[75] In the decision in respect of the 2019 Injunction Application, I mentioned that Questor was a "successful publicly traded company. It had an annual revenue of $23.5 million in 2018": ***Questor 2020*** at para 115. In contrast, Emission Rx was funded by the Individual Defendants' personal investments.

[76] I concluded that if Emission Rx were to cease operations as a result of the 2019 Injunction Application being granted, which the Court found to be probable, the Individual Defendants likely would not have the resources to proceed to trial: ***Questor 2020*** at para 116. That is always a relevant consideration in these types of proceedings.

[77] Based on my review of the aggregate context, the evidence now before me has not changed. Questor continues to be significantly larger and more established than Emission Rx. In

my view, the marginal benefit that Questor might receive if the 2021 Preservation Application was granted is dwarfed by the potential prejudice to the Defendants.

[78] In its initial submissions, Emission Rx acknowledged that it was unprofitable, illiquid, highly indebted and asset-light. Given these circumstances, the balance of convenience analysis in this case is as follows:

a. If the 2021 Preservation Application is granted, Emission Rx will be burdened with additional financial limitations. If Emission Rx were to cease operations, Questor will have acquired meager security. Albeit, Questor will have a path to judgment and to seizing the intellectual property over which it asserts ownership.

b. If the 2021 Preservation Application is granted to Questor and Emission Rx perseveres, Questor will continue to accumulate pre-judgment security while hobbling the ability of Emission Rx to fund its defence of this Action.

c. If the 2021 Preservation Application is not granted, Emission Rx may still cease to operate between now and trial. If that occurs, Questor will be deprived of the meager security it might have otherwise accumulated as Emission Rx ceased operations. However, Questor will still have a path to judgment and to seizing the intellectual property over which it asserts ownership. In the interim, the Defendants will still have a fair opportunity to defend themselves.

d. If the 2021 Preservation Application is not granted, Emission Rx is more likely to prosper because it will have the ability to reinvest profits and grow. The Defendants will have the resources to properly defend themselves. If Questor nevertheless wins at trial, there will be a better chance that Emission Rx (and the Individual Defendants) will have adequate funds to pay Questor damages.

[79] A factor leans the balance of convenience in favour of Emission Rx is the failure by Questor to provide an undertaking to pay damages in the event the Defendants are ultimately victorious. Depriving Emission Rx of a portion of its income for a significant length of time will impair its ability to reinvest in its businesses. It also will inevitably erode the income of the Individual Defendants. Those economic erosions, which may well be irreparable, should rightfully be compensated for by Questor.

[80] Based on the facts and analysis, I find Questor has not proved, on a balance of probabilities, that the balance of convenience favours it. As a result, the 2021 Preservation Order should not be granted. This addresses the third element of the Tripartite Test.

V. Conclusion

[81] The 2021 Preservation Application is dismissed. As a result, no order will be granted for the protection of Emission Rx profits earned pending trial. I make this decision because Questor has only satisfied the first of the three components of the Tripartite Test. It did not meet the threshold test in the latter two components of the Tripartite Test.

VI. Costs

[82] The parties may speak to costs, if they cannot otherwise agree.

Heard on the 25th day of January and the 21st day of June, 2021.

Dated at Calgary, Alberta this 13th day of August, 2021.

Justice D. Blair Nixon
J.C.Q.B.A.

Appearances:

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