Divisional Court File No.: 189/22
Superior Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

BOOK OF AUTHORITIES OF THE RECEIVER
(Motion for Leave to Appeal)

April 28, 2022

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com

Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver

LENCZNER SLAGHT LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Email: pgriffin@litigate.com
Monique J. Jilesen (43092W)
Tel: (416) 865-2926
Email: mjilesen@litigate.com
Derek Knoke (75555E)
Tel: (416) 865-3018
Email: dknoke@litigate.com

Lawyers for the Receiver, KSV Restructuring Inc.

TO: THE SERVICE LIST

Divisional Court File No.: 189/22
Superior Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

INDEX

Tab	Authority
1	*Castillo v. Xela Enterprises Ltd.,* 2021 ONSC 4860
2	*Bell Expressvu Limited Partnership v. Morgan* (2008), 67 C.P.C. (6th) 263, 2008 CanLII 63136 (Ont. Sup. Ct. J. (Div. Ct.)
3	*Blake v. Blake*, 2019 ONSC 5724
4	*Belokon v. The Kyrgyz Republic*, 2016 ONSC 995
5	*Silver v. Imax Corp*, 2013 ONSC 6751
6	*Lloyd v. Economical Mutual Insurance Co.* (2008), 168 A.C.W.S (3d) 1070, 2008 CanLII 38364 (Ont. Sup. Ct. J.)
7	*Closner v. Closner*, 2019 ONSC 703
8	*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Divisional Court File No.: 189/22
Superior Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE RECEIVER
(Motion for Leave to Appeal)

LENCZNER SLAGHT LLP
Barristers
130 Adelaide Street West, Suite 2600
Toronto ON M5H 3P5
Peter H. Griffin (19527Q)
pgriffin@litigate.com
Tel: (416) 865-2921
Monique J. Jilesen (43092W)
mjilesen@litigate.com
Tel: (416) 865-2926
Derek Knoke (75555E)
dknoke@litigate.com
Tel: (416) 865-3018

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street, Suite 1800 Toronto, ON M5J 2T9
Kyle Plunkett
Email: kplunkett@airdberlis.com
Sam Babe
Email: sbabe@airdberlis.com
Tel: (416) 863-1500
Fax: (416) 863-1515

Lawyers for the Receiver, KSV Restructuring Inc.

CITATION: Castillo v. Xela Enterprises Ltd., 2021 ONSC 4860
DIVISIONAL COURT FILE NO.: 279/21 and 314/21
DATE: 2021/07/09

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: MARGARITA CASTILLO, Applicant

AND:

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST, INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, AS EXECUTOR OF THE ESTATE OF JUAN ARTURO GUTIERREZ, Respondents

BEFORE: McWatt ACJSCJ, Sachs and Penny JJ.

COUNSEL: *Christopher MacLeod* and *N. Joan Kasozi*, for the Moving Party, Juan Guillermo Gutierrez

Philip Cho and *Michael Ly*, for the Moving Party, Arturo's Technical Services Inc.

Peter H. Griffin, *Monique J. Jilesen* and *Derek Knoke*, *Kyle Plunkett*, for the Receiver, Responding Party

HEARD at Toronto: In writing

ENDORSEMENT

[1] This motion for leave to appeal the Orders of McEwen J. dated March 25, 2021 is dismissed with costs to the Receiver fixed in the amount of $5000.00, all inclusive.

_____
McWatt ACJSCJ

_____
Sachs J.

_____
Penny J.

Date: July 9, 2021

COURT FILE NO.: 524/08
DATE: 20081119

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	)	
	)	
BELL EXPRESSVU LIMITED PARTNERSHIP, ECHOSTAR SATELLITE LLC, ECHOSTAR TECHNOLOGIES CORPORATION and NAGRASTAR LLC	)	*Christopher D. Bredt*, for the Plaintiffs
Plaintiffs	)	
- and -	)	
DAVID MORGAN a.k.a DAVID EDWARD MORGAN, DAVID MORGAN c.o.b. as www.modchipit.com, DAVID MORGAN c.o.b. as MODCHIPIT, MODCHIPIT, JOSEPHINE MORGAN, SHARON ALBERTA MORGAN, JOHN DOE, and other persons unknown who have conspired with the named Defendants	)	*Ian W. M. Angus*, for the Defendants
Defendants	)	
	)	**HEARD at Toronto:** November 19, 2008

BELLAMY J.: (Orally)

[1] The test for granting leave to appeal to the Divisional Court from this interlocutory order of Justice Wilton-Siegel is an onerous one. As far as I am concerned, the defendants have failed to meet the test in rule 62.04(b) and, for the following reasons, leave to appeal is denied.

[2] First, I see no good reason to doubt the correctness of the motion judge's decision. This was a well-reasoned decision, in which Wilton-Siegel J. applied the proper legal principles with respect to the review of all the facts and issues before him. He then applied the correct test established in the Supreme Court of Canada's decision in *Celanese Canada Inc. v. Murray Demolition*, [2006] 1 S.C.R. 189.

[3] Second, this appeal does not raise matters that are of general importance. This decision is essentially a factual one. The issues raised in it are presumably of importance to the parties, although I must confess to being surprised that the defendants waited a year after the Anton Piller Order was executed to even bring their motion. In any event, the issues raised lack general legal importance, they do not transcend the immediate interests of the specific facts of this case, they do not raise issues of general public interest, and, in the final analysis, they have very little jurisprudential value.

COSTS

[4] I have endorsed the Motion Record: "For oral reasons given, leave to appeal is denied. Costs payable by the defendants forthwith in the amount of $7,000.00, inclusive of GST and disbursements".

BELLAMY J.

Date of Reasons for Judgment: November 19, 2008

Date of Release: **November 24, 2008**

COURT FILE NO.: 524/08
DATE: 20081119

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:

BELL EXPRESSVU LIMITED PARTNERSHIP, ECHOSTAR SATELLITE LLC, ECHOSTAR TECHNOLOGIES CORPORATION and NAGRASTAR LLC

Plaintiffs

- and -

DAVID MORGAN a.k.a DAVID EDWARD MORGAN, DAVID MORGAN c.o.b. as www.modchipit.com, DAVID MORGAN c.o.b. as MODCHIPIT, MODCHIPIT, JOSEPHINE MORGAN, SHARON ALBERTA MORGAN, JOHN DOE, and other persons unknown who have conspired with the named Defendants

Defendants

ORAL REASONS FOR JUDGMENT

BELLAMY J.

Date of Reasons for Judgment: November 19, 2008

Date of Release: November 24, 2008

CITATION: Blake v. Blake, 2019 ONSC 5724
COURT FILE NO.: 515/19
DATE: 20191003

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N :	)	
	)	
BRUCE HOWARD BLAKE, KATHRYN JOAN HOMES AND PATRICIA GEDDES	)	*Fred Leitch* for Bruce Howard Blake and Kathryn Joan Homes
Applicants (Respondents on the motion)	)	
– and –	)	
KENNETH GEORGE BLAKE AND KENNETH GEORGE BLAKE, IN HIS CAPACITY AS THE ESTATE TRUSTEE OF THE ESTATE OF AINSLEE ELIZABETH BLAKE	)	*Edwin G. Upenieks* for Patricia Ruth Geddes *Bradley Phillips* for the Moving Party
Respondents (Moving Party on the motion)	)	**HEARD:** September 26, 2019

FAVREAU J:

[1] The moving party, Kenneth George Blake, brings a motion to extend the time for filing notices of motion for leave to appeal from two interlocutory decisions of the Superior Court.

[2] The parties to this proceeding are all siblings. In the underlying application, the respondents on this motion challenge the moving party's passing of accounts in respect of their mother's estate. The respondents claim that the moving party improperly transferred a number of their mother's properties to himself prior to her death, and that the properties should have been included as assets of the estate.

[3] In a decision dated March 18, 2019, Regional Senior Justice Daley dismissed the moving party's motion for summary judgment. The motion judge found that the moving party did not

establish that the issues between the parties were *res judicata* or that they were barred by the limitation periods in the *Trustee Act*, R.S.O. 1990, c. T.23 or the *Limitations Act, 2002*, S.O. 2002, c. 24. He also found that there were numerous factual and legal questions that could not be decided on the record before him. At the conclusion of his decision, the motion judge indicated that he would remain seized of the matter in accordance with Rule 20.05(2) of the Rules of Civil Procedure for the purpose of giving directions on the conduct of the application.

[4] Following the issuance of the summary judgment decision, on June 26, 2019, the parties participated in a case conference with the motion judge. On June 27, 2019, the motion judge released his endorsement from the case conference in which he made a number of procedural orders, including setting a schedule for the disclosure of documents and examinations for discovery. Noting the "protracted history of this application", he also directed that the matter be placed on the January 2020 civil trial list in Brampton.

[5] On July 8, 2019, the motion judge released an endorsement addressing the costs of the motion for summary judgment. The motion judge awarded costs to the respondents payable by the moving party on a substantial indemnity basis. In support of his finding that substantial indemnity costs were appropriate, the motion judge found that the lawyer representing the moving party on the motion intentionally failed to bring to the Court's attention a recent Court of Appeal decision, which the motion judge viewed as determinative on the issue of the limitation period.

[6] The moving party has initiated a motion for leave to appeal the costs decision to the Divisional Court. That motion was brought within the requisite timelines under the Rules of Civil Procedure and is not the subject of this motion.

[7] On this motion, the moving party seeks to extend the time for bringing motions for leave to appeal from the motion judge's decision dismissing the motion for summary judgment and the case management endorsement. The moving party argues that the costs decision demonstrates a reasonable apprehension of bias on the part of the motion judge, and that the alleged bias tainted the motion judge's summary judgment and case management decisions. He also argues that the receipt of the costs decision on July 8, 2019 provides an explanation for the delay in seeking leave to appeal beyond the time prescribed in the Rules because this is when he became aware of the alleged bias.

Test on a motion to extend the time for bringing a motion for leave to appeal

[8] Rule 61.03(1) of the Rules of Civil Procedure provides that a notice of motion for leave to appeal to the Divisional Court is to be served within 15 days after the date of the decision or order from which an appeal is being sought.

[9] Rule 3.02(1) of the Rules provides that "the court may by order extend or abridge any time prescribed by these rules … on such terms as are just".

[10] In *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, at para. 15, the Court of Appeal set out the circumstances in which a court may extend the deadline for an appeal:

> The test on a motion to extend time is well settled. The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including
>
> (a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period;
>
> (b) the length of, and explanation for, the delay in filing;
>
> (c) any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and
>
> (d) the merits of the proposed appeal.

[11] On a motion to extend the deadline to file a motion for leave to appeal, the same test applies, but, as held at para. 16 of the decision in *Enbridge*, "lack of merit alone can be a sufficient basis on which to deny an extension of time, particularly in cases such as this where the moving party seeks an extension to a notice of leave to appeal…"

[12] Ultimately, all of the factors listed by the Court of Appeal in *Enbridge* are to be considered together, and the overarching consideration is what the justice of the case requires.

[13] As set out below, balancing all of the factors together, I find that the justice of the case does not favour extending the deadline for bringing a motion for leave to appeal.

Whether there was a *bona fide* intention to seek leave to appeal

[14] It is clear from the moving party's own evidence that he did not intend to seek leave to appeal from these decisions until after he received the motion judge's costs decision. In his affidavit, the moving party's lawyer who argued the motion for summary judgment explains that it was only when he received the costs endorsement that he became concerned that the motion judge may have made the earlier decisions with bias or *animus* towards him or his client.

[15] The respondents argue that the fact that the moving party did not form the intention to seek leave to appeal within the 15 days provided by the Rules is fatal.

[16] The moving party relies on decisions of this Court to argue that, in some exceptional cases, the justice of the case allows for parties seeking leave to appeal to form their intentionto appeal after the expiry of the 15 day deadline. For example, in *Eustace v. Eustace*, 2017 ONSC 4814 (Div. Ct.), this Court extended the time for seeking leave to appeal in circumstances where the decision was issued just before a holiday period, and the Office of the Children's Lawyer was not able to confirm instructions to seek leave to appeal until three days after the expiry of the deadline. In *Berg v. Canadian Hockey League*, 2017 ONSC 6719 (Div. Ct.), the motion judge granted an extension for seeking leave to appeal in circumstances where a decision certifying an

almost identical class proceeding was released several weeks after the judge in that case rejected a certification motion. These decisions are consistent with the statement of the Court of Appeal in *Frey v. MacDonald*, [1989] O.J. No. 236 (C.A.), at para. 3, to the effect that:

> Usually, time for an appeal or taking any steps within an appeal is not extended unless the appellant has maintained a firm intention from the beginning of the appeal and the failure to observe the time limits is reasonably explained. This, however, is subject to a broader rule that extensions should be granted if the "justice of the case requires".

[17] Based on these cases, I agree with the moving party that the fact that the moving party did not intend to seek leave to appeal within the prescribed 15 days is not fatal. However, as reviewed below, this is not sufficient for me to find that the justice of the case requires extending the deadline for seeking leave to appeal.

The length and explanation for the delay

[18] The summary judgment decision was issued on March 18, 2019, and the case management endorsement was issued on June 27, 2019. The moving party's lawyer communicated his client's instructions to seek leave to appeal the decisions to the respondents' lawyers on July 30, 2019, and this motion was served on them on September 13, 2019. This is almost 6 months after the summary judgment decision was issued and 2½ months after the case management endorsement was released.

[19] These are lengthy delays, especially in respect of the motion for summary judgment.

[20] The moving party's explanation for the delay is that he did not become aware of the alleged reasonable apprehension of bias issue until the release of the costs decision on July 8, 2019. While the moving party's lawyer was able to issue a notice of motion for leave to appeal almost immediately upon receiving the costs decision, he was on vacation out of the country at that time and needed additional time to consider the advisability of appealing the summary judgment and case management decisions. He argues that the additional delay between the receipt of the costs decision and the issuance of the notice of motion was therefore reasonable.

[21] To some extent, the validity of the explanation for not bringing the motion for leave to appeal until after the release of the costs decision depends on the strength of the argument that the costs decision gives rise to a reasonable apprehension of bias. Indeed, if information came to light after the release of a decision that genuinely raises concerns that the motion judge was biased, then this could provide a reasonable explanation for the delay.

[22] However, I am troubled by the explanation for the delay between the receipt of the costs decision and the initiation of this motion. All of the necessary information was known by July 8, 2019, and a challenge to the costs decision was commenced almost immediately. The motion to challenge the two decisions at issue here was initiated almost two months later. In my view, the need to consider the matter is an insufficient explanation for this length delay, especially given

that the litigation remained active and the parties are under a case management timetable leading to a January 2020 trial.

[23] If this was my only concern with he moving party's motion, it may have been overcome by other considerations. But as reviewed below, prejudice and lack of merit clearly weigh against granting the requested extension.

The prejudice caused by the delay

[24] In my view, the prejudice to the respondents weighs heavily against granting the motion to extend.

[25] This application was commenced in 2011. The parties are siblings involved in acrimonious litigation over their mother's estate. There are serious allegations of wrongdoing on the part of the moving party.

[26] As part of his case management order, the motion judge set a schedule for the completion of steps leading to a trial in January 2020. At trial, the parties will have an opportunity to fully address the merits of the case. Under the circumstances, it is hard to understand how it would be beneficial to the respondents, and even the moving party, to proceed with an appeal of the summary judgment decision. At this point, a trial in January 2020 is a far more expeditious way of resolving the issues between the parties than a protracted leave to appeal and appeal of a motion for summary judge, which may ultimately not resolve the litigation.

[27] In addition, if I were to grant the motion to extend the time to appeal the summary judgment decision and the case conference order, this would inevitably bring the litigation to a halt. The trial date would have to be vacated in order to allow the motion to proceed.

[28] I also note that the motion judge is no longer case managing the case. Therefore, even if there was merit to the argument that the costs decision evidences a reasonable apprehension of bias, that concern has no impact on the litigation as it goes forward.

[29] Under the circumstances, I find that, if the time for seeking leave to appeal is extended, the prejudice to the respondents will be significant.

The merits of the proposed motion for leave to appeal

[30] In addition to prejudice to the respondents, I see little merit to the motion for leave to appeal.

[31] What must be assessed are the merits of the motion for leave to appeal and not the merits of the proposed appeal.

[32] The test on a motion for leave to appeal set out in Rule 62.02(4) is as follows:

> (4) Leave to appeal from an interlocutory order shall not be granted unless,

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted.

[33] This Court has held that leave to appeal should not be easily granted and the test is to be applied strictly: *King Line Investments Inc. v. 973976 Ontario Ltd.*, [2008] O.J. No. 2592 (Div. Ct.). at para. 3. Each branch of rule 62.02(4)(b) involves a two-part test, and, in order for leave to be granted, both parts must be met on at least one branch of the test.

[34] In this case, the moving party relies on the second branch of Rule 62.02(4), arguing that there is serious reason to doubt the correctness of the motion judge's decision. Under Rule 62.02(4)(b), the moving party does not have to convince the court that the decision was wrong, but that the decision is open to "very serious debate". In addition, the moving party must demonstrate "matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice": *Samuels v. Canada (Attorney General)*, 2016 ONSC 6706 (Div. Ct.), at para. 23.

[35] In his factum, the moving party argues that the proposed motion for leave to appeal is meritorious because the summary judgment and case management decisions are tainted by a reasonable apprehension of bias. He also argues that there is reason to doubt the correctness of the motion judge's findings that the limitation periods and *res judicata* do not apply.

[36] The question of whether there is reason to doubt the correctness of the motion judge's summary judgment decision as it relates to the issues of *res judicata* and the limitation period are issues that would have been known to the moving party at the time the decision was released. Yet, no motion for leave to appeal was brought at that time Therefore, during the argument of the motion before me, counsel for the moving party quite properly conceded that the primary ground upon which he takes the position that the proposed appeal has merit at this juncture is that the costs decision demonstrates a reasonable apprehension of bias that taints the motion judge's earlier decisions.

[37] In support of his argument that there is merit to the proposed motion for leave to appeal, the moving party relies on the Supreme Court's decision in *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, at para. 100, where the Court held that "[i]f a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision". While this may provide support for the argument that a finding of bias could taint the whole proceedings, it does not assist in determining whether there is any merit to the moving party's argument that the costs decision itself gives rise to a reasonable apprehension of bias.

[38] In *St. Lewis v. Rancourt*, 2012 ONSC 6768 (Sup. Ct.), at para. 39, Annis J. emphasized that there "is a strong presumption in favour of the impartiality of the trier of fact".

[39] In *S. (R.D.)*, at para. 113, the Supreme Court explained that there is a high threshold for establishing a reasonable apprehension of bias:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[40] The Court also emphasized, at para. 141, that, in assessing a claim of reasonable apprehension of bias, a court must look at the totality of the circumstances:

> These examples demonstrate that allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

[41] In this case, the moving party only focused on the costs decision in support of his allegation that there is a reasonable apprehension of bias that taints the motion judge's previous decisions. He has not provided any authority in support of the argument that a judge's finding that a lawyer breached the Rules of Professional Conduct on its own can form the basis for a finding of reasonable apprehension of bias. There is no evidence about the conduct of the hearing on the motion for summary judgment or anything else that suggests that the motion judge had an *animus* toward the moving party or his lawyer during the hearing or thereafter. With respect to the Case Conference, the moving party complains that the motion judge refused to reconsider his decision that he pay for the costs of his mother's medical records, but points to nothing more to suggest that there was anything untoward in the conduct of the case conference or the case conference decision.

[42] Accordingly, I am not satisfied that the moving party can show that the impartiality of the motion judge in deciding the summary judgment motion and in making the case management endorsement is open to serious debate.

[43] In any event, I do not see how this proposed motion for leave to appeal raises issues of general importance beyond the interests of the parties. There may be cases where claims of

alleged bias raise issues of general importance because they may affect the "reputation of the court", as was held in *St. Lewis*, at para. 32. This is not such a case.

The overall justice of the case

[44] The moving party's primary concern on this motion is evidently the motion judge's finding of professional misconduct against his lawyer in the costs decision. Whether there is any merit to the arguments the moving party will make on the motion for leave to appeal the costs decision and, if leave is granted, the appeal itself, are issues that can be and that will be addressed independently. There is no need for leave to be granted from the summary judgment decision or the case management endorsement for those issues to be addressed.

[45] This is acrimonious and hard-fought litigation. It involves serious allegations of impropriety. The parties are working toward a January 2020 trial date, where the merits of the case can be fully addressed. When the motion judge's summary judgment decision was initially released, the moving party did not seek leave to appeal the decision. The only intervening event is the costs endorsement, which, in my view, is far from sufficient to support a finding of reasonable apprehension of bias with respect to the motion judge's decisions on the summary judgment motion and the case conference.

[46] In all of these circumstances, I find that the justice of the case does not favour extending the time for seeking leave to appeal.

Costs

[47] Following the hearing of the motion, I received the respondents' costs outlines. The respondents Bruce Howard Blake and Kathryn Joan Homes are represented by one lawyer, who seeks $8,436.83 on a partial indemnity basis. The respondent Patricia Geddes is represented separately and seeks $12,000 on a partial indemnity basis.

[48] The costs outline provided by the moving party shows that he would have sought $19,156.22 on a partial indemnity basis if he had been successful on the motion.

[49] In all of the circumstances, I am awarding costs in the total amount of $16,000 to the respondents. This amount is fair and reasonable given the complexity of the issues on the motion. It also reflects what the moving party could have reasonably expected to pay.

Conclusion

[50] The motion to extend the time to bring a motion for leave to appeal the summary judgment decision and case management endorsement is dismissed. Under the circumstances, there is no need to address the moving party's motion for a stay pending the motion for leave to appeal.

[51] The respondent is to pay $8,000 in costs to Bruce Howard Blake and Kathryn Joan Homes, and $8,000 to Patricia Ruth Geddes. Costs are to be paid within 30 days of today's date.

FAVREAU J.

RELEASED: October 3, 2019

CITATION: Blake v. Blake, 2019 ONSC 5724
COURT FILE NO.: 515/19
DATE: 20191003

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N :

BRUCE HOWARD BLAKE, KATHRYN JOAN HOMES AND PATRICIA GEDDES

Applicants
(Respondents on the motion)

– and –

KENNETH GEORGE BLAKE AND KENNETH GEORGE BLAKE, IN HIS CAPACITY AS THE ESTATE TRUSTEE OF THE ESTATE OF AINSLEE ELIZABETH BLAKE

Respondent
(Moving Party on the motion)

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: October 3, 2019

CITATION: Belokon v. The Kyrgyz Republic, 2016 ONSC 995
DIVISIONAL COURT FILE NO.: 486/15
COURT FILE NO.: CV-015-10890-00CL
DATE: 20160211

SUPERIOR COURT OF JUSTICE – ONTARIO

RE:

VALERI BELOKON

Applicant/Responding Party

- and -

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC.

Respondents/Moving Party

BEFORE: Stewart J.

COUNSEL: *P. Cavanagh* and *C.A. Snider*, for the Applicant/Responding Party

R.A. Rubinoff and *J. Siwiec*, for the Respondent
The Kyrgyz Republic

M. Latella, *C. Doria* and *M. Saunders*, for the Respondent/Moving Party
Kyrgyzaltyn JSC

D.R. Byers and *V. Voakes*, for the Respondent
Centerra Gold Inc.

HEARD : In Writing

ENDORSEMENT

[1] Kyrgyzaltyn JSC ("KJSC") seeks leave to appeal to the Divisional Court from the order of Matheson J., dated September 8, 2015.

[2] KJSC moved before Matheson J. to set aside a *Mareva* injunction ordered by Wilton-Siegel J. on March 5, 2015 or, alternatively, to vary the *Mareva* injunction on grounds of inadequate factual foundation and material non-disclosure.

[3] Although KJSC argued on the motion that there had been material non-disclosure, counsel for Valeri Belokon asserts that KJSC did not take the position on the motion before Matheson J. that any such non-disclosure had been knowing or wilful on the part of Belokon or his counsel.

[4] By order dated September 8, 2015, Matheson J. varied the *Mareva* injunction and set it aside, subject to further order of the Court, on terms that did not preclude Belokon from bringing a fresh motion for injunctive relief.

[5] In her reasons for setting aside the *Mareva* injunction, Matheson J. accepted KJSC's submission that subsequent appeal decisions made the original evidentiary foundation for the order insufficient. She did not accept, however, that the *Mareva* injunction should be set aside for material non-disclosure.

[6] Costs of the motion were awarded to KJSC in the amount of $85,729.62.

[7] Notwithstanding that KJSC succeeded on its motion to set aside the *Mareva* injunction on one of the grounds raised, it has brought the within motion for leave to appeal the order. KJSC submits that Matheson J. erred by setting aside the *Mareva* injunction for reasons that accepted only one of the two grounds upon which KJSC had relied, that she should have accepted what KJSC now casts as intentional non-disclosure, and that she ought to have made an order precluding Belokon from bringing any future motion for similar relief.

[8] KJSC also seeks leave to appeal the motion judge's disposition of costs.

Test for Leave to Appeal

[9] The test for granting leave to appeal under Rule 62.02(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

[10] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted". A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.).

[11] Under Rule 62.02(4), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong - that aspect of the test is satisfied if the judge granting leave finds that he correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J.); *Ash v. Lloyd's Corp.* (1992) O.R. (3d) 282 (Gen. Div.). In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J.); and *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.).

[12] Leave to appeal a decision of a motions judge as to costs, a discretionary decision, is likewise not easily granted in light of these requirements.

Analysis

[13] With respect to the test under Rule 62.02(4)(a), I consider that KJSC has not shown any satisfactory reason that it is desirable that leave be granted. The motion judge's order, insofar as it reflects her agreement with one principal argument of KJSC and does not prevent Belokon from bringing a future motion for injunctive relief (subject to arguments of *res judicata*, abuse of process or such other consideration as may apply), was based upon the facts as presented by the parties and within her discretion to make.

[14] In view of this determination, it is therefore unnecessary to address the first branch of the test.

[15] With respect to the test under Rule 62.02(4), I do not consider that the proposed appeal involves matters of such importance that leave should be granted. The issues are specific to the parties and do not raise questions of general or public importance.

[16] Having so found, it is unnecessary to address the first branch of that test.

[17] KJSC therefore fails to meet either test for the granting of leave to appeal the substantive result of the motion.

[18] I would make the same determination insofar as KJSC seeks to appeal the motion judge's disposition of costs. Neither articulation of the test for granting leave has been met. The motion judge's decision in this regard falls within the scope of proper exercise of broad discretion that applies to the subject of costs. There is no adequate reason shown by the moving party to make it desirable that leave be granted, nor is there any issue on appeal that involves a question of general or public importance.

Conclusion

[19] For these reasons, the motions for leave to appeal these decisions are dismissed.

Costs

[20] The parties have agreed on the costs to be awarded on these motions. Accordingly, KJSC shall pay to Belokon the amount of $12,000.00, inclusive of disbursements and applicable taxes, on the substantive leave to appeal motion. KJSC shall pay to Belokon the sum of $6,000.00, inclusive of disbursements and applicable taxes, on the motion for leave to appeal costs.

Stewart J.

Date: February 11, 2016

Silver et al. v. IMAX Corporation et al.
[Indexed as: Silver v. IMAX Corp.]

Ontario Reports

Ontario Superior Court of Justice,

Tzimas J.

October 29, 2013

117 O.R. (3d) 616 | 2013 ONSC 6751

Case Summary

Civil procedure — Class proceedings — Class members — Motion judge amending definition of Ontario global class by removing persons who agreed to take part in court-approved settlement of parallel U.S. proceedings — Plaintiffs' motion for leave to appeal that order dismissed in absence of conflicting decisions or doubts over correctness of order.

The case management motion judge in an Ontario class proceeding amended the definition of the Ontario global class by removing all those persons who agreed to take part in a court-approved settlement of parallel U.S. proceedings. The removal from the Ontario global class of those class members was a condition of the settlement, so as to prevent double recovery from both jurisdictions. The plaintiffs brought a motion for leave to appeal that order.

Held, the motion should be dismissed.

The decision to amend the global class did not conflict with a decision by another judge or court in Ontario or elsewhere. There was no doubt about the correctness of the order. The motion judge had jurisdiction to amend the class. She would have erred if she had treated the U.S. settlement as irrelevant to the Ontario litigation. She did not err in holding that it would be contrary to the fundamental principles governing conflict of laws to look behind the U.S. settlement and evaluate it on its merits as a prerequisite to amending the class. The motion judge was the case management motion judge for six years and had acquired a thorough understanding of the competing facts. Her decision to amend the global class was entitled to substantial deference.

Abdula v. Canadian Solar Inc. (2012), 110 O.R. (3d) 256, [2012] O.J. No. 1381, 2012 ONCA 211, 289 O.A.C. 226, 98 B.L.R. (4th) 199, 348 D.L.R. (4th) 597, 214 A.C.W.S. (3d) 1006; *Currie v. McDonald's Restaurants of Canada* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506, 250 D.L.R. (4th) 224, 195 O.A.C. 244, 7 C.P.C. (6th) 60, 137 A.C.W.S. (3d) 250 (C.A.); *Fischer v. IG Investment Management Ltd*. (2012), 109 O.R. (3d) 498, [2012] O.J. No. 343, 2012 ONCA 47, 287 O.A.C. 148, 15 C.P.C. (7th) 81, 346 D.L.R. (4th) 598, 211 A.C.W.S. (3d) 785 [Leave to appeal to S.C.C. granted [2012] S.C.C.A. No. 135], **consd** [page617]

Other cases referred to

1250264 Ontario Inc. v. Pet Valu Canada Inc. (2013), 115 O.R. (3d) 653, [2013] O.J. No. 2012, 2013 ONCA 279, 362 D.L.R. (4th) 88, 34 C.P.C. (7th) 53, 305 O.A.C. 329, 226 A.C.W.S. (3d) 651; *Bell ExpressVu Limited Partnership v. Morgan*, [2008] O.J. No. 4758, 67 C.P.C. (6th) 263, 171 A.C.W.S. (3d) 426 (Div. Ct.); *Lefrancois v. Guidant Corp*., [2009] O.J. No. 4129 (Div. Ct.); *Lloyd v. Economical Mutual Insurance Co*., [2008] O.J. No. 3025, 65 C.C.L.I. (4th) 299, 168 A.C.W.S. (3d) 1070 (S.C.J.); *Mignacca v. Merck Frosst Canada Ltd*. (2009), 95 O.R. (3d) 269, [2009] O.J. No. 821, 247 O.A.C. 322, 71 C.P.C. (6th) 350, 176 A.C.W.S. (3d) 36 (Div. Ct.); *Morrison v. National Australian Bank Ltd*., 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010); *Silver v. IMAX Corp*., [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.); *Silver v. IMAX Corp*. (2011), 105 O.R. (3d) 212, [2011] O.J. No. 656, 2011 ONSC 1035, 80 B.L.R. (4th) 228 (Div. Ct.); *Silver v. IMAX Corp*. (2012), 110 O.R. (3d) 425, [2012] O.J. No. 1352, 2012 ONSC 1047, 17 C.P.C. (7th) 24, 213 A.C.W.S. (3d) 24 (S.C.J.); *Silver v. IMAX Corp*., [2013] O.J. No. 1276, 2013 ONSC 1667, 36 C.P.C. (7th) 254, 227 A.C.W.S. (3d) 23 (S.C.J.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1) (*d*), 12

Securities Act, R.S.O. 1990, c. S.5, s. 138.9 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 62.02(4), (a), (b)

MOTION for leave to appeal an order amending the definition of the Ontario global class in a class proceeding.

Daniel E.H. Bach and *Serge Kalloghlian*, for plaintiffs.

Dana M. Peebles, for defendants.

TZIMAS J.: —

I. *Introduction*

[1] The plaintiffs, Marvin Neil Silver and Cliff Cohen brought a motion for leave to appeal the order of Justice van Rensburg, dated March 19, 2013 [[2013] O.J. No. 1276, 2013 ONSC 1667 (S.C.J.)], to the Divisional Court. That order amended the definition of the Ontario global class by removing all those persons previously within the Ontario global class who accepted to partake in the settlement arising out of the parallel U.S. proceedings, and approved by the U.S. court. The removal from the Ontario global class of all class members who would partake in the

U.S. settlement was a condition of that settlement so as to prevent double recovery from both jurisdictions.

[2] The plaintiffs claim that the motion judge erred in her decision to amend the global class in four respects. They also say that the motion judge created a framework for the settlement of [page618] cross-border actions that will impact every cross-border class action that follows. That implication is of such public importance that it ought to be reconsidered by the Divisional Court. Finally, they observe that the standard on a motion for leave to appeal is low such that "important decisions that conflict with other decisions or that are open to serious debate are subject to review".

[3] With respect to the four specific errors, the plaintiffs challenge the judge's jurisdiction to remove those members of the class who accepted the settlement in the parallel U.S. action. Next, they say that the defendants' move to amend the global class in Ontario was nothing more than a procedural manoeuvre to extinguish the class members' claims. As such, it is barred by issue estoppel. In addition, the plaintiffs argue that the motion judge should have evaluated the U.S. settlement to determine if it would be enforceable in Ontario before deciding to amend the class. Finally, the plaintiffs argue that the motion judge misapplied the law as it relates to the recognition of foreign judgments and the preferability of venue, pursuant to s. 5(1)(*d*) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[4] In response, the defendants ("IMAX") oppose the motion. According to IMAX, Justice van Rensburg had to answer a single point of law: In the context of an ongoing parallel class proceeding in Ontario, "when should an Ontario Court recognize a U.S. class action Settlement Order"?

[5] Taking into account, not only this particular order, but the overall progression of the Ontario proceedings, IMAX contends that the motion judge was correct to amend the Ontario global class, given the court-approved settlement in the U.S. proceedings. Her Honour came to that conclusion in a thorough and detailed decision that applied the requirements of the Ontario Court of Appeal, as laid out in *Currie v. McDonald's Restaurants of Canada*[1] to the specific facts and situation of this case.

[6] IMAX cautions that the challenges put forward by the plaintiffs are nothing more than a repetition of the arguments that were presented at the motion. The motion judge considered those arguments but rejected them in a very deliberate and considered analysis.

[7] IMAX concludes its submissions with the observation that the order of March 19, 2013 "accords with the fundamental principles of settlement, and with the principles of international comity, and is the only resolution which treats the choices made by the strong majority of the Class in this Action -- to accept [page619] their share of the $12 million settlement in the U.S. action, rather than remain indefinitely in this Action to an uncertain result -- with fairness". In the context of this case, IMAX concludes that there was no error of law by the motion judge. Nor is there any conflicting decision by another judge. The motion for leave should therefore be dismissed.

II. *Background*

[8] Justice van Rensburg's most recent order reflects the culmination of a series of steps and motions over the course of six years, that began with the certification of a global class and has

come full circle to the amendment of that class in light of a settlement in the parallel U.S. action. The decisions of this court to certify of the global class in Ontario and the content and timing of the notice of the certified class set the stage and virtually anticipated the eventual need for an amendment to the Ontario global class.

[9] The overriding theme and objective across the six years of litigation has been to create a fair process that would preserve the options of the potential class members open for as long possible and, in any event, until they would be in a position to evaluate those options. Indeed, a hallmark of Justice van Rensburg's decisions was her common sense and fair approach to the issues as they arose. Justice Corbett, in his refusal to grant leave to appeal the certification decision, captured that quality in the following observation:[2]

> The proceedings are and should be complementary, to achieve a proper vindication of the rights of the plaintiffs, fair process for the defendants and plaintiffs, respect for the autonomous jurisdictions involved, and an integrated and efficient resolution of claims. This requires common sense, judicial comity and fair process. It does not require balkanization of class proceedings, but rather sensitive integration of them.

[10] Given this overall approach, the order that is the subject of this motion must be situated and evaluated within its broader context and with the full appreciation of how it fits into the overall scheme of these proceedings.

[11] Actions by the plaintiffs were commenced in Ontario and in the U.S. in 2006 against IMAX for alleged misrepresentations as it related to their financial reporting and the recognition of [page620] revenue for its theatre systems.[3] Early attempts to settle the litigation were unsuccessful.

[12] In Ontario, the action was certified as a class proceeding in December 2009.[4] The court certified a global class consisting of

> [a]ll persons, other than the Excluded Persons, who acquired securities of IMAX [Corporation] during the Class Period of the TSX and on the NASDAQ, on or after February 17, 2006 and held some or all of those securities at the close of trading on August 9, 2006.

[13] Justice van Rensburg was aware that approximately 85 per cent of the securities acquired by the class members in the Ontario action were purchased on the NASDAQ and, therefore, also fell within what at the time was a proposed class in proceedings that were pending in the United States District Court, Southern District of New York.[5] Nonetheless, Her Honour certified the global class with the full knowledge and appreciation that the decision to certify might have to be reviewed at a later stage in the litigation to address or respond to probable conflict of laws issues. In doing so, Her Honour did not want to deprive the plaintiffs of certification. But it was with the express warning that the certification had in it a certain "wait and see" element and a strong likelihood that the legal landscape would eventually change.

[14] That caution, in large measure, arose from the plaintiffs' own expert, Professor Borchers, who noted that parallel proceedings could only continue for so long. Eventually, the parties and the court would have to consider the outcome of the "wait and see". That outcome Professor Borchers described as the "day of reckoning". As for the period between certification and the "day of reckoning", Her Honour emphasized the need to ensure that the process was fair,

especially to the non-resident class members. That care could be accomplished by "paying careful [page621] attention to the notice and communications with the non-resident class members".[6]

[15] In the U.S. action, the certification of the proposed class in the U.S. action had a number of false starts with various representative plaintiffs being disqualified. The original first plaintiff, Westchester Capital (who was eventually disqualified as a lead plaintiff), proposed a definition of the class that was the same as the definition of the Ontario class.[7] As a result of a decision in the U.S. in a different case that excluded purchasers of shares on foreign exchanges from the U.S. securities class action,[8] the proposed class definition in the U.S. action had to be revised to exclude purchasers of IMAX shares on the TSX, thereby confining the U.S. proposed class to the NASDAQ purchasers.

[16] In April 2011, a new plaintiff, "The Merger Fund", was appointed in the U.S. action. It proceeded with settlement negotiations that were restricted only to the U.S. proceeding. On November 2, 2011, the parties to the U.S. action entered into a preliminary settlement agreement for the benefit of the U.S. settlement class.

[17] On January 26, 2012, the parties to the U.S. proceedings signed a formal "Stipulation and Agreement of Settlement" that purported to recover for the U.S. settlement class the sum of US$12 million.

[18] On February 1, 2012, the judge case managing the U.S. action, Justice Buchwald, gave preliminary approval to the proposed settlement and certified the U.S. settlement class for the purposes of the proposed settlement, and directed that the U.S. settlement class be given notice of the settlement and of the intention of the plaintiff to schedule a date for a fairness hearing.

[19] On May 3, 2012, IMAX made a "with prejudice" offer to settle the claims of the TSX class for a sum of US$1.33 million, exclusive of costs. The proposed sum was calculated *pro rata* to the U.S. action settlement. It also took into account the shorter [page622] class period of the Ontario action and the lower trading volume on the TSX.

[20] Turning back to the proceeding in Ontario, IMAX sought leave to appeal the "certification decision". That motion was dismissed on February 11, 2011. That enabled the parties to proceed with a motion to approve the form, content, timing and dissemination of the notification of the Ontario class proceeding, and the press release as required by s. 138.9 of the *Securities Act*, R.S.O. 1990, c. S.5.

[21] Although the court was set to hear the "notice motion" in May 2011, various delays meant that the motion did not get underway until the fall of 2011. By then, settlement negotiations were underway in the U.S. proceedings. This resulted in additional submissions over the course of the fall of 2011 and into 2012. The prospect of a U.S. settlement, when previously such was looking very doubtful, put into question the content of the Ontario notice and its relationship or connection to the U.S. notices.

[22] Ultimately, in the decision regarding the notice requirements, Her Honour began with first principles that govern the content of notice -- namely, that the content is to be informed by its purpose. Having regard to the specific facts, Her Honour observed:[9]

> The purpose of notice *at this stage* in these proceedings is to inform class members that the proceedings have been certified as a class action, to tell them what the action is about, and to permit class members to act on such notice, by taking such steps as they should be afforded to preserve their "litigation autonomy".
>
> *At this stage in the Ontario proceedings*, there is no need for a class member [to] elect between participation in these proceedings and participation in the U.S. Proceedings. As both experts agreed, there is no impediment to overlap class members belong to the classes in both proceedings at least until reaches judgment. The only decision required of class members *at this stage* is whether to opt out of these proceedings. The failure to opt out of these proceedings *will not have any impact on* the class members' ability to participate in the U.S. Proceedings, or indeed to participate in the U.S. settlement if and when it is approved. As Professor Borchers observed, and as we have seen in the proposed notices in the U.S. Proceedings, *if and when* the U.S. Settlement is approved, class members will receive notice that will make clear that "the day of reckoning" has arrived, information that may be pertinent to their choice, including contact information for counsel in both actions, and that the failure to opt out will preclude their claims, including claims in these proceedings."

(Emphasis added) [page623]

[23] Echoing the cautions reflected in the "certification decision", Her Honour indicated that the Ontario notice should direct the class members to a source of information about the other proceedings, but that such source should not attempt to summarize or evaluate the merits of the U.S. proceedings. Any detailed information about the U.S. proceeding could only confuse the class members and compromise their ability to make the only decision required at that instance -- namely, whether or not to opt out or remain in both the Ontario and the U.S. classes.

[24] By "litigation autonomy", Her Honour was focusing on the need to have a notice that provided the class members with the information they would need to make an informed decision. Her Honour specifically highlighted Justice Sharpe's directions in *Currie* that "if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded the unnamed plaintiff".[10] Her Honour did observe that the U.S. notices would have to contain sufficient information for a class member to make an election.

[25] The notice in the Ontario proceedings was published on April 27, 2012. The opting-out notice relating to the proposed U.S. settlement in the U.S. proceeding was published on April 26, 2012.

[26] The. U.S. notice made it clear that if the overlapping class members elected to remain bound by the U.S. settlement their ongoing participation in the Ontario action would be barred. The U.S. notice in effect, described the "day of reckoning" as follows:

> If the Canada Order is entered and becomes final, you will not be permitted to recover in both cases and if you do not exclude yourself from the U.S. Action, you will automatically be deemed to be a member of the Class in the U.S. Action, and therefore excluded from the Canadian Class in the Canadian Action. For members of the Canadian Class, a detailed description of the Canadian Action as well as details regarding how to exclude yourself from this action (and thereby participate in the Canadian Action) are contained below.[11]

In other words, the class members could not remain in both classes and recover from both classes. They would have to choose between the U.S. settlement class and the Ontario global class. [page624]

[27] The distribution of the U.S. notice was very widespread.[12] In total, 87,934 copies of the notices were sent out to individuals and institutions. That was supplemented with the publication of a summary notice in various newspapers that included Canada's major publications, both English and French, and a website. In the result, seven opt-out letters were received, of which five were from overlapping class members. There was also one objector who was a resident of the U.S. and who raised extensive concerns with reasonableness of the settlement.

[28] Following notification, the U.S. parties proceeded with the fairness hearing to seek the court's final approval of the U.S. settlement. On June 20, 2012, Justice Buchwald concluded that the notice to the members of the class was adequate. Her Honour certified the U.S. class for purposes of the settlement, and approved the settlement and the plan of allocation. Her Honour reserved on the issue of legal costs and expenses. The settlement order and the payment of the $12 million compensation remained conditional upon the global class being amended in the Ontario proceeding to exclude all those who chose to benefit from the U.S. settlement.

[29] The condition of the U.S. order resulted in the motion that is now the subject of this leave application. The materials before Justice van Rensburg were extensive: four motion records from the defendants, a transcript brief, five volumes of records from the plaintiffs, and an expert opinion on cross-border class actions. The motion was argued over two days in July 2012 and resulted in a thorough decision, outlined in 192 paragraphs and 85 footnotes that recognized the U.S. settlement order.

[30] Two paragraphs in particular stand out and exemplify the caution and care with which Her Honour approached the decision:[13]

> The defendants' position on this motion was that this court's amendment of the class should be automatic, provided that the U.S. Court that approved the fairness of the settlement of the claims of overlapping class members had jurisdiction. It should be obvious from my decision that I do not agree with this contention. Once a global class was certified in this jurisdiction, the claims of the overlapping class members came within the protection of this court. While this is not a motion to approve a settlement, the defendants nevertheless had to persuade the court that the certification order originally made should be amended, with the effect of removing from the certified class the overlapping class members who had not opted out of the U.S. settlement. This required the recognition of the U.S. judgment [page625] approving the settlement (under a *Currie* analysis), and then, the consideration of other factors relevant in particular to the objective of access to justice, in order to determine whether it was the "preferable procedure" to amend the class.
>
> I have concluded that the U.S. Court, in making the U.S. Fairness Decision which approved the U.S. Settlement subject to an order of this court, had jurisdiction and followed a procedure that was fair to absent class members and adequately represented their interests. Having recognized the U.S. Settlement, and considered whether the settlement furthers the objectives of class proceedings, and in particular access to justice, I have determined that it

is the preferable procedure to remove such claims from this action, in favour of an order that will permit the U.S. Settlement to be concluded.

[31] Justice van Rensburg was very deliberate in her analysis and her conclusions. Her Honour certified a global class at the outset with the full knowledge of the potential vulnerabilities that lay ahead. She did so, to maximize the litigants' options. In the same vein, Her Honour framed the notice requirements in a way that would put the best information into the class members' hands so that they could exercise their options as they saw fit. The amendment of the global class became the way to make sense and respond to the developments of the U.S. proceeding appropriately, in a way that was fair and that extended to the parties due process. The overriding concern, to use Professor Borchers' phrase was to resolve the developments in this case in a way so that "no class member should get 'two bites at the apple' against any defendant".[14]

III. *Analysis*

[32] Leave to appeal may be granted under rule 62.02(4)(a) or (b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, where

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[33] As observed by Justice Corbett in his decision that denied leave to appeal Her Honour's "certification decision",[15] within each branch of the test the rule is conjunctive. I echo Justice [page626] Corbett's observation that where there is neither "good reason to doubt the correctness" of a decision, nor a "conflicting decision", leave will not be granted to address debatable aspects of the reasons.[16]

[34] It is important to recognize that rule 62.02(4) is intended to be a "rigorous" screening mechanism that is designed to narrow the number of interlocutory decisions that qualify for appellate review.[17] The test for granting leave is high. Leave will not be granted where the decision is well-reasoned and the issues raised are not of general importance.[18]

[35] Furthermore, in the context of class proceedings, where the motion judge has substantial and intimate familiarity with the file, His or Her Honour ought to be accorded substantial deference.[19]

[36] Section 12 of the *Class Proceedings Act*, states:[20]

12. The Court on a motion of a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[37] The Ontario Court of Appeal has interpreted this section to confer broad, discretionary jurisdiction on the motion judge. Chief Justice Winkler, in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,[21] made it clear that:

> A discretionary decision to safeguard the fairness of a class proceeding is entitled to receive significant deference from this court. It may only be set aside if it is based on an error of law, a palpable and overriding error of fact, the consideration of irrelevant factors or omissions of factors that ought to have been considered, or it the decision was unreasonable.

[Citation omitted]

[38] These legal tests translate into the following three questions for consideration on this motion:

(a) Did Her Honour's order to amend the global class conflict with a decision by another judge or court in Ontario or [page627] elsewhere and does that make it desirable for leave to appeal to be granted?

(b) Does it appear to this court that there is good reason to doubt the correctness of Her Honour's order of March 19, 2013 and does the proposed appeal involve matters of such importance that, in this court's opinion, leave to appeal should be granted? and

(c) Did the motion judge make errors of law and palpable errors of fact such that the exercise of Her Honour's broad discretion ought to be reviewed?

Each question is considered separately below.

(a) *Does Her Honour's order to amend the global class conflict with a decision by another judge or court in Ontario or elsewhere and does that make it desirable for leave to appeal to be granted?*

[39] Justice van Rensburg's decision to amend the global class does not conflict with a decision by another judge or court in Ontario or elsewhere. Her decision was specific to the unique circumstances of these proceedings. Her Honour aimed to respond to developments in the U.S. action and a settlement that had as its only condition, the amendment of the global class so as to remove those Canadian class members who would be benefitting from the U.S. settlement. The reason for the condition was to prevent double recovery by class members in both proceedings. That objective was reasonable and it would not be desirable for leave to appeal to be granted.

(b) *Does it appear to this court that there is good reason to doubt the correctness of Her Honour's order of March 19, 2013 and does the proposed appeal involve matters of such importance that, in this court's opinion, leave to appeal should be granted?*

[40] The short answer to this question is "no". The plaintiffs suggest that there are four errors of law that put into question Justice van Rensburg's order. Each is reviewed below.

i. *Did Justice van Rensburg have the jurisdiction to amend the global class?*

[41] The plaintiffs identify three reasons for the judge's lack of jurisdiction. They say that the order created an impermissible opt-in class. They also say that it was impermissible for the [page628] court to extinguish the claims of the NASDAQ purchasers would are members of the global class. Finally, they argue that order created an impermissible merits-based definition of the class.

[42] All of these arguments were before the motion judge and they were considered very extensively. The same cases that were put before this court were before Her Honour but they were expressly distinguished from the facts and issues in dispute in this case. The analysis was thorough and sound. In their leave submissions, the plaintiffs did not identify any errors in Her Honour's analysis and response to their arguments.

[43] Taking a closer look, with respect to the concerns about the creation of an impermissible opt-in class, Her Honour rejected that proposition and explained that the overlapping class members' procedural rights were not compromised. The "litigation autonomy" that Her Honour spoke of in the "notice decision" permeated this analysis as well. Her Honour said [at paras. 73-74]:

> The opt out procedure is a cornerstone of our class proceedings regime, and serves to protect class members' litigation autonomy. The presumption is that, by not opting out, the NASDAQ purchasers made a decision to participate in the U.S. Settlement instead of pursuing a remedy on their own or in another civil proceeding, including this action.
> In this case the court is not being asked to approve a procedure that would convert this action into an opt in proceeding. The overlapping class members' procedural rights are not being comprised; through the U.S. notice, they were put to an election. If they opted out, they have chosen to remain in the Ontario class. If not, they are eligible to receive the benefits of the U.S. Settlement. They are not being denied the right to possible compensation unless they take some affirmative step; in fact, they gain the right to compensation in the U.S. Proceedings.

In other words, the overlapping class members could accept an immediate compensation via the U.S. action or they could choose to remain in the Ontario action and await an uncertain outcome.

[44] The amendment of the class would facilitate the exercise of a class member's litigation autonomy. It would not take anything away. Nobody would be forcing a class member to exercise his option on the day of reckoning in one way or another. To the contrary, a refusal to amend the class would effectively extinguish the U.S. settlement completely, and therefore, take away the settlement option from the class members who wanted to settle their claim.

[45] As for the criticism that the class was amended on the basis of an impermissible merits-based inquiry, Justice van Rensburg did not engage in any such analysis. The plaintiffs say that the motion judge's decision hinged on the assertion that NASDAQ purchasers did not have a claim on the merits [page629] in the Ontario action because they would be bound by the U.S. settlement.

[46] With respect, that is not what Her Honour Justice concluded. The analysis on the issue of choosing between jurisdictions focused on the litigant's autonomy. If they were to be

compensated in one jurisdiction, they would have to give up their claim in the other. If they were convinced of the merits of the Ontario action, they could preserve their rights and opt out of the U.S. settlement. The litigants would be evaluating the merits of one jurisdiction over the other, not the courts.

[47] In short, there was no error by the motion judge on the issue of the court's jurisdiction to amend the class.

ii. *Was the motion to amend a procedural move by the defendants and is it precluded by issue estoppel?*

[48] If there is one issue that cannot be said to be precluded by issue estoppel it is the possible amendment of the global class in these proceedings. Her Honour couldn't have been more prescient in the cautions that accompanied the certification decision. Her Honour expressly anticipated that future developments in the litigation as they related to the conflict of laws issue might result in an amendment to the global class.

[49] Her Honour addressed this very same argument head on in her "amendment decision". Relying on *Mignacca v. Merck Frosst Canada Ltd.*,[22] Her Honour noted that certification orders were interlocutory that could be amended at a later time, as a case might proceed. But Her Honour went further to engage with the facts in this case to conclude that if at the time of the certification motion there had been a pending settlement in the U.S. proceeding that encompassed the NASDAQ traders, that would have been a relevant factor in the decision to certify a global class.

[50] There was no settlement underway in the U.S. action that anyone spoke about or put before the court at the time that the certification motion was argued. Information of a possible settlement in the U.S. action surfaced in the course of the "notice" motion and, more particularly, in the fall of 2011 and into early 2012. The proposed settlement in the U.S. was therefore a new material fact for the court to consider. Against these facts, issue estoppel could not operate to prevent the amendment of the Ontario global class. [page630]

[51] The alternative argument by the plaintiffs that the U.S. settlement was irrelevant to the consideration of issue estoppel is equally unconvincing. The plaintiffs rely on *Fischer v. IG Investment Management Ltd.*[23] But the motion judge considered *Fischer* at some extended length and ultimately distinguished it from the facts of this case. In contrast to *Fischer*, Her Honour explained [at para. 80] that "the U.S. proceedings provide a vehicle for compensation to affected investors, and share with the Ontario class proceeding the objectives of achieving access to justice, behaviour modification and judicial economy". The existence of an approved settlement in the U.S. proceedings was clearly relevant to the question of whether or not the Ontario action would remain the preferable procedure to resolve the claims of the overlapping class members.[24]

[52] The motion judge then went further. As with her overall approach to this litigation, Her Honour was cautious to give due consideration to all of the developing facts and nuances of the case given the particular stage of the litigation. At certification, there was "lots" to wait and see. By the time of the amendment motion, the uncertainties had diminished significantly:[25]

> *At this stage*, there is not only a settlement available in the U.S. Proceedings; that settlement has been approved by the U.S. Court, and overlapping class members have elected to be covered by the settlement because they have not opted out. The question is whether *at this stage in the Ontario Action*, a class proceeding that includes all members of the overlapping class, or one that is redefined as the defendants propose, would be the "preferable procedure".

(Emphasis added)

[53] In other words, the fact of the U.S. settlement in the progression of the litigation was crucial as it related to the consideration of due process, judicial comity and common sense. These objectives were the overriding goals at certification. Would the fact of the U.S. settlement meet or be responsive to those goals? As a major development in one of the two parallel proceedings, it is difficult to understand how the U.S. settlement could be anything but relevant to this litigation. The motion judge would have erred if she treated the U.S. settlement as irrelevant. It is hard to speak of an error, much less require that an appellate [page631] court be tasked to review the decision, on the view that the very reason for seeking the amendment was irrelevant.

iii. *Did Justice van Rensburg apply the wrong legal test to determine whether the settlement should be enforced? Should the court have evaluated the U.S. settlement to determine if it would be enforceable in Ontario before deciding to amend the class?*

[54] On the motion before Her Honour, one of the plaintiffs' primary arguments was that the Ontario court look behind the U.S. settlement and evaluate it on its merits before agreeing to its enforcement, and by implication, as a prerequisite to the amendment of the class. Her Honour rejected the proposed approach and concluded that it would be contrary to the fundamental principles governing conflict of laws.

[55] Her Honour would not have had a legal basis to go behind Justice Buchwald's order. Such an analysis would have gone against the case law concerning cross-provincial class actions and would subvert the Supreme Court of Canada's principles of international comity. Her Honour referenced the leading cases on comity to conclude that absent evidence of fraud or a violation of natural justice or of public policy it would not be for the enforcing court to take an interest in the substantive or procedural law of the foreign jurisdiction, in this case, the U.S.[26] On the facts of this case, there were no allegations of fraud or conduct that was contrary to public policy or natural justice. Absent such allegations, the plaintiffs could not explain how the Ontario court would get around settled and long-standing authorities on conflict of laws to review the U.S. settlement.

[56] Justice van Rensburg applied the principles laid out by Justice Sharpe in *Currie*, only to conclude that it was appropriate for her to recognize the U.S. settlement. The perspective that seems to have influenced Her Honour the most was captured in the following paragraph:[27]

> I am satisfied that the U.S. Fairness Decision should be recognized in this jurisdiction, as the decision of a court that was made within its jurisdiction, and in circumstances where the

> order and fairness in the treatment of the claims of overlapping class members in the notice they were given respecting the options available to them, in the process before the U.S. Court, and their representation in the proceedings resulting in court approval of the settlement. [page632]

From the point of view of recognizing the U.S. fairness decision, there was nothing further to be considered.

[57] In light of that conclusion, Her Honour then turned to a preferability analysis. The objective was to determine whether there might be any other impediment to the amendment of the global class. Her Honour explained that she was prepared to accept as a working proposition that if the U.S. settlement were demonstrated to be improvident when compared to the alternative prospect of litigating the claims of the overlapping class members in Ontario, it might be preferable to refuse the amendment of the class and effectively defeat the U.S. settlement. That required Her Honour to consider what a likely outcome in Ontario might look like. Its components included the consideration of

(a) the alleged advantages of litigating the claims under Ontario law;

(b) the discovery evidence which supports the plaintiffs' claims; and

(c) their estimate of the maximum value of the class members' claim.

[58] The plaintiffs contend that a determination of the issues in Ontario would result in a far more substantial award for the class. Her Honour disagreed with that assessment. A substantial part of her decision considered the strengths and weaknesses of the Ontario proceeding. Ultimately, Her Honour concluded that the Ontario legal regime was not demonstrably more advantageous to the overlapping class members' claims.

[59] Her Honour cannot be faulted for that conclusion. The plaintiffs did not advance any evidence to support the contention that the U.S settlement was improvident. Nor did the plaintiffs file any expert evidence to establish that the Ontario liability regime would be more favourable to the overlapping class members than the U.S. liability regime. The only evidence on the subject was that from Professor Borchers, who was inconclusive in his assessment and suggested that the applicable regimes pulled in each direction. Finally, there were no other court determinations in the Ontario proceedings to guarantee a better outcome in the Ontario proceeding.

[60] Against these deficiencies, Her Honour concluded that her refusal to amend the class would deny the defendants the benefit of the U.S. settlement, which a U.S. court found to be fair. Such an outcome would compromise the defendants', and those [page633] wishing to partake in the settlement, their right to access to justice and due process.[28]

[61] It is possible that aspects of Her Honour's comparative assessment of the Ontario action might be considered overly cautious by a different judge. For example, on the subject of reliance and whether that could be proven by the efficient market theory or otherwise,[29] others might come to a different, more favourable assessment. However, there is no palpable or overriding error of fact to warrant appellate review. As with every aspect of this litigation, what is palpable in Her Honour's analysis is the concern to give full meaning to the parties' access to justice, due

process, respect for judicial comity and common sense.

iv. *Did Justice van Rensburg make errors in the application of Currie and in the preferable procedure analysis?*

[62] This suggested error appears to be a variation of the third suggested error discussed above. The plaintiffs contend that the court's conclusion that the claims of the NASDAQ traders are presumptively subject to U.S. law was wrong. They seem to suggest that the motion judge ought to have looked behind the U.S. settlement proposal to evaluate it against what a probable outcome in the U.S. might be if the rights were to be determined on the basis of Ontario law. That approach in effect would enable the court to look behind the U.S. fairness hearing and the court's approval of the settlement. In support of that proposition, they reference the *Abdula v. Canadian Solar*[30] case to argue that Ontario law could apply in a U.S. action to a person who purchased shares in a Canadian company trading only on the NASDAQ.

[63] But there is something wrong with this contention. *Abdula* does not stand for the proposition that Ontario law would be imported or applied in a U.S. action. In a more fuller elaboration of this issue, and relying on *Currie* and *Abdula*, Her Honour spoke of the reasonable expectations of the overlapping class members to conclude that in parallel proceedings a U.S. court would adjudicate their rights in accordance with the applicable U.S. laws. More significantly, the law does not support the conclusion that an Ontario court would or even [page634] could retry the legal issues before the U.S. court, either under U.S. or Ontario law.

[64] The plaintiffs also take issue with Her Honour's conclusion that there was no compelling reason to conclude that the Ontario legal regime would not result in a more favourable determination of the claims of the overlapping class members. As noted above, it is possible that a different judge might come to a different conclusion over the prospects of the Ontario proceeding. But there is no glaring error in Her Honour's assessment to support a review of that assessment.

(c) *Did the motion judge make errors of law and palpable errors of fact such that the exercise of Her Honour's broad discretion ought to be reviewed?*

[65] Complementary to rule 62.04 in the context of class proceedings is the requirement that substantial deference be shown to a motions case management judge in the context of class proceedings. If there was one case where this requirement could be supported, this is the one.

[66] Justice van Rensburg was the case management motion judge for six years. Her Honour presided over a full range of motions and wrote extensive decisions, including the "certification decision" and the "notice decision". Over the years, she acquired a thorough understanding of the competing facts. Her Honour studied very closely the various expert views that were put before her. She considered the full body of evidence against the various legal requirements. From the very beginning, Her Honour set the direction and the foundation for a fair process in an incremental and sequential basis so as to preserve the integrity of the administration of justice.

[67] Against that backdrop, Her Honour earned the right to be shown substantial deference for her decision to amend the global class. The case is important. However, in the absence of a conflicting decision or doubts over the correctness of the order to amend the class, there is no

basis for its review by the Divisional Court.

IV. *Conclusion*

[68] In the result, the motion for leave to appeal is denied. The defendants are entitled to their costs of this motion. If the parties are unable to agree to costs, they are to make submissions as follows: the defendants' submissions are to be made by November 15, 2013; the plaintiffs may respond by November 29, 2013; and, if necessary, the defendants may reply by December 6, 2013.

Motion dismissed.

Notes

1 (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (C.A.).

2 *Silver v. IMAX Corp.* (2011), 105 O.R. (3d) 212, [2011] O.J. No. 656 (Div. Ct.), at para. 65.

3 The factual details relating to the allegations are outlined in Justice van Rensburg's "certification decision", *Silver v. IMAX Corp.*, [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.), and they are updated in *Silver v. IMAX Corp.* (2012), 110 O.R. (3d) 425, [2012] O.J. No. 1352 (S.C.J.), the "notice decision". A synopsis of the facts is also outlined by Justice Corbett in His Honour's decision, *Silver v. IMAX Corp.*, *supra*, dismissing the motion for leave to appeal the certification.

4 The "certification decision", *supra*, note 3.

5 *Silver v. IMAX Corp.*, notice decision, *supra*, note 3, para. 2.

6 *Supra*, note 3,"certification decision", at para. 161.

7 For the purposes of this decision, it is not necessary to review the procedural history of the U.S. action in any detail. However, it is necessary to be aware that there was an extensive history. Justice van Rensburg provided that history in some detail in her certification decision, *supra*, note 3, at endnote 4. Her Honour updated the history in the "notice decision", and the "amendment decision", [2013] O.J. No. 1276, 2013 ONSC 1667 (S.C.J.) that is the subject of this motion.

8 *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869, 177 L, Ed. 2d 535 ù decision of the U.S. Supreme Court (2010).

9 Notice decision, *supra*, note 3, at paras. 94-95.

10 *Supra*, at note 1, para. 28.

11 As quoted by Justice van Rensburg in Her Honour's decision of March 19, 2013, at para. 42.

12 *Supra*, the "amendment decision", note 7, at paras. 44 and 46.

13 *Supra*, the "amendment decision", note 7, at paras. 188 and 189.

14 Affidavit of Professor Borchers of May 31, 2011, at para. 9.

15 *Supra*, note 2, at para. 3.

16 *Supra*, note 2, at para. 5.

17 *Lloyd v. Economical Mutual Insurance Co.*, [2008] O.J. No. 3025, 65 C.C.L.I. (4th) 299 (S.C.J.), at para. 29.

18 *Bell ExpressVu Limited Partnership v. Morgan*, [2008] O.J. No. 4758, 67 C.P.C. (6th) 263 (Div. Ct.).

19 *Lefrancois v. Guidant Corp.*, [2009] O.J. No. 4129 (Div. Ct.), at paras. 16-17.

20 S.O. 1992, c. 6, s. 12.

21 (2013), 115 O.R. (3d) 653, [2013] O.J. No. 2012 (C.A.), at para. 40.

22 (2009), 95 O.R. (3d) 269, [2009] O.J. No. 821 (Div. Ct.), at para. 39.

23 (2012), 109 O.R. (3d) 498, [2012] O.J. No. 343, 2012 ONCA 47, leave to appeal to the Supreme Court of Canada granted at [2012] S.C.C.A. No. 135.

24 *Supra*, note 7, at para. 80.

25 *Supra*, note 7, at para. 82.

26 *Supra*, at note 7, paras. 86-88.

27 *Supra*, at note 7, para. 130.

28 *Supra*, the "amendment decision", note 7, at paras. 166 and 167.

29 *Supra*, the "amendment decision, note 7, at para. 147.

30 *Abdula v. Canadian Solar Inc.* (2012), 110 O.R. (3d) 256, [2012] O.J. No. 1381, 2012 ONCA 211.

End of Document

COURT FILE NO.: 0419/00 (Belleville)
DATE: 2008-JUL-31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ELAINE LLOYD and
ECONOMICAL MUTUAL INSURANCE COMPANY

BEFORE: THE HONOURABLE MR. JUSTICE M.J. QUIGLEY

COUNSEL: GEORGE BONN of George Bonn Law Office, for the PLAINTIFF

KADEY B.J. SCHULTS of Dutton Brock, LLP for the Defendant

HEARD: July 29, 2008 at Belleville

ENDORSEMENT

1. The defendant, Economical Mutual Insurance Company, brings this motion seeking the following relief.

    a. An order granting an extension of time to move for leave to appeal; and

    b. An order granting leave to appeal the decision of the Honourable Justice Douglas Belch dated January 10, 2007.

The plaintiff consents to the granting of the extension of time to move for leave to appeal and therefore the only issue before the court is the motion of the defendant for leave to appeal Justice Belch's dismissal of the summary judgment motion.

2. The plaintiff, Elaine Lloyd, is suing Economical Mutual Insurance Company for the automobile insurance no-fault attendant care benefits in the amount of $93,040 for care she provided to her daughter, Robin Lloyd from 1991 to 1998.

3. Robin was struck by a motor vehicle on September 17, 1991. She sustained serious and permanent brain and orthopedic injuries.

4. The history of the case is described in the factums of the defendant and plaintiff, as well as the affidavit of Elaine Lloyd, filed for the defendant's motion for summary judgment before Justice Belch.

5. The defendant brought a Rule 20 motion for summary dismissal of the plaintiff's action. The motion was argued before Justice Douglas Belch on July 6th, 2006. He rendered his decision on January 10th, 2007 dismissing it on the following grounds in his Reasons for Judgment.

> "[19] The defendant insurer knew of the claims of Elaine Lloyd. After all, it had rejected them without further proof when they were set at $93,040 in March of 1998, and I assume counsel for the company had been provided with a copy of the plaintiff's mediation brief where that claim for damages is set out on pages 39 through 42. Again, it might be assumed that the insurance company would have expected to have to address the claim of Elaine Lloyd at the mediation, and must have been surprised when not called upon to present its position.
>
> [20] On a motion for summary judgment, a motions judge is not to assess credibility or find facts. Although Robin Lloyd has not resiled from the contract reached at the mediation, upon reflection that settlement does not appear to deal with all of the issues, notwithstanding the settlement claims to have done just that.

> [21] In addition, the insurance company received an application from the plaintiff and over the years paid many claims directly to her. A reasonable third party when told of these circumstances would conclude that if Elaine Lloyd did not have a claim independent of that of her daughter, one would expect the insurance company to have raised this at a much earlier date in the proceedings, and before the parties attended a mediation. This issue should be given a complete airing at a trial."

6. In paragraph 17 of his Reasons for Decision, Belch, J. referred to a mediation brief which had been tendered in a day-long Settlement Conference involving Elaine Lloyd's tort claim with respect to Robin's accident.

7. The plaintiff's and the defendant's counsel conceded at the summary judgment motion that the mediation brief would not be used for the purposes of the summary judgment motion. Belch, J. acknowledged such agreement of counsel.

8. After the accident, separate and distinct originating applications for accident benefits were submitted to Economical Mutual Insurance Company on behalf of Elaine Lloyd and on behalf of Robin Lloyd. It appears that the defendant insurer accepted Elaine's separate application without objection or any suggestion that she did not have independent right to apply for accident benefits. (Affidavit of Elaine Barry, paragraphs 5 and 6)

9. For several years many individual claims for accident benefits were submitted to the insurer by Elaine Lloyd in her own name; and the insurer accepted the claims and paid the benefits directly to Elaine by cheques payable to her. The insurer never suggested that Elaine did not have independent right to make the claims

and be paid the benefit amounts directly. (Affidavit of Elaine Barry paragraphs 6 and 7.)

10. The defendant's evidence on the motion for judgment contained an affidavit of Philippa Samworth, counsel for the defendant, that on May the 10th 2000, the insurer had taken into consideration Elaine's claims for past care benefits and had included that claim in the numbers put forward during the November 10th, 1999 settlement meeting. (Affidavit of Philippa Samworth paragraph 9 and Exhibit "E")

Position of the Defendant.

11. The defendant submits that Belch, J. improperly used the without prejudice discussions and written material in the mediation brief as a basis for dismissing the defendant's motion. The mediation brief was referred to in paragraphs 5, 6, 9, 17, 19, 20 and 21.

12. The counsel for the defendant further submits that had the mediation brief been properly before Belch, J. for his consideration on that motion they would have submitted argument with respect to other provisions of the mediation brief specifically paragraph 43.

13. The defendant further submits that Belch, J. misconstrued the negligence *Family Law Act* benefits claim of the plaintiff in paragraph 19, with the accident benefits claim involved in the within action.

14. The defendant submits that this court should have serious doubts about the correctness of Belch, J's decision in view of his use of impugned evidence.

15. The defendant submits that the issues before the court are of general public importance and that if the decision were allowed to stand it would mean that a non-injured third party could be awarded benefits in circumstances that were not envisioned in the Insurance Legislation.

16. The defendant further submits that settlement discussion privilege is sacrosanct in the litigation process. The use of such privileged information as a basis for a decision by a court would, in future, inhibit the free flow settlement discussions which are a necessary pre-condition of mandatory mediation.

17. Finally the defendant is seeking either leave to appeal the decision of Belch, J. to the Divisional Court or in the alternative for this court to send the matter back before a Justice of the Superior Court for a fresh hearing.

Plaintiff's Position

18. Counsel for the plaintiff asserts that the contents of the mediation brief were properly before the motion's judge in that the privilege, if it existed was in favour of the plaintiff Elaine Lloyd, and that she is waiving that privilege. However, counsel for the plaintiff concedes that he did agree to the exclusion of the Mediation Brief on the summary judgment motion.

19. Counsel for the plaintiff contends that the counsel's agreement with respect to admissibility of evidence was not binding on the court. In this case, counsel claims that the mediation brief was admissible evidence on the summary judgment motion.

20. In any event, counsel for the plaintiff asserts that Belch, J. used the mediation brief only as background material and it was not essential to the decision making process. In essence the mediation brief did not form part of the *ratio decidendi* of the decision. In particular counsel for the plaintiff concedes that paragraph 17 of Belch, J's decision was irrelevant to the issues that were before him on the summary judgment motion.

21. Counsel for the plaintiff also claims that the *ratio decidendi* of the decision was contained in paragraph's 19, 20 & 21 of the decision.

22. The plaintiff asserts that there is nothing in Belch, J's decision to indicate that it was based to any degree, let alone primarily, on the *Family Law Act* negligence claim that Elaine Lloyd had advanced against the driver of the car that struck her daughter.

23. Counsel for the plaintiff further asserts that the settlement agreement referred to in Justice Belch's decision was part of the defendant's own evidence before the court i.e. Exhibits "A" and "B" of the affidavit of Philippa Samworth.

24. The settlement contract does not refer, in any way, to the plaintiff Elaine Lloyd's, claim for attendant care benefits and essentially Belch, J. decided that the settlement contract between Robin Lloyd and Economical Mutual Insurance Company did not deal with the issues between Elaine Lloyd and Economical Mutual Insurance Company.

25. The plaintiff denies the defendant's assertion that Belch, J's decision is creating new law in permitting non-insured third parties to make claims on an insured's contract and cites the case of Steve Ryan and Axa Insurance [1994] O.I.C.D. No.114 File No. A-004948, contained in Tab 11 of the plaintiff's Book of Authorities on the Rule 20 motion.

The Law

23. Rule 20.04(2) The court shall grant summary judgment if,

    (a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence.

24. Section 19(1)(b) of the *Courts of Justice Act* provides as follows:

    19(1) An appeal lies to the Divisional Court from,

    (b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court.

25. Rule 62.02(4) provides as follows:

    62.04(4) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

26. Mod-Aire Homes Ltd. v Bradford (1990) 72 O.R. (2d) 683, Divisional Court, Sutherland, J.

> "…..rule 62.02(4), viewed as a whole, is intended to discourage the granting of leave to appeal with respect to interlocutory orders of judges."

27. Rule 62.04 (4) (b)

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

28. Greslik v Ontario Legal Aid Plan (1988) 65 O.R. (2d) 110 Divisional Court

With respect to what constitutes "matters of such importance" within the meaning of Rule 62.02 (4) (b), a full panel of the Divisional Court said this:

"A judge hearing (a motion for leave to appeal) must have good reason to doubt the correctness of the decision. He must also be satisfied that the matters involved are of "such importance" that in his opinion leave should be granted. We wish to draw to the attention of the members of this court and the profession at large that those words refer to matters of general importance not matters of particular importance, relevant only to the litigants. General importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice."

29. Rankin v McLeod, Young, Weir Ltd. (1987) 57 O.R. (2d) 569 at 573

Before the above pronouncement by the Divisional Court in *Greslik*, Justice Catzman commented as follows in this leave to appeal case:

"Matters of such importance that … leave to appeal should be granted"

The second condition (of 62.02(4)(b)) is that the proposed appeal involves matters of such importance that, in the opinion of the judge hearing the motion, leave to appeal should be granted. Counsel for the plaintiff argued the motion on the footing that this condition was satisfied because the matters in issue are of vital importance to his client. His position in this connection is reflected in the notice of motion for leave to appeal in the following terms:

> The proposed appeal involves matters of such importance that leave to appeal ought to be granted. The effect of the orders sought to be appealed unfairly denies the plaintiff adequate and complete discovery on important amendments to the statement of claim and particulars ordered by the court, and on important documentary evidence within the possession and control of the defendant admitted or known to exist but not produced.

Again, for the purpose of disposition of this motion, I am prepared to assume that the matters in issue are of considerable importance to both the plaintiff and the defendant. I am, however, of the view that they are not issues of broader importance extending beyond the interests of the parties. In my assessment, no question of principle arose for determination on the hearing before O'Driscoll J. He neither was called upon nor purported to establish or extend any new proposition of law or practice or to modify or overturn any established one. Rather, he applied existing propositions of law to the circumstances, as he analyzed them, of the appeal and cross-appeal which were before him.

Accordingly, it is necessary to determine whether the "matters of such importance" contemplated by the rule are matters of importance to the parties to the particular litigation in which the motion for leave to appeal is made or are matters of general or public importance extending beyond the interests of the parties before the court.

…….

…….. some cases approach the question of "importance" from what may be described as the narrower standpoint of the particular parties to the lawsuit, while other cases approach the question from the broader standpoint of the litigating public. As appears from the examples cited, there are instances where these two perspectives converge, in which the issue which arises is one of importance both to the individual litigants and to the general public. But where, as in the present case, there is no such convergence, I respectfully favour the second approach. In such a case, in my view, the "importance" comprehended by the rule transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application that are felt to warrant resolution by a higher level of judicial authority. I have earlier indicated my assessment that the issues raised in

respect of the orders in question are not of broad importance extending beyond the interest of the parties. It follows that, even on the assumption that there appears good reason to doubt the correctness of the orders in question, the proposed appeal does not involve matters of such importance, within the contemplation of the rule, that leave to appeal should be granted."

30. Petkovic v Olupona [2002] O.J. No. 3411, Divisional Court, Epstein, J.

"(Under Rule 62.02(4)(b)) the applicant must demonstrate substantial doubt about the correctness of the decision. See: Mod Aire Homes v Bradford (1990) 72 O.R. (2d) 683 at 693. Further, the court must also be satisfied there is a point of law of sufficient importance to merit the attention of the Divisional Court. The decision must be important in the sense of beyond the obvious importance to the parties. There must be a legal issue of general public importance within the meaning of Rankin v McLeod, Young, Weir (1986) 57 O.R. (2d) 569 per Catzman, J. or Greslik v Legal Aid (1988) 65 O.R. (2d) 110 per Callaghan C.J. at p. 113."

31. MacRae v Santa [2003] O.J. No. 2624

In order to conclude that there is good reason to doubt the correctness of the order, the motions judge must be of the opinion that the correctness of the order is open to very serious debate.

32. ESTOPPEL

Maracle v Travellers Indemnity Co. of Canada [1991] 2 S.C.R. 50

"The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect the legal relationship and to be acted on. Furthermore the representee must establish that in reliance on the representation, he acted on it or in some way changed his position."

Analysis and Conclusion

33. Although the motions judge misconstrued the plaintiff's *Family Law Act* claims with her statutory accident benefits claim, it is clear from his decision that he found that there was a genuine issue for trial. In particular he found that the insurance company had received an application for statutory benefits and had paid them directly to her for a number of years. He concluded that if the plaintiff did not have a claim independent of her daughter, one would have expected the insurance company to have raised that issue much earlier in the proceedings.

34. The issue of Estoppel relied upon by Belch, J. could only be determined by a trial and not determined in a summary judgment motion under Rule 20. The issue of the plaintiff filing for and receiving benefits from the insurer was before the motions judge in evidence independent of the mediation brief.

35. I find that the judge's obvious misconstruing of the third party tort claim with the statutory accident benefits claim did not affect the correctness of his decision. In particular, his findings in paragraph 20 that the settlement reached at mediation "does not appear to deal with all the issues" is consistent with the facts and is supported by other evidence in this case. He clearly understood the distinction between the tort claim which was referred to in paragraph 17 and the within claim for statutory accident benefits.

36. I find that the defendant has failed to satisfy this court that the decision of Belch, J. was incorrect. Therefore I do not propose to deal with the second prong of this test, that being whether the matters involved are of "such importance" that leave should be granted for this matter to go to the Divisional Court.

37. Therefore the defence motion for leave to appeal is denied.

38. If the parties cannot agree on costs, submissions not to exceed three pages in length, may be made to me at my chambers in Brockville at 41 Court House Square, Brockville, ON K6V 7N3 by September 30th, 2008.

"M.J. Quigley"
M.J. QUIGLEY

DATE: July 31, 2008

COURT FILE NO.: 0419/00 (Belleville)
DATE: 2008-JUL-31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ELAINE LLOYD and ECONOMICAL MUTUAL INSURANCE COMPANY

BEFORE: JUSTICE M.J. QUIGLEY

COUNSEL: GEORGE BONN, for the PLAINTIFF

KADEY B.J. SCHULTZ, for the DEFENDANT

ENDORSEMENT

THE HONOURABLE
MR. JUSTICE M.J. QUIGLEY

DATE: July 31, 2008

CITATION: Closner v. Closner, 2019 ONSC 703
DIVISIONAL COURT FILE NO.: 785/18-00ML
DATE: 20190128

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Neil Jonathan Closner, Applicant/Respondent in Appeal

AND:

Sherri Lavine Closner, Respondent/Appellant in Appeal

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Stephen Grant* and *Kristen Normandin*, for the Moving Party, Sherri Lavine Closner

Gary Joseph and *Stephanie Timerman*, for the Respondent, Neil Jonathan Closner

HEARD: January 16, 2019

ENDORSEMENT

[1] The parties to this motion are the parents of their daughter Quinn who is now five years old. The applicant on this motion, Sherri Lavine Closner (the "applicant" or "Sherri"), sought a stay of the order dated November 29, 2018 of Shore J. (the "Order") pending the hearing of her motion for leave to appeal the Order and, if leave is granted, pending the hearing of her appeal of the Order. The Order varied a previous interim order of Croll J. dated June 22, 2017 (the "Croll Order"). On January 21, 2018, I advised the parties that the motion was denied for written reasons to follow shortly. This Endorsement sets out the reasons of the Court for this decision.

Applicable Law

[2] Rule 62.02(4) governs the grounds for granting leave to appeal an interlocutory order, including the Order, as follows:

> Leave to appeal from an interlocutory order shall not be granted unless,
>
> > (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or

> (b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted.

[3] To obtain a stay of the Order, the applicant must satisfy the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 at para. 43:

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

[4] In custody and access cases, the paramount interest, which is reflected in the consideration of irreparable harm and the balance of convenience in particular, is the best interests of the child. The focus of these concepts is well expressed in *A.(D.) v. K.(H.)*, [2014] A.J. No. 1204 (C.A.) at para. 29 as follows:

> The words "irreparable" and "convenience" are awkward in this context if taken in their more common connotations. As to irreparable, the moving finger writes and moves on in human existence, and in the life of a young child it cannot be called back. What is really conveyed by the concept of 'irreparable' harm in this context is that the harm is real and significant and that it is more than the transitory disturbances of growing up. So there is emphasis on the quality of the harm and its potential for lingering effect. Similarly, as to convenience, the matter is not really a balance between two disputants. The concept is a child interest dominated perspective and looks to where the disadvantages or harms may rest more lightly. In family break-down situations, it may well be that none of the available alternatives is desirable in its own right, and therefore the ultimate focus is on choosing the least undesirable, with emphasis on the children's situation.

Factual Background

[5] The Croll Order provided that the child of the marriage, Quinn, would have her primary residence with Sherri and specified parenting time with Neil involving 5 of 14 overnights on a two-week cycle. The Croll Order also ordered the parties to participate in a Section 30 assessment and provided that the interim parenting schedule could be reviewed following the completion of the Section 30 assessment report.

[6] The parties retained Howard Hurwitz ("Hurwitz") to conduct the Section 30 assessment. Hurwitz released his final report on April 25, 2018 (the "Hurwitz Report"). In connection with the Report, Dr. Olga Henderson ("Henderson") performed psychological testing of both parties. The results of Henderson's testing are included in the Hurwitz Report.

[7] Hurwitz recommended a two-phase "step-up" parenting plan for Quinn. Phase 1 provided for Quinn to spend 5 of 14 overnights with Neil, on a two-week schedule, although on a different schedule from that contemplated by the Croll Order. Phase 2 provided for a 2-2-3 shared parenting schedule from and after August 19, 2019, shortly before Quinn enters grade one.

[8] Sherri was prepared to implement the Phase 1 schedule. However, Neil brought a motion for the immediately implementation of the Phase 2 schedule recommended in the Hurwitz Report. The motion judge ordered two modifications to the residential schedule in the Croll Order: (1) the Friday to Sunday stay with the respondent at the end of the first week was extended to Monday morning; and (2) the Monday night stay during the first week was extended to include a Tuesday night stay.

Analysis and Conclusions

[9] I will address each of three parts of the test for a stay in turn.

Serious Issue to be Tried

[10] In her notice of motion for leave to appeal, the applicant alleges that there are conflicting decisions by other judges in Ontario regarding the need to have regard to, and to apply, the recommendations of a Section 30 assessor on an interim motion for custody and access. She argues that the motion judge disregarded this case law in failing to implement Phase 1 of the Hurwitz Report. However, on the hearing of the motion, the applicant identified somewhat broader grounds of appeal which subsumed the grounds in her notice of appeal. In doing so, the applicant also effectively argued that there appeared to be good reason to doubt the correctness of the decision of the motion judge in addition to the existence of conflicting decisions. I have addressed the merits of the appeal based on the issues argued before the Court.

[11] Before addressing whether the applicant has demonstrated a serious issue for the purposes of the first requirement of the test for a stay, I will set out five observations that inform the issues on this motion.

[12] First, the decision of the motion judge was a discretionary decision involving the exercise of her discretion under, among other provisions, ss. 24 and 28 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. As the Divisional Court noted in *Comtrade Petroleum Inc. v. 490300 Ontario Ltd*. (1992), 7 O.R. (3d) 542 (Gen. Div.), for the purposes of an appeal under r. 62.02(4)(a), "[a]n exercise of discretion which has led to a different result because of different circumstances does not meet the requirement for a "conflicting decision". It is necessary to demonstrate a difference in the principles chosen as a guide to the exercise of such a discretion."

[13] Second, the motion judge had ample grounds for making the two modifications to the Croll Order. The extension of the weekend stay to Monday morning was necessary in order to avoid transition conflict that existed in respect of the bi-weekly weekend stay with the respondent. The motion judge added the Tuesday night stay in furtherance of the "maximum contact" principle, in light of the increased time that the respondent now has as a result of the sale of his business since the Hurwitz Report was prepared.

[14] Third, the Croll Order invited a review of that order upon receipt of the assessment report contemplated therein. The motion judge restricted her mandate to modifying the Croll Order to address the circumstances as of the date of the motion before her after the receipt of the Hurwitz Report. In the exercise of her discretion and in furtherance of her obligation to address the best interests of Quinn, the motion judge concluded that continuing the current residential schedule was not in the best interests of Quinn and that it was in her best interests to move to a residential schedule involving equal time with both parents. The motion judge crafted an order that she considered was appropriately responsive to Quinn's best interests at the time. While the motion judge noted that the residential schedule was similar to the Phase 2 schedule in the Hurwitz Report, she did not simply implement Phase 2 in that Report as the applicant suggests.

[15] Fourth, the motion judge limited her reliance on the Hurwitz Report to certain observations in that Report. In particular, she relied principally on the observations that (1) there is no real concern about the parenting of the parties; (2) this is a high conflict case and Quinn would benefit from a reduction of that conflict; and (3) each parent was capable of marginalizing the other parent's role in Quinn's life.

[16] Fifth, the applicant suggests that implementation of Phase 2 in the Hurwitz Report would involve a qualitative difference from Phase 1 of real significance in Quinn's life. At the hearing, however, she retracted the suggestion that the Hurwitz Report recommended moving to Phase 2 only after satisfactory completion of psychotherapy by the respondent. Given the need to revise the residential schedule in the Croll Order to address the conflict on the Sunday evening transition, the issue on this motion is, as a practical matter, therefore reduced to the significance of the motion judge's addition of one additional overnight stay every two weeks.

[17] With this background, I turn to the two grounds of appeal of the applicant. As stated in *Filia Estate v. Hamilton*, 2008 ONCA 784 at para. 15, a "serious issue" in the context of an appeal is "a ground of appeal that has a reasonable prospect of success."

[18] The applicant's first ground of appeal is that the motion judge ignored the warnings in the Hurwitz Report of the risks of awarding the respondent increased access to Quinn. She suggests that these risks were reflected in Hurwitz's recommendation that an updated assessment should be considered if the conflict between the parents continued after the conclusion of the Hurwitz Report. She submits that this means that, in the present circumstances, an updated assessment should have been ordered before the motion judge ordered implementation of Phase 2. Put another way, Sherri argues that, if the motion judge determined to implement the Hurwitz

Report, she should have implemented the entirety of it including, in particular, the requirement for an updated assessment prior to implementing Phase 2.

[19] I have approached this ground of appeal as involving the assertion that there are reasonable grounds for doubting the correctness of the decision of the motion judge based on a failure to understand, and apply, the Hurwitz Report in its entirety.

[20] This argument is based on a misreading of the particular recommendation in Hurwitz Report, which reads as follows:

> In the event that this parallel parenting arrangement is not successful, and, if the parental conflict does not subside after the conclusion of this Section 30 assessment, an updated assessment should be considered with a view to determining any changes to the custody, decision-making and residential schedule provisions of this parenting plan. A review should occur no earlier than the 6 month point once the parents have signed off on the parenting plan. In the event that one (or both parents) attempts to deliberately undermine this parenting plan within the 6 month period, this information will be known as part of the updated assessment.

[21] The recommendation is that a review should be conducted no earlier than six months after implementation of a parenting plan covering custody, decision-making and residential schedule incorporating the recommendations on these matters in the Hurwitz Report. Hurwitz did not recommend that an updated assessment limited to the residential schedule be conducted six months after receipt of the Hurwitz Report if conflict continued between the parties. That would not make any sense from a timing perspective. Moreover, the residential schedules set out in the Hurwitz Report already took continuing conflict into consideration.

[22] Insofar as the applicant suggests more generally that the motion judge failed to err on the side of caution as mandated by case law, the evidence does not demonstrate any risk of harm to Quinn that would result from the modifications to the Croll Order. This is discussed further below.

[23] Accordingly, I am of the view that this ground of appeal that has no reasonable prospect of success.

[24] The applicant's second ground of appeal is that the decision of the motion judge conflicts with established case law that requires that assessment reports should be reserved for use at trial. As a related manner, the applicant further submits that the case law provides that an assessment report should not be used to vary an interim order absent evidence that the existing arrangement is harmful to the child, other than in exceptional circumstances that do not exist here. She says that, if there was a need to vary the Croll Order, the motion judge should have limited the modifications of that order to implementation of Phase 1.

[25] In support of her position, the applicant relies on the dicta in *McEachern v. McEachern*, [1994] O.J. No. 1544 (Gen. Div.) at para. 8 which referred to the "the generally accepted principle that the *status quo* ought not to be changed on an interim basis in the absence of evidence that the existing arrangement is harmful to the children." The applicant also relies on the related statement in *McEachern* at para. 12 that an assessor's report should not be used to seek a variation of an interim custody order but, instead, should be restricted in use to the trial to assist the court in making a final order regarding custody and access.

[26] This ground of appeal asserts both that there are conflicting decisions of other Ontario judges and that there appear to be reasonable grounds for doubting the correctness of the decision of the motion judge on principled grounds. I do not think this ground of appeal has a reasonable prospect of success for two reasons.

[27] First, as noted above, there was a clear and obvious need to vary the Croll Order to address the Sunday night transition to avoid harm to Quinn. To that extent, at a minimum, the circumstances before the motion judge satisfied the test in *McEachern* for a variation of the Croll Order. The issue on the applicant's appeal therefore effectively reduces to whether harm was required to be demonstrated in ordering the extra overnight stay every two weeks. It is certainly arguable, as well, that Quinn suffered harm to the extent that the arrangements under the Croll Order did not implement the "maximum contact" principle to the fullest extent possible in the circumstances of the respondent's increased free time to devote to his daughter.

[28] Second, as discussed above, the motion judge limited her reliance on the Hurwitz Report to certain important observations of the assessor, rather than relying on its recommendations.

[29] Third, more generally, case law since *McEachern* reflects a more flexible approach to the variation of interim residential orders and to the use of assessor reports in the consideration of motions for such relief. These developments are reflected in the following statements of Sheppard J. in *Bos v. Bos*, 2012 ONSC 3425 at paras. 23 and 24:

> In my view, the jurisprudence has evolved to the point that although the general principle enunciated in *Genovesi* continues to be well founded, it is not so rigid and inflexible as to prevent a court on a motion to give some consideration to the content of an assessment report where that assessment report provides some additional probative evidence to assist the court, particularly where the court is making an order which is not a substantive departure from an existing order or status quo. In such circumstances, the court may consider some of the evidence contained in an assessment report without having to conclude that there are "exceptional circumstances" as set out in *Genovesi*. In fact, "exceptional circumstances" findings were not made in either *Forte* or *Kerr*.
>
> The court has a duty to make orders in a child's best interests and it would be counter intuitive to this principle to impose on the court an inflexible blanket prohibition against considering any aspect of an assessment report (absent

> exceptional circumstances) on an interim motion, especially when the only independent objective evidence before the court is from an expert assessor.

[30] In the present case, it is significant that the trial is not on the horizon, no date having even been set, so there is a need to ensure that the temporary residential order in effect until trial is responsive to the best interests of Quinn. In addition, as the motion judge noted, the only evidence of any utility before her was the Hurwitz Report. Further, given the obvious need to address the Sunday night transition problem and given that the practical issue is therefore limited to the addition of one overnight every two weeks, which is supportable on the "maximum contact" principle, the Order did not represent a "substantive departure from an existing order or *status quo*". Lastly, for the reasons set out above, I think it is wrong to suggest that the motion judge implemented Phase 2 of the Hurwitz Report, rather than thoughtfully crafted modifications of the Croll Order that she considered to be necessary in reliance on certain important observations in that Report.

[31] In summary, given the current case law regarding temporary parenting orders, the discretionary nature of the decision of the motion judge, the appropriateness of the Order given the present circumstances, and the difference in the circumstances in the case law relied upon by the applicant from the present circumstances, I do not think that the Order conflicts with any decision of other judges nor do I see any error in principle that constitutes a good reason to doubt the correctness of the Order.

[32] Based on the foregoing, I therefore conclude that the applicant has failed to demonstrate a serious issue on her appeal.

Irreparable Harm

[33] Irreparable harm for the purposes of the test for a stay of the Order is focused on harm to Quinn. The applicant raises two issues of potential irreparable harm to Quinn from implementation of the Order.

[34] First, the applicant says there is a real risk of harm to Quinn based on certain observations in the Hurwitz Report pertaining to the respondent's character, which she has extracted in three paragraphs of her Factum. Most of these comments relate to the relationship between the applicant and the respondent, rather than to the respondent's capabilities as a parent of Quinn. Similarly, the comments about the respondent's need for control were focused principally on his need for control in the context of his relationship with the applicant, not in his relationship with Quinn. Insofar as the Henderson psychological report with respect to the respondent suggested that his need for control could give rise to limitations in his parenting, the observations are speculative at the present time. They are also not reflected in any current concern on Hurwitz's part for the respondent's parenting.

[35] The issues raised regarding the character of the respondent, together with the issues raised regarding the character of the applicant, are treated in the Hurwitz Report as matters that

should be taken into consideration in the creation of the parallel parenting plan proposed by Hurwitz, rather than as risks to Quinn. Nor are they proposed as giving rise to the need for an updated assessment limited to the residential schedule prior to implementation of Phase 2, as the applicant suggests. There is therefore also no harm to Quinn in the form of a missed opportunity to benefit from an updated assessment regarding the residential arrangements, as the applicant suggests.

[36] More significantly, as mentioned, the motion judge found that there was no real concern for the parenting of Quinn and that both parties were good parents to Quinn. As the motion judge noted, "Mr. Hurwitz did express some concern with each of the parents, but nothing significant to enough to cause concern about their ability to parent Quinn." Each party can point to inadequacies of the other in the Hurwitz Report. However, when read in its entirety, the Hurwitz Report is supportive of this finding of the motion judge.

[37] In short, there was no evidence before the motion judge to suggest a real concern of a risk to Quinn associated with an increase in the respondent's parenting time.

[38] Second, the applicant raises the possible dislocation that would arise if the residential schedule under the Croll Order were reinstated on a successful appeal. Given the analysis above regarding the reasonable prospect of success of the appeal, however, it is more likely that the current schedule would be maintained. Accordingly, it would be more disruptive to grant the stay than to deny it and await a determination of the appeal.

[39] I conclude therefore that the applicant has failed to demonstrate a risk of irreparable harm to Quinn that would result from a denial of the requested stay of the Order.

Balance of Convenience

[40] The issue of balance of convenience also focuses on the child. In this case, the balance of convenience favours the residential schedule ordered by the motion judge. It removes the risk of harm caused by conflict on the Sunday evening transition and adds an additional overnight in furtherance of the benefits of "maximum contact" in circumstances where the respondent now has additional time to spend with Quinn. It also addresses, in part, the concern that one parent will attempt to marginalize the role of the other in Quinn's life by providing for an equal sharing of residential time.

[41] As mentioned, the applicant has raised two concerns for potential harm to Quinn. Given the Court's conclusion that these concerns do not represent real risks of harm to her, they do not factor into the consideration of the balance of convenience.

[42] Based on the foregoing, I therefore find that the balance of convenience favours a denial of the requested stay of the Order.

Conclusion

[43] Based on the foregoing, the applicant's motion for a stay of the Order is dismissed.

Costs

[44] If the parties are unable to agree on costs, they shall have thirty days to provide written costs submissions not exceeding five pages in length accompanied by a costs outline as required by the *Rules of Civil Procedure*.

Wilton-Siegel J.

Date: January 28, 2019

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

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

and

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

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

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

and

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

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

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

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

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

INDEXED AS: RJR — MACDONALD INC. v. CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

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

APPLICATIONS FOR INTERLOCUTORY RELIEF

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

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

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

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

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

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

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

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

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

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

Held: The applications should be dismissed.

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

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

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

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

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

Arrêt: Les demandes sont rejetées.

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

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

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

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

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

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

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

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

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

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

statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; **considered:** *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; **referred to:** *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135; *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127; *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269; *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619; *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574; *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294; *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392; *R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577; *Hubbard v. Pitt*, [1976] Q.B. 142; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280; *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59; *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791; *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304; *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158; *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix; *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.

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

Jurisprudence

Arrêt appliqué: *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110; **arrêts examinés:** *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594; *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396; **arrêts mentionnés:** *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401; *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135; *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127; *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269; *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619; *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574; *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294; *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143; *Tremblay c. Daigle*, [1989] 2 R.C.S. 530; *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392; *R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228; *MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577; *Hubbard c. Pitt*, [1976] Q.B. 142; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Nelles c. Ontario*, [1989] 2 R.C.S. 170; *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280; *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59; *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791; *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304; *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158; *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix; *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373; *R. c. Oakes*, [1986] 1 R.C.S. 103.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*), 24(1).
Code de procédure civile du Québec, art. 523.
Loi constitutionnelle de 1867, art. 91.
Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17*f*), 18.
Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 [aj. L.C. 1990, ch. 8, art. 40], 97(1)*a*).

Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(*a*).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(*f*), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following *Tobacco Products Control Regulations, amendment*, SOR/93-389.) In *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284.
Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

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

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

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

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

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

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

Loi sur les pêcheries, S.R.C. 1970, ch. F-14.
Règlement sur les produits du tabac — Modification, DORS/93-389.
Règles de la Cour suprême du Canada, 1888, Ordonnance générale nº 85(17).
Règles de la Cour suprême du Canada, DORS/83-74, art. 27.

Doctrine citée

Canada. Ministre de la Santé nationale et du Bien-être social. Résumé de l'étude d'impact de la réglementation. (Résumé accompagnant le *Règlement sur les produits du tabac*, DORS/93-389.) Dans *Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284.
Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

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

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

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

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

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

SOPINKA AND CORY JJ. —

I. Factual Background

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

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

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

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

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

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

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

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

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

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

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

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

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

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

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

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

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

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

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2*b*) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard

with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

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

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

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

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

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

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

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

decision of this Court confirming the validity of *Tobacco Products Control Act*.

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

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

II. Relevant Statutory Provisions

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

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

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

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

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

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

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

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

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

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

II. Les textes législatifs pertinents

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

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

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

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

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

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

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

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

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

III. Courts Below

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

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

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

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

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

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

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

III. Les tribunaux d'instance inférieure

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

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

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

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

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a

tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

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

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

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

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

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

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

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

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

La cour a fait droit en partie au redressement demandé:

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

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

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

. . .

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

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

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

IV. Jurisdiction

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

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

2. Le juge Brossard (dissident en partie)

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

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

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et

that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

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

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

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

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

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

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

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

Supreme Court Act

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

Rules of the Supreme Court of Canada

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

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

97....

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

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

Loi sur la Cour suprême

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

Règles de la Cour suprême du Canada

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

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

97....

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

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet

contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

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

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

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

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

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

regulations constitute conduct under a law that has been declared constitutional by the lower courts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms*.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.

   (ii) Compliance with the new regulations will cause irreparable harm.

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

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.

2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.

3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.

4. Les critères applicables à une suspension d'instance sont satisfaits:

   (i) Il existe une question constitutionnelle sérieuse à juger.

   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

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

VI. Analysis

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

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

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

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

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

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

VI. Analyse

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

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

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

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

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

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

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

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

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

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

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

à prolonger indûment le règlement final des différends.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. *Irreparable Harm*

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

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

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

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

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

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Public Interest

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

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

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

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

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

1. L'intérêt public

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

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

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

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

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

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

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

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

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

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

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

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

court of the public interest benefits which will flow from the granting of the relief sought.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Status Quo

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

E. *Summary*

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

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

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

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

2. Le statu quo

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

E. *Sommaire*

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

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

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

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

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

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

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

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

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

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

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

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

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

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

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

constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

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

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

C. *Balance of Inconvenience*

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

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

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

B. *Le préjudice irréparable*

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

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

C. *La prépondérance des inconvénients*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

vention of the widespread and serious medical problems directly attributable to smoking.

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

Applications dismissed.

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

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

Solicitors for the respondent: Côté & Ouellet, Montreal.

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

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

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

Demandes rejetées.

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

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

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

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