COURT FILE NUMBER	B303 389146
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 ONSITE3D LTD., ONSITE3D INDUSTRIAL SERVICES LTD., and ONSITE3D DIGITAL SOLUTIONS LTD.
DOCUMENT	**BRIEF OF LAW OF THE APPLICANTS**

BANKRUPTCY AND INSOLVENCY
FILED
by Email
Sep 01, 2026
Edmonton
FAILLITE ET INSOLVABILITE
ny

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

OGILVIE LLP
Barristers & Solicitors
2800 Stantec Tower
10220 103 Avenue NW
Edmonton, AB T5J 0K4

Attention:	**Susy Trace / Kaitlynd Hiller**
Phone:	780.421.1818
Fax:	780.429.4453
Email:	Strace@ogilvielaw.com Khiller@ogilvielaw.com
File No.:	74349.1

Commercial List Chambers Application
scheduled for the 3rd day of September, 2026
before the Honourable Justice J.T. Neilson

TABLE OF CONTENTS

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, ONSITE3D Ltd. ("**Onsite3D**"), ONSITE3D Industrial Services Ltd. ("**Onsite3D Industrial**"), and ONSITE3D Digital Solutions Ltd. ("**Onsite3D Digital**") (each an "**Applicant**" and collectively, the "**Applicants**") for the following relief:

   (a) an Order, pursuant to section 50.4(9)[1] of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "***BIA***"), substantially in the form of the draft Second Extension Order (the "**Second Extension Order**") attached as **Schedule "A"** to the Application filed in support of this order:

      (i) abridging time for service of this Application and deeming service good and sufficient, if necessary; and

      (ii) extending the first forty-five (45) day extension period, expiring September 5, 2026, within which the Companies are required under section 50.4(8) of the *BIA* to file a proposal, by an additional forty-five (45) days to 11:59 p.m. (Mountain Time) on October 20, 2026, pursuant to section 50.4(9) of the *BIA* (the "**Stay Period**");

   (b) And an Order, substantially in the form attached as **Schedule "B"** to the Application filed in support of this order:

      (i) temporarily sealing the Confidential Exhibits (as defined below) until the earlier of (i) acceptance of a proposal by the requisite statutory majority of the Companies' creditors; (ii) sale of the property appraised in the Confidential Exhibits in these proceedings, or any related insolvency proceedings, or (iii) until further order of this Honourable Court; and

   such further and other relief as this Honourable Court may deem appropriate or necessary.

2. The Orders sought are necessary to allow the Applicants to put forward a viable proposal to their creditors and stakeholders with the assistance of the Proposal Trustee and its legal counsel.

II. FACTS

Background

3. The Applicants are an Indigenous-owned business group recognized as a Certified Indigenous Business by the Canadian Council for Indigenous Business. The Applicants' business model combines engineering, construction, and procurement ("**EPC**") work, with the Onsite3D Group acting as an Indigenous prime contractor that can both manage projects and perform key technical work itself.[2]

---

[1] The *Bankruptcy and Insolvency Act, ,* RSC 1985, c B-3, ("***BIA***") s 50.4(9) [**Tab 1**].
[2] Affidavit of Wade Tyler Eno, sworn July 3, 2026 (the "**First Eno Affidavit**") at para 7.

4. Despite the success of the Onsite3D Group over the past decade, poor financial controls in the start-up phase as well as expensive factoring debt, Canada Revenue Agency ("**CRA**") exposure, and certain major creditors taking legal and enforcement action have contributed to the insolvency of the Companies.[3]

5. The main financiers of the Onsite3D Group are two factoring companies – Capital Now Ventures Inc. ("**CNV**"), and 1146991 Alberta Inc. ("**114**").[4]

6. Onsite3D is indebted to 114 in the approximate amount of $14,067,982.[5]

7. Onsite3D is allegedly indebted to CNV in the approximate amount of $751,529.73, which amounts are in dispute and subject to ongoing litigation.[6]

8. Canada Revenue Agency ("**CRA**") has filed Writs of Seizure and Sale (Federal Writ) against each of the Companies in the Alberta Personal Property Registry in relation to unremitted source deductions and unremitted GST which collectively exceed $8,550,000.[7]

9. CNV's alleged PPR security does not, on the Applicants' preliminary analysis, establish a claim over the entire general estate. The relevant factoring agreement appears to effect an irrevocable and absolute assignment of specified invoices, and 114 appears to have contractually waived its priority in accounts receivable in favour of CNV. Subject to the validity and enforceability of those arrangements, CNV appears to hold a later PPR-registered general security interest and is subordinate in the general estate. CNV's potential secured priority is therefore limited to the Onsite3D accounts receivable within the assignment, rather than the non-receivable assets. In the general estate, CNV is therefore subordinate to the apparent CRA deemed trust and 114 interests and any Administration Charge granted by the Court.

10. Although the Onsite3D Group continues to generate cash flow, this cash flow is insufficient to service its obligations.[8]

11. The Applicants each filed a Notice of Intention to Make a Proposal (the "**NOIs**") on June 22, 2026.[9]

---

[3] First Eno Affidavit at para 13.

[4] Affidavit of Wade Tyler Eno, sworn August 28, 2026 (the "**Second Eno Affidavit**") at para 11.

[5] Second Eno Affidavit at para 12.

[6] Second Eno Affidavit at para 13.

[7] First Eno Affidavit at para 27-28.

[8] First Eno Affidavit at para 16.

[9] First Eno Affidavit at para 17, Exhibits D, E, and F.

12. As a result of the NOIs, pursuant to section 69(1) of the BIA, creditors are stayed from taking enforcement steps against the Applicants or pursuing claims in Court.[10]

13. Given that the Companies have failed to remit employee source deductions for post-filing amounts to the CRA, the CRA is not stayed from taking enforcement steps against the Companies.[11]

Interim Financing and Material Adverse Change Reports

14. Following the filing of the NOIs, the Applicants and Proposal Trustee prepared 13-week projected cash flow statements for each of the Companies individually, as well as a combined cash flow statement (the "**Cash Flow Statements**") for for the period commencing June 22, 2026 and ending September 18, 2026, as required by the BIA.[12]

15. The Onsite3D Cash Flow Statement projected a closing cash balance of $134,488, which was based on the assumption of interim financing bring secured by the week ending July 17, 2026.[13]

16. Unfortunately, despite the Companies' efforts, they were unable to secure interim financing by that deadline.[14] On July 21, 2026 the Proposal Trustee filed a Material Adverse Change Report (the "**First MAC Report**") informing Onstie3D Group's creditors and the Court that the Companies did not have the cash flow required to sustain the projections in the Cash Flow Statements.[15]

17. Given the urgency of the situation, the Companies negotiated and entered into an interim financing term sheet (the "**DIP Term Sheet**") with a related company, Turtle Island Engineering & Consulting Ltd. ("**Turtle Island**", or the "**Interim Lender**").[16]

18. Turtle Island is a newly incorporated entity and sourced the funds for the interim financing (the "**DIP Loan**") from upstream lenders, including 114 (the "**Source Lenders**").[17]

---

[10] *BIA*, s 69(1) [**Tab 1**].

[11] Second Eno Affidavit at para 10.

[12] First Eno Affidavit at para 33, Exhibits J-L.

[13] First Eno Affidavit at para 39.

[14] Second Eno Affidavit at para 19.

[15] Ibid.

[16] Second Eno Affidavit at para 20.

[17] Second Eno Affidavit at para 21.

19. On the application of the Companies, this Court granted an order approving the DIP Term Sheet and associated charge over the Companies' assets in favour of Turtle Island (the "**DIP Financing Approval Order**") on July 22, 2026.[18]

20. Due to the Source Lenders being unable to advance funds to Turtle Island, the DIP Loan was ultimately never advanced.[19] The Applicants have continued to work to find replacement interim financing.[20]

21. Given the fact that the DIP Loan was not advanced, the Proposal Trustee issued a second Material Adverse Change Report on August 26, 2026 (the "**Second MAC Report**").[21]

Upcoming Work and Partnership with Indigenous Communities

22. The Onsite3D Group continues to perform existing contract work, as well as compete for and obtain new contracts.

23. The Applicants have also invested significant time and resources into fostering relationships with several First Nations. This has included participating in ceremony and discussing how Onsite3D can use its digital engineering technology and skill to complete commercial projects in partnership with the Nations, as well as provide training and employment opportunities to community members.[22]

24. As a result of these efforts, Onsite3D obtained a Band Council Resolution with Kehewin First Nation, approving a science, technology, engineering and mathematics-based workforce training program (the "**Training Program**") to help Indigenous youth and young adults gain experience working with advanced digital technologies.[23]

25. The Training Program is to be delivered by Onsite3D Group in partnership with educational and industry partners, including Imperial Oil and the Northern Alberta Institute of Technology.[24] It is expected to be funded in September.[25]

---

[18] Second Eno Affidavit at para 23.

[19] Second Eno Affidavit at paras 22-25.

[20] Second Eno Affidavit at para 17(e).

[21] Second Eno Affidavit at para 26 and Third Report of the Proposal Trustee dated August 26, 2026 at paras 20-23 (the "**Third Report**").

[22] Second Eno Affidavit at para 30.

[23] Second Eno Affidavit at para 31, Exhibit C.

[24] Second Eno Affidavit at paras 32-36, Exhibits A-B.

[25] Second Eno Affidavit at para 36.

26. The Training Program has been endorsed by Turtle Island Group ("**TIG**") as representing an important step towards advancing Indigenous participation, ownership, and leadership in the digital, engineering, and technology sectors.[26]

27. TIG is an Indigenous-owned coalition of Nations, communities, and development leaders which works with industry, government, and institutional partners to promote the economic participation of Indigenous peoples in Canada.[27]

Plan for Restructuring

28. Management of Onsite3D Group is currently drafting an agreement with TIG, whereby TIG would acquire a majority stake in the ownership of Onsite3D Group. The funds from that transaction (or a separate transaction should a sales process be conducted using the TIG offer as a stalking horse bid) would be used to fund a proposal to the Companies' creditors.[28]

29. Onsite3D Group would benefit from this ownership structure, as it would enable it to obtain access to government contracts and programs which have been set-aside for Indigenous businesses, as well as expand its network of Indigenous community relationships and therefore business opportunities.[29]

Creditor Support for Extension of Time to File a Proposal

30. The CRA and 114 are the creditors with the most material economic stake, and support the Applicants' application for a further extension of the Stay Period. Their support is significant because each has an asserted statutory or secured priority that is materially affected by preserving estate value; the nature, validity, quantum, and priority of all claims remain subject to further review.

31. Confidential Exhibits E, F and G (the "**Confidential Exhibits**") to the Second Eno Affidavit contain commercially sensitive valuation evidence concerning the Companies' assets. On a preliminary basis, those valuations support the Applicants' position that an orderly restructuring or sale may preserve materially more value for creditors than a forced liquidation.

III. ISSUES

32. The issues before this Honourable Court are:

(a) should the Applicants' Stay Period should be extended to October 20, 2026?; and

---

[26] Second Eno Affidavit at para 37, Exhibit D.

[27] Second Eno Affidavit at paras 38-39.

[28] Second Eno Affidavit at para 42.

[29] Second Eno Affidavit at para 44.

(b) should the Court seal the Confidential Exhibits?

IV. LAW AND ARGUMENT

A. The Applicants' Timeline for Filing a Proposal and the Stay of Proceedings Should be Extended

33. The Stay Period expires on September 5, 2026. Without a Court-ordered extension, the Applicants must file proposals by that date or face automatic bankruptcy.

34. Section 50.4(9) of the *BIA* authorizes the Court to extend the Stay Period where the applicant acts in good faith and with due diligence, and where no creditor would be materially prejudiced.[30]

35. Since filing the NOIs, the Applicants have acted in good faith and with due diligence by:[31]

(a) working cooperatively with the Proposal Trustee to manage cashflow;

(b) working diligently with the Proposal Trustee and its legal counsel to identify and quantify creditor claims;

(c) soliciting potential interim financing agreements with interim lenders;

(d) negotiating and entered into the DIP Term Sheet with the Interim Lender;

(e) soliciting back-up financing from other potential lenders when the DIP Loan did not fund;

(f) hiring a Chief Financial Officer, whose start date has been delayed due to restricted cash flow;

(g) obtaining letters of support from Indigenous communities, educational institutions, and industry;

(h) working on a restructuring plan involving a coalition of Indigenous Nations; and

(i) securing approval for new contracts which would generate value for the Estates.

36. These actions demonstrate the Applicants' commitment to moving the proposal forward in a timely and transparent manner.

37. The Applicants require additional time to, among other things:[32]

---

[30] *BIA* s 50.4(9) [**Tab 1**].

[31] Second Eno Affidavit at para 17.

[32] Second Eno Affidavit at para 46.

(a) continue its discussions with the Proposal Trustee regarding the identification and quantification of all creditor claims;

(b) continue to negotiate a draft agreement which would place majority ownership of Onsite3D in the hands of an Indigenous coalition;

(c) find a replacement interim lender to fund the Companies' ongoing operations during the Proposal Proceedings; and

(d) formulate and present a viable proposal to its creditors.

38. A 45-day extension to October 20, 2026 will provide sufficient time to materially advance these objectives.

39. No creditor would be materially prejudiced by the requested extension and the CRA and 114, creditors with the most material apparent economic stakes, support it..[33] To the contrary, the stay protects value by enabling an orderly restructuring. Premature termination of the stay would trigger an automatic bankruptcy and almost certainly lead to a significant destruction of value to the detriment of all creditors.

40. On a preliminary basis, and assuming the factoring agreement is valid and enforceable, invoices validly sold, transferred, and irrevocably and absolutely assigned under the factoring agreement are not property of Onsite3D for purposes of the CRA deemed trust or section 67(1)(a) of the BIA. The deemed trust attaches only to disposition proceeds remaining in the tax debtor's hands. The contractual waiver by 114, if valid and enforceable, leaves CNV with a limited priority in covered accounts receivable; it does not give CNV priority in non-receivable assets. The analysis in *First Vancouver Finance v M.R.N.*, 2002 SCC 49, together with section 67(1)(a) of the BIA, supports distinguishing any proprietary interest in identified property from a provable claim against the estate.[34]

41. On the Applicants' preliminary analysis, dissipation of factored receivables or traceable proceeds would extinguish the asserted proprietary trust claim and leave only a secured damages claim, if any, against the estate. Any such claim would rank behind CRA's deemed trust, behind 114 on non-accounts-receivable assets, and behind any Administration Charge granted by the Court, subject to the Court's determination. CNV's only secured-priority pocket would be the accounts receivable covered by the assignment, where it would rank ahead of 114 contractually but behind CRA, subject to the validity and enforceability of the relevant arrangements and claims.

42. A forced liquidation of the assets of the Companies would materially reduce the pool of asset value available to creditors as opposed to a sale for market value in the ordinary course.[35]

---

[33] Second Eno Affidavit at paras 50-51.

[34] *First Vancouver Finance v M.R.N.,* 2002 SCC 49 **[Tab 2]**; BIA s. 67(1)(a) **[Tab 1]**

[35] Second Eno Affidavit at paras 56-57, Confidential Exhibits E-G.

43. On a preliminary basis, the valuation evidence in Confidential Exhibits E, F and G supports the Applicants' position that an orderly, market-based process may preserve materially more value for creditors than a forced liquidation[36]. A forced liquidation of the assets of the Companies would materially reduce the pool of asset value available to creditors as opposed to a sale for market value in the ordinary course.

44. The Applicants respectfully submit that the requested extension to October 20, 2026 is both reasonable and necessary and should be granted.

B. It is Necessary to Seal the Confidential Exhibits to Protect Commercially Sensitive Information

45. The Applicants seek a temporary sealing order with respect to the Confidential Exhibits, which contains commercially sensitive information regarding the valuation of the assets of the Companies.

46. Part 6, Division 4 of the *Alberta Rules of Court* grants this court the discretionary authority to order sealing of commercially confidential information.[37]

47. The Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)* established the test that is considered by the Court when considering an application to seal records from the court file:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent that risk; and

(b) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes the public's interest in open and accessible court proceedings.[38]

48. The Supreme Court of Canada further confirmed in *Sherman Estate v Donovan* that the "core prerequisites" to obtain a sealing order include:[39]

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

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

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

---

[36] Second Eno Affidavit at paras 52-57.

[37] *Alberta Rules of Court*, AR 124/2010 (the "***Rules***") Division 4 of Part 6 including *Rule* 6.28 [**Tab 3**]

[38] *Sierra Club of Canada v Canada (Minister of Finance)* 2002 SCC 41, at para 45 [**TAB 4**]

[39] *Sherman Estate v Donovan,* 2021 SCC 25, at para 38 [**TAB 5**]

49. A sealing order is necessary to prevent a real and substantial risk of harm to the Applicants' ability to maximise recovery and therefore make a successful proposal to its creditors. The Confidential Exhibits contain commercially sensitive details of the value of the Onsite3D Group's assets, which may be subject to a Court-supervised sales process in these, or some other, insolvency proceedings in the future.

50. Public disclosure of this information could compromise the fairness and integrity of any future sales process, diminish the realizable value of the assets of the Applicants, and thereby prejudice the estate and its stakeholders.

51. Maintaining confidentiality preserves the value of the assets prior to any potential sales process. This outweighs the public interest in open court proceedings, particularly given that the public also has an interest in the integrity of court-supervised insolvency processes.

52. The protective value of the proposed sealing order outweighs its adverse impact: the order is limited in duration, extending only until the assets are sold, a proposal is accepted by the Applicants' creditors, or until further Order of the Court.

53. Accordingly, it is reasonable and appropriate to seal the Confidential Exhibits

V. CONCLUSION AND RELIEF SOUGHT

54. For the foregoing reasons, the Applicants respectfully submit that this Honourable Court grant the Second Extension Order and Sealing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28 DAY OF AUGUST, 2026

OGILVIE LLP

Per: Susy Trace
Counsel for the Applicant

OGILVIE LLP

Per: Kaitlynd Hiller
Counsel for the Applicant

VI. TABLE OF AUTHORITIES

1. Bankruptcy and Insolvency Act, RSC 1985, c B-3 [excerpts of]
2. *First Vancouver Finance v M.R.N.,* 2002 SCC 49
3. *Alberta Rules of Court*, AR 124/2010 (the "***Rules***") Division 4 of Part 6
4. *Sierra Club of Canada v Canada (Minister of Finance)* 2002 SCC 41
5. *Sherman Estate v Donovan,* 2021 SCC 25

TAB 1

CANADA

CONSOLIDATION

Bankruptcy and Insolvency Act

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

Current to May 26, 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 26 mai 2026

Dernière modification le 26 mars 2026

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

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n’y figurant qu’à titre de repère ou d’information.

NOTE

This consolidation is current to May 26, 2026. The last amendments came into force on March 26, 2026. Any amendments that were not in force as of May 26, 2026 are set out at the end of this document under the heading “Amendments Not in Force”.

NOTE

Cette codification est à jour au 26 mai 2026. Les dernières modifications sont entrées en vigueur le 26 mars 2026. Toutes modifications qui n'étaient pas en vigueur au 26 mai 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

(d) the approval or deemed approval by the court of the consumer proposal operates to annul the bankruptcy and to revest in the consumer debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the consumer debtor, unless the terms of the consumer proposal otherwise provide.

1992, c. 27, s. 32; 1997, c. 12, s. 58.

PART IV

Property of the Bankrupt

Property of bankrupt

67 **(1)** The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a ***registered retirement savings plan***, a ***registered retirement income fund*** or a ***registered disability savings plan***, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the

c) le moment par rapport auquel les réclamations des créanciers sont déterminées est celui où le débiteur consommateur est devenu un failli;

d) l’approbation — effective ou présumée — de la proposition par le tribunal a pour effet d’annuler la faillite et de réattribuer au débiteur consommateur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l’intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition ne soient à l’effet contraire.

1992, ch. 27, art. 32; 1997, ch. 12, art. 58.

PARTIE IV

Biens du failli

Biens du failli

67 **(1)** Les biens d’un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situés et où réside le failli, ne peuvent faire l’objet d’une mesure d’exécution ou de saisie contre celui-ci;

b.1) dans les circonstances prescrites, les paiements qui sont faits au failli au titre de crédits de taxe sur les produits et services et qui ne sont pas des biens visés aux alinéas a) ou b);

b.2) dans les circonstances prescrites, les paiements prescrits qui sont faits au failli relativement aux besoins essentiels de personnes physiques et qui ne sont pas des biens visés aux alinéas a) ou b);

b.3) sans restreindre la portée générale de l’alinéa b), les biens détenus dans un ***régime enregistré d’épargne-retraite***, un ***fonds enregistré de revenu de retraite*** ou un ***régime enregistré d’épargne-invalidité***, au sens de la *Loi de l’impôt sur le revenu*, ou dans tout régime prescrit, à l’exception des cotisations aux régimes ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

mais ils comprennent :

c) tous les biens, où qu’ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu’il peut acquérir ou qui peuvent lui être dévolus avant sa libération, y compris les remboursements qui lui sont dus

TAB 2

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada v. Callidus Capital Corp. | 2015 FC 977, 2015 CF 977, 2015 CarswellNat 4410, 2015 CarswellNat 8223, [2015] G.S.T.C. 105, 28 C.B.R. (6th) 209, 5 P.P.S.A.C. (4th) 29, 13 E.T.R. (4th) 43, 257 A.C.W.S. (3d) 740 | (F.C., Sep 17, 2015)

2002 SCC 49
Supreme Court of Canada

First Vancouver Finance v. Minister of National Revenue

2002 CarswellSask 317, 2002 CarswellSask 318, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] 3 C.T.C. 285, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 2002 D.T.C. 6998 (Eng.), 2002 D.T.C. 7007 (Fr.), 212 D.L.R. (4th) 615, 288 N.R. 347, 45 C.B.R. (4th) 213, J.E. 2002-960, REJB 2002-28499

Her Majesty The Queen in Right of Canada, as represented by the Minister of National Revenue, Appellant v. First Vancouver Finance, Respondent and Great West Transport Ltd., Respondent [non-party]

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

Heard: March 12, 2002
Judgment: May 23, 2002
Docket: 28062

Proceedings: additional reasons to [2002] G.S.T.C. 23 (S.C.C.); affirming [2000] 3 C.T.C. 93, [2000] 8 W.W.R. 386, 199 Sask. R. 9, 232 W.A.C. 9, [2001] G.S.T.C. 55 (Sask. C.A.); affirming [2000] 1 W.W.R. 713, [2000] 1 C.T.C. 99, 190 Sask. R. 286, [2001] G.S.T.C. 54 (Sask. Q.B.)

Counsel: *Edward R. Sojonky, Q.C.*, *Mark Kindrachuk*, for Appellant
Joel A. Hesje, *David M.A. Stack*, for Respondent, First Vancouver Finance

Subject: Income Tax (Federal); Insolvency; Goods and Services Tax (GST)
Related Abridgment Classifications
Tax
II Income tax
II.23 Administration and enforcement
II.23.i Collection of tax
II.23.i.ix Third party assessments
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.13 Administration and enforcement
III.13.c Collection remedies
III.13.c.i Garnishment
III.13.c.i.A Validity of requirement to pay
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.13 Administration and enforcement
III.13.c Collection remedies
III.13.c.i Garnishment
III.13.c.i.B Priority of requirement to pay

Royal Bank v. Sparrow Electric Corp., 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — considered

Royal Bank v. Tuxedo Transport Ltd., 1999 CarswellBC 612, 6 C.B.R. (4th) 285, [1999] 3 C.T.C. 393, 64 B.C.L.R. (3d) 158 (B.C. S.C. [In Chambers]) — referred to

Royal Bank v. Tuxedo Transport Ltd., 2000 BCCA 430, 2000 CarswellBC 1417, [2000] 3 C.T.C. 331, 2000 D.T.C. 6501, 79 B.C.L.R. (3d) 1, [2000] 9 W.W.R. 14, 18 C.B.R. (4th) 107, 190 D.L.R. (4th) 139, 140 B.C.A.C. 133, 229 W.A.C. 133 (B.C. C.A.) — followed

Statutes considered:

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

s. 317 [en. 1990, c. 45, s. 12(1)] — considered

s. 317(3) [en. 1990, c. 45, s. 12(1)] — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 153(1) — considered

s. 224 — considered

s. 224(1.2) — referred to

s. 227 — considered

s. 227(4) — considered

s. 227(4) [rep. & sub. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(5)(a) — considered

ADDITIONAL REASONS to judgment reported at 2002 CarswellSask 135, 2002 CarswellSask 136, [2002] G.S.T.C. 23, 219 Sask. R. 185, 272 W.A.C. 185 (S.C.C.), dismissing appeal by Minister of National Revenue from judgment which dismissed appeal and cross-appeal from determination of partnership's entitlement to funds received by Minister.

MOTIFS SUPPLÉMENTAIRES à l'arrêt publié à 2002 CarswellSask 135, 2002 CarswellSask 136, [2002] G.S.T.C. 23, 219 Sask. R. 185, 272 W.A.C. 185 (S.C.C.), qui a rejeté le pourvoi du ministre du Revenu national à l'encontre de l'arrêt qui avait rejeté le pourvoi et le pourvoi incident interjetés contre la décision que la société avait droit aux fonds perçus par le ministre.

***Iacobucci J.*:**

I. Introduction

1 This appeal concerns the interpretation of the deemed trust provisions in ss. 227(4) and 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"). At the hearing of this appeal, the Court dismissed the appeal with reasons to follow. The dispute is over certain property which came into the hands of the tax debtor after a deemed trust under s. 227(4.1) arose. The property was subsequently sold to a third party, after which time the Minister of National Revenue ("Minister") asserted an interest in the property on the basis that it continued to be subject to the deemed trust even after its sale.

2 As a result, the two specific issues to be resolved on this appeal are, first, whether property which comes into the tax debtor's hands after the deemed trust arises is subject to the trust, and, second, if so, whether the sale of trust property to third parties serves to release this property from the ambit of the trust.

3 Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

4 For the reasons set forth below, I find that the s. 227(4.1) deemed trust is similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty. The trust arises the moment the tax debtor fails to remit source deductions by the specified due date, but is deemed to have been in existence from the moment the deductions were made. As long as the tax debtor continues to be in default, the trust continues to float over the tax debtor's property. Thus, at any given point in time, whatever property then belonging to the tax debtor is subject to the deemed trust.

5 Viewed in this way, it is clear that, as property comes into possession of the tax debtor, it is caught by the trust and becomes subject to Her Majesty's interest. Similarly, property which the tax debtor disposes of is thereby released from the deemed trust. This mutuality of treatment between incoming and outgoing property relating to the deemed trust is supported by both the plain language of the provisions as well as their purpose and intent. Most importantly, Her Majesty's interest in the tax debtor's property is protected because, while property which is sold to third party purchasers is released from the trust, at the same time, the proceeds of disposition of the alienated property are captured by the trust. Moreover, commercial certainty is promoted owing to the fact that third party purchasers are free to transact with tax debtors or suspected tax debtors without fearing that Her Majesty may subsequently assert an interest in the property so acquired.

6 Accordingly, I would dismiss the appeal on the basis that, although the property acquired by the tax debtor after the deemed trust arose became subject to the trust, when this property was sold to a third party, it was thereby released from the ambit of the deemed trust. As such, after the sale, Her Majesty could no longer assert an interest in the property.

II. Facts

7 The respondent, First Vancouver Finance ("First Vancouver"), is engaged in the business of factoring accounts receivable. Great West Transport Ltd. ("Great West") is in the transportation business. On November 6, 1997, First Vancouver and Great West entered into a factoring agreement providing for the purchase by First Vancouver of Great West's accounts receivable at a discount. Pursuant to the agreement, First Vancouver became the owner of certain debts due to Great West.

8 Under the terms of the factoring agreement, First Vancouver purchased accounts through assignments entered into from time to time at Great West's option. First Vancouver did not purchase an individual account until it was submitted for approval, and it was not bound to purchase it up to that point. After purchase, the Great West invoices were forwarded to Great West's debtors, along with notification that the account had been sold and that subsequent payments should be made directly to First Vancouver. Among the accounts purchased were several owing by Canada Safeway Limited or its associated undertakings ("Canada Safeway").

9 As of the date of the factoring agreement, Great West owed money to the Minister because of unremitted payroll deductions and goods and services tax ("GST"). First Vancouver was aware from the time it began dealing with Great West in November of 1997 that Great West was in arrears in respect of its payroll deductions and GST accounts. First Vancouver had, as of November 10, 1997, made arrangements with the Minister to forward part of the purchase price of the accounts, in the form of bimonthly payments of $10,000, to the Minister which were to be applied to the arrears of Great West then outstanding. In addition, Great West remained directly responsible to the Minister for its ongoing payroll deductions and GST remittances as they became due.

While First Vancouver regularly made payments pursuant to its arrangement with the Minister, Great West failed to meet its ongoing tax obligations.

10 In January and February of 1999, Great West made 10 individual assignments to First Vancouver, relating to accounts receivable payable by Canada Safeway and its associated undertakings. On February 10, 1999, the Minister served Canada Safeway with Enhanced Requirement to Pay Notices ("RTP's"), as authorized by s. 224(1.2) of the *ITA* and s. 317(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended. In response, Canada Safeway made payments totalling $187,444.66 to the Minister relating to accounts which Great West had assigned to First Vancouver between January 4 and February 17, 1999. Two of the sets of Canada Safeway accounts, totalling $31,086.43, were assigned to First Vancouver on February 11 and February 17, 1999, after the RTP's had been issued. However, the remainder of the accounts had already been assigned to First Vancouver before February 10, 1999 when the RTP's were issued. At no time prior to the payments from Canada Safeway to the Minister did First Vancouver receive any notice that the Minister was claiming an interest in any Great West accounts purchased by First Vancouver.

11 In response to the Minister's actions, First Vancouver brought an application in the Saskatchewan Court of Queen's Bench to recover the amounts paid by Canada Safeway to the Minister pursuant to the RTP's.

12 Wimmer J. of the Court of Queen's Bench held that the monies owing on accounts factored prior to February 10, 1999, the date upon which Canada Safeway was served with the RTP's, were not subject to garnishment or to the deemed trust provisions of the *ITA*, or to any claim pursuant to the *Excise Tax Act*, and therefore that First Vancouver was entitled to these amounts. However, he held that the RTP's had captured the two accounts assigned after the RTP's were issued ("post-RTP accounts").

13 On appeal, the Saskatchewan Court of Appeal dismissed the appeal of the Minister and the cross-appeal of First Vancouver on the issue of the post-RTP accounts.

III. Relevant Statutory Provisions

14 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

> **227.** (4) **Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

IV. Judgments Below

A. Saskatchewan Court of Queen's Bench(1999), [2000] 1 W.W.R. 713, [2001] G.S.T.C. 54 (Sask. Q.B.)

15 On the preliminary issue of the ownership of the factored accounts, Wimmer J. relied upon the definition of a factoring agreement from *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963, [1996] G.S.T.C. 17 (S.C.C.), at pp. 985-86. In that case, Cory J. stated at para. 31 that, "A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration."

16 Wimmer J. observed that, according to *Canada Trustco Mortgage Corp.*, an absolute and unconditional assignment of book debts is beyond the reach of the Minister under garnishment provisions. He held further that the assignments from Great West to First Vancouver were absolute and unconditional because, upon completion of the assignments, Great West had no residual rights in the property and could not redeem or recover the accounts and, in that circumstance, Canada Safeway had no liability to Great West after there was a completed transfer of accounts. Although the Minister argued that the assignments were not absolute because under the factoring agreement First Vancouver had recourse to Great West if a customer disputed or failed to pay an account, Wimmer J. noted that the definition of factoring approved by Cory J. contemplated that a factor may acquire an absolute interest in book debts with or without recourse.

17 As a result, monies owing on accounts factored prior to February 10, 1999, the date upon which Canada Safeway was served with the RTP's, were not subject to garnishment under s. 224 of the *ITA* or s. 317 of the *Excise Tax Act*. However, the two accounts factored after February 10 were effectively intercepted by the RTP.

18 With respect to the deemed trust under s. 227(4.1) of the *ITA*, Wimmer J. applied the reasoning of Burnyeat J. of the British Columbia Supreme Court in *Royal Bank v. Tuxedo Transport Ltd.* (1999), 6 C.B.R. (4th) 285 (B.C. S.C. [In Chambers]). Since the Canada Safeway invoices came into existence after the Great West payroll deduction delinquencies arose and were assessed, the invoices were "after-acquired property" not subject to a s. 227(4.1) deemed trust in favour of Her Majesty. Wimmer J. acknowledged that *Tuxedo Transport Ltd.* was under appeal. However, he stated that, since the judgment came from a court of comparable jurisdiction, and as he was not satisfied it was wrong, he was prepared to follow that decision.

19 As a result, Wimmer J. held that amounts owing on accounts factored prior to February 10, 1999, the date upon which the Minister served Canada Safeway with the RTP's, were not subject to garnishment or to a deemed trust pursuant to ss. 224 and 227 of the *ITA*, or to any claim pursuant to s. 317 of the *Excise Tax Act*. Consequently, a declaration was made confirming First Vancouver's entitlement to the funds already paid by Canada Safeway to the Minister, with the exception of the funds covered by the two Canada Safeway accounts factored after February 10, 1999, along with costs.

B. Saskatchewan Court of Appeal, [2000] 8 W.W.R. 386, [2001] G.S.T.C. 55 (Sask. C.A.)

20 In a very brief oral decision, the Saskatchewan Court of Appeal dismissed the Minister's appeal, and First Vancouver's cross-appeal, both with costs, finding that the trial judge had not erred in the interpretation of the relevant statutory provisions or in the application of those provisions to the facts of the case.

V. Issues

21

A. Is property acquired by an employer after a default in remitting payroll deductions ("after-acquired property") subject to the deemed trust in s. 227(4.1) of the *ITA*?

B. Does the deemed trust under s. 227(4.1) continue to attach to property which has been sold by the tax debtor to a third party purchaser for value?

VI. Analysis

A. General Scheme and Background of the Section 227(4.1) Deemed Trust

22 The collection of source deductions has been recognized as "at the heart" of income tax collection in Canada: see *Pembina on the Red Development Corp. v. Triman Industries Ltd.* (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 51, *per* Lyon J.A. (dissenting), quoted with approval by Gonthier J. (dissenting on another issue) in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), at para. 36. Because of the importance of collecting source deductions, the legislation in question gives the Minister the vehicle of the deemed trust to recover employee tax deductions which employers fail to remit to the Minister.

23 It has also been noted that, in contrast to a tax debtor's bank which is familiar with the tax debtor's business and finances, the Minister does not have the same level of knowledge of the tax debtor or its creditors, and cannot structure its affairs with the tax debtor accordingly. Thus, as an "involuntary creditor", the Minister must rely on its ability to collect source deductions under the *ITA*: *Pembina on the Red Development Corp.*, *supra*, at pp. 33-34, *per* Scott C.J.M., approved by Cory J. in *Canada Trustco Mortgage Corp.*, *supra*, at paras. 16-18. For the above reasons, under the terms of the *ITA*, the Minister has been given special priority over other creditors to collect unremitted taxes.

24 This Court had occasion to interpret the deemed trust provisions in *Sparrow Electric Corp.*, *supra*. At that time, the relevant provisions were ss. 227(4) and 227(5) of the *ITA* which read as follows:

> (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> > (*a*) deemed by subsection (4) to be held in trust for Her Majesty, ...
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

25 In *Sparrow Electric Corp.*, both Royal Bank and the Minister claimed an interest in the proceeds of inventory of the tax debtor. In characterizing the nature of the deemed trust provisions, Gonthier J. (dissenting, but not on this issue) stated at para. 34 that, even if collateral was subject to a fixed charge at the time of a triggering event such as bankruptcy or liquidation, the deemed trust operated to attach the Minister's interest to such collateral as long as it was not subject to the fixed charge at the time the source deductions were made:

> Thus, s. 227(5) [now 227(4.1)] alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. [Emphasis in original.]

Royal Bank's interest was characterized as a fixed and specific charge over the inventory of the tax debtor. This had the effect of making the bank the legal owner of inventory as it came into possession of the tax debtor, subject to the debtor's equitable right of redemption. The majority of the Court concluded that, since the inventory was subject to the bank's security interest before the deductions giving rise to the deemed trust occurred, the bank's interest attached to the inventory in priority to Her Majesty's interest under the deemed trust.

26 However, in reaching this conclusion, the majority of the Court noted at para. 112 that Parliament was free to grant absolute priority to the deemed trust by adopting the appropriate language:

> Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind.

27 In response to *Sparrow Electric Corp.*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest ... in the amount so deducted, or withheld" were added to s. 227(4). As well, s. 227(4.1) [formerly s. 227(5)] expanded the scope of the deemed trust to include "property held by any secured creditor ... that but for a security interest ... would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured creditors to be held in trust "at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act". Finally, s. 227(4.1) now explicitly deems the trust to operate "from the time the amount was deducted or withheld".

28 It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words "notwithstanding any security interest" in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric Corp.*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.

29 As noted above, Parliament has also amended the deemed trust provisions in regard to the timing of the trust. Reference to events triggering operation of the deemed trust such as liquidation or bankruptcy have been removed. Section 227(4.1) now states that the deemed trust begins to operate "*at any time* [source deductions are] ... not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Thus, the deemed trust is now triggered at the moment a default in remitting source deductions occurs. Further, pursuant to s. 227(4.1)(*a*), the trust is deemed to be in effect "from the time the amount was deducted or withheld". Thus, while a default in remitting source deductions triggers the operation of the trust, the trust is deemed to have been in existence retroactively to the time the source deductions were made. It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.

30 In light of this overview of the context and operation of the s. 227(4.1) deemed trust, it remains to be determined, first, whether the trust captures property that the tax debtor acquires after the trust is deemed to come into existence, and, second, whether the sale by the tax debtor of trust property effectively releases such property from the purview of the deemed trust.

B. Does the Deemed Trust Attach to After-Acquired Property of the Tax Debtor?

31 As noted above, in coming to the conclusion that the deemed trust did not attach to after-acquired property of the tax debtor, the courts below relied on the B.C. Supreme Court decision in *Tuxedo Transport Ltd.*, *supra*. That decision has since been overturned by the B.C. Court of Appeal: *Royal Bank v. Tuxedo Transport Ltd.* (2000), 79 B.C.L.R. (3d) 1 (B.C. C.A.). In that case, Donald J.A., speaking for the court, characterized the trust as follows, at para. 11:

> Subsection 227(4) makes the trust operative at the time of the deductions. Subsection 227(4.1) acts to ensure that if deductions are still unpaid when assets come into the hands of the taxpayer, those assets will be deemed to be part of the trust. Beginning with the date the deductions are made the trust continues forward in time and attaches to any property of the debtor as it comes into existence. (at para. 11).

The Court of Appeal based this conclusion on the plain meaning of the language used in the statute, and was bolstered by its view that, to hold otherwise, would lead to "unacceptable results" (at para. 15), such as the following:

> Take the example of a company that makes a payroll deduction one day and receives a large payment the next. The company could carry on business using the unremitted deductions for its operating expenses and the deemed trust could not attach to the monies received shortly after the payday.

32 I am in essential agreement with the view taken by the B.C. Court of Appeal in *Tuxedo Transport Ltd.* In my view, the plain language of the provisions leads to the inevitable conclusion that the deemed trust attaches to after-acquired property. Most notably, s. 227(4.1) refers expressly to the "proceeds" of property which is subject to the trust and directs that "the proceeds of such property shall be paid to the Receiver General in priority to all ... security interests [in the property]". In addition, the section states that where, at any time, the debtor is in default to the Minister, that "property of the person ... *equal in value to the amount so deemed to be held in trust* is deemed" to be held in trust for Her Majesty (emphasis added). This language implies that Parliament has contemplated a fluidity with respect to the assets of the debtor to which the trust attaches. In particular, reference to the "proceeds" of trust property is an explicit indication that property acquired through the disposition of trust property by the tax debtor after the trust arises is included within the ambit of the trust.

33 I find additional support for this view in the fact that s. 227(4.1) deems the trust to be in effect "*at any time* [source deductions are] not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Further, in the event of default, the trust extends back "from the time the amount was deducted or withheld by the person". These words indicate that the intent of the section is to allow the trust to operate in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction. The language Parliament has chosen belies the suggestion that the deemed trust only captures property of the tax debtor in existence at some particular moment in time.

34 I find no contradiction in coming to the conclusion that after-acquired property can be subject to the trust even though the trust reaches back in time to a point before the acquisition of the property by the tax debtor. This is because the property so acquired will presumably have been taken in exchange for property of equal value which the debtor has disposed of. Thus, the acquired property can simply be viewed as replacing the initial subject matter of the trust. Moreover, since the trust is a deemed statutory trust, it is not governed by common law requirements, and, in this regard, the ongoing acquisition of trust property does not present a conceptual difficulty. I emphasize that it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law.

35 In addition to being supported by the clear wording of the provisions, this view accords with the purpose of the s. 227(4.1) deemed trust. In this respect, I agree with the B.C. Court of Appeal that Parliament could not have intended an employer who is in default one day and comes into a significant payment the next to thereby largely escape the operation of the deemed trust and continue to use the misappropriated funds in its business dealings. This would not accord with the Parliamentary intention to grant broad powers of collection to the Minister under the deemed trust.

36 As well, if the deemed trust were limited to property held by the employer at the time of the default, the Minister would have difficulty establishing that any particular part of the employer's property was subject to the deemed trust, and would be forced to engage in a significant degree of tracing. However, as noted by Gonthier J. in *Sparrow Electric Corp.*, at para. 37, one of the purposes of the deemed trust is to eliminate the need for tracing:

> After considering the matter, it is my view that it is not accurate to describe the mechanism of s. 227(5) as a means of "tracing"; indeed, it would seem that this subsection is antithetical to tracing in the traditional sense, to the extent that it requires <u>no link at all</u> between the subject matter of the trust and the fund or asset which the subject matter is being traced into. ... [Emphasis added.]

37 This observation holds true despite the subsequent amendments to the deemed trust provisions. As with the previous enactment of the section, s. 227(4.1) refers to property "*equal in value* to the amount so deemed to be held in trust" (emphasis added), and states that this property is subject to the trust "whether or not the property has in fact been kept separate and apart". Indeed, if anything, by deeming the trust to be effective "at any time" the debtor is in default, the amendments serve to strengthen

the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made. In this regard, the remarks of Gonthier J. in *Sparrow Electric Corp.*, at para. 31, are apposite:

> The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust. ... However, s. 227(5) [now s. 227(4.1)] has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat, supra*, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her". [Emphasis added.]

The reasoning adopted by the courts below would require substantial tracing, as the deemed trust would be restricted to include only property held by the tax debtor on the date the source deductions were made. With respect, this is not in accord with the language or purpose of the deemed trust.

38 In conclusion, based on the plain language of ss. 227(4) and 227(4.1) as supported by the purpose of the provisions and intentions of Parliament, the deemed trust created by these sections encompasses property which comes into the hands of the tax debtor after the trust arises. As a result, when Great West came into possession of the Canada Safeway invoices, the deemed trust, which had already arisen as a consequence of Great West's default in remittances, successfully attached to those invoices.

C. Does the Deemed Trust Continue to Operate on Property Which Has Been Sold by the Tax Debtor to Third Parties?

39 As a preliminary matter, I note that the Minister does not take issue with the chambers judge's holding, following *Canada Trustco Mortgage Corp.*, *supra*, that First Vancouver is not a secured creditor of Great West, but a third party purchaser of book debts. Thus, the question of the priority of secured creditors does not arise. The issue here is whether the alienation by Great West of the Canada Safeway invoices, which were subject to the deemed trust under ss. 227(4) and 227(4.1), served to release that property from the scope of the trust.

40 In my view, the scheme envisioned by Parliament in enacting ss. 227(4) and 227(4.1) is that the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default. As noted above, the trust has priority from the time the source deductions are made, and remains in existence as long as the default continues. However, the trust does not attach specifically to any particular assets of the tax debtor so as to prevent their sale. As such, the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property.

41 This interpretation finds support in both the words used in ss. 227(4) and 227(4.1) and the purpose of the deemed trust. In my opinion, s. 227(4.1) explicitly restricts the trust to property owned by the tax debtor by stating that the property of the tax debtor held in trust for Her Majesty "is property beneficially owned by Her Majesty ... and *the proceeds of such property* shall be paid to the Receiver General" (emphasis added). This reference to the proceeds of trust property is an acknowledgment in the very words of the *ITA* that Parliament contemplated that a tax debtor is free to alienate its property and that, when it does so, the trust releases the disposed-of property and attaches to the proceeds of sale. In addition, as discussed above, the trust does not attach to any specific property. Instead, by s. 227(4.1), the trust attaches to "property of the [tax debtor] ... equal in value to the amount [of the tax debt]". This language indicates, first, that the subject matter of the trust is focussed solely on the tax debtor's property, and, second, that it is anticipated that the character of the tax debtor's property will change over time.

42 Indeed, it is the logical corollary to my conclusion on the first issue, namely that the deemed trust attaches to after-acquired property of the tax debtor, that the trust also releases property alienated by the tax debtor. In this way, when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset; however, the property received by the tax debtor in exchange becomes subject to the deemed trust. As such, the trust is neither depleted nor enhanced; it simply floats over the property belonging to the tax debtor at any given time, for as long as the default in remittances continues.

43 Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the *ITA*. It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227(4.1) whereas secured creditors are. In *Pembina on the Red Development Corp.*, *supra*, Twaddle J.A. took note

of the "long-established principle of law that, in the absence of clear language to the contrary, a tax on one person cannot be collected out of property belonging to another" (p. 46). In *Sparrow Electric Corp.*, *supra*, at para. 39, Gonthier J. also referred to this principle, stating that:

> [T]his provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Section 227(4) and (5) are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) [now s. 227(4.1)] to permit the expropriation of the property of third parties who are not specifically mentioned in the statute. [Emphasis added.]

Thus, in the absence of an express reference to third party purchasers, there is no basis upon which to allow the Minister's interest in the tax debtor's property to continue once such property has been sold to third parties.

44 Although it is not necessary to resort to policy arguments, in my view it is worthwhile noting that to allow s. 227(4.1) to override the rights of purchasers for value would result in an unprecedented level of uncertainty. In fact, in oral argument counsel for the Minister conceded that such an interpretation would, in theory, allow the Minister to go so far as to assert an interest in assets sold by tax debtors to ordinary consumers. In my view, it is no exaggeration to say that adopting this interpretation of the deemed trust would have a general chilling effect on commercial transactions.

45 Furthermore, to allow the deemed trust to attach to property sold to third parties would be more likely to hinder, rather than help, the Minister's collection efforts. For example, in the case at bar, if First Vancouver had thought that it could not purchase Great West's assets free and clear of Her Majesty's claim, it would have been unlikely to have entered into the factoring agreement with Great West. As a result, Her Majesty would not have received the bimonthly payments of $10,000 from First Vancouver. More generally, the interpretation advocated by the Minister would likely frustrate the ability of a tax debtor to convert hard assets into cash in order to pay "the proceeds of such property ... to the Receiver General" as contemplated by s. 227(4.1), because prospective purchasers would fear that the Minister would assert an interest in these assets. The practical effect of this would be to freeze the tax debtor's assets and prevent it from carrying on business. In my view, this is clearly not a result intended by Parliament.

46 In summary, the deemed trust does not operate over assets which a tax debtor has sold in the ordinary course to third party purchasers. As such, once the Canada Safeway invoices had been factored to First Vancouver, the Minister was prevented from asserting its interest in these invoices.

VII. Conclusion

47 For the foregoing reasons, I would dismiss the appeal with costs.

Order accordingly.

Ordonnance en conséquence.

TAB 3

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 158/2025

Current as of June 25, 2025

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Inspection or examination of property

6.26 On application, the Court may make one or more of the following orders:

(a) an order to inspect property, including an inspection by a judge or jury, or both, at trial, if the inspection is advisable to decide a question in dispute in an action, application or proceeding;

(b) an order to take samples, make observations or undertake experiments for the purpose of obtaining information or evidence, or both;

(c) an order to enter land or premises for the purpose of carrying out an order under this rule.

Notice before disposing of anything held by the Court

6.27(1) On application, the Court may direct that money or other personal property held by the Court not be paid out or disposed of without notice being served on the applicant.

(2) The applicant must be a person who

(a) is interested in the money or other personal property held by the Court, or

(b) is seeking to have the money or personal property applied to satisfy a judgment or order or a writ of enforcement against the person on whose behalf the money or personal property is held.

(3) The applicant

(a) must file an affidavit verifying the facts relied on in the application, and

(b) may make the application without serving notice of the application on any other person.

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

Application of this Division

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

(a) to ban publication of court proceedings,

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

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

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

(e) for use of a pseudonym.

Restricted court access applications and orders

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

When restricted court access application may be filed

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

AR 124/2010 s6.30;194/2020

Timing of application and service

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

(a) file the application in Form 32, and

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

Notice to media

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

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

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or applications judge assigned to application

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

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

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

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

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

Application to seal or unseal court files

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

(2) The application must be made to

(a) the Chief Justice, or

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

(3) The Court may direct

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

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

(c) any other matter that the circumstances require.

Persons having standing at application

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

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

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

No publication pending application

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

AR 124/2010 s6.36;143/2011

Division 5
Facilitating Proceedings

Notice to admit

6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, streamlined trial or trial, either or both of the following:

(a) any fact stated in the notice, including any fact in respect of a record;

(b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based.

(2) A copy of the notice must be served on each of the other parties.

(3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that

(a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or

(b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part,

(i) privileged, or

(ii) irrelevant, improper or unnecessary.

(4) A copy of the statement must be served on each of the other parties.

(5) A denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

TAB 4

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

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

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

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

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

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

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

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

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

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

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

V. Issues

35

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

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

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

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

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

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

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

TAB 5

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8340, 2021 CarswellOnt 8339, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants
Iris Fischer, Skye A. Sepp, for Respondents
Peter Scrutton, for Intervener, Attorney General of Ontario
Jacqueline Hughes, for Intervener, Attorney General of British Columbia
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence
Judges and courts
XVI Jurisdiction

Club analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

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

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

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

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

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

A. The Test for Discretionary Limits on Court Openness

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

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without

altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

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

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

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

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An