Court File No. CV-21-00661386-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

2504670 CANADA INC., 8451761 CANADA INC.
and CHI LONG INC.

Applicants

and

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334
CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY

Respondents

AND

Court File No. CV-21-00661530-00CL

B E T W E E N:

2583019 ONTARIO INCORPORATED as general partner of YONGESL INVESTMENT
LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD.,
E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC.

Applicants

-and-

9615334 CANADA INC. as general partner of YG LIMITED PARTNERSHIP and
YSL RESIDENCES INC.

Respondents

JOINT BOOK OF AUTHORITIES OF THE APPLICANTS

June 16, 2021

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E&B Investment Corporation and Taihe
International Group Inc.

TO: **THE SERVICE LIST**

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TAB 1

CITATION: Tridelta Financial Partners Inc. v Zephyr Abl Ser-A 4.875% Jan 25, 2021 GP INC
2020 ONSC 5211
COURT FILE NO.: CV-19-625186-00CL
DATE: 20200901

2020 ONSC 5211 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

Commercial List

RE: TRIDELTA FINANCIAL PARTNERS INC.,
TRIDELTA FIXED INCOME FUND,
TRIDELTA HIGH INCOME BALANCED FUND, 2679518 ONTARIO INC. and
ZEPHYR ABL SER-A 4.875% JAN 25, 2021 LIMITED PARTNERSHIP

Applicants

- and –

ZEPHYR ABL SER-A 4.875% JAN 25, 2021 GP INC. and
SQUARE CAPITAL MANAGEMENT INC.

Respondents

BEFORE: **Koehnen J.**

COUNSEL: *C. Naudie and L. Tomasich* for the applicants

H. Book and A. Young for the respondents.

HEARD: July 15, 2020

ENDORSEMENT

[1] The applicants invested $7.5 million into Zephyr ABL SER-A 4.875% JAN 25, 2021 Limited Partnership (the "Partnership"). The Partnership was managed by its general partner, the respondent Zephyr ABL SER-A 4.875% JAN 25, 2021 GP Inc. ("Zephyr"). The applicant seeks a declaration to the effect that Zephyr was validly removed as the general partner effective as of February 7, 2019 and for related ancillary relief.

[2] The applicants allege that Zephyr should be removed as general partner because of a number of breaches of fiduciary duty.

[3] Zephyr submits that there were no breaches of fiduciary duty to begin with and that, in the alternative, if there were any such breaches, they caused no harm and were cured within 30 days of Zephyr being advised of the breach. The Limited Partnership Agreement provides for the removal of the general partner only if it has committed a breach which remains uncured for 30 days.

[4] Shortly after the hearing I advised the parties that I would grant the declaration the applicants seek with reasons to follow. These are those reasons.

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The Parties

[5] The TriDelta applicants act as the manager and trustee of two funds which invest on behalf of others. For ease of reference I will refer to the TriDelta applicants collectively as TriDelta. In January 2018, TriDelta invested $7.5 million into the Partnership in exchange for 75,000 Series A units of the Partnership. The purpose of the Partnership was to invest in real estate mortgages. The units provide TriDelta with interest of 4.875% per year until January 2021 at which time the units mature and are to be redeemed.

[6] Zephyr acted as general partner of the Partnership from January 2018 onward. Mr. Sutha Kunam is an officer, director, and controlling shareholder of Zephyr. The two other directors of Zephyr are Mr. Asif Khan and Mr. Ranier De Lambert.

[7] Square Capital Management, Inc ("SCM") is the only other limited partner of the Partnership and holds 10 Series B units, which required a contribution of $1,000 to the Partnership. Kunam is the sole shareholder, officer and director of SCM.

The Breaches of Fiduciary Duty

(i) Related Party Agreements

[8] Section 8.9 of the Limited Partnership Agreement requires Zephyr to obtain a resolution passed by a majority of the limited partners before entering into any agreement with an affiliate. TriDelta complains that Zephyr entered into agreements with affiliates without obtaining the approval of the limited partners.

[9] The principal investment of the Partnership was a loan to Kuber Mortgage Investment Corporation.

[10] Mr. Kunam is the Chief Executive Officer, a director and the controlling principal of Kuber (Mr. De Lambert is also its Chief Operating Officer). This makes Kuber an affiliate of Zephyr. The Limited Partnership Agreement defines "affiliate" as having the meaning ascribed to that term under the *Ontario Business Corporations Act*, RSO 1990, c B.16. Section 1 (4) of the *OBCA* defines affiliate as:

> "For the purposes of this Act, one body corporate shall be deemed to be affiliated with another body corporate if, but only if, one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person."

[11] Given Mr. Kunam's position and controlling interest in both Zephyr and Kuber, it is clear that Zephyr and Kuber are controlled by the same person and are affiliates. The loan to Kuber was not, however, put to a vote of the limited partners.

[12] Under the Kuber loan agreement, the Partnership agreed to lend Kuber up to $7.5 million at 9.25% per year interest. TriDelta earned only 4.875% on that investment. The balance was retained by Zephyr.

[13] Moreover, when the funds were advanced to Kuber, there was no loan agreement in place. A loan agreement was not prepared until several months later in April 2018. This arguably falls afoul of the obligation in section 8.5 of the Limited Partnership Agreement to safeguard the Partnership's assets.

[14] The agreement pursuant to which Zephyr retained SCM was also never put to the limited partners for approval even though SCM was an affiliate of Zephyr . On this application, SCM asserts a claim against the Partnership for all outstanding management fees to the end of its tenure as envisaged under the SCM agreement.

[15] Zephyr submits that the SCM agreement was disclosed in the Limited Partnership Agreement because section 6.3 of that agreement refers to an Administration Services Agreement. In addition, Zephyr points to a resolution of the general partner approving the SCM agreement. Both submissions miss the point. The issue is not whether the general partner is entitled to enter into an administration services agreement, the issue is not even whether the general partner can enter into such an agreement with an affiliate. The issue is whether any agreement with an affiliate has been approved by the limited partners as required by the Limited Partnership Agreement. TriDelta says there was no such approval. Zephyr has not produced any evidence to the contrary.

[16] In addition, Zephyr rented office premises from a numbered company owned by Mr. De Lambert. Partnership assets were used to pay for the condominium fees, renovation and decorating expenses associated with the office space. The rental agreement was never put to the

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limited partners for approval. Even if not strictly speaking and affiliate because Mr. De Lambert does not control Zephyr, the rental agreement demonstrates a disregard of common law fiduciary duties and demonstrates a general disregard of the separation of interest required by common law principles of fiduciary duty.

[17] Shortly after TriDelta paid the $7.5 million, Mr. Kunam arranged for $444,937.50 of those funds to be paid to Millwood Real Estate Inc., a company controlled by Mr. Khan who is also a director of Zephyr. After TriDelta became aware of this advance and began asking questions about it, the principal was repaid without interest on April 6, 2018. The Millwood loan was not put to the limited partners for approval. Once again, even if Millwood not technically an affiliate because Mr. Khan does not control Zephyr, the loan demonstrates a further disregard for common law principles of fiduciary duties and the separation of interests those duties require.

[18] The respondents defend the Millwood loan on the basis that Mr. Khan was a friend of Ed Jong, a former employee of TriDelta who was responsible for the TriDelta investment into the Partnership. Zephyr submits that it was Mr. Jong who asked that Mr. Kahn be made a director of Zephyr so that someone associated with TriDelta would be involved in the general partner. Even this is the case, it does not relieve Zephyr of its fiduciary duties. Mr. Khan was clearly a director of Zephyr. As a fiduciary, Zephyr should not be making investments into companies controlled by its own directors without the approval of the beneficiaries of those fiduciary duties.

[19] The obligations of a fiduciary go beyond personal friendships or relationships. Zephyr knew or ought to have known that the money it received did not belong to Mr. Khan. The fact that Mr. Kahn might have been a friend of a TriDelta employee does not mean that Zephyr can ignore its fiduciary obligations to TriDelta and benefit Mr. Khan at whim.

[20] On cross-examination, Mr. Kunam sought to defend the lack of interest on the Millwood advance by arguing that, if the funds had remained unallocated in a Zephyr account, they would not have earned interest either. That too misses the point. The point is that the funds were not sitting unallocated in a Zephyr account. They had been given to another party without interest or security. During his cross-examination, Mr. Kunam also suggested that the amounts advanced to Millwood were somehow subject to a 90 day interest-free "holiday period" during development. I was not directed to any documentation to establish that this was in fact the case. Nor was I otherwise directed to documentation that established the purpose of the Millwood advance.

(ii) Co-mingling of Partnership Funds

[21] Section 8.5 of the Limited Partnership Agreement provides:

> "The General Partner is responsible for the safekeeping and use of all funds and assets of the Partnership whether or not in its immediate possession or control and will not employ or permit

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> another to employ the funds or assets except for the exclusive benefit of the Partnership."

[22] Section 8.8(c) restricts the General Partner from co-mingling Partnership funds "with the funds of the General Partner, its Affiliates or any third party."

[23] Zephyr maintained a single bank account for the partnership in its own name. It also set up a Visa card in its own name and used Partnership funds to pay for all expenses on that card.

[24] Kunam and Zephyr used the single bank account and Visa card to pay personal expenses including first class travel, meals at high-end restaurants, nearly daily uber-eats and uber-rides, multiple cell phone bills (including the cell phone of Mr. De Lambert's wife), personal car expenses, personal transponder expenses, an engagement party and a 400-person wedding party for Mr. De Lambert's daughter at the Royal York Hotel.

[25] The respondents submit that these expenses were legitimate because they were paid to entertain and travel to investors who would potentially take out the TriDelta investment on maturity. The respondents explained that the engagement and wedding came about because the partnership had reserved space at the Royal York Hotel for investor presentations that ultimately did not occur. When the investor presentations fell through, Messrs. Kunam and De Lambert decided to use the Royal York for the engagement and the wedding celebrations rather than losing the deposit they had paid for the investor presentation. The respondents have not produced any documentation to support visits or presentations to investors or to support the assertion that the Royal York reservation was originally for an investor presentation.

[26] Zephyr further submits that the co-mingling of accounts was appropriate because the general partner was "just a flow-through" and did not have its own assets. Zephyr suggests that they had accounting advice to this effect. No one, however, directed me to any clear accounting advice to that effect. Even if such advice had been received, Zephyr does not appear to have been used as a "flow-through". Zephyr received partnership funds. That same Zephyr account was used to pay purely personal expenses of Mr. Kunam and Mr. DeLambert. If the Zephyr account was indeed a "flow-through" account, presumably the flow had to be through to some sort of legitimate partnership expense. That might be to a service provider to the partnership or a payment pursuant to the distributions contemplated by the Limited Partnership Agreement. Partnership assets are not, however, intended to flow-through to pay for wedding expenses.

(iii) Use of Partnership Funds for Legal Expenses

[27] It appears that Kunam, Zephyr and SCM have used Partnership funds to pay their personal legal counsel on this Application. The purpose of that legal retainer was to represent their personal interests in maintaining their tenure and to recover SCM's management fees from the Partnership. Respondent's counsel on this application has not performed any services for the Partnership. Rather the purpose of the engagement is to advance the personal interests of Zephyr and SCM.

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Zephyr's Defences

[28] Zephyr defends itself on a number of bases.

[29] First, it argues that the application has arisen because Mr. Jong has left TriDelta and that TriDelta's CEO, Ted Rechtshaffen has tried to obtain a different business deal than the one Mr. Jong agreed to. While Zephyr does not say so expressly, the suggestion is that the special resolutions terminating Zephyr as general partner were only passed after Mr. Rechtschaffen's efforts to obtain a different business deal failed.

[30] That argument is of no assistance. Even if I assume it is correct, it would only underscore the importance of a fiduciary adhering strictly to its duties. Adhering to fiduciary duties will protect the fiduciary from opportunistic efforts to renegotiate a transaction. The failure to adhere to fiduciary duties may well expose a fiduciary to efforts to renegotiate a transaction. There may in fact be nothing wrong with trying to renegotiate a transaction once it is discovered that a fiduciary has breached its duties. At the end of the day, I am not concerned with whether someone has tried to or not tried to renegotiate a transaction, the question before me is whether Zephyr did or did not breach its fiduciary duties.

[31] Second, Zephyr argues that TriDelta has continued to receive its interest payments as provided for in the Limited Partnership Agreement and has suffered no harm. In my view, this also misses the point. Limited partners are entitled to have fiduciaries manage the limited partnership in accordance with strict observance to their fiduciary duties. A general partner who does not adhere to fiduciary duties changes the risk profile that investors have agreed to accept and places them at greater risk of future harm. Investors who are given the protection of a fiduciary expect the fiduciary to protect them from the risk of future harm, not expose them to it.

[32] Moreover, as TriDelta submits, the expenditure of partnership assets on improvident, self-interested contracts or on personal expenses, reduces the general assets of the Partnership. This increases the risk that future monthly payments might not be paid or would be paid at a reduced amount or that the principal under the limited partnership units will not be repaid.

[33] In response, Zephyr submits that it underpaid SCM on the management agreement as a result of which it was entitled to take Partnership assets and that under the distribution waterfalls in the Limited Partnership Agreement, the funds would have been payable to other parties in any event. The short answer to that submission is that if the principals of Zephyr or others believed they had an entitlement to Partnership assets under the waterfall arrangements in the Limited Partnership Agreement, those arrangements should have been followed. Following those arrangements may or may not have given TriDelta an argument to the effect that the distributions were improper under the waterfall arrangement. Even if TriDelta had no such argument, the essence of a fiduciary duty is to maintain a strict division between the affairs and interests of the fiduciary and those of the limited partners the fiduciary has agreed to protect. Co-mingling those interests by ignoring the distinctions breaches a core element of the fiduciary's duty.

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The Resolutions Removing Zephyr as General Partner

[34] Section 8.10 of the Limited Partnership Agreement provides:

> In addition, the General Partner may be removed and a substitute general partner appointed by Special Resolution in the event of the default by the General Partner in the Performance of its obligations under this Agreement, which default remains unremedied for a period in excess of thirty (30) days after the Limited Partners have given written notice of such default to the General Partner following passage of a Special Resolution to consider such default and authorize such notice.

[35] On December 13, 2018, TriDelta passed a special resolution removing Zephyr as general partner. The defaults on which TriDelta relied when passing the special resolution included: retaining related party entities without the approval of the limited partners, commingling Partnership assets with its own assets, and using Partnership assets to pay personal expenses.

[36] TriDelta notified Zephyr of the special resolution on January 4, 2019 and gave Zephyr thirty days' notice to remedy the defaults set out in the special resolution.

[37] While Zephyr ultimately repaid some of the impugned expenses, it did not repay all of them and continued to do business through related entities without putting those arrangements to a vote of the limited partners.

[38] On February 7, 2019, TriDelta passed a further special resolution removing Zephyr and appointing TriDelta GP as the general partner.

[39] Zephyr refused to accept its termination as a result of which, TriDelta brought this Application.

[40] In my view, the court should respect the resolutions passed by the limited partners removing Zephyr as general partner. As the B.C. Supreme Court held when dealing with similar circumstances in *Naramalta Development Corp v Therapy General Partner Ltd*, 2010 BCSC 590 at para 115 "the number of votes against [the former general partner] speaks for itself" and "an exercise of democracy … ought to govern the outcome…" and the last thing" that the Court should do is reverse the vote of a large majority of the limited partners and force them to take back the general partner they wanted to remove.

[41] Other courts have taken an even more limited view of their roles and have held that courts should be limited to determining whether the limited partners had "validly passed an extraordinary resolution" and assessing whether the limited partners had "satisfied the conditions precedent to the passing of such resolution": see for example *Neural Capital GP, LLC v 1156062 BC Ltd*, 2019 BCSC 2180, at paras 4-5.

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[42] I am satisfied on the facts of this case that Zephyr has committed specific breaches of the Limited Partnership Agreement which it has not remedied, namely entering into related party agreements without seeking the approval of the limited partners, co-mingling of funds and mis-use of Partnership funds for personal expenses.

[43] There is also, however, a broader concern. A general partner is a fiduciary of the limited partners: *Molchan v Omega Oil & Gas Ltd*, [1988] SCR 348 at para 35. Its obligation is to act for and on behalf of the limited partners. More general breaches of fiduciary duty would also disqualify a general partner from acting quite apart from the specific terms of the Limited Partnership Agreement. Courts have recognized that a general loss of trust and confidence in a general partner constitutes a material default under a limited partnership agreement which gives the limited partners the right to terminate the general partner. By way of example, in *Village Gate Resorts Ltd v Moore*, [1997] BCJ No. 2478, 1997 CanLII 4052 (BCCA), the British Columbia Court of Appeal noted at para 34 that:

> "[34] … The phrase "is in material default" … must be informed by a consideration of the fact that the limited partnership structure, even more than that of a company or even of an ordinary partnership, relies on a substratum of trust and confidence in the integrity and ability of the general partner. It was surely the intention of the draftsman of the Agreement that the Limited Partners could take action to bring the relationship to an end where that trust and confidence have fallen away. This loss of trust and confidence cannot now be restored any more than the past breaches can now be "cured" in any real sense."

Relief from Forfeiture

[44] Zephyr brings a cross - application for relief from forfeiture. Zephyr bears the onus on the application: *Kozel v The Personal Insurance Company*, 2014 ONCA 130 at para 28-29.

[45] In *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490 the Supreme Court of Canada has set out the test for relief from forfeiture as follows at para 32:

> "[t]he power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach".

[46] Applying these principles would not lead me to exercise my discretion in favour of relief from forfeiture. The breaches in question here are serious. They are not minor technical

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breaches that someone might stumble into inadvertently. Rather, they go to fundamental elements of character and trust.

[47] The fundamental problem with the value of the property forfeited is that the "property" is the value of payments to which SCM is entitled under an agreement that should have been approved by the limited partners but was not. Granting relief from forfeiture in those circumstances would effectively ignore the provision of the Limited Partnership Agreement that requires related party transactions to be approved by a majority of the limited partners.

[48] I do not believe it would be appropriate to exercise the court's equitable discretion to allow a fiduciary to retain the benefit of a self-interested transaction that was entered into in breach of its contractual and common law duties.

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Disposition

[49] As a result of the foregoing I grant the following declarations and orders:

(a) A declaration that TriDelta was appointed as the general partner of the limited partnership as of February 7, 2019.

(b) A declaration that Zephyr was removed as the general partner of the limited partnership as of February 7, 2019.

(c) An order requiring Zephyr to deliver all of the books, records and accounts and assets of the limited partnership to TriDelta GP.

(d) An order directing Zephyr to cease representing and asserting that it continues to act as general partner of the limited partnership.

(e) A declaration that the Administrative Services Agreement between the limited partnership and SCM was terminated as of April 12, 2019.

(f) On consent, an order that TriDelta's limited partnership units shall be redeemed no later than January 21, 2021.

(g) An order barring Zephyr GP from using Partnership funds to fund its opposition to this Application or to pay for any cost order.

[50] TriDelta GP shall continue as general partner until TriDelta's limited partnership units have been redeemed. Once TriDelta's units have been redeemed, Zephyr may resume its status as general partner.

[51] TriDelta also seeks an order requiring a full accounting of Zephyr's management of the Partnership from January 2018 to the present, including the repayment of any "unauthorized" expenses. I order Zephyr to provide such an accounting. I am not prepared, at this point, to order the repayment of unauthorized expenses to the Partnership. I do not have enough information about who is entitled to funds that Zephyr receives in excess of the interest payments owing to TriDelta or about the entitlement of Zephyr to distribute those funds under the Limited Partnership Agreement. That was not the focus of any oral or written argument.

[52] Although the failure to adhere to proper accounting and a separation of interests amounts to a breach of fiduciary duty and a breach of the Limited Partnership Agreement sufficient to replace the general partner, it does not follow automatically that the funds could not have been paid out as Zephyr claims, had it followed proper procedures. If the parties cannot agree on the entitlement to and distribution of funds after receiving an accounting, those issues will have to be the subject of further adjudication.

[53] These reasons are not to be interpreted as having any bearing on the rights of TriDelta, if any, beyond the right to interest on and the right to redemption of its units.

[54] Any party seeking costs as a result of these reasons may make written submissions within 14 days of the release of the reasons. A responding party will have seven days to respond with a further five days for reply.

Koehnen J.

Date: September 1, 2020

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TAB 2

CANADA
PROVINCE OF NOVA SCOTIA

B8816-17-18-19

1995 CanLII 9324 (NS SC)

IN THE SUPREME COURT OF NOVA SCOTIA
(BANKRUPTCY)

IN THE MATTER OF THE BANKRUPTCIES OF
AQUACULTURE COMPONENTS PLANT V LIMITED PARTNERSHIP,
TARTAN GOLD FISH FARMS LTD.,
TARTAN SPRINGS FISH FARMS LTD.,
AQUACULTURE COMPONENTS PLANT III LIMITED PARTNERSHIP

DECISION

HEARD:	Before the Honourable Justice Jill Hamilton, in Chambers, at Halifax, Nova Scotia, September 7, 1995
DECISION:	Orally, September 8, 1995
WRITTEN RELEASE OF ORAL:	October 19, 1995
COUNSEL:	Timothy Hill, Esq., Solicitor for Ernst & Young (Trustee in Bankruptcy) Robert Aske, Esq., Solicitor for Creditors of Bankrupt

Hamilton, J. (Orally)

Each of the four bankrupts made an assignment in bankruptcy on June 6, 1995. Aquaculture Components Plant III Limited Partnership and Aquaculture Components Plant V Limited Partnership are limited partnerships. Tartan Gold is the general partner for Plant III. Tartan Springs is the general partner for Plant V. All of the assignments were executed by Graham Johnson, president of both Tartan Springs and Tartan Gold. In respect of Plant III and Plant V, he executed those assignments for and on behalf of the respective general partners.

The general partners appear to have no assets. Each of the limited partnerships has assets. There are no secured creditors of the limited partnerships.

Certain of the limited partners made unsecured loans to the respective limited partnerships and there are other unsecured creditors of the limited partnerships who are not limited partners. There are not sufficient assets in the limited partnerships to pay all of the unsecured creditors.

This was an application on behalf of the trustee in bankruptcy, Ernst & Young Inc., for directions with respect to: (1) the validity of the assignments in bankruptcy of the limited partnerships, (2) the status of the limited partnerships in light of the assignment in bankruptcy of their respective sole general partners, (3) the determination of the present ownership of the assets of the limited partnerships, and (4)

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the priority of the claims of creditors of the limited partnerships among those creditors who are also limited partners of those limited partnerships and those creditors who are not.

I reviewed the affidavit of Mathew M. Harris, the affidavit of Bruce Groh and Stephen Kuryliw, and the memo of counsel for the trustee. I heard argument from counsel for the trustee and counsel for three creditors who are not limited partners of either of these limited partnerships, namely, David McNearny, Royal Stevens and Karen Westhaver.

I find that the assignments in bankruptcy of the two limited partnerships are invalid because of the provisions of s.85 of the **Bankruptcy and Insolvency Act**. That section provides that the Act will apply to limited partnerships in like manner as if the limited partnership was an ordinary partnership. In order for an ordinary partnership to make an assignment in bankruptcy, the assignment must be executed by each of the partners. In this case, the assignments in bankruptcy of the two limited partnerships were only signed by their general partners, not by each of the limited partners, and, hence, the assignments are invalid. This is in accordance with the decision In **re Squires Brothers** (1922), 3 C.B.R. 191. Accordingly, I order, pursuant to s.181 of the **Bankruptcy and Insolvency Act**, that the assignments in bankruptcy of the two limited partnerships are annulled.

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I also find that, as a consequence of the provisions of s.85 of the **Bankruptcy and Insolvency Act**, the assets of each limited partnership vested in the trustee of its general partner by operation of law when its general partner made its assignment in bankruptcy.

The **Partnership Act** of Nova Scotia, in some situations, applies to limited partnerships by virtue of s.3 of the **Limited Partnerships Act**. S.3 states as follows:

> "The **Partnership Act** and the rules of equity and common law applicable to partnerships, except as such rules are inconsistent with the **Partnership Act** and this Act, apply to limited partnerships."

Since the **Limited Partnerships Act** of Nova Scotia does not deal with the consequences to the limited partnership of the bankruptcy of its general partner, the provisions of s.36(1) of the Partnership Act apply. S.36(1) of the **Partnership Act** states as follows:

> "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy or insolvency of any partner."

Accordingly, I find that as a result of the assignment in bankruptcy of the general partner of each of the limited partnerships, that both limited partnerships have been dissolved.

The result of this dissolution is that the assets of each limited partnership should be distributed in accordance with the **Limited Partnerships Act**.

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The priority issue among the creditors of the limited partnerships is not as clear. There appears to be no Canadian law on this point and virtually no American law either. Two sections of the Nova Scotia **Limited Partnerships Act** are relevant, s.13 and s.26, and appear to provide for different priorities in the case of insolvencies and bankruptcies.

S.13 provides, among other things, that a limited partner may loan money to a limited partnership of which it is a limited partner, and share *pro rata* in any claim against the limited partnership with all other creditors, except that such a creditor (1) cannot take collateral security to secure its indebtedness and (2) cannot be repaid its loan if, at the time of the proposed repayment, the assets of the limited partnership are not sufficient to discharge the partnership liabilities to creditors who are not limited partners. This has the effect of subordinating the claim of creditors who are also limited partners to the claims of creditors who are not also limited partners in the case of an insolvent limited partnership.

On the other hand, s.26 deals specifically with priorities of payment of liabilities upon dissolution. That is the situation we have here. S.26 provides as follows:

"Priority of payment of liabilities upon dissolution

> 26 In settling accounts after the dissolution of a limited partnership the liabilities of the partnership to creditors, excepting
>
> > (a) to limited partners on account of their contributions; and

1995 CanLII 9324 (NS SC)

1995 CanLII 9324 (NS SC)

> (b) to general partners,
>
> shall be paid first and then, subject to any statement in the certificate or to subsequent agreement, in the following order:
>
> (c) to limited partners in respect of their share of the profits and other compensation by way of income on their contributions;
>
> (d) to limited partners in respect of the capital of their contributions;
>
> (e) to general partners other than for capital and profits;
>
> (f) to general partners in respect of profits;
>
> (g) to general partners in respect of capital."

I interpret this to mean that only the capital contributions of limited partners, as opposed to loans they have made to the limited partnership, are excluded from sharing *pro rata* with other creditors on dissolution. This appears to me to be the correct interpretation of the word 'contributions' in s.26(1), in light of the use of this word and the word 'contributed' in other parts of s.26 and in other sections of the Act such as s.5(2)(e), (f), (g) and (i), s.6(2), s.8(1), and especially s.10.

In the book **Limited Partnerships** by Lyle R. Hepburn, Carswell, referred to me by counsel, it deals with priority among creditors who are and are not also limited partners in the event of insolvency and dissolution, starting at page 4-31. On page 4-33, the author states:

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> "As discussed below, there is a specific ordering of payment of assets of the limited partnership upon dissolution. In the Uniform Jurisdictions, the priority payment is in respect of the liabilities to creditors, except to limited partners on account of their contributions and to general partners. It is submitted that a 'creditor' in such context would encompass a limited partner who has loaned money to or transacted business with the limited partnership.
>
> Confusion arises where the limited partnership is insolvent. Where this is an insolvency, paragraph 11(1)(b) of the Ontario Act (which is comparable to our 13(1)(b)) prohibits a preferential payment to be made to the limited partner, but it is submitted that if the partnership took steps to dissolve, the limited partner would then stand on a *pro rata* basis with other creditors. This proposition is, however, not without doubt.
>
> The position of a limited partner who loans money to or transacts business with the limited partnership has been clarified under the *Uniform Limited Partnership Act* (19%). Section 107 of this Act provides that:
>
> > 'Except as provided in the partnership agreement, a partner may lend money to and transact business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.'
>
> The Act further clarifies the position of a limited partner on dissolution by providing that the assets are distributed first to creditors, including partners who are creditors, to the extent permitted by law."

I understand this to mean that under the 1976 **Uniform Limited Partnership Act** in the United States, all creditors are treated *pro rata*, regardless of whether or not they are also limited partners.

1995 CanLII 9324 (NS SC)

The author then goes on to refer to British Columbia and the Yukon and indicates that on the wording in their equivalent legislation, all creditors would be treated on a *pro rata* basis.

After considering all of the foregoing and the American cases: **Nexsen v. New York Stock Exchange** (1965), 261 N.Y.S.(2d) 780 (S.C.A.D.) and **Mills v. Kochis**, 208 S.E.(2d) 352 (Ga.C.A.), I find there is a distinction in the Nova Scotia **Limited Partnerships Act** in the way creditors who are limited partners are treated in the event of an insolvency as opposed to a dissolution. Since Section 26 specifically deals with the settling of accounts on dissolution, I find it governs this case, which involves a dissolution, with the result that all creditors, including those who are limited partners, should share *pro rata* in the proceeds available from the sale of the assets.

J.

TAB 3

1922 CarswellSask 10
Saskatchewan King's Bench, In Bankruptcy

Squires Brothers, Re

1922 CarswellSask 10, [1922] 3 W.W.R. 130,
16 Sask. L.R. 68, 3 C.B.R. 191, 68 D.L.R. 571

In re Squires Brothers

Maclean, J.

Judgment: August 19, 1922

Counsel: *B. M. Wakeling*, for the authorized trustee.
E. B. Jonah, for William Squires.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Assignments in bankruptcy — Types of assignors — Partnerships — Assignment not made by all partners

Bankruptcy — Partnership Debtor — Purported Authorized Assignment by One Partner for the Firm — No Authority by Other Partner — Bankruptcy Act, Sec. 85, Amended 1921, Ch. 17, 1 C.B.R. 581.

An assignment for creditors under *The Bankruptcy Act* by one partner on behalf of his firm without the knowledge or authority of his co-partner is invalid. It is not even effective as an assignment of the property of the signing partner. An authorized assignment under *The Bankruptcy Act* must be the voluntary act of the assignor and must show expressly and not by implication his intention to assign. Sec. 85 of *The Bankruptcy Act*, as amended 1921, ch. 17, merely outlines procedure in making an assignment and does not purport to, and could not, change the substantive law affecting partnerships.

Application by an authorized trustee for directions, where the debtor was a partnership and one partner alone had made the authorized assignment and without the knowledge and consent of the other partner. Assignment held to be invalid.

***Maclean, J.*:**

1 On March 23, 1922, Charles E. Squires, one of the two partners in the firm of Squires Bros., of Domremy, Saskatchewan, purported to make on behalf of his firm an assignment under *The Bankruptcy Act*, 1919, ch. 36, in favour of the Canadian Credit Men's Trust Association, Limited, as authorized trustee. The trustee proceeded to wind up the partnership business and did sell the

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assets. The other partner, William Squires, was, about this time, absent from Domremy for a few weeks, and was not apprised of the assignment, nor was he aware of the activities of the trustee until after the partnership assets had been sold. Immediately upon William Squires ascertaining what had transpired, he notified the trustee and protested against any further dealings with the affairs of the firm. The trustee now brings this application for directions. A notice of motion was served on all the interested parties. A great many questions are asked by the trustee, but they all depend on the validity of the assignment, and the intention of this application is to bring up the question in this summary way.

2 Counsel for the trustee relies upon sec. 85 (as amended, 1921, ch. 17) of *The Bankruptcy Act*, [1 C.B.R. 581] which reads as follows:

> For all or any of the purposes of this Act, an incorporated company may act by any of its officers or employees authorized in that behalf, a firm may act by any of its members, and a lunatic may act by his committee or curator or by the guardian or curator of his property.

3 It is contended on behalf of the trustee that as the section quoted expressly provides that the officer or employee acting for an incorporated company must be authorized in that behalf, and as no such provision is stated in respect to a member by whom a firm acts, the lack of definite or any authority by a firm to one of its members to make an assignment will not affect the validity of that assignment. In my opinion the section quoted merely outlines procedure in making an assignment and does not purport to, and could not, change the substantive law affecting partnerships. A member of a partnership may bind himself and his partners upon all contracts made in the course of the ordinary scope of the partnership business. An assignment such as the one in question is not within the ordinary scope of the partnership business, but practically amounts to a suspension of business and a dissolution of the partnership itself. The law on this point is very fully and forcibly stated by Draper, C.J. in *Cameron v. Stevenson* (1862) 12 U.C.C.P. 389. It is clear, therefore, that in the absence of authority from or subsequent ratification by William Squires the assignment cannot be considered the assignment of the firm.

4 The evidence before me is to the effect that William Squires did not authorize his partner, Charles E. Squires, to make the assignment. An affidavit, filed on behalf of the trustee, alleges, that what Charles E. Squires stated to the trustee at the time was that his brother William would have no objection if he, Charles E. Squires, made an assignment on behalf of the firm. It is clear from the affidavit of William E. Squires himself and the affidavit filed on behalf of the trustee that Charles E. Squires had no authority to make the assignment and that he did not represent to the trustee that he had such authority. It is also clear, from the affidavit of William Squires, that there has been no ratification by himself of the act of his brother in making the assignment.

5 Counsel for the trustee argues that the words in reference to a firm in the section of *The Bankruptcy Act* above quoted should be strictly construed, and that by implication a member of the

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firm need not be specially authorized as is required of an officer or employee of an incorporated company. The strict interpretation of the words in question is that a firm may, by one of its members, make an assignment. What is really contended for by counsel is an interpretation to the effect that a member may make an assignment for his firm — something totally different to a firm acting by one of its members.

6 In my opinion the assignment is invalid. In view of that it is unnecessary to deal with any of the questions raised, excepting the second question, which in substance is whether the assignment may be treated as the assignment of Charles E. Squires himself and whether his assets pass to the trustee. It is true that if the assignment were a valid one the separate assets of Charles E. Squires would pass to the assignee as well as his interest in the firm, and if Charles E. Squires had made a personal assignment his interest in the partnership would also pass to the trustee and the ultimate result might be the same in either case. But he clearly did not intend to make a personal assignment, or he would have done so, and it is not difficult to conceive numerous instances where a partner might be ready to enter into an assignment by the firm and yet not be willing to make a personal assignment.

7 It seems to me that an authorized assignment under *The Bankruptcy Act* must be the voluntary act of the assignor, and must show expressly and not by implication his intention to assign. An authorized assignment cannot be construed out of a document which the party executing it intended for some other purpose, even though the execution of that document might, in itself, constitute an act of bankruptcy. The assignment in question does not constitute an assignment under the Act by Charles E. Squires. William Squires will have his costs against the trustee.

Assignment held invalid.

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TAB 4

HMANALY D§72
Houlden & Morawetz Analysis D§72

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Bankruptcy Orders and Assignments (s. 49)
L.W. Houlden and Geoffrey B. Morawetz

D§72 — Who May Assign

D§72 — Who May Assign

See s. 49

(1) — *Generally*

To make an assignment, the debtor must be an "insolvent person" or the legal personal representative of such a person: s. 49(1). "Insolvent person" is defined by s. 2(1) as meaning a "person" who meets the requirements set out in the definition. The word "person" is also defined by s. 2(1). The definition of "person" is an inclusive, not a restrictive one. "Person" is defined to include, among others, a partnership, an unincorporated association, a corporation and a legal representative of a person.

A debtor who meets the requirements of s. 2(1) for an "insolvent person" is entitled to make an assignment, so long as there is no abuse of the process of the court: *Re Kergan* (1966), 9 C.B.R. (N.S.) 15 (Ont. S.C.); *Kalau v. Dahl* (1966), 57 C.B.R. (N.S.) 296, 39 Alta. L.R. (2d) 156, 59 A.R. 224 (Q.B.). Even though the debtor gains some benefit for himself by making the assignment, *e.g.,* terminating a shareholders' agreement, this does not prevent the making of an assignment: *Kalau v. Dahl, supra.* Similarly if the assignment is filed at the urging of certain creditors who are attempting to change priorities, this does not render the assignment invalid: *Gasthof Schnitzel House Ltd. v. Sanderson,* [1978] 2 W.W.R. 756, 27 C.B.R. (N.S.) 75 (B.C. S.C.); *Re Develox Indust. Ltd.,* [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (H.C.); *Re Public's Own Market (Prince George) Ltd.* (1984), 54 C.B.R. (N.S.) 222 (B.C. S.C.); *Triona Invts. Ltd. v. Smythe, McMahon Inc.* (1988), 67 C.B.R. (N.S.) 281, 23 B.C.L.R. (2d) 222 (C.A.); *Re Koprel Ent. Ltd.* (1978), 27 C.B.R. (N.S.) 22 (B.C. S.C.).

A trustee can agree to act in an assignment even if the debtor has covenanted with a large creditor not to commit an act of bankruptcy without the consent of the creditor. Such an agreement is

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not binding on the trustee: *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127, 143 O.A.C. 195, 2001 CarswellOnt 1060 (Ont. C.A.). However, in *Henfrey Samson Belair Ltd. v. Manolescu* (1985), 58 C.B.R. (N.S.) 181, 69 B.C.L.R. 216, 1985 CarswellBC 491 (C.A.), a court order had been made restraining the bankrupt from dealing with his assets without giving his wife seven days' notice. Without notice to the wife, the bankrupt made an assignment in bankruptcy. The court annulled the assignment. This case was followed in *Stasiuk v. Stasiuk* (1999), 46 R.F.L. (4th) 382, 9 C.B.R. (4th) 182, 1999 CarswellBC 1117, [1999] B.C.J. No. 1185 (B.C. S.C. [In Chambers]). But see *Blaxland v. Fuller* (1999), 2 C.B.R. (3d) 125, 1990 CarswellBC 377 (B.C. S.C.) which distinguished the *Manolescu* case and refused to annul the assignment in the circumstances.

To come within the definition of "insolvent person", a "person" must satisfy three requirements:

(*a*) not a bankrupt;

(*b*) reside, carry on business or have property in Canada; and

(*c*) have liabilities to creditors provable as claims

under the Act amounting to $1,000.

(i) — *Not a bankrupt*

If a person is already bankrupt and has not obtained a discharge, he or she cannot make an assignment. This matter is discussed in detail, *infra,* under D§75 "Second Assignment Where Bankrupt is Undischarged".

(ii) — *Reside, Carry on Business or Have Property in Canada*

To make an assignment, a person must reside, carry on business or have property in Canada. "Residence" refers to bodily presence in a certain locality.

To be carrying on business, the debtor must be actively pursuing a business: *Re Solloway* (1938), 19 C.B.R. 350 (Ont. S.C.). "Carrying on business" means the constant daily repetition by a person of the same act bringing with it a money return; the transaction of one's private affairs does not constitute carrying on business: *Re Tobin* (1930), 12 C.B.R. 55 (Que. S.C.). It is the continuous carrying of certain functions which constitutes a carrying on of business.

If a debtor has outstanding debts and obligations arising out of business operations in Canada, he or she is deemed to continue to carry on business in Canada even though he or she has, in fact, ceased to carry on business or to reside in Canada. In these circumstances, the debtor is deemed to continue to carry on business in Canada until the debts and obligations have been satisfied and

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can, therefore, make a valid assignment in bankruptcy: *Re Donaldson* (1992), 13 C.B.R. (3d) 53, 1992 CarswellNS 42, 113 N.S.R. (2d) 356, 309 A.P.R. 356 (T.D.).

If a debtor has incurred debts in Canada but has not carried business in Canada and has no property in Canada, he or she cannot make an assignment in Canada if, at the time that he or she wishes to file an assignment, he or she resides in the United States and intends to continue to reside in that jurisdiction: *Re Purnell* (1998), 5 C.B.R. (4th) 277, 1998 CarswellAlta 464, [1999] 3 W.W.R. 547, 63 Alta. L.R. (3d) 226, 224 A.R. 21 (Q.B.).

(iii) — *Debts of $1,000*

To make a valid assignment, a person must have liabilities to creditors provable as claims under the Act amounting to $1,000: s. 2(1). Although the definition of "insolvent person" in s. 2(1) speaks of "liabilities to creditors", it is sufficient if the debtor has only one creditor with a debt amounting to $1,000: *Canada (Attorney General) v. Gordon (Trustee of)* (1992), 15 C.B.R. (3d) 100, 1992 CarswellSask 32 (Sask. Q.B.).

Even if debts are not, by reason of s. 178, released by a discharge from bankruptcy, they are still provable debts and may be taken into account in deciding whether or not the debtor owes $1,000: *Phaneuf v. Charbonneau* (1961), 3 C.B.R. (N.S.) 212 (Que. S.C.).

Unless there is an agreement to pay interest on a promissory note for $950, interest cannot be added to the principal to form an amount in excess of $1,000: *Dextraze v. Leger* (1953), 34 C.B.R. 61 (Que. S.C.).

A debtor whose main liability is a judgment for $4,900 arising out of a motor vehicle accident can make a valid assignment: *Champagne v. Rivard* (1954), 34 C.B.R. 173 (Que. S.C.).

(2) — *Persons Who Have Made Assignments*

Persons making assignments who have received the attention of the courts are the following:

(a) — *Debtors Without Assets*

Providing he or she falls within the definition of "insolvent person", a debtor need not have assets to make a valid assignment: *Re Labrosse* (1924), 5 C.B.R. 600 (Que. C.A.); *Desjardins v. Ferland* (1960), [1961] Que. Q.B. 299, 2 C.B.R. (N.S.) 68 (Q.B.); *Fournier v. Pinault,* [1961] Que. Q.B. 697, 3 C.B.R. (N.S.) 103 (Q.B.); *Linteau v. Lefaivre* (1943), 1943 CarswellQue 26, 1943 CarswellQue 244, 26 C.B.R. 244, [1944] Que. S.C. 432 (Que. Bktcy.); *Adelard Sevigny Inc. v. St. Onge* (1958), 38 C.B.R. 95 (Que. S.C.).

(b) — *Partnerships*

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"Person" is defined by s. 2(1) to include a partnership; hence a partnership may make an assignment. However, since an assignment in bankruptcy is not within the ordinary scope of the business of a partnership, an assignment by a partnership must be signed by all the partners in order for it to be a valid assignment of partnership assets. If it is not, it will only be an assignment of the separate assets of the partners signing the assignment and of their interest in the partnership: *Re Squires Bros.* (1922), 3 C.B.R. 191 (Sask. K.B.); *Re Berthelot* (1922), 3 C.B.R. 386 (Ont. S.C.); *Can. Carbon & Ribbon Co. v. Rung* (1922), 3 C.B.R. 423 (Ont. S.C.); *Re Union Fish Co.* (1923), 3 C.B.R. 779 (Ont. S.C.); *Gibeau v. Vermette* (1953), 33 C.B.R. 197 (Que. S.C.); *Re Reynolds,* 10 C.B.R. 127, 62 O.L.R. 271, [1928] 2 D.L.R. 520 (S.C.), affirmed 10 C.B.R. 127 at 131, 62 O.L.R. 360, [1928] 3 D.L.R. 562 (C.A.).

An assignment executed by all the members of a partnership carries with it all the assets of the partnership as well as the separate assets of the partners: *Taylor v. Leveys* (1922), 2 C.B.R. 390 (Ont. S.C.); *Cohen v. Mahlin,* 8 C.B.R. 23, [1927] 1 W.W.R. 162, 22 Alta. L.R. 487, [1927] 1 D.L.R. 577 (C.A.).

A partner who does not execute the assignment can authorize a partner or partners to execute the assignment for the partnership: *Nolan v. Donnelly* (1883), 4 O.R. 440 (Div. Ct.); *Byers v. Craig* (1922), 2 C.B.R. 528 (Que. S.C.). If this authorization is given, it would seem to be prudent to have the authorization made in writing and to attach a copy to the assignment. Such an assignment will, however, only convey the assets of the partnership and it will be necessary for each individual partner to sign an assignment to convey his or her separate assets.

For the procedure to be followed in making an assignment for a partnership, see D§60 "Formalities of Filing an Assignment," *ante.*

(c) — *Limited Partnerships*

To be valid, an assignment by a limited partnership must be signed by each of the limited partners: *Re Tartan Gold Fish Farms Ltd.* (1996), 41 C.B.R. (3d) 245, 1996 CarswellNS 362 (N.S. S.C.).

(d) — *Corporations*

"Person" is defined by s. 2(1) to include a corporation so that a corporation can make an assignment in bankruptcy, provided it is not a corporation that is precluded by the definition of "corporation" from so doing. For the effect of bankruptcy on a corporation, see B§12 "Corporation," *ante.*

Certain corporations are not permitted to make an assignment in bankruptcy. "Corporation" is defined by s. 2(1) as not including "incorporated banks, saving banks, insurance companies, trust companies, loan companies or railway companies". For a discussion of corporations that are not permitted to make an assignment, see B§12 "Corporation," *ante.*

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For the procedure to be followed by a corporation in making an assignment, see D§60 "Formalities of Filing an Assignment," *ante.*

(e) — *Wage Earners*

By s. 48 a wage earner who earns less than $2,500 per year cannot be applied into bankruptcy, but such a person can make an assignment: *Fine v. Tabah Cousins Ltd.* (1935), 17 C.B.R. 17 (Que. S.C.).

(f) — *Farmers*

Although by s. 48 a petition cannot be filed against a farmer, there is no such restriction on a farmer making an assignment in bankruptcy.

The *Bankruptcy and Insolvency Act* and the Saskatchewan *Farm Security Act,* which is designed to afford protection to farmers from the loss of their land, are not in conflict. If a farmer has made an assignment in bankruptcy, a mortgagee will be allowed to realize its security against the farm, since the farmer has no reasonable possibility of meeting his or her obligations under the mortgage. However, the making of an assignment is not inconsistent with the farmer making a sincere and reasonable effort to meet his or her obligations under the mortgage in so far as it affects the homestead; consequently, the court may refuse the mortgagee permission to realize its security against the homestead even though the farmer has made an assignment in bankruptcy: *Farm Credit Corp. v. Gurski* (1989), 76 C.B.R. (N.S.) 237 (Sask. Q.B.).

The *Farm Debt Mediation Act* offers a form of relief for insolvent farmers. The legislation is considered in vol. 5 under the tab "FDMA".

(g) — *Infants*

A person under the age of majority is entitled to make an assignment provided the debts have arisen from contracts for necessaries, from tortious acts or from liabilities created by statute, such as taxes. If an infant owes legally enforceable debts, the infant can make an assignment: *Re Davenport,* [1963] 1 W.L.R. 817, 107 S.J. 457, [1963] 2 All E.R. 850 (C.A.).

The definition of "insolvent person" in s. 2(1) contains no age requirement: *Re Mitchell* (1985), 56 C.B.R. (N.S.) 297, 63 N.B.R. (2d) 233, 164 A.P.R. 233 (Q.B.).

An infant is not liable for goods supplied to him or her to enable to carry on a trade or business: *Pyett v. Lampman* (1911), 53 O.L.R. 149 (C.A.). An infant could not, therefore, make an assignment based on this kind of debt, since there would not be liabilities to creditors provable as claims under the Act amounting to $1,000: *Re Beauchamp,* [1894] 1 Q.B. 1, 63 L.J.Q.B. 101, 10 T.L.R. 17; *Re Jones* (1881), 18 Ch.D 109, 50 L.J.Ch. 673, 45 L.T. 193, 29 W.R. 747.

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(h) — *Mental Incompetents*

"Person" is defined by s. 2(1) to include legal representatives. This definition would seem to be wide enough to include the committee of a mental incompetent. In *Re Buchner* (1935), 17 C.B.R. 155, Fisher J.A. of the Ontario Supreme Court held that a committee of a mental incompetent should not make an assignment because the *Bankruptcy and Insolvency Act* makes no provision for the maintenance of the incompetent in priority to the payment of the claims of creditors. Such assignments have, however, been permitted in the province of Québec: see *Reinhardt v. Chevalier* (1939), 21 C.B.R. 228 (Que. S.C.).

(i) — *Personal Representatives of Deceased*

If the insolvent person is deceased, his or her legal personal representative may make an assignment, provided the leave of the court is first obtained: s. 49(1). Since an executor takes its authority not from letters probate but from the will, an executor need not take out letters probate in order to seek the consent of the court to make an assignment: *Chetty v. Chetty,* [1916] 1 A.C. 603, 85 L.J.P.C. 179; *Re Sherstofbetoff* (1945), 26 C.B.R. 210 (Sask. D.C.). However, an administrator must first obtain letters of administration before applying for leave to file an assignment. A suggested form for an order granting leave to file an assignment will be found in Precedent 38 "Order Granting Leave to a Personal Representative to File an Assignment" under Precedents in vol. 5.

In the province of Québec, the curator of a vacant estate of a deceased is an administrator and comes within the definition of "person" in s. 2(1). A curator can therefore apply for leave to file an assignment: *Re Mooney* (1938), 20 C.B.R. 340, 66 Que. K.B. 166 (C.A.).

In deciding whether to grant leave to a personal representative to file an assignment, the court must exercise its discretion judicially and after a full examination of all relevant facts; however, it is unnecessary for the judge hearing the application to set out all the facts that have been considered in deciding to grant leave: *Re Sherstofbetoff, supra.*

(j) — *Liquidators*

If a company is being wound up voluntarily, the liquidator does not have the authority to execute and file an assignment in bankruptcy for the company: *Re Jarvis Const. Co.* (1971), 16 C.B.R. (N.S.) 193 (B.C. S.C.); but see *contra*, *Re Western Hemlock Products Ltd.*, 2 C.B.R. (N.S.) 207, 35 W.W.R. 184, 27 D.L.R. (2d) 457 (B.C. S.C.).

The court administering a winding-up has power to direct a provisional liquidator of a company to make an assignment in bankruptcy for the company and to execute all necessary documents for that purpose: *Re Brandon Packers Ltd.* (1962), 3 C.B.R. (N.S.) 326, 39 W.W.R. 1, 33 D.L.R. (2d) 503 (Man. C.A.).

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(k) — *Receivers*

There is a lack of unanimity in the decided cases whether the court can authorize a court-appointed receiver to file an assignment for a company. Some cases have held that the court cannot authorize such action: *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1988), 68 C.B.R. (N.S.) 24 (B.C. S.C.); other cases have held that the court can authorize such action: *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232, 1991 CarswellOnt 170, 78 D.L.R. (4th) 585 (Ont. Gen. Div.); *Royal Bank v. Sun Squeeze Juices Inc.* (1994), 24 C.B.R. (3d) 302, 1994 CarswellOnt 266 (Ont. Gen. Div.), affirmed (1994), 28 C.B.R. (3d) 201, 1994 CarswellOnt 310 (Ont. C.A.), and some cases have held that the court can authorize such action but that the receiver should first complete his duties under the relevant provincial companies legislation before applying for leave: *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.).

In *Prairie Palace Motel Ltd. v. Carlson*, *supra*, Wright J. of the Saskatchewan Court of Queen's Bench was of the opinion that if a courtappointed receiver and manager filed an assignment in bankruptcy, his authority to act as receiver and manager ceases. The Ontario Court of Appeal did not agree with this decision and held that the authority of the receiver and manager could continue notwithstanding the making of an assignment. The Court of Appeal said that the effect of bankruptcy on the authority of a receiver and manager depends on the circumstances of each case: *C.I.B.C. v. King Truck Engineering Can. Ltd.* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.).

The Newfoundland and Labrador Supreme Court annulled the bankruptcy of a deceased debtor with the result that the estate vested, once again, in the Canadian executrix and the U.S. executor: *Re Briggs*, 2020 CarswellNfld 341, 85 C.B.R. (6th) 126, 2020 NLSC 159 (N.L. S.C.). For a discussion of this judgment, see H§71 "Setting Aside and Annulling Bankruptcy Orders and Assignments".

(l) — *Monitor Under the Companies' Creditors Arrangement Act*

The court can authorize a monitor appointed under the *Companies' Creditors Arrangement Act* to file an assignment for the debtor company: *Re Canada 3000 Inc.* (2002), 33 C.B.R. (4th) 184, 2002 CarswellOnt 1589 (Ont. S.C.J.).

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TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp. | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne * Inc., proposed monitor.

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John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant

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companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Table of Authorities

Cases considered:

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Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — *referred to*

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — *referred to*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 [H.C.] — *referred to*

Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — *referred to*

Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — *referred to*

Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *referred to*

Inducon Development Corp. Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

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McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 (H.C.) — *referred to*

Meridian Developments Inc. v. Toronto Dominion Bank, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 1 (Q.B.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) , affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — *referred to*

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Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) — *referred to*
Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — *referred to*
Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*
Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — *referred to*
Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, *(*sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.) — *referred to*
United Maritime Fishermen Co-operative, Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.) , varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.) , reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, *(*sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.)* 51 D.L.R. (4th) 618 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — preamble

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

Judicature Act, The, R.S.O. 1937, c. 100.

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Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

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(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction

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with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the

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CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and

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"Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada*

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Ltd. , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word

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> creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

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The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

> **The Power to Stay**
>
> The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:
>
> > 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.
>
> Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.
>
> Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue

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of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be

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> satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
>
> . . . . .
>
> In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
> > The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
> >
> > > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

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16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

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18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that

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there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

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TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: 2671914 Manitoba Ltd. v. Suncorp Pacific Ltd. | 2001 MBQB 70, 2001 CarswellMan 108, 103 A.C.W.S. (3d) 1138, [2001] M.J. No. 124, 13 Imm. L.R. (3d) 134, 154 Man. R. (2d) 261, [2001] 7 W.W.R. 69 | (Man. Q.B., Mar 16, 2001)

1998 CarswellOnt 4423
Ontario Court of Appeal

Kucor Construction & Developments & Associates v. Canada Life Assurance Co.

1998 CarswellOnt 4423, [1998] O.J. No. 4733, 114 O.A.C. 201, 167 D.L.R. (4th) 272, 21 R.P.R. (3d) 187, 41 O.R. (3d) 577, 43 B.L.R. (2d) 136, 70 O.T.C. 80, 83 A.C.W.S. (3d) 852

Kucor Construction & Developments & Associates, Applicant (Appellant) and The Canada Life Assurance Company and Hongkong Bank Trust Company, Respondents (Respondents) and Gowling Strathy & Henderson and Fasken Campbell Godfrey, Intervenors/Respondents (Respondents)

Catzman, Austin, Borins JJ.A.

Heard: September 17-18, 1998
Judgment: November 13, 1998
Docket: CA C26783

Proceedings: affirming (1997), 32 O.R. (3d) 548 (Ont. Gen. Div.)

Counsel: *Robert D. Malen*, for the appellant.
Malcolm M. Mercer, for the respondent, The Canada Life Assurance Company.
I.V.B. Nordheimer, for the respondent, Hongkong Bank Trust Company.
Peter K. Doody, for the respondent, Gowling Strathy & Henderson.
Warren H.O. Mueller, Q.C., for the respondent, Fasken Campbell Godfrey.

Subject: Corporate and Commercial; Property; Torts; Insolvency
Headnote
Mortgages --- Redemption — Who may redeem — Miscellaneous persons
Limited partnership, consisting of 23 individual limited partners and one general partner who was corporation, acquired real property — Limited partnership, as mortgagor, gave mortgage on property, with each limited partner and general partner acting as guarantor — In amendments of mortgage agreement, corporation executed agreement on behalf of limited partnership —

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Limited partnership's application for order that it could prepay mortgage was dismissed — Limited partnership appealed — Limited partnership was not legal entity — It is through general partner that limited partnership acquires and conveys title to real property — Although in original mortgage limited partnership was described as mortgagor, it was executed by corporation in its capacity as sole general partner of limited partnership — Similarly, amending agreements were executed by corporation — Limited partners executed guarantees of mortgage debt, but did not join in mortgage as mortgagor — It was clear on facts and law that mortgage was given by corporation, and corporation was precluded by s. 18(2) of Mortgages Act from prepaying mortgage under s. 18(1) — Appeal dismissed — Mortgages Act, R.S.O. 1990, c. M.40, ss. 18(1), 18(2).

Partnership --- Relationship between partners — Partnership property — Lands

Limited partnership, consisting of 23 individual limited partners and one general partner who was corporation, acquired real property — Corporation, as grantor, conveyed property to limited partnership, as grantee, in trust arrangement with limited partners as beneficiary owners — Limited partnership, as mortgagor, gave mortgage on property with each limited partner and general partner acting as guarantor — Limited partnership's application for order that it could prepay mortgage was dismissed — Limited partnership appealed — Motions judge found that deed by which corporation conveyed property to limited partnership was nullity because limited partnership was incapable of holding title to land, with result that title remained in corporation — To hold that deed was nullity means that it lacked legal validity and conveyance did not occur — Corporation acquired property in trust for limited partnership and intent and purpose were to convey land to limited partnership — Difficulty was that grantee should not have been limited partnership, it should have been either general partner, or all of partners — It was unnecessary to treat deed as nullity, rather it should be regarded as ill-conceived attempt to convey title to limited partnership — Deed to limited partnership should be, and ordinarily would be, treated as transferring legal title to general partner — Application was properly commenced in name of limited partnership — Mortgages Act, R.S.O. 1990, c. M.40, ss. 18(1), 18(2).

Partnership --- Rights and liabilities of partners — Scope of partners' authority — Contracts under seal

Limited partnership, consisting of 23 individual limited partners and one general partner who was corporation, acquired real property — Limited partnership, as mortgagor, gave mortgage on property, with each limited partner and general partner acting as guarantor — In amendments of mortgage agreement, corporation executed agreement on behalf of limited partnership — Limited partnership's application for order that it could prepay mortgage was dismissed — Limited partnership appealed — Limited partners chose to conduct their business through general partner, which was corporation — General partner was authorized by limited partners to arrange financing and, under Limited Partnerships Act, was empowered and required to do so — It was intended that mortgage would be obligation enforceable against general partner — Fact that beneficial ownership of property was made up of limited partners who were individual, non-corporate investors did not detract from fact that mortgage was given by corporate general partner — Mortgage was and remained mortgage given by corporation, with result that prepayment was

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precluded by s. 18(2) of Mortgages Act — Appeal dismissed — Mortgages Act, R.S.O. 1990, c. M.40, ss. 18(1), 18(2).

Bankruptcy and insolvency

Annotation

The central issue in *Kucor Construction v. Canada Life Assurance Co.* was whether or not a limited partnership which had purported to grant a mortgage with a maturity in excess of five years could invoke s. 18(1) of the *Mortgages Act*, R.S.O. 1990, c. M.40. Section 18(1) of the *Mortgages Act*, mirrored by s. 10 of the *Interest Act*, R.S.C. 1985, c. I-15, provides a right of early redemption on closed mortgages with maturities greater than five years, so long as the mortgage is *not* given by a corporation (see s. 18(2) of the *Mortgages Act*). The mortgagor argued that the mortgage, as amended, provided for a 15-year term, and, being a limited partnership, the mortgager was not a corporation; *ergo*, the mortgagor could invoke the early redemption right.

Paraphrased significantly, Mr. Justice Ground's reasons at trial ((1997), 32 O.R. (3d) 548, 25 O.T.C. 321 (Ont. Gen. Div.)) were as follows:

1. The mortgaged property had been transferred by Kucor Construction and Developments Ltd. ("Kucor Ltd."), as transferor, to Kucor Construction and Developments Associates ("Kucor Limited Partnership"), a limited partnership that happened to also have Kucor Ltd. as general partner, as transferee. Since a limited partnership is not itself a legal entity (at least for the purposes of holding and mortgaging property), the deed from Kukor Ltd. to Kucor Limited Partnership was a *legal nullity* and title to the real property remained vested with Kucor Ltd.

2. The mortgage granted by Kucor Limited Partnership to the bank must therefore be interpreted as being a mortgage from Kucor Ltd., as general partner, in trust for the limited partners of Kucor Limited Partnership.

3. Since Kucor Ltd. was the grantor of the mortgage, and is itself a corporation, it follows therefore that the mortgagor is *not* entitled to invoke the right of early redemption as a result of the application of Section 18(2) of the *Mortgages Act*, notwithstanding that it holds in trust for limited partners, some or all of whom were not corporations and may, therefore, have been entitled to invoke the early redemption right afforded by s. 18(1) of the *Mortgages Act*.

Paraphrasing the Court of Appeal just as heavily, Mr. Justice Borins, on behalf of a bench comprised of himself, Catzman, and Austin, JJ.A, openly criticizes the "unnecessar[il]y complicated" legal reasoning adopted by Mr. Justice Ground at trial, yet arrives at the same conclusion as does the trial judge with respect to the dispositive issue: the mortgage ought to be interpreted as having been given by Kucor Ltd., as general partner; and, since Kucor Ltd. was a corporation, s. 18(2) of the *Mortgages Act* precludes the mortgager from invoking early redemption.

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The Court of Appeal decision differed from the trial decision in two principle respects. Firstly, at trial, it was held that the recent Court of Appeal decision in *Litowitz v. Standard Life Assurance Co. (Trustee of)* (1996), 5 R.P.R. (3d) 161, 30 O.R. (3d) 579, *(*sub nom. *Litowitz v. Royal Trust Corp. of Canada)* 94 O.A.C. 274, *(*sub nom. *Vale v. Sun Life Assurance Co. of Canada)* 143 D.L.R. (4th) 77 (C.A.) (readers are commended to the excellent case annotation thereon by Kenneth Kraft at 5 R.P.R. (3d) 164) was "not of assistance" since none of the three appeals heard together in *Litowitz* actually dealt with a limited partnership scenario. While admittedly not directly on point (the *Litowitz* trilogy dealing with corporate nominee mortgagors and individual principals), Mr. Justice Borins concluded that the holding of the Court of Appeal in *Litowitz* (i.e. that the identity of the "giver" of the mortgage alone was the proper test of the s. 18(2) exclusion, irrespective of the identities of those that held the mortgaged property behind the "giver" of the mortgage) applied equally well to the facts in *Kucor* and, thus, *Kucor* could have been decided on the basis of *Litowitz* alone (although the trial judge expressly avoids *Litowitz* as authority, it should be noted that his analysis ultimately proved to be similar).

The second major distinction between the trial and appellate versions of *Kucor* concerned the trial judge's conclusion that, as a result of a limited partnership not being a separate legal entity and therefore not being entitled to hold or mortgage property, it necessarily followed therefore that the deed from Kucor Ltd. to Kucor Limited Partnership must have been a *legal nullity*, leaving the land vested with Kucor Ltd. Mr. Justice Borins directly overruled this conclusion, holding that the obvious intent of the parties was to convey the land to Kucor Ltd., as a general partner for the Kucor Limited Partnership, and the deed should, therefore, be read accordingly.

Although the Court of Appeal seemed openly critical of the trial court's conclusion that the deed to the limited partnership was in and of itself a *legal nullity*, the two courts actually went about the problem in a very similar manner. Both courts accepted the general proposition that a limited partnership was not a legal entity and therefore could not hold or mortgage property (there is virtually no academic or jurisprudential authority that suggests anything to the contrary: see, in particular, the excellent reasons on point of Mr. Justice Farley in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and in *Kingsberry Properties Ltd., Partnership, Re* (1997), 3 L.B.R. (4th) 124, together with the numerous authorities set forth by Mr. Justice Borins at pp. 196 *ff.*; but see also the U.S. decision in *Ruzicks v. Roger* (1953), 305 N.Y. 191, 111 NE 2d 878, 39 A.L.R. 2d 288 and the excellent critique thereon by Brad A. Milne in "Extra-provincial Liability of the Limited Partner" in [1985] Alta. L.R. 345 at pp. 349 *ff.* — note also, that, according to Mr. Milne's analysis, the rule may be reversed in Quebec ([1985] Alta. L.R. at pp. 348-9)). Nonetheless, neither the trial judge nor the Court of Appeal seemed prepared to allow the mortgagee to be prejudiced by the technicality. Instead, both the trial and appellate courts deemed that the mortgage given to the bank notionally by Kucor Limited Partnership to have been given by Kucor Ltd., as general partner for Kucor Limited Partnership. In effect, both the courts used the equitable doctrine of rectification to correct the legally impossible

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mortgage. Where the courts differed, however, was that the Court of Appeal also rectified the original deed to the limited partnership so that the deed was deemed to have also been given to Kucor Ltd. in its capacity as general partner for Kucor Limited Partnership. In contrast, at trial, Mr. Justice Ground had refused to provide the second (going chronologically backward) rectification, leaving the deed as simply null and void.

With respect, the position adopted by the Court of Appeal is probably the more appropriate and certainly the more practical approach. To the extent that the court was prepared to recognize that the mortgage should have come from the general partner, and was prepared to rectify the mortgage to ensure that result, it was also appropriate for the court to recognize that the deed should also have gone to the general partner and to likewise rectify the deed to ensure that result. Alternatively put, the trial court was internally inconsistent when it concluded that the mortgage should be rectified to reflect Kucor Ltd. as mortgagor in its capacity as general partner for Kucor Limited Partnership, but that the deed remained null and void. If the deed to Kucor Ltd. was indeed a nullity, then the mortgage coming form Kucor Ltd. would have charged nothing since Kucor Limited Partnership would, in theory, have had no property to mortgage. On the facts in *Kucor*, this result may have somewhat obscured because Kucor Ltd. was also the original vendor of the mortgaged property before attempting to convey to Kucor Limited Partnership. Accordingly, nullifying the deed would simply have left the mortgaged property back into the hands of Kucor Ltd., which in turn the court had found had given the mortgage to the bank. Consider, however, the trial judge's nullity argument in the context (and not, by any stretch, a remote context) of a third party vendor. Applying the trial reasons would have seen the bank holding a rectified mortgage from Kucor Ltd., as general partner for Kucor Limited Partnership, but with the mortgaged property vested back with the original, unrelated third party vendor!

That being said, there is nothing inherently wrong with Mr. Justice Ground's conclusion that the deed was a nullity (it only becomes inconsistent when viewed in the context of deeming the mortgage to be rectified). That is, these annotators would not have been entirely surprised if Mr. Justice Ground had concluded that, the deed being a nullity, so too must have been the mortgage, leaving the bank with no security whatsoever and the s. 18(1)/18(2) issues accordingly moot. Indeed, when we first heard rumours about the trial decision (with thanks to Jeremy Johnson of Fraser, Milner), but before we read the decision, we actually thought, to our horror, that the decision resulted in a double nullity! In the end, the facts in *Kucor* seemed to warrant rectification, and that is what the courts seem to have done.

Whenever reasonably practicable to do otherwise, practitioners should not rely on *Kucor* as a general remedial doctrine. To the extent that *Kucor* is in fact an example of the application of the doctrine of rectification, practitioners should recall that, rectification, coming squarely from the equity side of the courts, is not a remedy that arises as of right (see, generally, Baker and Langan, Snell's Equity, 29th edition, (1990) Sweet & Maxwell, at pp. 626 *ff.*, and, in particular, M.R. Evershed's comment in *Whiteside v. Whiteside*, [1950] Ch. 65 (Eng. C.A.) to the effect

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that rectification is only a discretionary remedy and one "which must be cautiously watched and jealously guarded").

In light of *Kucor*, it may also be prudent to revisit the traditional convention of how general partners actually execute documents. Most of these annotators' corporate precedents seem to be engrossed "XYZ Limited Partnership by its general partner, ABC Inc.". Curiously enough, most of these annotators' real estate precedents provide "ABC Inc., as general partner for the partners of XYZ Limited Partnership". Semantics? Perhaps. In *Kucor*, the reasons at both levels seemed to suggest that the mortgage was simply engrossed in the name of "Kucor Limited Partnership". This is not entirely correct. According to the Court of Appeal reasons (at p. 193), the mortgage was actually engrossed, "Kucor Limited Partnership, by its general partner, Kucor Ltd." (*i.e.* the conventional corporate approach). Both the trial judge and the Court of Appeal noted the mortgage to be technically incorrect. Based on the theory behind Kucor, the limited partnership, not being a legal entity, could not, in its own name, receive or convey property, whether by its general partner or an attorney or any other representative, and rectification was required to vest the property with the general partner, who in turn holds in trust for all of the partners in accordance with the terms of the partnership agreement. Only a general partner (or all partners) can receive or convey property so, by right, the mortgage in *Kucor* should have been engrossed "Kucor Ltd., as general partner for the partners of Kucor Limited Partnership".

Kucor stands as the latest appellate authority for the proposition that a limited partnership is not a juristic entity capable of holding or mortgaging property, but that rectification may be available under certain circumstances where conveyancing appears to be attempted by or to a limited partnership. Of course, the law is full of a number of deeming statutes which allow a limited partnership for certain purposes to take on the guise of a separate legal entity (for an excellent analysis of the law, see, generally, Alison Manzer, *A Practical Guide to Canadian Partnership Law* (Canada Law Book) at para. 9.310 *ff.*). So, for instance, a limited partnership can: sue and be sued; file its own income tax returns; be petitioned into bankruptcy; have financing statements registered against it, etc., all in its own name. Nonetheless, these incidences of legal existence remain statutorily granted conveniences, and it remains a non-sequiter to then conclude that a limited partnership is, therefore, a separate legal entity for all purposes. In theory, a partnership is only a relationship between legal entities (not unlike a marriage is a relationship between individuals) and a partnership does not, at common law, take on a legal existence of its own. Furthermore, a limited partnership is simply one type of partnership, and nothing in its constating legislation makes it any more of a legal entity. Similar confusion, and similar exceptions, surround trusts, which, like partnerships, are relationships between legal entities, but not, in and of themselves, legal entities (that said, how often have we seen conveyances to and from the XYZ Family Trust?). Finally, while *Kucor* examines the legal existence of a limited partnership in the context of real property, there is nothing limiting the principles set forth in *Kucor* to real estate, and practitioners dealing with tangible and intangible personal property should also take interest in *Kucor*.

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Jeffrey W. Lem

Andrea White

Heenan Blaikie

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s. 3(2) — considered

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s. 5 — considered

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APPEAL by applicant limited partnership from judgment reported at (1997), 32 O.R. (3d) 548, 25 O.T.C. 321 (Ont. Gen. Div.) which held that although mortgage was purportedly given by limited partnership, as limited partnership was not legal entity capable of holding title to real property or transferring title under mortgage on property, it was incapable of giving mortgage and as general partner was corporation within meaning of s. 18(2) of *Mortgages Act*, it was precluded from prepaying mortgage under s. 18(1) of Act.

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

1 The issue raised by this appeal is whether, or under what circumstances, a limited partnership is entitled to rely on the statutory right of prepayment provided by s.18(1) of the *Mortgages Act*, R.S.O. 1990, c.M.40, to discharge a long-term closed commercial mortgage purported to have been given by the limited partnership.

2 In an application brought against the mortgagee by the limited partnership in its firm name, Kucor Construction & Developments & Associates ("Kucor"), a declaration was sought that the limited partnership had the right to "redeem" the mortgage under s.18(1). The application was dismissed by Ground J., whose reasons for judgment are reported at (1997), 32 O.R. (3d) 548 (Ont. Gen. Div.). Additional relief was claimed which, in the view I hold of this appeal, it is unnecessary to consider.

3 In summary, it was held by Ground J. that although the mortgage was purportedly given by Kucor, as a limited partnership is not a legal entity capable of holding title to real property, or transferring title under a mortgage on the property, it was incapable of giving the mortgage. He interpreted the mortgage document as having been entered into by the general partner, Kucor Construction & Developments Ltd. ("Kucor Ltd."), on behalf of the limited partners. As Kucor Ltd. is a corporation within the meaning of s.18(2) of the Act, he held that it is precluded from prepaying the mortgage under s.18(1). I agree with the conclusion of Ground J. that, in the circumstances of this appeal, s.18(2) precludes the operation of s.18(1) of the Act. However, as I will explain, I do not agree with certain findings and conclusions which he reached in dismissing the application.

The Legislation

4 Section 18(1) of the *Mortgages Act* gives any person, and this includes a corporation, liable to pay or entitled to redeem a mortgage which is not payable until a time more than five years after the date of the mortgage, the right to prepay the outstanding balance on the mortgage after the expiry of five years. This section states:

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> 18.(1) Where any principal money or interest secured by a mortgage of freehold or leasehold property is not, under the terms of the mortgage, payable until a time more than five years after the date of the mortgage, then, if at any time after the expiration of such five years any person liable to pay or entitled to redeem tenders or pays to the person entitled to receive the money the amount due for principal money and interest to the time of such tender or payment, together with three months further interest in lieu of notice, no further interest is chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage.

5 Section 18(2) of the Act exempts corporate mortgagors from the protection afforded by subsection (1). It states:

> 18.(2) This section does not apply to any mortgage given by a joint stock company or other corporation nor to any debenture issued by any such company or corporation for the payment of which security has been given on freehold or leasehold property.

6 As I will be making reference to certain sections of the *Partnerships Act*, R.S.O. 1990, c.P.5 and the *Limited Partnerships Act*, R.S.O. 1990, c.L.16, it is convenient to reproduce these sections. The following provisions are in the *Partnerships Act*:

> 2. Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.
>
> 5. Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively a firm, and the name under which their business is carried on is called the firm name.
>
> 6. Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.
>
> 10. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner, and after the partner's death the partner's estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

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21 (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act "partnership property", and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

7 The following provisions are in the *Limited Partnerships Act*:

2. (1) A limited partnership may, subject to this Act, be formed to carry on any business that a partnership without limited partners may carry on.

(2) A limited partnership shall consist of one or more persons who are general partners and one or more persons who are limited partners.

3. (1) A limited partnership is formed when a declaration is filed with the Registrar in accordance with this Act.

(2) A declaration shall be signed by all of the general partners desiring to form a limited partnership and shall state the prescribed information.

4. (1) The general partners of every limited partnership other than an extra-provincial limited partnership shall maintain a current record of the limited partners stating, for each limited partner, the prescribed information.

5. (1) A person may be a general partner and a limited partner at the same time in the same limited partnership.

(2) A person who is at the same time a general partner and a limited partner in the same limited partnership has the rights and powers and is subject to the restrictions and liabilities of a general partner except that in respect of the person's contribution as a limited partner the person has the same rights against the other partners as a limited partner.

7. (1) A limited partner may contribute money and other property to the limited partnership, but not services.

(2) A limited partner's interest in the limited partnership is personal property.

8. A general partner in a limited partnership has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners except that, without the written consent to or ratification of the specific act by all the limited partners, a general partner has no authority to,

(a) do any act in contravention of the partnership agreement;

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(b) do any act which makes it impossible to carry on the ordinary business of the limited partnership;

(c) consent to a judgment against the limited partnership;

(d) possess limited partnership property, or assign any rights in specific partnership property, for other than a partnership purpose.

9. Subject to this Act, a limited partner is not liable for the obligations of the limited partnership except in respect of the value of money and other property the limited partner contributes or agrees to contribute to the limited partnership, as stated in the record of limited partners.

13. (1) A limited partner is not liable as a general partner unless, in addition to exercising rights and powers as a limited partner, the limited partner takes part in the control of the business.

(2) For the purposes of subsection (1), a limited partner shall not be presumed to be taking part in the control of the business by reason only that the limited partner exercises rights and powers in addition to the rights and powers conferred upon the limited partner by this Act.

Facts

8 The limited partnership, Kucor, was created by a limited partnership agreement entered into on March 12, 1976, by Kucor Ltd., as general partner, and a number of other corporations and individuals as limited partners.

9 As set out in the agreement, the intent of the parties in forming the limited partnership was to create an investment vehicle for acquiring certain real property in Cornwall, Ontario on which a large apartment building was to be constructed. It also stated that the purposes of the agreement were, *inter alia*, to make provisions for "the holding of title to the Lands and Building by the Limited Partnership" and the construction of the building. Ultimately, two apartment buildings were constructed.

10 The terms of the agreement provided, *inter alia*, that Kucor Ltd., as general partner, was to be in charge of the management, conduct and operation of the business of the limited partnership, including the execution of all agreements related to the acquisition of the land and the construction of the building on it. The agreement prohibited the limited partners from taking part in the management of the limited partnership and stipulated that they did not have the power to sign for or bind the partnership. In particular, it precluded a limited partner from mortgaging his interest in the limited partnership without the consent of the general partner. In addition, the agreement obligated each limited partner to execute a guarantee of any loan required to purchase the land or finance the construction of the apartment building, the guarantee to be limited to the

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amount of capital contributed by the limited partner to the partnership relative to the total capital contributed by all limited partners.

11 On March 30, 1976, Kucor Ltd., as grantor, conveyed the Cornwall property to the limited partnership, as grantee. The land transfer tax affidavit, sworn by Garth Drabinsky, as president of Kucor Ltd., stated:

> Land taken in trust for limited partnership to be formed; Trustee now conveying to beneficiary. The grantee has been the sole beneficial owner during the entire period the lands have been or will be registered in the name of the grantor.

12 In an indenture made on September 8, 1977, the limited partnership, as mortgagor, gave a mortgage on the property in the amount of $6,160,050.00, with interest equal to 12% per annum, to The Maritime Life Assurance Company ("Maritime"). The mortgage was for a five-year term, maturing on May 1, 1982. The mortgage was signed by Norman Goldman on behalf of the mortgagor, which was described as "KUCOR CONSTRUCTION & DEVELOPMENTS & ASSOCIATES, by its general partner KUCOR CONSTRUCTION & DEVELOPMENTS LTD.". In an affidavit required by the *Planning Act*, Mr. Goldman described himself as secretary of the mortgagor, "Kucor Construction & Developments Ltd. [*sic*] & Associates". Each limited partner executed the mortgage as a guarantor in an amount approximately equivalent to his, or its, capital contribution. Kucor Ltd. also executed the mortgage as a guarantor. At that time there were 17 limited partners, at least two of whom were corporations.

13 Subsequently, the maturity date of the mortgage was extended to January 1, 1983. On March 9, 1983, Maritime assigned the mortgage to Morguard Trust Company ("Morguard"). As a result, the term of the mortgage was extended to March 1, 1988 and the rate of annual interest was increased to 13.875%. The limited partners remained as guarantors of the mortgage debt in proportion to the amounts of their respective capital contributions to the limited partnership.

14 On August 1, 1987 the mortgage was amended, and extended, for a third and final time. The amendment followed substantial negotiations between Kucor Ltd. and Morguard which resulted in a decrease of the annual interest on the mortgage loan to 11.96% and an extension of the term for 15 years commencing July 1, 1987 and maturing on July 1, 2002. A negotiated term of the amending agreement was that the mortgage was not open for repayment before its maturity. This term, which is preceded by the sub-heading "Prepayment Privilege" states: "This Mortgage shall have no prepayment privileges for the full term of the loan". Like the previous agreements, this agreement was executed by "KUCOR CONSTRUCTION & DEVELOPMENTS & ASSOCIATES, a limited partnership, by its sole general partner KUCOR CONSTRUCTION & DEVELOPMENTS LTD.", which affixed its corporate seal to its signature. As before, the limited partners executed the amending agreement as guarantors in accordance with their individual capital contributions to the

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limited partnership. At that time there were 23 limited partners, each of whom was an individual. Kucor Ltd. signed as an additional covenantor.

15 On September 3, 1987, the limited partners passed a resolution authorizing Kucor Ltd., as general partner, to execute the amending agreement with Morguard on behalf of the limited partnership. The relevant clauses of the resolution provided as follows:

> 3. The execution by Kucor Construction & Developments Ltd., as General Partner on behalf of the Partnership of a Mortgage Amending and Extending Agreement regarding Partnership Property, known municipally as 1430 & 1450 First Street East, Cornwall, Ontario with Morguard Trust Company for the amount of $6,089,241.50 bearing interest at the rate of eleven and ninety-six one hundredths (11.96%) per centum per annum for a term of five years [sic] and the delivery of the Agreement by the General Partner as well as the execution and delivery of such other documentation as may be required under the provisions of the Commitment Letter on behalf of the Partnership is hereby authorized and approved;
>
> 4. The General Partner is hereby authorized on behalf of and in the name of the Partnership to do all other acts and things and to sign all such documents, which may, in its opinion, be necessary or desirable to give effect to the Commitment Letter.

On September 24, 1987, Kucor Ltd.'s board of directors approved a similar resolution which, correctly, referred to a 15-year extension of the mortgage, rather than a 5-year extension as stated in clause 3.

16 On October 5, 1987, Morguard changed its name to Metropolitan Trust Company, which in turn changed its name on October 27, 1995 to Hongkong Bank Trust Company ("Hongkong"). The respondent, The Canada Life Assurance Company ("Canada Life"), is the actual investor in the mortgage, while Hongkong is the mortgage administrator.

17 The application before Ground J. was precipitated by an exchange of correspondence in the spring of 1996 between the solicitor for the limited partnership and the solicitors for Hongkong and Canada Life. The solicitor for the limited partnership wrote to Hongkong stating that the partnership intended to prepay the mortgage under s.18(1) of the *Mortgages Act* as it wished to take advantage of favourable interest rates, and requested that appropriate arrangements be made. Counsel for Hongkong denied the request on the ground that as the mortgage had been given on behalf of the limited partnership by its general partner, Kucor Ltd., a corporation, the right to prepay the mortgage under s.18(1) was precluded by s.18(2). Counsel for the limited partnership responded and took the position that as the mortgagor was the limited partnership, and not Kucor Ltd., s.18(1) was applicable. Before both Ground J., and this court, the limited partnership and the mortgagee maintained their respective positions.

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18 The law firms Gowling Strathy & Henderson and Fasken Campbell Godfrey, solicitors for Morguard and the limited partnership respectively at the time the mortgage was amended and extended in 1987, were granted intervenor status by an order granted by Master Peterson on November 12, 1996. The law firms were given leave to intervene as "added parties Respondent to the Application with all rights of such a Respondent including rights of appeal", and the title of the application was amended accordingly. Paragraph 3 of the order reads as follows:

> AND THIS COURT ORDERS that the entitlement of or obligation of any of the parties to the Application other than the Intervenors to be paid costs by the Intervenors or to pay costs to the Intervenors, as the case may be, shall be in the discretion of the Judge hearing the Application.

Reasons of the Motions Judge

19 At p.553 of his reasons for judgment, Ground J. characterized the issues before him as follows:

> The principal issue to be determined on this application is whether the limited partnership is a "person liable to pay or entitled to redeem" the mortgage and whether the mortgage, which is the subject matter of this application, was "given by a joint stock company or other corporation". Subsidiary issues to be determined are whether parties may contract out of the provisions of the *Mortgages Act* and the significance, if any, of the corporate seal of Kucor being affixed to the third amendment.

20 With respect, Ground J.'s broad characterization of the issues made the resolution of the application unnecessarily complicated. As well, it is unfortunate that in his view the decision of this court in *Litowitz v. Standard Life Assurance Co. (Trustee of)* (1996), 30 O.R. (3d) 579 (Ont. C.A.) was of no assistance in deciding the application. That appeal involved the interpretation, and application, of s.18 of the *Mortgages Act*, and its counterpart, s.10 of the *Interest Act*, R.S.C. 1985, c.I-15, to three mortgages. As I will elaborate, Robins J.A., on behalf of the court, held at pp.585 and 591, that the only issues to determine in deciding whether s.18(1) applies to a particular mortgage are by whom the mortgage was "given" within the meaning of s.18(2), and whether that entity is "a joint stock company or other corporation".

21 Instead of focusing on the issues identified by Robins J.A., Ground J. first considered who was "liable to pay or entitled to redeem" the mortgage for the purpose of s.18(1). He concluded that the general partner, Kucor Ltd., and the limited partners "collectively" were persons liable to pay the mortgage on the basis of their guarantees and, therefore, were entitled to prepay the mortgage under s.18(1). He also concluded that there is no authority "for the proposition that a limited partnership is a joint stock company or would be included within the term joint stock company". (p.554)

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22 Ground J. then concluded that a limited partnership is not a legal entity capable of holding title to real property and mortgaging it. His analysis supporting this conclusion and the dismissal of the application is found at pp.554-5:

> To revert to basic legal principles, the law regards as persons with distinct and separate legal rights only individuals and corporations. A partnership may be recognized in law as an association of persons with certain distinctive characteristics and one which, in accordance with rule 8.01 of the Rules of Civil Procedure, is entitled to commence proceedings or have proceedings commenced against it in the name of the partnership. The concept of partnership property is also recognized in law but this does not mean that it is property owned by the partnership but rather property in which all of the partners have undivided interests. In a limited partnership, the legal title is held by the general partner for the benefit of all of the partners. None of these factors, in my view, constitutes a partnership a legal entity or person having a separate existence recognized in law and accordingly being capable of holding title to property and mortgaging or creating security on such property. I find, therefore, that the limited partnership is incapable of holding title to the mortgaged property and accordingly the deed from Kucor to the limited partnership must be regarded as a nullity and the title to the real property remains with Kucor which holds the property for the benefit of all of the partners in the limited partnership. With respect to the mortgage documents, they must, in my view, be interpreted as having been entered into by Kucor in its capacity as general partner of the limited partnership on behalf of all of the partners. This is consistent with the terms of the limited partnership agreement and with the resolution passed by the partners authorizing the mortgage.

23 In addition, the motions judge considered the ability of the parties to contract out of the provisions of s. 18(1) of the *Mortgages Act*, although he recognized that this issue was moot as a result of his finding that s.18(1) was not available to the mortgagor. Nevertheless, on the basis of the decision of this court in *Litowitz*, he concluded that the provision of the amending agreement precluding prepayment would be unenforceable.

24 In respect to a procedural point, Ground J. expressed doubt in respect to whether the application had been properly brought in the name of the limited partnership as applicant. At p.554 he stated:

> The notice of application may be technically flawed in that the applicant is shown as the limited partnership but clearly leave would be granted to amend the application to show the general partner as a co-applicant on behalf of itself and the individual limited partners.

Discussion

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25 In my view, the starting point in determining whether s.18(1) of the *Mortgages Act* is available to permit prepayment of the mortgage, as Robins J.A. held in the *Litowitz* case, is s.18(2) of the Act. If, pursuant to s.18(2), the mortgage was "given by a joint stock company or other corporation", prepayment is precluded. As I have indicated, the position of counsel for the limited partnership is that the mortgage was given by the partnership and that as a limited partnership is neither a joint stock company, nor a corporation, it was entitled to prepay the mortgage. Central to this position is the issue whether a limited partnership is a discrete legal entity capable of holding title to real property, and conveying title upon the mortgaging of the property. Counsel for the respondents and the intervenors are united in their submission that a limited partnership is not a legal entity. In my opinion, they are correct.

26 Well respected authorities are uniform in the view that a limited partnership is not a legal entity. In 35 *Halsbury's Laws of England*, (4th ed., 1994, Butterworths) at 136 it is stated: "A limited partnership, like an ordinary partnership, is not a legal entity". In R.C.P. Banks, *Lindley & Banks on Partnership*, (17th ed., 1995, Sweet & Maxwell) it is said at 864: "A limited partnership is not a legal entity like a limited company but a form of partnership with a number of special characteristics introduced by the Limited Partnerships Act 1907". See, also, *Sadler v. Whiteman*, [1910] 1 K.B. 868 (Eng. K.B.), per Farwell L.J. at 889; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 39. The concept that neither a general, nor a limited partnership, is a legal entity has been long accepted by Canadian and English law and, no doubt, is why a limited partnership is required by law to have a general partner through which it normally acts: *Limited Partnerships Act*, ss.2(2), 8 and 13. As for a general partnership, s.6 of the *Partnerships Act* describes through whom it may act.

27 As Farley J. observed in the *Lehndorff* case at 38, a limited partnership is a creation of statute. As such, had the legislature intended to create a new legal entity it is reasonable to conclude that it would have done so in the *Limited Partnerships Act*, as it did in s.15 of the *Business Corporations Act*, R.S.O. 1990, c.B.16, which provides that a "corporation has the capacity and the rights, powers and privileges of a natural person". See, also, the *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, s.15(1). This conclusion finds support in an examination of the history of the limited partnership: Alison R. Manzer, *Canadian Partnership Law*, (1995, Canada Law Book Inc.) 9-5 *et seq*. Legislation enacting corporations and limited partnerships occurred relatively contemporaneously in the 19th Century in England, Canada and the United States. The enactment of separate, and fundamentally, different structures for the corporation and the limited partnership indicates that legislatures did not intend to invest the limited partnership with legal status. Indeed, as I will discuss, a limited partnership is a special kind of general partnership.

28 It follows that Ground J. was correct in holding that a limited partnership is not a legal entity.

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29 As a limited partnership is not a legal entity, it becomes necessary to determine how a limited partnership carries on its business, and, in particular, how it can acquire, and hold title to, real property.

30 In the *Lehndorff* case, at pp.38-40, Farley J. has provided a very helpful explanation of the features of a limited partnership and how its business is conducted. His reference to "Ontario LPA" is to the *Limited Partnership Act*:

> A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p.1-2 and p.1-12.... A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: See Ontario LPA ss.8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.
>
> . . . . .
>
> It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle).... The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process.... The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited

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> partnership as carried on by the general partner - the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership....

31 Although a limited partnership is a partnership, and the *Partnerships Act*, which governs general partnerships, would apply to it unless its provisions are inconsistent with those of the *Limited Partnerships Act*, there are at least two important distinctions between a general partnership and a limited partnership which are evident from the provisions of the two Acts quoted earlier. The first distinction is that in a general partnership all of the partners are liable for the obligations of the partnership, whereas in a limited partnership the general partner is fully liable for partnership obligations, with the financial exposure of limited partners being limited to their contributions to the partnership. The second distinction is that in a general partnership any partner can conduct the usual business of the partnership, whereas in a limited partnership the limited partners are passive and the general partner manages and controls the business of the partnership.

32 It is important to emphasize that unlike a general partnership, a limited partnership has a special category of partner, a limited partner, whose obligation to the partnership is restricted to the contribution of its capital. By s.13(1) of the *Limited Partnerships Act*, a limited partner is restricted from active participation in the business affairs of the partnership, in return for which he or she is given limited liability, similar to a shareholder in a corporation. Involvement by a limited partner in the business of the partnership may result in the loss of limited liability by that partner.

33 It follows, therefore, from the statutory characteristics of a limited partnership that if its management and control are the exclusive responsibility of the general partner, who derives its powers from the *Limited Partnerships Act*, it is through the general partner that a limited partnership acquires and conveys title to real property. "Title [to real property] is normally registered with the name of a general partner": D.J. Donahue and P.D. Quinn, *Real Estate Practice in Ontario*, (5th ed., 1995, Butterworths) 115. It is, in my view, most unlikely that limited partners, as partners in a general partnership are required to do, would exercise the option of taking title in their own names, and thereby risk exposing themselves to unlimited liability by virtue of s.13 of the *Limited Partnerships Act*. That a limited partnership, not being a legal entity, is incapable of acquiring title to real property finds recognition in s.48(2) of the *Registry Act*, R.S.O. 1990, c.R.20, which provides that the only entities known to law capable of acquiring title to real property are limited companies and individuals.

34 We were not provided with the decision of any Canadian court which specifically addressed the issue of how title to real property is to be taken by a limited partnership. However, it would appear that in *Elevated Construction Ltd. v. Nixon* (1969), 9 D.L.R. (3d) 232 (Ont. H.C.), which was a *Vendors and Purchasers Act* application, Osler J. was of the view that title is to be taken in the name of the general partner. In 68 *Corpus Juris Secundum*, "Partnership", 1024 the early case of *Madison County Bank v. Gould*, 5 Hill 309 (U.S. N.Y. Sup. 1843) is cited as authority for the

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proposition that legal title to real property acquired by a limited partnership should be registered in the names of the general partners and not the limited partners. At 313 the court held:

> The title to the mill should have been taken in the names of the general partners alone. The legislature evidently intended that the legal title to all the partnership property should be vested in the general partners; that they should sue and be sued; and that the whole business should be conducted just as though there were no special partner in the case.

A "special" partner was the equivalent of a limited partner.

35 In summary, because a limited partnership is not a legal entity capable of holding and conveying title to real property, provision is made in the *Limited Partnerships Act* for a general partner to conduct and manage the business of the limited partnership, including acquiring and conveying real property on its behalf. On the facts of this appeal, this was recognized by the general partner and the limited partners.

36 The limited partnership agreement of March 12, 1976, which created the limited partnership, provided that Kucor Ltd., as general partner, was to be in charge of the management, conduct and operation of the business of the limited partnership, including the execution of all agreements related to the acquisition of the land and the construction on it of the apartment buildings. Although in the original mortgage of September 8, 1977 to Maritime, Kucor was described as the mortgagor, it was executed by Kucor Ltd. in its capacity as the sole general partner of Kucor. Similarly, when the final extension of the mortgage occurred on August 1, 1987, the amending agreement, which was between Kucor, as mortgagor, and Morguard, as mortgagee, was executed by Kucor Ltd. in its capacity as the sole general partner of Kucor. In each instance, each limited partner executed a guarantee of the mortgage debt, but did not join in the mortgage as a mortgagor. As of August 1, 1987, there were 23 limited partners, each of whom was an individual. In addition, the limited partners and the board of directors passed resolutions authorizing Kucor Ltd., as general partner, to execute the amending agreement extending the term of the mortgage by 15 years and reducing the rate of interest on the mortgage debt.

37 In my opinion, it is clear on the facts and the law, that the mortgage was given by Kucor Ltd., and as it is a corporation, it is precluded by s.18(2) of the *Mortgages Act* from prepaying the mortgage under s.18(1). It follows that Ground J. was correct in dismissing the application.

38 A more troubling problem is presented by Ground J.'s finding that the deed of March 30, 1976 by which Kucor Ltd. conveyed the property to the limited partnership was a nullity because a limited partnership is incapable of holding title to land, with the result that title remained with Kucor Ltd. which continued to hold the property "for the benefit of all of the partners in the limited partnership". To hold that the deed was a nullity means that it lacked legal validity and the conveyance did not occur.

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39 To resolve the problem, it is necessary to determine the intent and purpose of the conveyance. In my view, this does not cause this court any difficulty as the record, which contains no disputed evidence, points to only one conclusion. From the land transfer tax affidavit in the deed, it is learned that Kucor Ltd. had acquired the property in trust for a limited partnership to be formed and that the intent and purpose of the conveyance were to convey the land to the limited partnership which, as I have indicated, had been formed. The difficulty, of course, was that the grantee should not have been the limited partnership as such. It should have been either the general partner, or all of the partners.

40 In my view, the intent of the deed was to convey the property from Kucor Ltd., which had acquired it in trust for a limited partnership to be formed, to itself in its capacity as the general partner of the limited partnership. Any doubt that this was the intent of the deed is resolved by the mortgage and its extension. The mortgage and the extension agreements were executed by Kucor Ltd., in its capacity as general partner. If the deed had been intended to be a deed to each limited partner, then each of them would necessarily have executed these documents as mortgagors, whereas they executed them as guarantors. Thus, any doubt about the intended grantee is resolved by this subsequent conduct: *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.) at 260-1.

41 Although by the form of the conveyance the deed was not capable of fulfilling its intended purpose, taking a functional approach, based on the above analysis it is clear that in fact it did. Its purpose was to regularize the commercial reality that the land was no longer solely the property of Kucor Ltd., but was the property of the limited partnership, and that in its capacity as general partner, Kucor Ltd. held title to it on behalf of all the partners. In my view, it was unnecessary to treat the deed as a nullity. It should be regarded as an ill-conceived attempt to convey title to the limited partnership. As this could be accomplished either by a conveyance to the general partner, or to all partners, it should be considered as a deed by Kucor Ltd. to itself in its capacity as general partner. Support for this conclusion is found in 68 *Corpus Juris Secundum*, "Partnership", 506-507 where it is stated that a deed to a limited partnership should be, and ordinarily would be, treated as transferring legal title to the general partner.

42 In the passage from Ground J.'s reasons which I have quoted in paragraph [24], he expressed the view that the application "may be technically flawed" as it was commenced by the limited partnership rather than by the general partner. As a limited partnership is a partnership, rule 8.01(1) of the *Rules of Civil Procedure* applies. It states:

> 8.01(1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership.

Neither the *Partnerships Act*, nor the *Limited Partnerships Act*, affects the application of this rule. Because a partnership is not a legal entity, it has no capacity to sue or be sued, with the result

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that proceedings must be brought by or against all members of the partnership individually. To overcome the practical problems of litigation involving partnerships whose membership is large, or when some partners live outside the jurisdiction, rule 8.01(1), and its predecessors, was introduced to recognize a partnership as a legal entity for the procedural purpose of suing or being sued in the firm name of the partnership. See G.D. Watson, S. Borins, N.J. Williams, *Canadian Civil Procedure*, (1973, Butterworths) 560-563. Although the choice remains whether a proceeding will be brought in the name of the partnership or in the name of the individual partners, it is improper to do both: *Wabi Iron Works Ltd. v. Patricia Syndicate* (1924), 54 O.L.R. 640 (Ont. C.A.). Therefore, it is my view that the application was properly commenced in the name of the limited partnership and it would be improper to add the general partner as a party applicant. See, also, *872928 Ontario Ltd. v. Gallery Pictures Inc.* (1990), 75 O.R. (2d) 273 (Ont. Gen. Div.)

43 As a result of my conclusion that the mortgage was given by a corporation and that, therefore, s.18(1) of the *Mortgages Act* has no application, it is unnecessary to consider whether a limited partnership is a joint stock company within the meaning of s.18(2), or whether the mortgagor made an effective tender within the meaning of s.18(1).

44 Considerable argument was directed to whether the short answer to the application is contained in the negotiated provision in the amending agreement of August 1, 1987 that the mortgage was not open for repayment before its maturity. It was the position of the appellant that this provision was inoperative on the authority of the decision of this court in the *Litowitz* case at 586 where it was stated that, because s.18 is consumer protection legislation enacted in the public interest, as a matter of public policy it cannot be contracted out of or waived. On the other hand, the respondents took the position that this policy applied only to residential mortgages and not to commercial mortgages, such as the mortgage in this appeal. In my opinion, this is an issue which it is unnecessary to consider, or to decide, because of my conclusion that s.18(2) precludes the operation of s.18(1).

Conclusion

45 In the *Litowitz* case, this court heard together three appeals involving different factual situations, concerning the application of s.18 of the *Mortgages Act* and s.10 of the *Interest Act*. For the sake of convenience, I will refer to them as the *Litowitz*, the *Vale* and the *Glied* appeals. In each appeal, the mortgagor sought a declaration that it was entitled to prepay a long-term closed commercial mortgage. In none of the appeals was the mortgagor a limited partnership. As I have indicated, in his reasons for judgment Robins J.A. provided a thorough and helpful discussion of the history, the evolution and the policy of the relevant legislation at pp.582-7.

46 The circumstances of the *Litowitz* appeal closely approximate those of this appeal. In *Litowitz*, the project in respect to which the mortgage was given was promoted by a prospectus as a multi-unit residential apartment building ("MURB") and involved the construction, ownership

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and operation of a 20-storey apartment building. By way of the issue of securities, some 310 units of ownership were sold, mainly to individuals. However, the property was owned by a corporation, which gave the mortgage which was the subject of the application. As in this appeal, the unitholders chose to conduct their business through a corporation. In my view, the reasoning applied by Robins J.A. at pp.591-594 in holding that s. 18(2) precluded prepayment under s.18(1) has direct application to this appeal. I would respectfully adopt and apply his reasoning.

47 In this appeal, the limited partners chose to conduct their business through a general partner, Kucor Ltd., which is a corporation. There is no question that the general partner was authorized by the limited partners to arrange the financing and, under the *Limited Partnerships Act*, was empowered and required to do so. Therefore, it was intended that the mortgage would be an obligation enforceable against the general partner. The fact that the beneficial ownership of the property was made up of limited partners who were individual, non-corporate investors does not detract from the fact that the mortgage was given by the corporate general partner, and accordingly, does not remove the mortgage from the exemption in s.18(2) of the *Mortgages Act*, or entitle the limited partners to the right of prepayment under s.18(1). It is not appropriate to look past the corporate entity. Lenders are entitled to rely on title documents to determine the mortgagor's prepayment rights. The mortgage was, and remains, a mortgage given by a corporation, with the result that prepayment is precluded by s.18(2).

48 Assuming, without deciding, that because of their individual guarantees of the mortgage the limited partners may be "persons liable to pay or entitled to redeem" the mortgage under s.18(1), the essential question in the application of s.18 remains the identity of the person, or entity, that gave the mortgage. The opinion of Robins J.A. in *Litowitz* at p.594 is determinative of this issue:

> The scope of the right of prepayment is cast so as to include anyone who is liable to pay or entitled to redeem a mortgage. However, this right is subject to the exemption clause - and that clause is based on the identity of the party who *gives* a mortgage. A mortgage can be *given* only by a titleholder and, if the titleholder is a corporation, a mortgage *given by the corporation* will, by virtue of the exemption, be excluded from the protection afforded by s-s.(1). Liability to pay or entitlement to redeem a mortgage is not the criterion for determining the applicability of s-s.(1). Thus, accepting as I do that the unitholders may be "persons liable to pay or entitled to redeem", the fact that the mortgages were given by a company precludes them from exercising the prepayment rights to which they would be entitled had the mortgage been given by a non-corporate mortgagor.

49 In the first paragraph of my reasons, I stated that the issue raised by this appeal is whether, or under what circumstances, a limited partner is entitled to rely on the statutory right of prepayment in s. 18(1) to discharge a long-term closed commercial mortgage purported to have been given by the limited partnership. I would respond to this issue as follows:

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(1) A limited partnership, because it is not a legal entity, carries on its business through a general partner which has the power to hold and convey title to real property on behalf of the members of the limited partnership.

(2) A general partner which is a corporation and which gives a mortgage is precluded by s.18(2) from the operation of s.18(1) and, therefore, cannot prepay a long-term closed mortgage.

(3) A general partner which is an individual and which gives a mortgage is not subject to the s.18(2) exemption, and, therefore, is entitled to prepay the mortgage.

(4) Where there are two or more general partners, one of which is an individual, and the other a corporation and they are joint mortgagors, as decided by Robins J.A. in the *Glied* appeal, the individual, because he is liable for the entire mortgage debt, is not subject to the s.18(2) exemption, and, therefore, is entitled to prepay the mortgage.

(5) The fact that a mortgage is a long-term closed commercial mortgage is not relevant to the application of s.18(2). The relevant issue is the identity of the person who gave the mortgage.

50 For all of the above reasons, the appeal is dismissed with costs to the respondents Canada Life and Hongkong. In the circumstances of this appeal, no costs are awarded to the intervenors.

Appeal dismissed.

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TAB 7

2013 ONSC 485
Ontario Superior Court of Justice

Thyssenkrupp Elevator (Canada) Ltd. v. 1147335 Ontario Inc.

2013 CarswellOnt 549, 2013 ONSC 485, 225 A.C.W.S. (3d) 317, 23 C.L.R. (4th) 13

Thyssenkrupp Elevator (Canada) Limited, Plaintiff and 1147335 Ontario Inc., Defendant

Master C. Albert

Heard: October 11-12, 16-19 2012
Judgment: January 22, 2013 * **
Docket: 04-CV-280219 ***

Proceedings: additional reasons at *Thyssenkrupp Elevator (Canada) Ltd. v. 1147335 Ontario Inc.* (2013), 2013 ONSC 2452, 2013 CarswellOnt 4792 (Ont. S.C.J.)

Counsel: J. Armel, for Plaintiff
L. Bleta, for Defendant

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure; Evidence; Insolvency; Property

Headnote

Construction law --- Construction and builders' liens — Services and materials for which liens available — Miscellaneous

Elevator maintenance and repairs — Defendants were related companies that owned five apartment buildings — Corporate plaintiff TE Inc. supplied elevator maintenance and repair services to fifteen elevators in defendant's apartment buildings — TE Inc. charged owner periodic payments for regular maintenance under contracts and for repairs outside scope of work covered by contracts — Contracts required payment monthly, in advance, but payments were usually late and in amounts that did not match amounts charged — Contracts permitted plaintiff to terminate them if defendants were in arrears by more than 30 days — TE Inc. brought ten lien claim actions under Construction Lien Act for unpaid services and materials — Defendants breached contracts by failing to pay for materials and services supplied by TE Inc. to repair and maintain fifteen elevators in buildings — Defendants did not prove that plaintiff failed to provide maintenance services required under contract and evidence proved that elevators were maintained at acceptable level — TE Inc. suspended contracts for non-payment in accordance with terms of contract and gave written notice subsequent to suspension — Liens included payments due in advance.

Construction law --- Construction and builders' liens — Right to lien — When lien arising

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Defendants were related companies that owned five apartment buildings — Corporate plaintiff TE Inc. supplied elevator maintenance and repair services to fifteen elevators in defendant's apartment buildings — TE Inc. charged owner periodic payments for regular maintenance under contracts and for repairs outside scope of work covered by contracts — Contracts required payment monthly, in advance, but payments were usually late and in amounts that did not match amounts charged — Contracts permitted plaintiff to terminate them if defendants were in arrears by more than 30 days — TE Inc. brought ten lien claim actions under Construction Lien Act for unpaid services and materials — Defendants breached contracts by failing to pay for materials and services supplied by TE Inc. to repair and maintain fifteen elevators in buildings — Defendants did not prove that plaintiff failed to provide maintenance services required under contract and evidence proved that elevators were maintained at acceptable level — TE Inc. suspended contracts for non-payment in accordance with terms of contract and gave written notice subsequent to suspension — Liens included payments due in advance.

Equity --- Equitable doctrines — Equitable set-off

Defendants were related companies that owned five apartment buildings — Corporate plaintiff TE Inc. supplied elevator maintenance and repair services to fifteen elevators in defendant's apartment buildings — TE Inc. charged owner periodic payments for regular maintenance under contracts and for repairs outside scope of work covered by contracts — Contracts required payment monthly, in advance, but payments were usually late and in amounts that did not match amounts charged — Contracts permitted TE Inc. to terminate them if defendants were in arrears by more than 30 days — TE Inc. brought ten lien claim actions under Construction Lien Act for unpaid services and materials — Lien claim actions allowed — Defendants were not entitled to set-off of $75,000 — Defendants lead no evidence from any other maintenance service provider, other than one, to corroborate that no other service provider had been prepared to take over maintenance contracts without capital upgrades — Elevators in defendant's buildings required infusion of capital or modernization due to age and wear and tear.

Contracts --- Performance or breach — Breach — General principles

Defendants were related companies that owned five apartment buildings — Corporate plaintiff TE Inc. supplied elevator maintenance and repair services to fifteen elevators in defendant's apartment buildings — TE Inc. charged owner periodic payments for regular maintenance under contracts and for repairs outside scope of work covered by contracts — Contracts required payment monthly, in advance, but payments were usually late and in amounts that did not match amounts charged — Contracts permitted plaintiff to terminate them if defendants were in arrears by more than 30 days — TE Inc. brought ten lien claim actions under Construction Lien Act for unpaid services and materials — Lien claim actions allowed — Defendants breached contracts by failing to pay for materials and services supplied by TE Inc. to repair and maintain fifteen elevators in five buildings — Defendants did not prove that plaintiff failed to provide maintenance services required under contract and evidence proved that elevators were maintained at acceptable level — TE Inc. suspended contracts for non-payment in accordance with terms of contract and gave written notice subsequent to suspension — Liens included payments due in advance.

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s. 60 — considered

s. 67 — considered

s. 67(1) — considered

s. 67(2) — considered

s. 67(3) — considered

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Generally — referred to

s. 35 — referred to

s. 35(4) — referred to

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Forms considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Form 51A — referred to

ACTION by plaintiff for construction lien claim.

***Master C. Albert*:**

Part I: Introduction

1 1147335 Ontario Inc., 1298781 Ontario Inc. and 1241676 Ontario Inc. are related companies that own five apartment buildings in Toronto. In these reasons I refer to these companies either as "Owner" or else by number of the company. Thyssenkrupp Elevator (Canada) Limited ("Thyss") supplied elevator maintenance and repair services to the fifteen elevators in the Owner's five apartment buildings until December 2004.

2 The ten lien claim actions tried together by reference under the *Construction Lien Act*, R.S.O. 1990, c.C.30 are collection claims for unpaid services and materials. Particulars of the ten lien

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claims are set out in Schedule "A" to these reasons. This decision and these reasons apply to all ten lien claim actions.

3 The Owner's defence is twofold: (i) Thyss failed to prove the amounts claimed and (ii) the Owner is entitled to set off $75,000.00 paid to Quality Allied Elevators Inc. ("Quality") to upgrade the elevators after the contracts with Thyss ended.

4 The issues are:

a) What amount, if any, does the Owner owe to Thyss for the supply of elevator maintenance and repair services? and

b) Is the Owner entitled to set off $75,000.00 (or some other amount) paid to Quality Allied Elevators to upgrade twelve of the fifteen elevators as part of the Owner's 2005 elevator maintenance contract with Quality?

Part II: The Reference and Background

5 By orders dated October 23, 2006 Justice Matlow referred five of the ten Thyssenkrupp actions to the master [1] . Pursuant to section 60 of the *Construction Lien Act* all liens against each property are heard together in the reference. Master Polika signed orders for trial on October 25, 2006. My order of November 17, 2006 [*ThyssenKrupp Elevators (Canada) Ltd. v. IUEC, Local 96*, [2006] O.L.R.D. No. 4221 (Ont. L.R.B.)] reflects the consent of counsel to conduct a combined reference of all ten lien claim actions.

6 The reference has had a long and complicated procedural history with multiple motions and appeals. The history and chronology of the reference are set out in Schedule "B".

7 The result of the many motions and appeals is that the reference was narrowed to Thyss' ten collection claims for unpaid accounts for the supply of elevator maintenance and repair services and the Owner's $75,000.00 set-off claim for upgrades and repairs. The total amount claimed in all ten lien claim actions combined is $122,810.30. The Owner's one million dollar counterclaim was struck, a decision upheld on appeal. Each individual lien claim is within or only slightly above the monetary jurisdiction of the Small Claims Court. However, lien remedies are not available in the Small Claims Court. The Act provides that lien remedies must be sought in the Superior Court of Justice.

8 The *Construction Lien Act* and rule 55 require the references master to direct a procedure that is proportionate to the amount in issue:

***Construction Lien Act*, s.67:**

Summary procedure

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> **67.** (1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.
>
> **Interlocutory steps**
>
> (2) Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute.
>
> **Application of rules of court**
>
> (3) Except where inconsistent with this Act, and subject to subsection (2), the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act.
>
> **Rule 55**:
>
> ***Simple Procedure to be Adopted***
>
> **55.01** (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,
>
> (a) give such directions as are necessary; and
>
> (b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken.

9 Once the reference trial date is fixed the practice in Toronto is for the parties to attend before the reference master, who gives pretrial directions necessary to prepare the reference for trial. Usually in a simple reference one or two pretrial hearings for directions are convened. In this case twelve such hearings were required. (See Schedule "B").

10 During the pretrial process counsel for Thyss advised the court that Thyss proposed to call three witnesses. Counsel for the Owner proposed to call one hundred and ten (110) witnesses, including numerous tenants, a politician and a tenant advocate who had appeared for the tenants at a tribunal hearing about rent. If all of the witnesses had been called the trial would have required 30 days or more for hearing. Invoking the reference powers of the court to imposed a process proportionate to the issues, I restricted the number of tenant witnesses that the Owner may call to nine[2]. The Owner chose to call none. I also directed that the local municipal politician and the tenant advocate may not be called as witnesses. The reasons for disallowing these witnesses are set out in the procedural orders of October 17, 2011 and January 23 2012.

11 In a further effort to reduce the length of trial, taking into account the quantum in issue and proportionality, I directed the parties to call evidence in chief by affidavit where witnesses

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were co-operative and I imposed time restrictions on *viva voce* evidence of all witnesses. I issued procedural orders that incorporated procedures similar to rule 76 summary trial procedures where appropriate.

12 At the January 23, 2012 hearing for directions Owner's counsel advised the court that the Owner proposed to summons several expert witnesses. My order of that date, more than eight months before the fixed trial date of October 11, 2012, provided as follows:

> Both counsel are reminded of the rules respecting evidence from experts. Any witness called as an expert must provide by the deadline ordered herein an expert report together with a curriculum vitae and statement of expert witness prescribed by the rules, failing which the witness may not testify as an expert.

13 Despite these clear directions Owner's counsel failed to serve expert reports as required by my order and the rules. Instead, Owner's counsel asked for leave at trial to permit two witnesses to testify as experts without having complied with rule 53 or the court's orders. In Schedule "C" I set out rulings made throughout this trial on preliminary and procedural matters, including my ruling precluding the Owner from calling as a witness one of the two proposed experts.

14 By the January 23, 2012 hearing for directions the Owner had reduced its list of witnesses from one hundred and ten (110) to ten (10). Three of the Owner's witnesses testified in chief by affidavit, as directed. Thyss served notice of its intention to cross-examine all three witnesses. One of the three witnesses, Paula MacDougall, who is employed by the Owner as a property manager, failed to present herself to be cross-examined. Mr. Bleta advised the court that she had been present at the trial on the day that he had expected to call her but that she had not been reached. He did not arrange for her to return to be cross-examined on a subsequent date.

15 There are two consequences of the Owner's failure to produce Ms MacDougall for cross-examination. The first is that her affidavit evidence in chief is struck. Having been served with notice by Thyss of its intention to cross-examine, her evidence cannot be permitted to stand in the absence of cross-examination. The second consequence is that the court draws an adverse inference from her failure to appear to be cross-examined. The witness is in the Owner's employ. Consequently it is within the Owner's control to require the witness to attend at court during business hours. I draw the inference that the evidence that Ms MacDougall would have given had she been cross-examined would have been detrimental to the position taken by the Owner at trial and for that reason the Owner chose not to produce her for cross-examination.

16 Four other witnesses listed on the Owner's list of witnesses were not called by the Owner, notwithstanding that they had been summonsed by the Owner. The witnesses under summons who did not testify are:

a) David Sala, a City of Toronto building inspector;

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b) Dave Balmer, of Quality Allied Elevator;

c) Mr. DeSouza, a Technical Standards & Safety Authority (TSSA) inspector[3]; and

d) Joe Baranowsky, a TSSA inspector.

17 These witnesses had been on the Owner's witness list. It is unclear whether the Owner excused them or whether they simply failed to appear. The Owner did not ask for an adjournment or any other relief or sanction against witnesses who were summonsed and failed to appear. I draw the inference that the Owner chose not to call these witnesses.

Part III: The Trial Witnesses

18 An important function of the trial judge is to assess credibility of the witnesses and make findings of fact based on their evidence, including their oral and written testimony and their documents.

19 Mike Tate was called by Thyss as its first witness. He has been employed by Thyss as a credit manager since February 2005. He introduced and explained the account statements attached as exhibits to his affidavit evidence and also filed in another format as exhibit 7[4]. Thyss relies on these account statements to show amounts charged, amounts paid and amounts unpaid by the Owner for each of the five buildings. Mr. Tate gave evidence in chief by affidavit and was cross-examined at trial. Although he was not employed by Thyss during the period reflected in the account statements, Mr. Tate explained the Thyss accounting and computer system and how Thyss generated account statements. His evidence was corroborated by the documents filed in evidence. I found Mr. Tate to be a credible witness, forthright in his testimony and unshaken in cross-examination.

20 Fazil Shaw was formerly employed by Thyss as credit and legal manager from May 1989 to October 2004. His employ encompasses all but the last two months of the supply of services by Thyss to the Owner. He gave evidence in chief by affidavit and was cross-examined at trial. Thyss terminated his employment and he sued Thyss for wrongful termination, settling his claim shortly after it was issued. However, when cross-examined on that issue he was less than forthright, refusing to admit that he had sued Thyss for wrongful dismissal and instead characterizing his cessation of employment as a layoff. I attribute his evasive answers about his lawsuit against his former employer to his understanding that once he settled his claim against Thyss anything "wrongful" about his termination had been corrected.

21 Mr. Shaw was the direct liaison from Thyss to the Owner regarding account issues. He instructed counsel to register the liens for unpaid accounts. In general I found that his evidence was

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helpful to the factual issues before the court. Apart from questions about his employment lawsuit against Thyss, his evidence was unshaken on cross-examination. He was a credible witness.

22 The Owner called George Ronald Smith of Gemini Elevator as an expert witness. Mr Smith had inspected the elevators at the request of the Owner on two occasions. He had also prepared reports. Because the Owner had failed to serve Mr. Smith's reports as required by rule 53 and the order for directions of January 23, 2012 fixing March 9, 2012 as the deadline for serving expert reports, the Owner required leave to introduce Mr. Smith's reports, curriculum vitae and statement of acknowledgement of expert witness. I granted leave because the reports had been included in the Owner's earlier productions and also because Thyss did not challenge Mr. Smith is an expert in elevator maintenance and repairs. [5]

23 Mr. Smith testified in chief and was cross-examined at trial. He provided his opinion on the state of elevator maintenance on the dates of his inspections. He was a credible and knowledgeable witness.

24 The Owner proposed to call Rick Sokoloff of Quality as an expert in elevator maintenance and repairs but had not served an expert report, curriculum vitae or statement of acknowledgement of expert witness as required by Rule 53.03 and the pretrial order of January 23, 2012. In contrast to Mr. Smith of Gemini, Mr. Sokoloff had not prepared a report setting out his opinions and nothing had been produced to Thyss prior to trial, as had been the case with Mr. Smith's reports.

25 After hearing submissions of counsel on whether to grant leave to permit Mr. Sokoloff to testify as an expert witness I delivered my ruling at trial disallowing the witness as an expert, but permitting him to testify as a fact witness. My reasons for refusing to grant leave are set out in Schedule "C".

26 Mr. Sokoloff was not an impartial witness. He is presently under contract with the Owner to provide elevator maintenance and repair services. As a condition of taking on the elevator maintenance contracts in 2005 he charged the Owner $5,000.00 per elevator for pre-maintenance upgrades to twelve of the fifteen elevators. It was in his interest to justify the charges and help the Owner recover these charges in the Owner's set-off claim. I found his evidence coloured by his self-interest.

27 Roslyn Brown, vice president of the Owner, manages the Ontario operations. She gave evidence in chief by affidavit and was cross-examined at trial. Her affidavit is fraught with hearsay and generalizations. Ms Brown's credibility was undermined at trial by her evasive answers to simple questions.

28 One example was her refusal to admit that the Owner had received four Schindler Elevator [6] invoices dated January 2005. Ms Brown admitted that she was the only one who dealt with

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Schindler. She testified that she did not recall receiving the four Schindler invoices addressed to her attention, and she did not know whether the Owner had paid them.

29 Ms Brown admitted that Schindler carried out work in January 2005 and invoiced for the work. Knowing in advance of trial that authenticity and admissibility of the Schindler invoices had been challenged by her counsel, she failed to inform herself and at trial admitting only that it was possible that the Owner paid them. When asked whether she disputed the authenticity of the four Schindler invoices she replied evasively:

> I cannot disagree or agree. It never crossed my mind that the documents would be fabricated.

30 Rather than testify that she had reviewed the Owner's records and could not find any indication that the invoices had been received or paid, or admitting that the invoices had been received and paid, she evaded answering. A witness from Schindler was called and readily proved the invoices. Ms Brown's refusal to admit the invoices undermined her credibility.

31 I found some of Ms Brown's evidence in chief vague. Examples include:

> a) Paragraph 4: "I was troubled by the elevator problems...immediate concerns were those raised by municipal officials". No examples or specifics were provided and the Owner called no municipal officials to testify at trial.
>
> b) Paragraph 5: "I have also been privy to more of the ongoing saga of poorly run elevators than Mr. Barrasso". She gave no specifics or examples.
>
> c) Paragraphs 13, 22 and 23: Ms Brown referred to TSSA[7] reports but did not attach any reports as exhibits. Nor were TSSA reports submitted through a TSSA inspector notwithstanding that the Owner had summonsed two TSSA inspectors but did not call either of them to testify at trial.
>
> d) Paragraph 15: Ms Brown deposed in generalities but provided no examples or corroborating evidence. She generalized with statements such as "There are countless examples of situations where people can become frustrated when they are deprived of a properly functioning major amenity such as elevators". She did not provide a single example.
>
> e) Paragraph 21: Ms Brown referred to six elevators in two buildings with "constant and recurring problems" without identifying the buildings and without any corroborating evidence of service calls requested and failure by Thyss to respond. She deposed misleadingly incomplete facts such as: "up until the time that they (referring to Thyss) willfully and deceitfully abandoned us in December 2004", without reciting the relevant fact that as of December 2004 the Owner owed Thyss over $122,000, a fact admitted by the Owner's witness, Fatima Massri, at trial.

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32 Ms Brown's answers on cross-examination were largely non-responsive and evasive. She testified that she had never seen the contracts between Thyss and the Owner yet she has been instructing counsel in these lien claim actions for over six years. The contracts were exchanged before trial in the document books and presumably produced early on when affidavits of documents were exchanged. Ms Brown's testimony that she has never seen them is simply not credible.

33 Ms Brown arrived in Ontario from Quebec in 2003. Her evidence at discovery in 2007 was different from her evidence five years later at trial. At discovery she testified that in 2004 she spent most of her time at the two Kipling buildings, but in paragraph 6 of her affidavit, sworn in 2012, she deposed "I visit and inspect each of the properties more than 7 times a week and usually spend between one and four hours at the three sites of the properties". She provided no particulars or corroborating evidence of these visits, nor did she indicate when these seven visits a week started. The Owner's relationship with Thyss ended in December 2004. Eight of the nine years that Ms Brown has worked in Ontario postdate the relationship with Thyss.

34 At discovery in 2007 Ms Brown testified that the Owner had not received any complaints about the elevators in writing and that Thyss responded to service calls on a timely basis when called. She admitted that the Owner did not call any meetings with Thyss about service. She also admitted that the Owner was in arrears of payments owing to Thyss.

35 Ms Brown's evidence at trial provided no details of elevator problems, no examples of breakdowns, no evidence of failure by Thyss to attend for regular maintenance or failure to respond to service calls upon request. She provided no evidence to contradict the accounting relied on by Thyss to establish the amounts owing by the Owner to Thyss. She did not give any examples of any charge claimed by Thyss in these actions that was either improperly charged or paid and not credited.

36 For all of these reasons I find that Ms Brown's evidence lacks credibility. Where her uncorroborated evidence conflicts with that of another witness I generally prefer the evidence of the other witness.

37 Enzo Barrasso, who resides in Quebec, is president of the Owner. He gave evidence in chief by affidavit and was cross-examined at trial. On several occasions he refused to answer questions asked, instead ranting about Thyss and Mr. Shaw being "crooks" (his word). He evaded questions put to him in cross-examination but when the same questions were asked of him in redirect examination by his own counsel he answered them. For example, when asked in cross-examination who looked after his operations in Toronto he did not give a direct answer. When asked the same question in redirect examination he replied that it was Ms Brown.

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38 Much of Mr. Barrasso's affidavit evidence in chief is hearsay, with the source of information undisclosed. Ironically, he admitted in cross-examination that the source of much of his hearsay evidence was Mr. Shaw, who he repeatedly referred to as "a crook".

39 Examples of hearsay evidence in Mr. Barrasso's affidavit in chief include:

a) Paragraph 6: he referred to information provided to him by Albert Audin, who was not called as a witness at trial. The hearsay evidence is inadmissible.

b) Paragraphs 7, 8, 11, 13, 14: Mr. Barrasso testified as to what Mr. Shaw knew but when Mr. Bleta cross-examined Mr. Shaw he did not put any of these facts to him. Pursuant to the rule in *Brown v. Dunn* the hearsay evidence has no weight. The reason for the rule is fairness.

c) Paragraph 10: This paragraph is fraught with generalities with no examples and no corroborating documents.

d) Paragraph 18: Mr. Barrasso's evidence that Thyss did not perform the contracts in good faith is uncorroborated by any examples of failure on the part of Thyss to attend to carry out monthly maintenance or respond to service requests. The evidence is of no probative value.

e) Paragraph 21: Mr. Barrasso testified in chief about TSSA reports but did not attach any TSSA reports as exhibits to his affidavit nor did he introduce them through the TSSA inspector. I find it significant that the TSSA inspector, who was on the Owner's witness list and who the Owner served with a summons to attend and given evidence at trial, was not called by the Owner as a witness at trial. Mr. Barrasso's affidavit evidence about TSSA inspection reports is of no probative value. Further, I draw an adverse inference from the Owner's failure to call a TSSA inspector as a witness.

40 Mr. Barrasso's evidence provides no particulars of elevator problems, no examples of breakdowns and no evidence of failure by Thyss to attend for regular maintenance or in response to service call requests for maintenance. His evidence does not contradict the account statements relied on by Thyss in these actions. He did not give a single example of a charge claimed by Thyss that was either improperly charged or that is claimed as owing when it has been paid.

41 Mr. Barrasso's affidavit evidence in chief is replete with generalities, innuendo and hearsay evidence without specifics or corroboration, undermining its probative value and Mr. Barrasso's credibility as a witness. Where his uncorroborated evidence conflicts with that of another witness I prefer the evidence of the other witness.

42 Fatima Massri, a former employee of Thyss, was summonsed as a witness by the Owner. She worked for Thyss for less than a year as credit manager, from September 2004 to early 2005 (January or February). She testified that she was brought into the company because she

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was bilingual (English and French) and Thyss wanted her to take responsibility for collections in Quebec as well as Ontario. She was offended that Thyss terminated her employment because she did not speak French fluently. Ms Massri sued Thyss after she was terminated. She settled her claim.

43 As a witness under summons by the Owner her examination in chief was conducted orally at trial. Ms Massri contradicted herself in cross-examination. In chief she stated that Mr. Shaw left in September 2004, one week after she arrived,. In cross-examination she testified that Mr. Shaw may not have left until the end of October 2004 and that she may only have taken over dealing with the accounts of the Owner for the months of November and December 2004.

44 She refused to admit instructing Thyss counsel, Mr. Armel, to garnish the bank accounts of the Owner to recover default judgments but acknowledged that default judgments were obtained. She testified that the Owner owed Thyss approximately $124,000.00 at the time.

45 Ms Massri worked out of a central office. She complained that she found it challenging to reconcile the accounts on a building by building basis because in the case of two of the properties the accounting for two buildings was combined into a single statement.

46 I find Ms Massri's evidence less than credible. The account statements attached to Mr. Tate's affidavit and those filed as exhibit 7 clearly identify the address of the building against which each debit and each credit is noted. Ms Massri's assertion that she could not reconcile the accounts because two buildings were combined into one statement is simply not credible.

47 Ms Massri confirmed that as of October 2004 the Owner's accounts were approximately $65,000.00 overdue by 90 days or more and that by the end of her employment arrears were in the range of $124,000.00. She explained that unpaid accounts and requests for elevator maintenance service are not linked.

48 Paula MacDougall is a property manager currently employed by the Owner. The Owner filed her affidavit evidence in chief but failed to have her attend to be cross-examined at trial, notwithstanding that Thyss had served notice of its intention to cross-examine. Her affidavit evidence in chief is struck.

Part IV: Accounting

49 Thyss and the Owner entered into contracts to maintain fifteen elevators in five buildings. The contracts provided for periodic payments: monthly at first and then quarterly. Where repairs beyond regular maintenance were required the contract provided for Thyss to submit a quote for the work but the Owner was not required to hire Thyss to carry out such repairs.

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50 Thyss charged the Owner periodic payments for regular maintenance under the contracts and for repairs outside the scope of work covered by the contracts for which the Owner contracted with Thyss. The Owner submitted no evidence to challenge the accuracy of charges and payments reflected in Thyss' account statements. There is no evidence that the Owner refutes any of the charges.

51 Initially the contracts required payment monthly, in advance, on the first day of the month (paragraph 16 of each contract). Beginning April 1, 2003 the parties agreed to change the payment schedule to quarterly, with payment due on the first day of each quarter.

52 At trial Thyss presented the accounting information by way of account statements attached as exhibits to the affidavit evidence in chief of Mike Tate [8], who is employed by Thyss as a credit manager. Exhibit "A" is the account statement for 1011 Lansdowne Avenue. Exhibit "B" is the account statement for 1765 Weston Road and 1775 Weston Road, combined into one account statement. Exhibit "C" is the account statement for 2667 Kipling Avenue and 2677 Kipling Avenue, also combined into one account statement. This evidence was served before trial as required by the court's procedural directions.

53 The accounting is somewhat complex because of the Owner's sporadic payment pattern. Payments were usually late and in amounts that did not match the amounts charged. Typically the arrears would accrue and the Owner would send a cheque to cover several months of arrears for multiple buildings. Mr. Tate testified that where the Owner's cheques specified the invoice or invoices to which the payments were to be applied then Thyss applied the payments as directed. Where not specified Thyss applied the payments to the longest outstanding overdue charges, a practice that has been accepted by the Court of Appeal as appropriate (see: *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359 (Ont. C.A.) CanLII at paragraphs 55 and 56).

54 Mr. Tate was cross-examined at trial and his evidence was unshaken. Mr. Shaw, employed by Thyss until October 2004, was also cross-examined about the accounting and his evidence was unshaken. Neither Ms Brown nor Mr. Barrasso identified any discrepancies in the account statements. Nor did they provide any evidence of any complaints made about the calculations and the accounting at or near the time that the charges were made. Ms Brown admitted that the Owner was usually in arrears and that payments were sent in lump sums from time to time. Neither Ms Brown nor Mr. Barrasso gave evidence of any disputed invoices or of any payments that were not credited. I find that the Owner did not dispute any of the charges either as improper or as duplication. Ms Massri, employed by Thyss in late 2004 and early 2005, and relied on by the Owner at trial, testified that when she left Thyss the Owner's accounts were in arrears by approximately $124,000.00.

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55 Ten construction liens were registered on a building by building basis, five in 2003 and five in 2004. Even though in two cases two buildings are operated as a single residential complex, for construction lien purposes each building has a unique property identification (PIN) number and for construction lien purposes calculations must be made on a building by building basis, not a residential complex by residential complex basis.

56 Because it is unwieldy to work with account statements that combine two buildings into one statement, even where the charges for each of the two buildings are clearly shown on the account statements, I directed Thyss to split the account statements by building so that I could perform the math more readily. In response Thyss produced exhibit 7, which is comprised of five account statements, one for each of the five buildings. The information of amounts charged and paid in the original exhibits to Mike Tate's affidavit (exhibit 6) and in the account statements filed as exhibit 7 is the same. The only difference, other than the date of the statements, is that the information pertaining to two buildings in one residential complex has been split into two statements for the Weston Road buildings and two statements for the Kipling Avenue buildings.

57 The account statements provide the following information:

a) invoice number: where the letter "M" appears in the invoice number the invoice is for maintenance; otherwise the invoice pertains to repairs;

b) invoice date;

c) amount charged;

d) building against which the charge is made;

e) amount credited where Thyss credits the Owner other than for payments received;

f) amounts paid;

g) the payment date of each payment;

h) the owner's cheque number for each payment; and

i) the amount owing, on an invoice by invoice basis.

58 Mr. Tate explained that the account statements are generated by the Thyss computer system, referred to as the Libra system, from source data input directly into the computer. The Libra system generates invoices in the same manner.

59 The Owner did not lead any evidence to the contrary through Mr. Barrasso, Ms Brown or any other witness as to any of the charges or payments recorded in the account statements. Nor

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did the Owner challenge any of the charges and payments recorded in the account statements as incorrectly reflected in the statements.

60 Ms Massri testified in chief that anyone could go into the accounting system and delete something at any time, but clarified under cross-examination that she was referring only to notes, not to account entries of billings and payments.

61 The account statements are initially confusing because they do not provide a running balance. Rather, the reader must look to the far right hand column for each line to determine whether the charge recorded on that line has been paid or credit given. If the amount charged has been paid or credited fully then the "amount due" column reflects "0.00". If the amount charged has not been paid or credited fully then the balance owing on the particular invoice recorded on that line will be shown as a positive number. For example, for 1011 Lansdowne Avenue invoice C110110815 issued February 22, 2002 for $6,860.84 was never paid in full. On December 17, 2004 the owner paid $5,000.00 by way of cheque #1201, leaving an unpaid balance for that charge of $1,860.84. To calculate the total amount that remains outstanding for a particular building one must tally the debits and credits in the far right column of each account statement in the column "Amount Due".

62 I conclude that the account statements for each building accurately reflect the charges made, the payments received and the credits applied as between Thyss and the Owner. I have reviewed the arithmetic in each of the account statements and am satisfied that each of the account statements is accurate.

63 The account statements also provide the evidence required to calculate the amount owing as of the date that each of the ten construction liens was registered. The Owner asserts that the liens were improperly filed because the amounts claimed as owing were exaggerated or not owing at all. However, when the Owner's counsel presented his calculations in argument at the end of trial he neglected to include on the debit side all of the unpaid charges for repairs, thus misrepresenting the true accounting as between the parties. He included in his calculation only invoices with the letter "M" in the invoice number, thereby ignoring all of the charges for repair services and materials supplied by Thyss in addition to monthly maintenance services that were not paid for by the Owner. The methodology underlying the Owner's calculations is flawed and contrary to the evidence.

64 To ascertain the accuracy of the amounts claimed as owing at the time the five construction liens were registered in 2003 I determined the charges made, payments received and credits applied for the period up until the day prior to the date the first liens for each PIN were registered. I am satisfied in each case that the amounts reflected in the construction lien claims registered in 2003 for each of the five buildings were accurate at the time the lien claims were registered. In calculating the amount owing for each of those lien claims at the time of trial I have taken into account payments made by the Owner after the first five liens were registered, as reflected in the account statements.

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65 Similarly I calculated the amounts owing as of the dates in 2004 that the second five lien claims were registered against each of the five buildings. Again, I am satisfied that the amounts claimed in the 2004 lien claims were accurate at the time the liens were registered, that they cover the period after the 2003 lien claims were registered, that they do not duplicate outstanding amounts claimed in the 2003 lien claims and that they reflect payments received between registration of the first five lien claims and registration of the second five lien claims.

66 Where Thyss is exposed to criticism is in its failure (i) to release one of the 2003 lien claims which had been paid in full by the time this reference was underway, and (ii) to reduce the quantum of the 2003 lien claims and in some instances the 2004 lien claims, to reflect payments received after the 2004 lien claims were registered. However, considering the complex and lengthy path that these lien claims have taken and the manner in which the Owner has conducted the reference (see Schedule "B"), it was not unreasonable for Thyss to await the court's adjudication before releasing or reducing any of the lien claims.

67 During the course of the reference the Owner asked the court to schedule motions to release or reduce the quantum of the lien claims. I fixed a motion date to hear the Owner's motions. However, the Owner failed to prepare its motion materials and did not proceed with its motions. (See Schedule "B", particularly the entries for October 21, 2009, June 8, 2010 and September 21 - 22, 2010). Had the Owner proceeded with its proposed motions when scheduled the lien claims would have been reduced or discharged, as appropriate, after applying the applicable credits. Had the Owner pleaded section 35 of the *Construction Lien Act* (sanctions for registering an exaggerated lien claim) I would have found Thyss not liable under that section because at the time the liens were registered the amounts claimed were accurate. At trial Thyss only asks for the balance owing after crediting all payments.

Liens #1 and #2: 1011 Lansdowne Ave. (liens: $36,593.05 in 2003 and $32,345.04 in 2004)

68 The account statement for 1011 Lansdowne includes a quarterly maintenance charge of $5,670.14 on January 1, 2005 that was reversed and credited in full. Based on the account statement for 1011 Lansdowne Avenue, including credits for payments made after the liens were registered, I find that:

a) the amount currently owing in respect of the lien claim registered on October 20, 2003 as instrument AT311421 is $2,982.10; and

b) the amount currently owing in respect of the lien claim registered on October 21, 2004 as instrument AT635037 is $32,345.04.

Liens #3 and #4: 1765 Weston Road (liens: $22,370.92 in 2003 and $30,334.16 in 2004)

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69 In the account statement for 1765 Weston Road the quantum of the maintenance charge on November 1, 2004 is for only two months ($4,046.65 for November and December 2004) rather than three. The account statement also includes a quarterly maintenance charge of $6,069.98 on February 1, 2005. That charge was reversed and credited in full. Based on the account statement for 1765 Weston Road, including credits for payments made after the liens were registered, I find that:

a) the amount currently owing in respect of the lien claim registered on October 20, 2003 as instrument AT311451 is $2,153.39; and

b) the amount currently owing in respect of the lien claim registered on October 21, 2004 as instrument AT635043 is $30,334.16.

Liens #5 and #6: 1775 Weston Ave. (liens: $16,690.11 in 2003 and $20,337.16 in 2004)

70 In the account statement for 1775 Weston Road the quantum of the maintenance charge on November 1, 2004 is for only two months ($4,046.65 for November and December 2004) rather than three. The account statement also includes a quarterly maintenance charge of $6,069.98 on February 1, 2005. That charge was reversed and credited in full. Based on the account statement for 1775 Weston Road, including credits for payments made after the liens were registered, I find that:

a) the amount currently owing in respect of the lien claim registered on October 20, 2003 as instrument AT311445 is $2,689.69; and

b) the amount currently owing in respect of the lien claim registered on October 21, 2004 as instrument AT635001 is $20,337.16.

Liens #7 and #8: 2667 Kipling Ave. (liens: $9,802.51 in 2003 and $19,777.05 in 2004)

71 In the account statement for 2667 Kipling Avenue the quantum of the maintenance charge on December 1, 2004 is for three months but then the account is credited back with $4,249.08 to reflect that Thyss only provided maintenance service for one of the three months covered by that charge. Based on the account statement for 2667 Kipling Avenue, including credits for payments made after the liens were registered, I find that:

a) the lien claim registered on October 8, 2003 as instrument AT302531 was paid in full by December 17, 2004; and

b) the amount currently owing in respect of the lien claim registered on October 21, 2004 as instrument AT635016 is $12,062.04.

Liens #9 and #10: 2677 Kipling Ave. (liens: $16,188.55 in 2003 and $18,959.37 in 2004)

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72 In the account statement for 2677 Kipling Avenue the quantum of the maintenance charge on December 1, 2004 is for three months but then the account is credited back with $4,247.30 to reflect that Thyss only provided maintenance service for one of the three months covered by that charge. Based on the account statement for 2677 Kipling Avenue, including credits for payments made after the liens were registered, I find that:

a) the amount currently owing in respect of the lien claim registered on October 8, 2003 as instrument AT302525 is $947.35; and

b) the amount currently owing in respect of the lien claim registered on October 21, 2004 as instrument AT635028 is $18,959.37.

73 In argument the Owner asserted that Thyss ignored payments adding up to $50,000.00 that the Owner made in November and December 2004. The Owner filed no proof that payments made in November and December 2004 add up to $50,000.00. A review of the account statements filed as exhibits to Mike Tate's affidavit (exhibit 6) and also as exhibit 7 disclose that Thyss credited the Owner with payments of $48,630.36 received in November and December 2004, after the second series of liens had been preserved, calculated as follows:

a) *1011 Lansdowne*: on December 17, 2004 $5,000.00 was credited against the February 22, 2002 charge of $6,860.84 and on November 10, 2004 $537.25 was credited against the March 1, 2003 charge of $1,845.75 and $4,462.75 is credited against the April 1, 2003 charge of $5,537.25;

b) *1765 Weston Road*: on November 9, 2004 $5,803.04 was credited against the February 1, 2004 charge of $5,803.04;

c) *1775 Weston Road*: on November 9, 2004 $119.85 was credited against the November 1, 2003 charge of $5,803.04 and $4,077.11 was credited against the February 1, 2004 charge of $5,803.04; on December 17, 2004 $10,000.00 was credited against the July 30, 2002 charge of $12,840.00;

d) *2667 Kipling Avenue*: on November 9, 2004 $3,559.50 was credited against the December 1, 2003 charge of $6,081.58 and $6,081.58 was credited against the March 1, 2004 charge of $6,081.58; on December 17, 2004 $1,000.00 was credited against the balance unpaid for the January 30, 2002 charge of $24,988.78 and $2,653.60 was credited against the August 29, 2002 charge of $1,369.60;

e) *2677 Kipling Avenue*: on November 9, 2004 $358.92 was credited against the March 1, 2004 charge of $6,079.15; on December 17, 2004 $520.56 was credited against the February 13, 2004 charge of $520.56, $2,653.60 was credited against the June 26, 2002 charge of $2,653.60 and $1,802.64 was credited against the March 1, 2004 charge of $6,0791.15.

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74 The Owner's argument that the $50,000.00 paid in December 2004 was not credited fails because it is contrary to the evidence which shows that payments received after the liens were registered have been credited to the Owner and are not claimed by Thyss at trial.

Part V: Is the Owner Entitled to Set Off $75,000?

75 The Owner claims that it is entitled to set off $75,000.00 because Thyss failed to properly perform the maintenance contracts. The Owner quantifies the set-off as the amount it paid to Quality Elevators to upgrade to twelve of the fifteen elevators. The Owner claims that $75,000.00 was a "negotiated package price" based on $5,000.00 per elevator even though Quality did not upgrade three of the elevators.

76 The basis of the Owner's claim is that Quality would only take on maintenance of the elevators if the Owner agreed to upgrade them, thereby reducing the amount of maintenance required on a monthly basis. The Owner's theory is that Thyss failed to perform the monthly maintenance duties required by its contracts with Thyss. The evidence does not support that theory.

77 During examination for discovery Ms Brown admitted that Thyss responded to service calls when requested and that Thyss responded on a timely basis when elevators broke down. The Owner led no evidence to the contrary at trial. Nor did the Owner lead evidence of complaints made by the Owner (either by Mr. Barrasso, Ms Brown or any of their staff members) about the service provided by Thyss under the contracts. On discovery Ms Brown testified at question 152 that she was unaware of any complaints made in writing to Thyss about the service Thyss provided.

78 Counsel for the Owner alluded to TSSA (Technical Standards & Safety Authority) inspection reports and deficiencies in his final argument but no such reports were properly tendered in evidence at trial.

79 The Owner did not call the TSSA inspector as a witness despite having listed the inspector as a proposed trial witness and despite having served a summons on the TSSA inspector. The inference I draw is that the evidence of the TSSA inspector, had he been called, would not have advanced the Owner's claim for set-off.

80 The Owner relies on the evidence of Ronald Smith of Gemini Elevators. Mr. Smith is knowledgeable and an expert in his field. Thyss did not challenge his credentials.

81 At the request of the Owner Mr. Smith inspected the elevators on two occasions: once in 2004 when Thyss was the elevator maintenance service provider and then again in February 2005, a little over a month after Thyss stopped servicing the elevators.

82 The Owner submitted nine separate reports prepared by Mr. Smith. The following chart summarizes Mr. Smith's conclusions (underlining added):

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Building Address	***1{st} report***	***2{nd} report***
1011 Lansdowne	April 7, 2004: "In general the elevator installation and the level of maintenance being provided is *marginally acceptable* but has substantial room for improvement."	February 22, 2005: "In general the elevator installation and the level of maintenance being provided is *marginally acceptable* but has substantial room for improvement."
1765 Weston Road	February 17, 2004: "In general the elevator installation and the level of maintenance being provided is *acceptable* but has substantial room for improvement."	December 7, 2005: "In general the elevator installation and the level of maintenance being provided is *reasonably acceptable* but has room for improvement."
1775 Weston Road	February 17, 2004: "In general the elevator installation and the level of maintenance being provided is *marginally acceptable* but has substantial room for improvement."	February 9, 2005: "In general the elevator installation and the level of maintenance being provided is *reasonably acceptable* but has substantial room for improvement."
2667 Kipling Avenue	*No report submitted*	February 8, 2005: "In general the elevator installation and the level of maintenance being provided is *marginally acceptable* but has substantial room for improvement."
2677 Kipling Avenue (*incorrectly identified as 2667 Kipling on the cover page and in the report)*	February 9, 2004: "In general the elevator installation and the level of maintenance being provided is *acceptable* but has substantial room for improvement."	*No report submitted*

83 In each case Mr. Smith's conclusion in 2004 about the level of elevator maintenance is that it was acceptable. It was either marginally acceptable or acceptable. But for each property the Owner's expert evidence is that the level of elevator maintenance supplied was acceptable. The Owner submitted no evidence to support a finding that in 2004 the level of elevator maintenance provided by Thyss was unacceptable.

84 Based on the evidence of the Owner's expert I find that the Owner has not proven that upgrades of $5,000.00 per elevator were needed because Thyss failed to properly perform maintenance services required by the elevator maintenance contracts.

85 Nor do Mr. Smith's reports attach a value to any upgrades and repairs recommended by him. He provided no opinion as to the whether the $5,000.00 per elevator pre-maintenance charge by Quality was a result of the manner in which Thyss carried out its duties under the contracts, whether it was a result of the age and design of the elevators, or whether it was required because of the manner in which the residents of the apartment buildings used or abused the elevators.

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86 Mr. Smith did not know what steps were taken to address the concerns outlined in his 2004 reports. The Owner did not terminate the Thyss elevator contracts after receiving Mr. Smith's reports in February and April 2004.

87 One indicia that elevators are not properly maintained would be penalties issued by TSSA, the elevator regulating authority. Mr. Sokoloff of Quality testified that TSSA can impose fines against a building owner of up to $500,00.00 for failure to comply with TSSA requirements. There is no evidence that TSSA imposed fines on the Owner for failure to comply with TSSA requirements during the period of the Thyss contracts or at all.

88 Nor were any TSSA reports of deficiencies tendered in evidence. As already noted, the TSSA inspector, summonsed as a witness by the Owner, was not called upon to testify. The inference I draw is that Thyss addressed the concerns expressed by Mr. Smith in his report in a manner that was satisfactory to the Owner and to the TSSA inspector.

89 The Owner did not retain Mr. Smith to re-inspect the elevators until February 2005, which coincides with when the Owner retained Quality to upgrade the elevators and take on the maintenance contracts.

90 The Owner summonsed and tendered Mr. Sokoloff, principal of Quality, as an expert. Thyss objected on the basis that no expert report, curriculum vitae or statement acknowledging an expert's duty of impartiality, had been served as required by rule 53 and by orders for directions made in this reference. I did not accept Mr. Sokoloff as an expert for reasons are set out in Schedule "C". He testified as a fact witness.

91 Mr. Sokoloff has visited each of the buildings. He described them as poorly maintained. In his words they "are not the nicest buildings in Toronto".

92 The summons served on Mr. Sokoloff required him to bring to court "all opinion letters, information and records, documents, reports and memoranda in your files and/ or any other information which you may possess in connection with this matter". He failed to bring these documents to court. He is currently under contract with the Owner and provides ongoing elevator maintenance services. I draw the inference that any documents that he had in his possession about the matters in issue in this trial and which he failed to bring to court would not have advanced the Owner's position.

93 Quality had a prior relationship with the Owner, having provided repair services to the Owner prior to 2005 while Thyss was under contract for maintenance of the elevators (the Thyss contracts did not require the Owner to hire Thyss to carry out repairs beyond monthly maintenance services). Quality had also provided a repair quote after the December 2004 flood incapacitated three elevators.

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94 In late December 2004 or early 2005 Quality provided a quote for monthly maintenance services for all five buildings. As a precondition to taking on the monthly maintenance contract Quality required the Owner to authorize upgrades and repairs of $5,000.00 per elevator. Mr. Sokoloff testified that Quality could either "charge a lot up front" or else charge a larger monthly amount. He wanted the upgrades done because otherwise the monthly maintenance requirements would have been too high. Mr. Sokoloff explained that he did not keep records of the materials and services supplied by Quality for the $5,000.00 per elevator charge. He intermixed the work performed as upgrades with the monthly elevator maintenance services. I conclude from his evidence that Mr. Sokoloff merely required an up front lump sum payment to reduce monthly maintenance charges, much like a larger down payment on a car lease reduces monthly lease payments.

95 He admitted in cross-examination that he only carried out the upgrades to 12 of the 15 elevators, excluding the 1765 Weston Road elevators that had been repaired by Schindler after the flood. The total value of the pre-maintenance repairs supplied by quality was $60,000.00 [9] but the Owner claims $75,000 as set-off based on a calculation of $5,000.00 per elevator for 15 elevators.

96 Mr. Sokoloff confirmed under cross-examination that if the Owner had not upgraded the elevators then ongoing maintenance would have been more extensive and the monthly maintenance fee would have been higher. By upgrading the elevators the monthly maintenance required is less and monthly costs are lower. He would not have taken on the elevator maintenance contracts without the upgrades. He did not keep records of upgrades Quality performed in addition to monthly maintenance, testifying that he carried out upgrades and maintenance all at once. In other words, he required an upfront payment to defray the cost of maintenance. Ms Brown produced no records of any upgrades performed for the charge of $5,000.00 per elevator.

97 Quality took over the monthly maintenance of the five buildings in February 2005, except for 1765 Weston Road, where Schindler Elevator continued to carry out repairs after the December 2004 flood damage. Mr. Sokoloff testified that Schindler had been providing repairs as required in all of the buildings and that Quality took over maintenance of the elevators from Schindler, not from Thyss.

98 I find it notable that both Mr. Smith of Gemini and Mr. Sokoloff of Quality testified that an elevator maintenance contractor is required to keep a log book on site to record periodic maintenance service, but the Owner failed to produce any of the log books for the timeframe in issue at trial. I draw the inference that the evidence in the log books would have corroborated Thyss' position that it carried out monthly maintenance and would not have advanced the Owner's position. I draw the inference that for this reason the Owner, who has control over the log books, failed to produce them.

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99 Mr. Sokoloff testified that Quality carried out the elevator maintenance from 2005 through 2007 and then discontinued because the cost to Quality to maintain the elevators was too high. To continue maintaining the elevators Quality required the Owner to modernize them. The Owner subsequently modernized the elevators and Quality recently resumed the elevator maintenance contracts.

100 The Owner's position is that it is entitled to set-off the $75,000.00 it paid to Quality to upgrade the elevators because it could not find another elevator service provider, referring in particular to Schindler, to take on maintenance contracts after Thyss terminated service in December 2004. The Owner lead no evidence from Schindler or any other maintenance service provider, other than Quality, to corroborate that no other service provider had ben prepared to take over the maintenance contracts without capital upgrades. The evidence of Mr. Sokoloff is not sufficient to support the Owner's theory.

101 Mr. Smith's reports raised the age of the elevators as an issue. I find that the elevators in the Owner's buildings required an infusion of capital or modernization due to age and wear and tear. The onus of proof rests with the Owner to prove its set-off claim. The Owner has not proven that the manner in which Thyss maintained the elevators under the contracts caused the Owner to spend $5,000.00 per elevator for upgrades.

102 I find that the Owner has not proven its claim for set-off of $75,000.00.

Part VI: Did Thyss Breach the Contracts?

103 The Owner argues that because Thyss breached the contracts the doctrine of equitable set-off precludes Thyss from recovering its unpaid accounts. The Owner relies on the decision of the Ontario Court of Appeal in *Pierce v. Canada Trustco Mortgage Co.*, 2005 CarswellOnt 1876, 5 B.L.R. (4th) 178, 254 D.L.R. (4th) 79, 197 O.A.C. 369 (Ont. C.A.) where Justice MacPherson, for the court, explains at paragraph 38 two categories of set-off: legal and equitable. The Owner relies on equitable set-off asserting that Thyss breached the contracts by (1) failing to provide maintenance services as required and (2) terminating service in December 2004.

104 As to the first alleged breach, for reasons already stated, I find that the Owner has not proven that Thyss failed to provide the maintenance services required under the contracts. To the contrary, the evidence proves that the elevators were maintained in 2004 at an acceptable level.

105 As to the second alleged breach, the issue is whether Thyss suspended or terminated the contracts and if so whether Thyss complied with the terms of the contracts in doing so. If not, the issue is whether Thyss is precluded from recovering its unpaid accounts for services and materials supplied prior to the breach.

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106 Thyss' position is that it invoked paragraph 17 of the contracts when the Owner breached the contracts by failing to pay the arrears. The contracts provide:

> 17. It is expressly agreed that payment of all sums due hereunder is a condition precedent to the rendering of services by THYSSEN and THYSSEN reserves the right at its option to suspend service until all payments due are made. Notice of suspension in writing will be forwarded to you by mail following suspension.

107 The contracts permit Thyss to suspend service for non-payment with written notice of suspension provided subsequent to the suspension. The issue is whether Thyss suspended service for non-payment and delivered notice in writing.

108 On discovery Ms Brown was asked whether the contracts were "terminated" around December 21 (2004). She replied at question 1049:

> The service stopped before that, but the letter explaining that came I think on the 21 st of December from Fatima (Massri). Prior to that, the service had stopped.

109 Ms Brown admits in paragraph 31 of her affidavit that she had been informed by Ms Massri, Thyss' collections clerk, that Thyss would discontinue service for non-payment. The contracts also provide for termination by Thyss at paragraph 17 which reads:

> THYSSEN may terminate this agreement upon written notice, effective immediately, without prejudice to any other rights or remedies which it may have at law or in equity, if the OWNER fails to remit payment due within 30 days of service or suspension notice.

110 The termination clause permits Thyss to terminate the contracts in writing without any advance notice ("effective immediately") where payment is in arrears by more than 30 days. By December 21, 2004 the contracts were in arrears by more than 30 days.

111 On discovery Ms Brown admitted receiving written notice from Thyss on December 21, 2004. Neither party produced the letter. Ms Brown's evidence is an admission against interest and carries significant weight. The account statements show arrears of more than 30 days as of December 21, 2004 as follows:

> a) *1011 Lansdowne Avenue*: the July 1, 2003 charge of $5,537.25 was unpaid; the January 1, 2004 charge of $5,537.25 was unpaid by $2,768.75; the April 1, 2004, July 1, 2004 and October 1, 2004 charges of $5,537.25 on each of those dates was unpaid. Total arrears: *$24,917.75*
>
> b) *1765 Weston Road*: the July 30, 2002 charge of $3,909.78 was unpaid; the August 14, 2003 charge of $2,685.70 was unpaid; the August 14, 2003 charge of $9,972.40 was unpaid; the

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> May 1, 2004 charge of $5,803.04 was unpaid; the August 1, 2004 charge of $6,069.98 was unpaid; the November 1, 2004 charge of $4,046.65 was unpaid. Total arrears *$32,487.55*
>
> c) *1775 Weston Road*: the May 1, 2004 charge of $5,803.04 was unpaid; the May 13, 2004 charge of $2,541.25 was unpaid; the August 1, 2004 charge of $6,069.98 was unpaid; the November 1, 2004 charge of $4,046.65 was unpaid. Total arrears: *$18,460.92*
>
> d) *2667 Kipling Avenue*: the June 1, 2004 and September 1, 2004 charges of $6,081.58 on each of those dates was unpaid; the December 1, 2004 charge of $6,373.50 was unpaid but not by more than 30 days and a credit of $4,249.08 was applied by Thyss to reflect that services ended after the first of the three months of the quarterly payment; (arrears of $12,163,16 more than 30 days. Total arrears *$14,287.58*.
>
> e) *2677 Kipling Avenue*: the June 1, 2004 and September 1, 2004 charges of $6,079.15 on each of those dates was unpaid; the December 1, 2004 charge of $6,370.95 was unpaid but not by more than 30 days and a credit of $4,247.30 was applied by Thyss to reflect that services ended after the first of the three months of the quarterly payment. (arrears of $12,158.30 more than 30 days. Total arrears: *$14,281.95*

112 The question is whether the Thyss letter of December 21, 2004 gave notice of suspension of service or notice of termination of the contracts. If it was notice of suspension the Owner had 30 days to pay up the arrears. However, the Owner treated the letter as a termination of the contracts by Thyss and accepted the termination. Alternatively the Owner terminated the contracts. In her responding letter of December 23, 2004 Ms Brown wrote to Thyss to the attention of Ms Massri:

> We will now find a replacement maintenance contractor and hereby ask Thyssenkrupp to return any parts or elevator component they have taken from our properties.

The letter of December 23, 2004 is clear: the Owner treated the contracts as at an end.

113 At the time the letter was sent Thyss' accounts for each of the contracts was in arrears by more than 30 days and total arrears were over $120,000.00. The Owner made arrangements for Schindler on an emergency basis and then Quality on a regular basis to service the elevators.

114 I find that Thyss suspended the contracts for non-payment in accordance with the terms of the contract and gave written notice subsequent to the suspension. Had the Owner paid the arrears Thyss would have been required to resume its role as elevator maintenance contractor. However, instead of paying up the arrears the Owner terminated the contract with its letter of December 23, 2004. The Owner did not pay the arrears and the contracts were never reinstated.

115 The contracts also permit Thyss to terminate them if the Owner is in arrears by more than 30 days. When Thyss gave written notice the Owner's account was in arrears by more than 30 days. Notwithstanding that the text of the notice was not submitted in evidence, based on the surrounding

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circumstances I find that the notice was effective December 21, 2004, and that the termination was effected pursuant to the provisions of the contracts. The Owner accepted the termination by letter of December 23, 2004.

116 In conclusion I find that the Owner breached the contracts by failing to pay for materials and services supplied by Thyss to repair and maintain fifteen elevators in five buildings.

117 The Owner argues that Thyss breached the contracts by wrongfully terminating them. Having found that Thyss served notice effective December 21, 2004 as required under the contracts, the contracts were not wrongfully terminated and the Owner fails on this point.

118 Had I found that Thyss had wrongfully terminated the contracts the onus rests with the Owner to prove damages flowing from wrongful termination. The Owner has not proven any damages.

119 Had TSSA shut down the elevators or imposed fines on the building Owner then there would have been some evidence of damage. However Mr. Barrasso confirmed under cross-examination that TSSA never shut down the elevators and never imposed any fines against the Owner. As to the claim for $75,000.00 paid to Quality to upgrade the elevators, for reasons already given, the Owner has not proven that Thyss is liable for this capital infusion of elevator upgrades. Therefore, even if Thyss breached the contracts by terminating them improperly, which I have found it did not, there would be no damages for which Thyss is liable.

Part VII: Liens Vacated

120 By orders dated May 30, 2011 I vacated six of the 10 lien claims, the other four liens having been vacated earlier. With the consent of Thyss (provided by counsel, Mr. Drake), funds held in Mr. Bleta's trust account [10] were applied as security to vacate the six liens that were the subject of the motions before me on May 30, 2011.

Part VIII: Are Advance Payments Lienable?

121 Maintenance charges were payable monthly in advance up until March or April 2003, then quarterly in advance. The Owner argues that advance payments cannot be included in the quantum of the lien claims because the fees are payable before services are supplied and liens may only be registered in respect of services and materials supplied, rendering advance payments ineligible.

122 The Court of Appeal for Ontario disagrees. In *Landmark II Inc. v. 1535709 Ontario Ltd.*, 2011 CarswellOnt 8789, 2011 ONCA 567, 5 C.L.R. (4th) 1, 283 O.A.C. 239 (Ont. C.A.) Justice Laskin, speaking for the court, wrote at paragraph 24:

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> Registering a lien for the entire amount of the contract before construction is completed is not necessarily improper. The claimant will be secured only for the actual value of the work done, which is typically determined at trial....a claimant can register a lien for the unpaid balance if it stays on the job and intends to finish the contract. It cannot do so when it has left the job and does not intend to finish it.

123 The Thyss liens registered in 2003 include payments due in advance. Thyss continued to supply the services and materials for which payments were claimed for:

a) October, November and December 2003, in the case of 1011 Lansdowne;

b) October 2003 in the case of 1765 Weston Road;

c) October 2003 in the case of 1775 Weston Road;

d) October and November 2003 in the case of 2667 Kipling Avenue; and

e) October and November 2003 in the case of 2677 Kipling Avenue.

124 I find that in the case of the liens preserved in October 2003 Thyss registered lien claims that included the unpaid balance of materials and services to be performed and which it stayed on the job and performed.

125 The liens registered in October 2004 included payments due in advance. Thyss supplied the services and materials for which payment were claimed for:

a) October, November and December 2004, in the case of 1011 Lansdowne;

b) October 2004 in the case of 1765 Weston Road;

c) October 2004 in the case of 1775 Weston Road;

d) October and November 2004 in the case of 2667 Kipling Avenue; and

e) October and November 2004 in the case of 2677 Kipling Avenue.

126 I find that in the case of the liens preserved in October 2004 Thyss registered lien claims that included the unpaid balance of materials and services to be performed and which it stayed on the job and performed.

127 Applying *Landmark II Inc.*, *supra*, the Owner's argument that advance payments cannot be liened fails.

Conclusion

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128 For the reasons given I find that 1298781 Ontario Inc. shall pay to Thyssenkrupp Elevator (Canada) Limited:

a) $2,982.10 in respect of the lien claim registered on October 20, 2003 as instrument AT311421 and

b) $32,345.04 in respect of the lien claim registered on October 21, 2004 as instrument AT635037.

129 For the reasons given I find that 1147355 Ontario Inc. shall pay to Thyssenkrupp Elevator (Canada) Limited:

a) $2,153.39 in respect of the lien claim registered on October 20, 2003 against 1765 Weston Road as instrument AT311451 is;

b) $30,334.16 in respect of the lien claim registered on October 21, 2004 against 1765 Weston Road as instrument AT635043;

c) $2,689.69 in respect of the lien claim registered on October 20, 2003 against 1775 Weston Road as instrument AT311445; and

d) $20,337.16 in respect of the lien claim registered on October 21, 2004 against 1775 Weston Road as instrument AT635001.

130 For the reasons given I find that 1241676 Ontario Inc. shall pay to Thyssenkrupp Elevator (Canada) Limited:

a) $12,062.04 in respect of the lien claim registered on October 21, 2004 against 2667 Kipling Avenue as instrument AT635016;

b) $947.35 in respect of the lien claim registered on October 8, 2003 against 2677 Kipling Avenue as instrument AT302525; and

c) $18,959.37 in respect of the lien claim registered on October 21, 2004 against 2677 Kipling Avenue as instrument AT635028.

131 For the reasons given I further find that the lien claim registered by Thyssenkrupp Elevator (Canada) Limited on October 8, 2003 against 2667 Kipling Avenue as instrument AT302531 has been paid in full and shall be discharged.

132 I further find that the Owner is not entitled to set off any amount against the amounts found owing.

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133 I further find that Thyssenkrupp Elevator (Canada) Limited is entitled to prejudgment interest up to the date the reference report is signed and post-judgment interest at the *Courts of Justice* rate thereafter.

134 Generally costs follow the event. If the parties are unable to agree on costs counsel may file written submissions on costs. Submissions may not exceed four pages (typed, 8 $^{1}/_{2}$" × 11" pages, double space, minimum font size 12), plus a Bill of Costs, copies of any relevant offers to settle, if any, and case law.

a) Thyss' submissions must be filed [11] by February 4, 2013.

b) The Owner's submissions must be filed [12] by February 18, 2013.

c) Thyss' reply submissions must be filed by February 25, 2013.

135 If the parties are unable to agree on the form of the final report an attendance may be required to settle the report.

Schedule "A" — Actions included in the reference

Court file no.	*Title*	*Building Address*	*Quantum of lien claim*	*Lien particulars Date/Registration*
03-CV-259248	*Thyssenkrupp v 1298781 Ontario Inc.*	1011 Lansdowne Ave.	$36,593.05	October 20, 2003 AT311421
04-CV-280276	*Thyssenkrupp v 1298781 Ontario Inc.*	1011 Lansdowne Ave.	$32,345.04	October 21, 2004 AT635037
03-CV-259251	*Thyssenkrupp v 1147335 Ontario Inc.*	1765 Weston Road	$22,370.92	October 20, 2003 AT311451
04-CV-280310	*Thyssenkrupp v 1147335 Ontario Inc.*	1765 Weston Road	$30,334.16	October 21, 2004 AT635043
03-CV-259249	*Thyssenkrupp v 1241676 Ontario Inc.*	2667 Kipling Ave	$ 9,802.51	October 8, 2003 AT302531
04-CV-280284	*Thyssenkrupp v 1241676 Ontario Inc.*	2667 Kipling Ave.	$19,777.05	October 21, 2004 AT635016
03-CV-259250	*Thyssenkrupp v 1147335 Ontario Inc.*	1775 Weston Ave.	$16,690.11	October 20, 2003 AT311445
04-CV-280219	*Thyssenkrupp v1147335 Ontario Inc.*	1775 Weston Ave.	$20,337.16	October 21, 2004 AT635001
03-CV-259252	*Thyssenkrupp v 1241676 Ontario Inc.*	2677 Kipling Ave.	$16,188.55	October 8, 2003 AT302525
04-CV-280220	*Thyssenkrupp v 1241676 Ontario Inc.*	2677 Kipling Ave	$18,959.37	October 21, 2004 AT635028

Schedule "B" — History and Chronology of the Thyss reference

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Date	***Event***	***Thyssenkrupp Disposition***
Nov. 17 2006	Pretrial #1 order	All Thyss lien claims ordered tried together or consecutively. Thyss and Schindler lien references to be managed together. Thyss's affidavits of documents due by Dec. 8, 2006. Owner to provide particulars including particulars of its million dollar counterclaim for damages and punitive damages by Dec. 31, 2006. Owner's affidavits of documents due by Jan. 31, 2007. All discoveries by March 31, 2007.
April 12, 2007	Pretrial #2 Order	Finding: "the (Owner's) counterclaim is pleaded in a bare bones manner and is inadequate such that it is unreasonable to expect (Thyss) to know the case to meet". Finding: "Last chance" order for Owner to provide adequate particulars failing which sanctions may include striking pleadings. Owner to provide position on quantum of each lien claim by June 1, 2007. Undertakings deadline of June 1, 2007. Owner required to provide particulars of allegations in January 11, 2007 letter by June 1, 2007. Owner to (i) produce documents by June 1, 2007 (types of documents to be produced specified in the order); (ii) provide preliminary Scott Schedule by June 1, 2007 listing and quantifying each deficiency and failure alleged, (iii) produce revised Scott Schedule by September 30, 2007 after discoveries. Thyss' responding Scott Schedule due by October 31, 2007.
June 6, 2007	Pretrial #3 order	Owner breached April 12, 2007 order. Owner's request to extend time granted on a "last and final chance" basis to June 15, 2007 and to June 30, 2007 for Thyss to produce responding particulars and documents. Discovery deadline July 31, 2007. Owner's Scott Schedule deadline extended *sine die.* Findings: "The time has come and gone for the owner to take this litigation seriously and clearly state its position, the facts it relies on and intends to prove at trial and the allegations that the plaintiffs (defendants by counterclaim) must answer at trial. Notwithstanding that I stated in the last order that the owner would be allowed one final chance (which chance it now seeks to extend) to state its case through proper particulars, production of documents, and discovery, the order made today is truly the last chance for the defendant (plaintiff by counterclaim) to comply. The dates and deadlines are peremptory to the defendant (plaintiff by counterclaim) in each case. Cost sanctions are imposed for the breach of the April 12, 2007 order."
Oct. 3, 2007	*Related action*	*NOTE*: Motion to strike Owner's pleading brought only in the related Schindler reference. The Thyss reference could not proceed until the motion and Owner's appeal were decided because cases proceeding together.
Nov 23, 2007	Pretrial #4 Order	Owner's answers to undertakings inadequate. Owner's 4{th} counsel asks for another extension of time to produce documents. Order: "last extension of time" to December 31, 2008 for Owner to provide particulars and productions and to January 31, 2008 for Owner to answer undertakings and produce supplementary affidavit of documents. Discovery deadlines: examine Owner on June 9-13, 2008 and Thyss by June 20, 2008.
June 23, 2008	Pretrial #5 Order	Undertakings deadline August 1, 2008. Additional discovery ordered completed by September 15, 2008. Deadline for discovery motions: November 28, 2008. Witness lists to be filed by December 8, 2008. Owner to provide damages brief quantifying counterclaim in detail by category: July 11, 2008. Case conference fixed for August 12, 2008 to review damages brief, unless issues pertaining to damages brief resolved by counsel before then.

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August 12, 2008	Pretrial #5A order	Attendance to review damages brief. Owner's counsel provided different versions of the damages brief to the court and to Thyss. Owner had not complied with directions, requiring additional extension of time to comply. Directions issued: "in future in this and any other case before the courts, counsel providing a document brief to the court must provide a copy of the *exact same document* to all counsel involved in the proceeding." Deadline extended with detailed directions to permit Owner a final opportunity to provide a properly prepared damages brief by August 29, 2008. Discoveries ordered to continue on September 8-12 and 15, 2008.
Dec. 15, 2008	Pretrial #6 Order	Upon request of both parties a settlement conference [13] was scheduled for February 2009.
Feb. 3, 2009	Settlement conference	Settlement conference with construction lien Master Polika. Not settled.
July 13, 2009	Pretrial #7 Order	Owner's counsel announced intention to amend Owner's pleading but did not produce a proposed pleading, causing delay by failing to bring the motion contemporaneously with a similar motion in the related Schindler action. Timetable ordered scheduling Owner's motion to amend pleading for October 5, 2009, requiring Thyss to provide an accounting by August 31, 2009, requiring discoveries by October 31, 2009 and undertakings by December 11, 2009.
Oct. 5, 2009	Pleadings motion	Unopposed, Owner's pleading amended.
Oct. 21, 2009	Pretrial #7A order	Case conference convened at the request of both counsel to discuss damages brief and conduct of examinations for discovery. Directions ordered regarding conduct of discoveries. Thyss requested a date for a motion to strike the counterclaim Owner requested a date for motions to dismiss five of the Thyss lien claims as having been satisfied. Timetable ordered for all motions, with hearing dates scheduled for August 10 and 11, 2010, being the earliest dates available to counsel after the exchange of materials and cross-examinations [14] .
June 8, 2010	Adjournment	Motion dates adjourned from August 10 and 11, 2010 to August 26 and 27, 2010, a 16 day delay, requested by Thyss' counsel to allow him to fulfil his role as articling principal during articling interview week. Despite deadline of December 31, 2009 to serve Owner's motion records, by Jue 8, 2010 Owner had not yet served its motion records for the motions to strike five of Thyss' lien claims.
	Adjournment	August 26 and 27, 2010 motion dates adjourned to September 21 and 22, 2010 at request of Thyss' counsel (spouse gave birth to twins).
August 17, 2010	Owner's motion to examine	Owner moved to compel non-parties to be examined for Thyss' motion to strike the counterclaim. Motion refused. Owner to pay costs of $3,810.21.
August 18, 2010	Recusal Motion	Owner advised Thyss of intention to move to recuse Master Albert as reference Master.
Sept. 13, 2010	Triage court	Owner attended before Justice Himel in triage court for a motion date before a judge to consolidate Owner's claim against Aviva Canada (its bonding company) with the lien proceedings and to bring a motion to recuse Master Albert from these references. Himel, J. endorsed, in part: "The No Co (numbered company) can bring the motion for the Master (to) recuse herself in advance. There is another matter before the Master scheduled for next Sept 21/22/10 and a case conference. Master Albert is the Master overseeing these motions. Costs are reserved to the master presiding."

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		Owner's counsel did not inform Master Albert of the proposed recusal motion or provide Master Albert with a copy of Justice Himel's endorsement. Nor did the Owner prepare the motion for hearing on September 21 and 22, 2010.
Sept. 20, 2010	Case conference	Telephone case conference convened at the request of Owner's counsel to ask to adjourn the Sept. 21 - 22, 2010 special appointment because Owner's materials not ready. Owner's counsel asked to adjourn all motions, not just the Owner's motions. Owner's counsel failed to inform Master Albert of the proposed recusal motion and Justice Himel's endorsement. Order: Thyss motions to proceed as scheduled. Owner's proposed motions to be rescheduled when ready. Motions are not interdependent.
Sept. 21 - 22, 2010	Motions to strike	Dates set aside for special appointment to hear Thyss' motions to strike Owner's defence of set-off for lost rents and counterclaim, and for Owner's motions to dismiss five of the Thyss lien claims. Owner had not served any motion materials. Owner's proposed motion to recuse brought to Master Albert's attention for the first time but no motion materials had been served. Owner's counsel argued unsuccessfully that recusal motion be heard by a judge, contrary to Himel, J's order and settled case law. Costs of the attendance before Himel, J. ordered against Owner, fixed at $3,120.00 to Thyss. Thyss' motions adjourned pending Owner's recusal motion.
Nov. 24, 2010	Recusal Motion	Defendant's motion to recuse heard and reserved
Dec. 21, 2010	Decision: Recusal Motion	Order released refusing Owner's recusal motion, reasons to follow. (*Note*: Defendant's judicial review dismissed July 27, 2012 by Divisional Court, costs $9,500.00)
Jan. 24, 2011	Pretrial #8 Order	Decision in motion to strike counterclaim under reserve. Owner's motion for directions regarding conduct of Mr. Shaw's cross-examination and five motions brought by Owner to strike 5 of the Thyss lien claims fixed for hearing on May 9, 2011.
Feb. 11, 2011	Reasons Recusal	Reasons for decision released for recusal motion
May 6, 2011	Motion to strike	Thyss' motion to strike defence of set-off for lost rents and counterclaim, heard Jan. 6, 2011, granted for reasons released May 6, 2011.
May 9, 2011	Motion to prohibit motions	Thyss' motion to preclude Owner from bringing interlocutory motions dismissed, costs of $500.00 payable by Thyss to Owner.
May 9, 2011	Motion to compel attendance	Owner's motion to compel Mr. Shaw to re-attend cross-examinations and to compel production of hard drive refused, costs payable by Owner to Thyss fixed at $2,800.00.
May 9, 2011	Pretrial #9 order	Timetable for discovery of Thyss.
October 17, 2011	Pretrial #10 order	Limited additional discovery by Owner permitted. Thyss lists 3 witnesses for trial. Owner lists 112 (one hundred and twelve) witnesses for trial. (Note: Total of $122,000.00 in dispute in 10 actions.) Directions issued limiting witnesses, time permitted per witness at trial and directing affidavit evidence from some witnesses.
Dec. 5, 2011	Appeal striking counterclaim	Jennings, J. dismissed Owner's appeal from Albert, M. order striking Owner's claim of set-off for lost rents and counterclaim.
Jan. 23, 2012	Pretrial #11 order	Order: trial procedures, including time limits and affidavit evidence in chief.

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April 12, 2012	Appeal order	Wilton-Segal, J. order granting Thyss' motion to strike Owner's appeal from Pretrial order #11 made Jan. 23, 2012. Substantial indemnity costs ordered against Owner for $8,500.00 on basis appeal was vexatious.
July 9, 2012	Pretrial #12 order	Final procedural order.
July 13, 2012	U & R	Owner's motion to compel answers to undertakings and refusals. Owner successful on 2 out of 31 undertakings and 5 out of 29 refusals. Costs to Thyss fixed at $2,000.00, 30 days.
July 27, 2012	Judicial Review decision	Divisional Court (Nordheimer, J. writing for Swinton, and Wilton-Siegel, JJ.) dismissed Owner's application for judicial review of Master Albert's refusal to recuse herself, costs $9,500.00 payable by Owner to Thyss.
October 1, 2012	Telephone conference	Conference call with counsel to address preliminary procedural issue of Owner's challenge to authenticity and admissibility of 192 documents in Thyss' document book; directions given that the issue would be dealt with as a preliminary issue at trial.
October 11, 2012	Trial	Trial commenced. Trial concluded October 19, 2012. Decision reserved.

Schedule "C" — Preliminary and procedural rulings made at trial

This schedule describes the many procedural issues that arose at trial, my rulings and reasons.

#1. Owner challenged authenticity and admissibility of 192 Thyss documents

1 In a 14 page Notice of Objection the Owner challenged the authenticity and admissibility of 192 of the documents served and filed in Thyss' document books.

2 At the trial management stage of this reference the court gave directions regarding the exchange and filing of documents, including directions about proving documents. The purpose of these directions lies in section 67 of the *Construction Lien Act* and reference rule 55.01, which require the reference Master to devise as summary a process as is suitable to the case. These legislative provisions are based on principles of proportionality and authorize the reference Master to give directions as are necessary, to dispense with any procedure ordinarily taken that the referee considers unnecessary, and to adopt procedures different from those ordinarily taken where appropriate.

3 On January 23, 2012 I gave the following directions:

Document books:

> (a) Each party shall prepare four (4) sets of document books containing all documents to be relied on at trial. Documents attached as exhibits to affidavits filed as evidence in chief need not be duplicated in the document books but shall be treated as if they

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were included in the document book(s) for purposes of these directions. Each document book shall be titled "Document Book" and shall be indexed, tabbed and page numbered. **Only documents contained in a document book prepared in compliance with these directions may be tendered in evidence at trial, except with leave of this court.** *Emphasis added*

(b) Document books must be exchanged and filed with Assistant Trial Co-ordinator for construction liens, 6th floor, 393 University Avenue, Toronto by September 11, 2012.
(c) **The authenticity of each document in the document books shall be deemed admitted, pursuant to rules 51.01, 51.02 and 51.03, and shall be admissible at trial unless the party objecting to authenticity or admissibility serves a written Letter of Objection, within 10 days following the date the document books are served, in which case the court will rule on authenticity or admissibility at trial. Otherwise the documents in the document books shall be admissible in evidence without further formal proof.** *Emphasis added*

(d) Evidence and argument regarding the truth of the contents of documents may be presented at trial.

4 Thyss served and filed a three volume document book with 548 tabs and more than that number of documents.

5 Relying on section 35 of the *Evidence Act*, R.S.O. 1990, c.E.23, Thyss also served the Owner with notice of its intention to produce business records. Section 35 provides:

35. (1) In this section,

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"record" includes any information that is recorded or stored by means of any device.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

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(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

6 The challenged documents fall into six categories:

a) Category #1: Call back sheets, unknown personnel: 177 documents

b) Category #2: Scheduled maintenance work order, unknown personnel: 5 documents

c) Category #3: Faxes from Thyss: 3 documents

d) Category #4: Correspondence from Thyss: 1 document

e) Category #5: Maintenance report, unknown personnel: 2 documents

f) Category #6: Schindler invoices: 4 documents

7 Categories #1 and #2 are call back sheets and scheduled maintenance work orders. The Owner's notice of objection described its objection as "unknown personnel".

8 The Owner objected on two grounds:

a) Thyss failed to comply with the court's order to answer a question refused on discovery. The Owner argued that pursuant to rule 31.07(2) the court should not permit Thyss to introduce at trial information that was not provided; and

b) Thyss is attempting to introduce evidence that it withheld from the Owner on discovery.

9 I am not persuaded by the first ground for two reasons. Firstly, Thyss complied with the court's order to answer question 260. In its letter dated August 24, 2012, filed as exhibit 4, Thyss listed the personnel who carried out elevator maintenance work and, where available, the employee code number of the worker. The fact that in some of the documents the code number or name of the worker is missing does not mean that the document is not an authentic business record or that Thyss failed to comply with the court's order to answer question 260. Thyss provided as fulsome an answer as it could based on the information available to it.

10 Secondly, the first ground of objection fails because Thyss did not have the missing information (employee names or code numbers) at the time of discovery or in August 2004 when it answered question 260, and it still does not have the information at trial. Thyss is not trying to introduce at trial information withheld from the Owner. There is no surprise at trial. Thyss simply

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does not have the information. Rule 31.07(2) does not apply to preclude the 177 call back sheets, or the five scheduled maintenance work order documents on grounds of attempting to introduce at trial information withheld at discovery.

11 The second ground of objection by the Owner to the first two categories of documents is that the documents are not properly business records within the meaning of section 35 of the *Evidence Act*. That section provides that upon serving the proper notice a party may introduce as business records "any writing or record made of any act, transaction, occurrence or event" as evidence of the occurrence of that "act, transaction, occurrence or event" if the record is made "in the usual course of business at, or within a reasonable time thereafter, of the time of the act, transaction, occurrence or event".

12 Thyss served notice under the *Evidence Act* in the proper form and in sufficient time. The issue is whether the documents submitted as business records are documents that qualify as writings or records made of acts, transactions, occurrences or events made in the ordinary course of business in a timely manner.

13 Thyss called Mike Tate as a witness to testify as to the record keeping practices of Thyss and the manner in which the company's records are maintained and produced. Mr. Tate was not an employee of Thyss at the time of the events that give rise to these construction lien actions or at the time that the records in dispute were created. He has been employed by Thyss as credit manager since February 2007. As such he is responsible to manage accounts receivable, set up new accounts, verify new accounts, collect accounts, and administer accounts. He testified that he knows the record keeping and paper flow throughout the company. I found Mr. Tate to be credible and knowledgeable about the record keeping of Thyss. He testified that the category 1 and 2 documents were made in the ordinary course of business at or near the time of the events recorded.

14 The Owner relies on the decision of Justice Hryn in *R. v. Felderhof*, 2005 CarswellOnt 4726 (Ont. C.J.) at para 199 as standing for the proposition that "instructions, conditional instructions, suggestions, questions or advice" do not qualify as business records under section 35 of the *Evidence Act* because these types of documents are not the recording of purely objective data. Counsel for the Owner argues that the records submitted by Thyss as business records constitute opinions because they reflect what a maintenance worker, in his or her opinion, decided was required. I disagree with that submission. The call back sheets reflect the items of maintenance carried out by the maintenance worker on the call. The data reflected in the call back records is objective data that records the date, the property, the nature of the call, the reason for the call, and the work performed. The same applies to the scheduled maintenance work order documents.

15 I find that the 177 call back sheets and the five scheduled maintenance work order sheets to which objection was taken are properly admitted as business records under section 35 of the

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Evidence Act. Where the call back records are silent as to the identity of the worker it goes to the weight to be given to the evidence. The fact that the records are admitted through a witness who does not have personal knowledge of the making of the record also goes to the weight to be given to the evidence, pursuant to section 35(4) of the *Evidence Act*.

16 I turn next to categories 3 and 4, faxes and correspondence from Thyss to the Owner, found at exhibit 2, tabs 2, 8, 9 and 16. The faxes to which objection are taken do not include transmittal information. The Owner does not admit receiving them. Mr. Tate testified that the faxes reflect data that is conveyed in this way in the ordinary course of business to reflect interactions between Thyss and its customers, but he was not present at the time these particular faxes were created. I find that the faxes are admissible as business records for the purpose of establishing that the documents were created by Thyss, but not as evidence that they were transmitted to the defendant. This ruling applies to the faxes at exhibit 2, tabs 8, 9 and 16. As to the correspondence at exhibit 2, tab 2, again Thyss provided no evidence that the letter was sent to the Owner and the Owner does not admit receiving it. On that basis I find that the document is admissible as a business record to prove that the document was created by Thyss but not as proof that it was delivered to the Owner.

17 Category 5 refers to two maintenance reports, filed at exhibit 2, tabs 21 and 22. These reports are summaries of the maintenance call back sheets and maintenance work orders prepared in the ordinary course of business by Thyss based on the information provided daily by maintenance workers. The Owner objects to these documents as business records on the basis that they are summaries and, relying on the *R. v. Felderhof* decision, *supra*, the Owner argues that summaries are not business records. Mr. Tate's evidence is that these reports are generated from the Thyss computer system data base. He testified that when mechanics submit their maintenance sheets the information is input into the Thyss computerized record keeping system, which then generates these types of maintenance reports. It is a report that is prepared in the usual course of business on a customer-by-customer basis. If the report had been a "one of" type of report created solely and subjectively for the purpose of analyzing data for trial or summarizing trial evidence, then I would have agreed with the Owner that it is not properly a business record. Rather it would have been a submission. However, the summaries at tabs 21 and 22 are in the nature of reports regularly maintained and generated by Thyss for its customers and on that basis it is not the objectionable type of summary that the court in *Felderhoff* rejected.

18 On that basis I find that the maintenance reports at tabs 21 and 22 of exhibit 2 are admissible as business records under section 35 of the *Evidence Act*.

19 Category 6 is made up of four documents on the letterhead of Schindler. They were included in Thyss' document book for completeness, in anticipation that they may be required in reply evidence. The four documents are invoices addressed to the Owner, to the attention of Ms Brown. Because Ms Brown refused to acknowledge receipt of the documents when she was cross-examined Thyss called a representative from Schindler in reply to testify as to the authenticity of

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the four documents. I am satisfied that the documents are business records maintained by Schindler in the ordinary course of business and that the documents are admissible on that basis, notice having been given under the *Evidence Act*.

#2. Defendant asks court not to allow plaintiff's witness Fazil Shaw to testify

20 At the opening of trial counsel for Thyss advised the court that one of its two witnesses was not available on the first day of trial but would be available on the second day of trial. The Owner's counsel asked the court to disallow the witness because he was not available to testify at the opening of trial.

21 After hearing the many preliminary and procedural issues raised by counsel, which took up most of the first day of trial, the issue became moot.

#3. Owner's motion to strike portions of the Thyss affidavits

22 Owner's counsel asked the court to strike paragraphs 8, 9 and 12 of the affidavit of Fazil Shaw on the basis that the facts recited are based on information and belief received from David Bond, who was not going to be called as a witness. The paragraphs depose as follows (*challenged portions underlined*):

> 8. Despite the defendants constantly being in arrears, Thyssenkrupp provided continual maintenance service throughout the term of my employment, and I have been advised by David Bond, the district manager of Thyssenkrupp, on or about March 30, 2010 and do verily believe him, and I have attested to same in my affidavit of April 1, 2010, that maintenance service continued past the final date of my employment until December 2004.
>
> 9. During my employment, until October 2004, Thyssenkrupp sent out invoices to the defendants on a regular basis and generally, invoices were delivered quarterly. I was advised by Mr. Bond on or about March 30, 2010 and do verily believe, and I have already attested to same in my affidavit of April 1, 2010, that this practice continued until the termination of the defendants' contracts in December 2004.
>
> 12. Accordingly, where payments referenced specific invoices I attributed them to those specific invoices. Where invoices did not reference specific invoices I applied them to the oldest outstanding accounts. I am advised by Mr. Bond on or about March 30, 2010 and do verily believe him, and I have attested to same in my affidavit of April 1, 2010, that subsequent to the cessation of my employment with Thyssenkrupp, that Thyssenkrupp continued to account for all payments received from the defendants.

23 The Owner also asked the court to strike the last three pages of exhibit B to the affidavit of Fazil Shaw on the basis that they were not properly attested to in the affidavit. In paragraph 3 of his affidavit Mr. Shaw deposed that exhibit "B" is the monthly contract for the property identified

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in it. The last three pages are proposals dated February 11 and 19, 2004 for a specific task and not monthly contracts.

24 One of the difficulties in this trial is that the individuals who were employed by Thyss in 2003 and 2004, when the events in issue occurred, have moved on. It has taken over eight years to get to trial, due primarily to many interlocutory motions and appeals (see the chronology at Schedule "B" of these reasons). Thyss asked the court to accept these assertions for the fact that they were made and not for the truth of the contents of the hearsay statements which would be proven by other evidence.

25 Paragraphs 8, 9 and 12 of the Shaw affidavit are not struck. The court will give them appropriate weight taking into account their hearsay nature, the best evidence rule and the following corroborating evidence given at trial:

a) the facts in paragraph 8 deposed on information and belief, that Thyss continued to provide maintenance service until December 2004, was not disputed;

b) the facts in paragraph 9 deposed on information and belief, that Thyss' practice of invoicing quarterly, was otherwise proven at trial by testimony including that of Ms Massri and corroborated by exhibits 6 and 7;

c) the facts in paragraph 12 deposed on information and belief, that Thyss' practice of applying payments as directed by the Owner but where not directed applying them to the oldest outstanding accounts, was otherwise proven at trial by testimony and corroborated by exhibits 6 and 7; and

d) The Owner had the opportunity to cross-examine Mr. Shaw on the February 2004 contracts attached as the last three pages of exhibit "B" of his affidavit.

26 The last three pages of exhibit B to the Shaw affidavit are not struck because the Owner could have cross-examined Mr. Shaw on the documents at trial. However, these three pages are irrelevant to the outcome of trial.

#4. Thyss' motion to strike portions of the Owner's affidavits

27 Thyss asked the court to strike paragraph 6 of the affidavit of Mr. Barrasso on the basis that it is hearsay, based on the information and belief of Mr. Audin. Mr. Audin did not testify at trial either by affidavit or in person. In paragraph 6 Mr. Barrasso deposes *(challenged portions underlined)*:

6. At the time of entering into the contracts I was advised by Albert Audin, my construction and building maintenance contractor, and do verily believe that the Plaintiff was well aware of the quality of the individual elevators and that the plaintiff had experience with Dover elevators, such as those in place at the properties. The Plaintiff had acquired the Dover

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> company previously and therefore had its technology. Mr. Audin is no longer working for the Defendants for reasons unrelated to the subject actions, and is now retired to my knowledge.

28 Hearsay evidence includes statements by persons otherwise than in testimony at trial where the evidence is tendered as proof of their truth [15]. In this case Mr. Barrasso asks the court to accept as truth information provided to him by a person not before the court, Mr. Audin, that Thyss "was well aware of the quality of the individual elevators" and "had experience with Dover elevators" and "had acquired the Dover company". No corroborating or independent evidence of these facts was adduced by the Owner. The Thyss witnesses could have been cross-examined on these facts. The truth of these statements based on hearsay from Mr. Audin in the Barrasso affidavit is inadmissible and is struck. In any event, whether or not Thyss was familiar with Dover elevators was not determinative of whether they are liable to the Owner for the set-off claimed to upgrade the elevators at a cost of $75,000.00, or whether Thyss is entitled to be paid for services and materials supplied under the maintenance contracts.

29 Thyss also asked the court to strike portions of paragraphs 9, 10, 12, 34 and 35 of the affidavit of Ms Brown on the basis that they are hearsay evidence given without revealing any source. The paragraphs state as follows:

> 9. As I received very little cooperation from the Plaintiff in servicing the elevators I was compelled to and undertook to obtain professional audits of the elevators. I retained Ron Smith of Gemini Consultants. Ron Smith knows most, if not all, of the leaders in the elevator industry. For instance, he was well acquainted with Jack Elias, the former President of Schindler Elevator Corporation.
>
> 10. I also had dialogue with Mr. Shaw and I understand that he and Mr. Smith knew each other, and following Mr. Shaw's dismissal from the Plaintiff I know that Mr. Shaw and Mr. Smith have done business together.
>
> 12. I also caused the TSSA Reports to be regularly forwarded onto the plaintiff upon receipt. This work by law required an elevator maintenance provider's skills, for the most part. As has been explained to me I understand that the law only allows elevator maintenance providers to access, handle and alter elevator equipment.
>
> 34. Mr. Shaw and I spoke subsequently as did he and Mr. Barrasso. ...My letter of December 23, 2004 which is found in the request to Admit @ (*sic*) pages 124-125 was essentially dictated and re-drafted by Mr. Shaw over the telephone. This includes the contents of the letter which is more toned down than that which I had originally drafted; as well as Mr. Shaw's knowledge and wording which I did not know about. For instance he knew and wrote that: the liens were not proper because...

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35. Mr. Shaw told me that he always got along with Mr. Barrasso, that Mr. Barrasso was a perfect gentleman in their dealings, ..."

30 Paragraphs 9 and 10 will be allowed to stand on the basis that Ms Brown has personal knowledge of the relationship of Mr. Shaw and Mr. Smith. The last sentence of paragraph 12 is struck as hearsay evidence because it fails to reveal the source of the information and belief and Ms Brown has no personal knowledge of the facts deposed.

31 The words in paragraph 34 "as did he and Mr. Barrasso" and "he knew" are struck as hearsay because the source of the information is not disclosed. The hearsay evidence in paragraph 35 that is based on information and belief from Mr. Shaw is allowed to remain and will be given appropriate weight, taking into account the hearsay nature of the evidence and the best evidence rule.

#5. Admissibility of "Request to Admit" as evidence at trial

32 Rule 51 provides that a party may serve a request to admit (Form 51A) requesting another party to admit the truth of a fact or the authenticity of a document. The party receiving the request must respond by specifically denying or refusing to admit the truth of a fact or the authenticity of a document listed in the request, failing which that party is deemed to admit the truth of the facts and the authenticity of the documents in the request. Admitted facts and documents do not require further proof at trial.

33 The Owner served a request to admit. Thyss responded, specifically denying and refusing to admit the truth of facts and authenticity of documents in the request.

34 At trial the Owner sought to file the request to admit as an exhibit and rely on the facts and documents listed in it but not admitted by Thyss on the basis that the request to admit had been referred to in the affidavits of evidence in chief of Mr. Barrasso and Ms Brown. Thyss objected to the admissibility of the request to admit because Thyss had denied most of the facts and documents alleged such that they were not admissions.

35 For decades references in Toronto under the *Construction Lien Act* have followed a pretrial procedure whereby the parties attend hearings called "pretrial hearings for directions" in which the reference master gives directions for the conduct of the reference prior to conducting the evidentiary portion of the reference trial. The chronology at Schedule "B" to these reasons shows that many such hearings for directions were convened in this reference and directions were issued.

36 The directions given by order on January 23, 2012 provided at paragraph 6:

Document books:

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> (a) Each party shall prepare four (4) sets of document books containing all documents to be relied on at trial. Documents attached as exhibits to affidavits filed as evidence in chief need not be duplicated in the document books but shall be treated as if they were included in the document book(s) for purposes of these directions. Each document book shall be titled "Document Book" and shall be indexed, tabbed and page numbered. **Only documents contained in a document book prepared in compliance with these directions may be tendered in evidence at trial, except with leave of this court.** *emphasis added*

37 All documents relied on at trial had to be included either in (1) the affidavit of a witness testifying in chief by affidavit, or (2) a document book. Documents attached to a request to admit are not admissible in evidence unless included in either (1) or (2) as described.

38 I ruled at trial that only documents listed in the Owner's request to admit that were also included in a document book or attached as an exhibit to an affidavit of evidence in chief may be admitted in evidence without leave of the court. The request to admit itself could not be admitted as evidence.

39 The Owner did not provide any basis upon which to grant leave to admit the request to admit, or to admit documents listed in the Owner's request to admit but excluded from the document books and affidavits of evidence in chief. Allowing such documents to be admitted at trial would be prejudicial to Thyss, having prepared for trial based on the court's pretrial orders and directions. Leave to admit the request to admit at trial was refused. The only purpose to which the request to admit can be put is in respect of costs submissions after trial (rule 51.04).

#6. Reading in the transcript of examination for discovery

40 At the close of its case in chief Thyss sought to read in excerpts from the examination for discovery of Ms Brown on behalf of the Owner. The Owner objected.

41 Rule 31.11 provides that at the trial of an action a party may read into evidence as part of its own case any part of the evidence given by an adverse party on the examination for discovery. Both parties were allowed to read in portions of the examinations for discovery they conducted of each other.

#7. Leave sought by Owner to introduce expert reports of Gemini Elevator Consultants

42 Rule 53.03(1) provides:

> (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule 2.1.

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(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

43 The Owner sought leave to introduce into evidence reports prepared by George Ronald Smith of Gemini Elevator Consultants. Owner's counsel did not have copies of the reports suitable for filing as exhibits as required by the directions issued before trial. Nor had expert reports been served as required by rule 53 and the court's order of January 23, 2012. Nor were the reports included in a document book served before trial.

44 Thyss did not object to Mr. Smith's qualifications as an expert. The issue was whether leave should be granted to permit the Owner to serve at trial, for the first time, expert reports that it intended to rely on at trial. The court's pretrial directions were clear. Rule 53 is clear. The Owner breached both.

45 Thyss acknowledged that it had received copies of the reports at the production stage of the reference several years earlier. What it did not know was that the Owner intended to rely on those reports at trial.

46 Mr. Smith was on the Owner's list of trial witnesses. Counsel for Thyss was familiar with the reports and not taken by surprise. Rather than preclude the Owner from filing and relying on the

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Gemini reports the court adjourned the trial for the balance of the day to give the Owner's counsel time to collate the expert reports into a format suitable for filing as an exhibit at trial, including the expert's curriculum vitae and acknowledgement of expert duty.

47 On that basis I granted leave to the Owner to file the expert reports of Mr. Smith of Gemini.

#8. Owner's request for leave to call Rick Sokoloff of Quality as an expert

48 The Owner asked the court for leave to adduce expert evidence from Rick Sokoloff of Quality Allied Elevator without an expert report. The Owner relies on rule 53.03(3), by which the court may grant leave to permit an expert to testify where the party seeking leave failed to serve an expert report summarizing his or her opinion. The test is whether granting leave would prejudice Thyss or cause undue delay in the trial.

49 The Owner did not seek leave to introduce an expert report. Rather, counsel asks for leave to call Mr. Soklоloff as an expert without any report at all, without an acknowledgement of expert duty, without having disclosed in advance the proposed expert's opinions, without a statement of instructions and without an analysis and reasons, all of which are required by rule 53 to be included in an expert report.

50 The only authority Owner's counsel relies on is the decision of Zelinski, J. in *Brink v. Timberjack Inc.*, [2004] O.J. No. 4610 (Ont. S.C.J.). In that case the defendant, Timberjack, having already served two expert reports, sought to introduce a third one when the trial reconvened after an adjournment of over one and a half months. The new report advanced a different theory of causation, based on factual evidence that the expert first learned of at the trial, before the adjournment. The new report had been served one and a half months before the trial resumed.

51 The *Brink* case is distinguishable for several reasons. It is distinguishable on its facts because in *Brink* the expert had already provided two written reports in compliance with the rule and had served the new report some six weeks before the trial was to resume. The plaintiff knew what opinions were being advanced and could prepare to respond. In the present case the proposed expert has not prepared a report. Nor has he provided any disclosure of his instructions, the issues about which he would be asked to opine, or his opinions on those issues. Rather, the Owner's counsel proposes to have his witness provide opinions at trial without any prior disclosure. He did not even provided a witness statement or statement providing details of the anticipated opinions of the proposed expert as required by the pretrial directions and orders made in this reference. The Owner's conduct in this regard is a flagrant disregard of the rules and the court's process.

52 *Brink* is also distinguishable on its facts because in that case the new theory of causation advanced in the expert report that was the subject of the motion was based on facts first learned at trial. In the present case the Owner proposed to call an expert to opine about the condition of

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elevator maintenance in 2004 and 2005, seven years ago. There were no new facts that prevented the Owner from serving an expert report before trial as directed.

53 *Brink* is further distinguishable because the rules regarding expert witnesses have changed since that case was decided. Although the court retains jurisdiction to grant leave to hear from an expert without a report, the court must have regard to rule amendments since *Brink* was decided, increasing the obligations on a party before an expert may testify. The report must include specified information. An acknowledgement of expert duty is required. These amendments were imposed to ensure that expert evidence is impartial, not acting as an advocate for his or her client, and to ensure that all parties know the case they must meet at trial. If I were to grant leave and permit the Owner to call Mr. Sokoloff to testify as an expert without a report, in the absence of a very good reason for not having served a report, the form and substance of the rule regarding experts would be undermined.

54 The first pretrial hearing for directions in this reference was held on November 17, 2006. I issued a procedural order. The chronology at Schedule "B" lists the dates of hearings for directions and procedural orders. In all of the hearings for directions I made procedural orders for the purpose of narrowing issues, to ensure that the parties would know in advance of trial the case they must meet at trial.

55 The directions issued following the January 23, 2012 hearing, in which the Owner advised the court of its intention to summons several expert witnesses, provided:

> Both counsel are reminded of the rules respecting evidence from experts. Any witness called as an expert must provide by the deadline ordered herein an expert report together with a curriculum vitae and statement of expert witness prescribed by the rules, failing which the witness may not testify as an expert.

56 The Owner provided no explanation for not providing an expert report from Mr. Sokoloff, who was under contract with the Owner prior to and at the time of trial, and arguably within the Owner's control. If the Owner could not obtain a written report from Mr. Sokoloff (no evidence to that effect was advanced) then the court's pretrial directions allowed for other ways to provide disclosure.

57 The court's orders for directions provided that disclosure before trial is required for all of the evidence to be given at trial in one of the following formats:

> 1. Where the evidence of a witness in chief was to be by affidavit, the sworn affidavit was to be served by a specified date.

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2. Where the witness was to be called as an expert, an expert report must be delivered. The rules govern the timeframe for the delivery of expert reports, as did my order of January 23, 2012.

3. Where the witness was to give oral evidence in chief at trial a witness statement summarizing the evidence of the witness and signed by the witness was required by the deadline ordered.

4. Where a witness had to be summonsed and would not sign a witness statement, a summary of the anticipated evidence of the witness was required to be served by the deadline date.

58 The October 17, 2011 order for directions provided at paragraph 2(e):

(1) Witness statements provide a summary of the evidence proposed to be adduced from each witness at trial, to avoid surprise at trial. Only evidence summarized in a witness statement signed by the witness may be called at trial. Where the proposed witness is unco-operative and must be summonsed to trial a statement of anticipated evidence signed by counsel for the party calling the witness may be filed instead.

59 The Owner summonsed Mr. Sokoloff as a witness. The summary of anticipated evidence filed for Mr. Sokoloff states:

1. as the maintenance provider for the 1765-1775 Weston Road, 2667-2677 Kipling Avenue and 1011 Lansdowne Avenue properties after the plaintiff abandoned the Defendant, as well as at certain points in time when called on to perform certain repairs to the elevator systems he will discuss the condition of the elevators as he found them;

2. he will discuss the generally poor condition of the elevators, the terms of the contract for service that was to be provided by Thyssenkrupp and how Thyssenkrupp's services fell below the level required by the contract;

3. he will speak to the costs and work required as pre-maintenance when Quality Allied Elevators assumed its position as maintenance provider for each of the above three locations;

4. he will discuss the TSSA Directives and Orders issued and Thyssenkrupp's responsibility for complying with Directives and Orders issued to the owners, how the items set out in specific Directives and Orders would affect the elevator system's operations; and the standard to be expected of Thyssenkrupp as the self-reported leading elevator maintenance provider;

5. he will discuss the reasonable owner expectations of elevator service given Thyssenkrupp's representations as the leader in elevator maintenance services and the contractual requirements;

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6. he will provide his opinion as to the manner in which Thyssenkrupp stopped providing elevator maintenance services in light of the TSSA requirements;

7. he will discuss the effects on a maintenance provider's knowledge of and ability to maintain, service and repair elevator systems after being the longstanding maintenance provider and how that position affects and assists the maintenance provider;

8. He will discuss the steps that could be taken as a maintenance provider to improve performance issues with or without a full modernization;

9. He will discuss the effect on the elevator system of not attending to repairs on the elevators in a timely manner

60 The summary of anticipated evidence for Mr. Sokoloff identifies issues, but does not provide a summary of the evidence proposed to be adduced from him at trial, to avoid surprise at trial, as ordered. The summary is silent as to his expert opinions and the proposed factual evidence of the witness. The summary provides that Mr. Sokoloff "will discuss" or "will provide his opinion" without disclosing the substance of the anticipated evidence from this witness.

61 Nowhere has the Owner disclosed Rick Sokoloff's expert opinions: not in an expert report, a witness statement or a summary of anticipated evidence.

62 If the court were to allow Mr. Sokoloff to testify as an expert Thyss would be taken by surprise in a reference hearing where the pretrial process was designed to eliminate the element of surprise at trial. The Owner provided no explanation why Mr. Sokoloff did not provided an expert report, why a witness statement was not forthcoming from him and why the summary of anticipated evidence of Mr. Sokoloff as a witness under summons failed to disclose the opinions that the Owner anticipated he would give. Mr. Sokoloff's company provides elevator maintenance services under contract to the Owner. He has done so, on and off, for many years. I draw the inference that the Owner intended to rely on the element of surprise and "trial by ambush" expecting to spring the opinions of this witness on Thyss without notice, without warning and without giving Thyss an opportunity to prepare properly for cross-examination or to retain a responding expert.

63 The test for leave in rule 53.08 suggests that leave be granted unless it would cause prejudice to the opposite party or undue delay in the the trial. If this trial had to be adjourned for Thyss to prepare to respond to Mr. Sokoloff's expert opinions then the trial could not likely be resume before January 2014, taking into account the fixed trial dates already booked before me for 2013. That constitutes undue delay. Furthermore, adjourning this trial would be prejudicial to Thyss given the length of time it has taken to get to trial and the absence of any reasonable explanation by the Owner for failing to provide Mr. Sokoloff's expert opinion in advance of trial either in the form of an expert report, witness statement or properly drafted summary of anticipated evidence of a witness under summons. Finally, it would be prejudicial because the Owner has disregarded

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court orders repeatedly throughout this reference. There is no reason to expect that if the trial is adjourned the Owner would comply with the court's directions. The Owner has had sufficient time to comply with the court's directions before trial and has repeatedly failed to do so. I find that the test in rule 53.08 is not met.

64 Delay in asking for leave is another reason to refuse the Owner's request for leave to permit Mr. Sokoloff to testify as an expert without a report. The Owner's leave request ought to have been made before trial. On October 1, 2012, ten days before the date fixed for trial, I convened a telephone conference with both counsel to deal with preliminary and procedural trial issues. After discussing the specific issues for which the conference had been convened I asked both counsel whether there were any other procedural or preliminary issues that needed to be addressed.

65 Mr. Bleta, Owner's counsel, did not raise as a procedural or preliminary issue on October 1, 2012 that he would be seeking leave to call Mr. Sokoloff as an expert in the absence of compliance with rule 53 and the October 17, 2011 and January 23, 2012 orders. By October 1, 2012, Mr. Bleta knew that he intended to call Mr. Sokoloff as an expert. He had served a summons to appear on Mr. Sokoloff on August 23, 2012. He knew that he had not served an expert report from Mr. Sokoloff. If Mr. Bleta was going to tender Mr. Sokoloff as an expert witness then he knew by October 1, 2012 when the conference call to address preliminary issues was convened, that he would require leave of the court. Knowing this, Mr. Bleta remained silent and did not identify to the court or to Thyss' counsel that he would be seeking leave pursuant to rule 53.03(3). I conclude from this omission that it was the Owner's trial strategy to wait in the weeds and surprise Thyss at trial, denying Thyss time to properly prepare for cross-examination and rendering Thyss unable to provide a responding expert opinion. By this conduct the Owner is estopped from putting Mr. Sokoloff forward as an expert witness.

66 The Owner has provided no relevant authority to support the proposition that an expert should be permitted to testify without a report, no explanation for the absence of a report, no summary in advance of trial as to the opinions that would be sought and given by Mr. Sokoloff, despite court orders to do so. At no time did the Owner suggest that Mr. Sokoloff was a hostile witness unprepared to provide a report. He is a contractor who, through his company, continues to supply services to the Owner.

67 For these reasons the request for leave to allow Mr. Sokoloff to testify as an expert was refused at trial. Rick Sokoloff was permitted to testify as a fact witness about matters regarding which he has direct knowledge, without giving opinion evidence.

#9. Is Thyss permitted to question Ms Brown about Schindler's invoices?

68 Thyss included in its document book at tabs 542 through 545 four invoices dated January 25, 2005 that on their face appear to be invoices for elevator services issued by Schindler to the Owner, addressed to the attention of Ms Brown. The Owner objected to the authenticity of these

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documents, requiring Thyss to prove them either through a witness from Schindler or else through the Owner as recipient of the invoices.

69 Owner's counsel objected to Thyss questioning Ms Brown about the invoices on the basis of relevance. He did not argue that the invoices were not rendered by Schindler.

70 Evidence was adduced at trial about a flood that occurred at one of the Weston Road buildings causing an elevator shut down in late December 2004. Schindler carried out the emergency repairs. The invoices that are the subject of the objection are for work performed on or before January 25, 2005, in the period immediately following the flood and after Thyss has discontinued providing maintenance services. Maintenance and repairs of elevators is directly relevant to the issues raised by the Owner in its amended statement of defence, in particular at paragraphs 38 and 39 for the Weston Road property. The Schindler documents were included in the Thyss document book and served before trial pursuant to the court's directions. The Owner is not surprised by them. I find that it is proper cross-examination to question Ms Brown about the Schindler invoices. Under cross-examination Ms Brown did not admit that the Owner had received these invoices from Schindler, requiring Thyss to call a witness from Schindler to prove the documents.

#10. Recusal motion

71 On the fourth day of trial the Owner asked the court to adjourn the trial for the Owner to bring a recusal motion. Two issues arose from the recusal request: timing of the motion hearing and the substantive recusal issue.

(i) Timing

72 The Owner's counsel sought to adjourn the trial to obtain a transcript of the trial thus far as evidence on the motion. He anticipated requiring several weeks to obtain the transcript and then additional time thereafter to prepare motion materials.

73 Responding counsel argued that the motion should be dealt with by the court immediately or left to an appellate process, if one of the parties moved to oppose confirmation of the reference report. I ruled that the recusal motion proceed forthwith. Rule 55.01 requires the reference master to "adopt the simplest, least expensive and most expeditious manner of conducting a reference" and permits the reference master to "dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken." Adjourning for a formal recusal motion to be brought would have been the opposite of "simple, least expensive and most expeditious". That is particularly so in circumstances such as this where the Owner's earlier recusal motion failed before me in 2010 and also failed on judicial review before a panel of three judges in 2012.

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74 I exercised discretion and dispensed with the requirement of a motion record and written materials and directed the parties to present their arguments.

(ii) Substantive issue: recusal

75 I refused the defendant's recusal motion and directed the trial to continue for the reasons that follow.

76 The Owner asked me to recuse myself from this reference on grounds of bias or reasonable apprehension of bias. In support of the motion the Owner offered several grounds of complaint which I address seriatim in the order that the grounds were argued:

a) *Complaint #1: Convening a case conference at Thyss' request*

The Owner argued apprehension of bias because I convened a case conference by telephone on October 1, 2012, 10 days before trial, to address preliminary matters raised in a letter from Thyss. One concern was that the letter from Thyss' counsel requesting an attendance with the court was not copied to Owner's counsel.

Findings: Thyss' counsel's failure to copy Owner's counsel with correspondence to the court is clearly contrary to the rules and contravenes civility protocol. I admonished Thyss' counsel, who apologized verbally and in writing, explaining that it had been an oversight. The court accepts Thyss' counsel's acknowledgement and apology.

The first issue raised by Thyss in the letter was that Thyss had not received copies of summonses to witnesses served by the Owner, contrary to the court's pretrial directions. Thyss subsequently admitted that it had received copies of the summonses. The second issue raised in the letter concerned the Owner's objection to the authenticity and admissibility of 192 of Thyss' trial documents. Thyss sought directions on the process to be used to prove the documents at trial: whether it would be dealt with as a preliminary issue at trial or on a witness by witness and document by document basis during the evidentiary portion of the trial. This is properly a trial management issue and it was proper for Thyss' counsel to ask the court to provide directions before trial. I issued directions that the proof of documents would be dealt with as a preliminary issue at trial. The court's response to the request by convening a telephone conference call with both counsel does not give rise to bias or an apprehension of bias.

b) *Complaint #2: Conference call requested by Thyss was unnecessary*

The Owner argued apprehension of bias because a conference call before trial was not necessary to deal with a motion to admit business records when notice was served under the *Evidence Act*;

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Findings: My findings regarding the Owner's first ground applies equally to this ground.

c) *Complaint #3: Owner's requests for conference calls ignored*

The Owner argued apprehension of bias alleging that the court refused requests by the Owner for conference calls but conducted conference calls when requested by Thyss. The Owner provided no examples of instances where a conference call requested by the Owner had been refused.

Findings: Each request for a conference call is considered by the court. If the proposed subject of the conference call is one that is properly dealt with by way of conference call then a conference call is scheduled with all counsel participating. Otherwise it is not. I find no bias or apprehension of bias on this ground.

d) *Complaint #4: Court did not sanction Thyss for breach of rule 1.09*

The Owner argued apprehension of bias because the court did not sanction Thyss' counsel for failure to use neutral language and for arguing its point in the letter requesting a conference call for directions regarding the admissibility of documents.

Findings: In my view the letter from Thyss's counsel requesting a conference call to address a trial management issue did not require court sanction except in regards to Thyss' failure to copy Owner's counsel, for which Thyss was admonished and apologized. I find no bias or apprehension of bias on this ground.

e) *Complaint #5: Court sanctions unevenly*

The Owner argued apprehension of bias because the Owner was sanctioned for not paginating a court document and the court treats Thyss counsel and Owner's counsel differently.

Findings: Paragraph 6 of the court's directions issued on January 23, 2012 provides as follows:

> 6) **Document books**:
>
> (a) Each party shall prepare four (4) sets of document books containing all documents to be relied on at trial. Documents attached as exhibits to affidavits filed as evidence in chief need not be duplicated in the document books but shall be treated as if they were included in the document book(s) for purposes of these directions. Each document book shall be titled "Document Book" and **shall be indexed, tabbed and page numbered**. Only documents contained in a document book prepared in compliance with these directions may be tendered in evidence at trial, except with leave of this court.
>
> If a document book submitted by a party was not paginated the court should have instructed that party to paginate the document for ease of use at trial. In this reference I instructed the Assistant Trial Co-ordinator to contact Thyss' counsel before trial to

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paginate a document that had been filed without proper pagination. If the Owner filed a document without pagination counsel would also have been directed to paginate the document for use at trial so that witnesses could find the pages referred to when being questioned at trial. I find no bias or apprehension of bias arising from the reference master instructing the Assistant Trial Coordinator to instruct counsel to comply with procedural directions.

During the trial the Owner proffered as an exhibit a series of expert reports prepared by George Smith of Gemini Elevators, the Owner's expert witness. The expert reports had not been served in accordance with the requirements of rule 53 nor had the Owner complied with the court's directions. The proposed exhibits were not collated, paginated or reproduced in sufficient numbers of copies for the court, the witness and all parties, contrary to the court's directions. Rather than refuse to allow the reports to be filed the court gave mid-trial directions allowing the Owner time to properly prepare the exhibits in a suitable format, tabbed, paginated and with sufficient copies. The Owner's complaint that it is treated more harshly is unfounded and contrary to the facts.

f) *Complaint #6: Permitting plaintiff to file exhibit 7*

The Owner argued apprehension of bias because Thyss was permitted to file a new exhibit at trial but the Owner was not..

Findings: The document that Owner's counsel refers to is exhibit 7. The information contained in exhibit 7 is identical to the information contained in the account statements filed as exhibits "A", "B" and "C" attached to exhibit 6, the affidavit of Mike Tate, served and filed in advance of trial as directed. The only difference in the two versions of the account statements is one of format: where an account statement included two building addresses in one statement, the court asked Thyss to separate the information out into building-specific statements. The information is the same. The reason for separating the data on a building-by-building basis was for ease of calculation. The Owner is incorrect to assert that the court permitted Thyss to file new exhibits but did not afford the same accommodation to the Owner. Thyss' exhibit 7 is not new information. There is no bias or apprehension of bias on this ground.

g) *Complaint #7: Judging credibility of a witness*

The Owner argued that by questioning Ms Brown about the four Schindler invoices in Thyss' document book I created an apprehension of bias because, as presiding reference master, I "delved into the arena" and prejudged the credibility of a witness. Counsel also argued apprehension of bias because I referred to Ms Brown as "being coy", indicating that I had made a finding of credibility against her.

Findings: Ms Brown was on the witness stand when Owner's counsel brought the mid-trial recusal motion. The Schindler lien claim reference had been case managed together with

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the Thyss lien claim reference until the Schindler reference settled. Thyss' document book included four invoices on Schindler letterhead, addressed to the Owner, to the attention of Ms Brown.

Under cross-examination Thyss' counsel asked Ms Brown whether she had received each of the four Schindler invoices addressed to her attention. She responded in each case: "it is possible it was received". She did not know whether the invoices were paid. Owner's counsel objected to the questions as not relevant. I ruled that questions about the Schindler invoices were relevant because the Owner had contracted with Schindler to carry out repairs at Weston Road around the time that the Thyss contracts ended. The Schindler invoices were potentially relevant to the Owner's set-off claim alleging that Thyss had not performed its contractual maintenance obligations.

Because the Owner objected to the authenticity and admissibility of the four Schindler invoices, had Ms Brown admitted receiving them Thyss would not have had to call a witness from Schindler to prove them as business records. The Owner had received Thyss' document book in advance of trial and knew that the Schindler invoices were included in it. Ms Brown could have reviewed the Owner's records before trial and informed herself as to whether the Schindler invoices matched her records. She admitted on cross-examination that she was the only person that Schindler dealt with and the only person to whom Schindler would address communications.

Ms Brown's answers in response to questions about the invoices were evasive. She testified that she did not recall seeing the invoices, that it was possible that she did see them and that it is possible that the Owner paid them. When asked in cross-examination whether she disputes the authenticity of the four Schindler invoices Ms Brown responded that she could not agree or disagree, and that it never crossed her mind that the documents would be fabricated and that there was no reason to believe that the documents are fictitious. She acknowledged that Schindler carried out work in January 2005, which matches the dates of the invoices. But she evaded admitting that the documents are what they purport to be, requiring Thyss to call a witness from Schindler to prove the documents as business records.

Rule 55.01 provides:

> (1) A referee shall...devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may (b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken.

The rule gives a reference master wide powers as to the procedure on a reference. An inquisitorial style is one where the trier of fact asks questions. Rule 55.01 permits this approach where appropriate and, in my view, it was appropriate and necessary in this instance because the witness was evasive in her answers about the Schindler invoices.

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One of the roles of a trial judge is to assess credibility of witnesses. I was concerned that Ms Brown was coyly refusing to answer the questions and admit the invoices, thus compromising her credibility. I pointedly used the word "coy" in court. Coy means "reluctant to give details about something sensitive". "Sensitive" means "kept secret or with restrictions on disclosure". [16] In my view, observing Ms Brown in cross-examination about the Schindler invoices, I found her to be reluctant to give details about something (the Schindler invoices) that she wanted to keep from being disclosed (or proven). "Coy" is the proper English word to convey that concern to her. I was concerned that Ms Brown was misguided and under the impression that if she refused to admit the invoices they could not be relied on as evidence. In an effort to allow Ms Brown an opportunity to preserve her credibility I told her that her answers about the Schindler invoices were coy and gave her an opportunity to supplement her answers. She did not wish to do so.

Ultimately the four Schindler invoices were proven through a witness employed by Schindler who testified that the invoices are business records. As such they are records properly admissible under section 35 of the *Evidence Act*.

In my view, communicating to a witness that evasive answers undermine her credibility, and giving her an opportunity to cure it, is not bias nor does it give rise to an apprehension of bias. I find no bias or apprehension of bias on this basis.

h) *Complaint #8: Requiring Owner to file proof of service of summonses*

The Owner argued apprehension of bias because the Owner was required to file proof of service of summonses to witnesses but Thyss was not required to do so.

Findings: The simple answer is that at the trial management stage the Owner had included on its witness list multiple witnesses who were to be summonsed. None of the Thyss witnesses were under summons.

The purpose of requiring proof of service of summonses to witness was twofold: (i) to know how many witnesses on the Owner's witness list were actually going to be summonsed to attend at trial to testify so that Thyss would not be put to the expense of preparing unnecessarily to cross-examine witnesses identified in the pretrial process as witnesses to be summonsed but who in fact had not been served with a summons, and (ii) to protect the Owner should a witness who was summonsed fail to appear, causing the Owner to seek relief from the court. I find no bias or apprehension of bias on this ground.

i) *Complaint #9: Proposed expert rejected as expert*

The Owner argued apprehension of bias because he was unsuccessful in his motion to have the court accept Mr. Sokoloff as an expert witness.

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> Findings: A party's lack of success on a procedural ruling does not give rise to bias against that party or an apprehension of bias. In a contested matter there is a winner and a loser for every ruling. Detailed reasons (see procedural ruling #8) explain why the court refused to accept Mr. Sokoloff as an expert. I find no bias or apprehension of bias on this ground.

77 The case law on apprehension of bias is well developed. The test for apprehension of bias is an objective one. It presupposes that a reasonable person knows and considers the context of the impugned behavior, including the length and difficulty of the proceedings. The test is set out succinctly by De Grandpré J. in his dissent [17] in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (S.C.C.):

> the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude...The grounds for this apprehension must, however, be substantial.

78 This reference has been exceptionally long and complex, not because of the issues raised in the lien claims themselves but rather because of the Owner's conduct throughout the reference, as described in the chronology at Schedule "B" of these reasons. It has been a lengthy and difficult process.

79 A trial judge is entitled to make reasonable criticism respecting the conduct of counsel and witnesses who appear in court: *R. v. McCullough*, [1998] O.J. No. 2914 (Ont. C.A.).

80 This is the third attempt by the Owner to remove me as presiding reference master for bias or apprehension of bias. The first attempt was by motion heard November 24, 2010, decision released December 21, 2010 and reasons released February 11, 2011. I dismissed the motion and ordered the Owner to pay costs of $9,151.69 to Thyss. The Owner brought an application to the Divisional Court to judicially review the refusal to recuse. A panel of three judges of the Divisional Court dismissed the application with reasons released July 27, 2012, ordering the Owner to pay costs of $9,500.00 to Thyss.

81 The Owner's mid-trial motion to recuse fails. The Owner does not like the procedural rulings I have made throughout this trial. The Owner has been unsuccessful in many of the procedural rulings because the unsuccessful procedural challenges were ill founded. Displeasure over unsuccessful results is not grounds to disqualify the trial judge. The Owner tried this tactic previously and was unsuccessful before me and also unsuccessful before three judges of the Divisional Court. The Owner's tactics have not changed. Rather than abiding by procedural orders, the rules of civil procedure and the rules of evidence, the Owner continues to seek relief and

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then asks for the maker of decisions not in its favour to recuse herself when the defendant is unsuccessful.

136 In *Rogers Wireless Inc. v. Celluland Canada Inc.*[18] Master Haberman summarizes applicable principles that emerge from recusal motions, including:

- The grounds of apprehension of bias must be substantial;
- The onus of demonstrating bias lies on the party alleging it;
- The burden of proof is a heavy one in the midst of an ongoing proceeding...interference should only be in the 'in the most extraordinary cases;
- There is a presumption that officers of the court will carry out their oaths of office, which can only be displaced by cogent evidence. A mere possibility or suspicion will not suffice;
- The presumption of impartiality carries considerable weight. The law should not carelessly evoke the possibility of bias in a judge whose authority depends on it;
- While litigants are entitled to a fair and impartial judge they are not entitled to a favourable one;
- An unfavourable disposition is not indicative of bias if it is objectively justifiable;
- The court must not be intimidated by a litigant who makes unfounded allegations because he is unhappy with decisions made against him. If a judge steps aside merely for the asking then justice would neither be done nor be seen to be done;
- Toronto case management is based on a single master hearing all motions, acquiring familiarity with the facts of the case, the issues, and the dynamics between the parties and their counsel. This level of familiarity is considered beneficial because it leads to efficiencies;
- The legislation that put case management in place is "prima facie fair and just" and one that permits a judge or master to take into account, in each motion, their accumulated knowledge of the case, gained from previous contact with the action;
- In the context of a case managed action the test of reasonable apprehension of bias is even more stringent. An applicant must demonstrate that the judicial officer is no longer capable of being persuaded by evidence and argument in subsequent motions; and
- The real question is whether the judge has demonstrated that he (or she) has decided a matter to the extent of no longer being capable of persuasion.

82 Both counsel are familiar with the *Rogers Wireless Inc.* case because it was referred to extensively on the first recusal motion in this reference. Construction lien references are subject

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to a form of case management through the hearing for directions process pursuant to the reference rule (rule 55) and section 67 of the *Construction Lien Act.* Although Master Haberman's reasons in *Rogers Wireless Inc.* were in respect of a case managed action that was subject to rule 77, the principles apply equally to the form of case management used in construction lien references in Toronto. I agree with Master Haberman and adopt her analysis of the applicable principles.

83 Applying these principles I find that the Owner has not met the onus of demonstrating actual bias or that a reasonable and informed person would have reason to believe that it is more likely than not that I, as the decision maker, would not decide the matters fairly.

84 For these reasons the Owner's mid-trial recusal motion fails.

#11. Defendant's request for leave to introduce TSSA reports

85 The Owner asked the court to grant leave to permit the Owner to introduce into evidence TSSA reports notwithstanding that these reports were not served as exhibits to an affidavit of a witness or included in the Owner's document book delivered before trial. As explained in procedural ruling #5, the pretrial order of January 23, 2012 clearly required documents that were to be relied on at trial to be served in a document book or as exhibits to an affidavit. Paragraph 6 of the order for directions issued on January 23, 2012 provided:

> 6) **Document books**:
>
> (a) Each party shall prepare four (4) sets of document books containing all documents to be relied on at trial. **Documents attached as exhibits to affidavits filed as evidence in chief need not be duplicated in the document books but shall be treated as if they were included in the document book(s) for purposes of these directions**. Each document book shall be titled "Document Book" and shall be indexed, tabbed and page numbered. **Only documents contained in a document book prepared in compliance with these directions may be tendered in evidence at trial, except with leave of this court.** *emphasis added*

86 In this case the TSSA reports that the Owner seeks to introduce were part of a "request to admit" that the Owner served on Thyss, but Thyss refused to admit the TSSA documents. In the absence of including the TSSA reports in a document book or as exhibits to an affidavit of evidence in chief served before trial, the TSSA reports are not evidence that may be adduced at trial without leave. Thyss understood that the TSSA reports would not be introduced into evidence at trial and prepared for trial on that basis. Thyss prepared for trial in reliance on the procedural orders. No TSSA inspector was called as a witness at trial.

87 As previously explained, the reason for the pretrial process and orders for directions in a construction lien reference is to narrow the issues and ensure that all parties know the case that

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they must meet at trial. Parties develop the theory of their case and trial strategy, and prepare for trial, in reliance on the case as disclosed in the pretrial hearing for directions process.

88 Counsel for the Owner did not ask for leave to admit the TSSA reports until day four of trial, after Thyss had closed its case in chief and cross-examined defence witnesses.

89 The Owner offered no explanation for its failure to include in its document book the TSSA reports that it sought to introduce at trial. I find that there would be actual prejudice to Thyss if the court were to grant leave on the fourth day of trial to allow the TSSA reports to be admitted because Thyss cannot go back and restructure its case to take these additional documents into account at this late date. For these reasons the Owner's request for leave to introduce the TSSA reports into evidence was refused.

#12. Scope of examination in chief of Ms Massri

90 The Owner summonsed Fatima Massri to testify. The October 17, 2011 order for directions provided as follows:

> Witness statements:
>
> (1) Witness statements provide a summary of the evidence proposed to be adduced from each witness at trial, to avoid surprise at trial. Only evidence summarized in a witness statement signed by the witness may be called at trial. Where the proposed witness is unco-operative and must be summonsed to trial a statement of anticipated evidence signed by counsel for the party calling the witness may be filed instead.
>
> (2) The plaintiff must serve all witness statements by November 30, 2011.
>
> (3) The defendant must serve all witness statements by December 16, 2011.
>
> (4) The plaintiff must serve all reply witnesses statements by a date to be fixed at the next pretrial.
>
> (5) No witness may be called at trial unless a witness statement has been served as ordered.
>
> (6) All witness statements must be filed with the court by January 16, 2012.

91 The Owner failed to comply with the October 17, 2011 order. I extended the time for the Owner to comply in the January 23, 2012 order as follows:

> 7. At today's hearing for directions Mr. Bleta told the court that he overlooked the deadline set out in the court's October 17, 2011 order. Mr. Bleta filed unsigned statements at the hearing. The court will allow the defendant to call these witnesses provided the defendant files signed

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statements of anticipated evidence of witnesses to be summonsed no later than February 1, 2012. One purpose of requiring the witness (where co-operative) or counsel (where the witness is unco-operative) to sign witness statements is to avoid surprise at trial.

92 The January 23, 2012 order also directed the parties as follows:

3) Trial:

a) Summary Trial: Trial shall be by way of modified summary trial. The summary procedures described in rule 76 apply unless otherwise ordered. **Where a witness is not co-operative such that an affidavit of evidence in chief is not available and the witness must be summonsed then the witness may be examined in chief orally, provided a statement of anticipated evidence signed by counsel was served and filed as directed, subject to the time limits set out in Schedule "B" to this order**. *emphasis added*

93 The court clearly and unambiguously directed the parties to deliver, for each witness, either (i) affidavits of evidence in chief or (ii) where a witness was under summons, statements of anticipated evidence signed by counsel outlining the anticipated evidence. The purpose, as stated in paragraph 7 of the directions, is to avoid surprise at trial.

94 The statement of anticipated evidence delivered by the Owner for Ms Massri, a witness under summons, is reproduced below:

FATIMA MASSRI -

1. as the Plaintiff's representative to dealings with the Defendant from the latter $^{1}/_{2}$ *(sic)* of 2004 she will give evidence as to her instructions on how to deal with the Defendants, and what the Defendants asked for and what the Plaintiff was prepared to do.

2. she will testify as to her various telephone calls with the Defendants in December 2004 and how she informed Ms Brown that the Plaintiff was terminating all the contracts with the Defendants, and that the Plaintiff had no intention of re-attending at the properties since a specific date in December 2004.

3. she will testify as to how her relationship ended with the Plaintiff and any discussions she had with the Plaintiff regarding her last conversations with the Defendants.

95 Nowhere in the statement of anticipated evidence of Ms Massri does the Owner describe that the witness will be asked to give evidence about the state of accounts (charges and receipts) or the calculation of arrears as disclosed by the accounting statements attached as exhibits to Mr. Tate's affidavits.

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96 At trial Owner's counsel began to question Ms Massri about how the accounting statements attached as exhibits to Mr. Tate's affidavits were generated. Thyss objected on grounds that the questions called for evidence outside the scope of the statement of anticipated evidence for Ms Massri. Thyss argued that if the Owner intended to question Ms Massri about how the accounting statements were generated then the Owner should have included that topic and the anticipated evidence on that issue in her statement of anticipated evidence.

97 The Owner argued that accounts were under Ms Massri's auspices when she was employed by Thyss so that the questions are proper ones. That argument fails because (i) Ms Massri did not prepare the accounting statements. As an employee her job was to collect arrears in customer accounts; and (ii) if the Owner had intended to question her about how accounting statements were generated and interpreted then her statement of anticipated evidence should have disclosed that topic and the anticipated evidence to be adduced on that topic.

98 The purpose of the pretrial hearing for directions process in construction lien references is to narrow the issues and limit the scope of the reference trial. Rule 55 provides that a referee may dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken.

99 The orders of October 17, 2011 and January 23, 2012 gave clear directions to counsel and parties that statements of anticipated evidence were required to avoid surprise at trial. The Owner was familiar with Thyss' account statements. Owner's counsel knew that Ms Massri had been Thyss' collections clerk in late 2004. He knew or ought to have known prior to delivering her statement of anticipated evidence that he intended to question her about the account statements. That topic and the anticipated evidence about it ought to have been included in the statement of anticipated evidence of Ms Massri.

100 For these reasons Thyss' objection is valid and the line of questioning was not permitted.

End of Schedule "C": Reasons for Procedural Rulings

Action allowed.

Footnotes

* Corrigenda issued by the court on February 5, 2013, April 25, 2013 and May 10, 2013 have been incorporated herein.

** Additional reasons at *Thyssenkrupp Elevator (Canada) Ltd. v. 1147335 Ontario Inc.* (2013), 23 C.L.R. (4th) 87, 2013 ONSC 2452, 2013 CarswellOnt 4792 (Ont. S.C.J.).

*** And 9 other actions listed in Schedule "A".

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1 Justice Matlow referred one action for each building: court file numbers 04-CV-280219, 04-CV-280220, 04-CV-280276, 04-CV-280284 and 04-CV-28031.

2 Three tenant witnesses from 1765 and 1776 Weston Road, three tenant witnesses from 2667 and 2677 Kipling Avenue and three tenant witnesses from 1011 Lansdowne Avenue.

3 At trial Mr. Bleta advised that a different inspector would be attending but no inspector from TSSA was called by the Owner as a witness.

4 The account statements attached to Mr. Tate's affidavit as exhibits combine 1765 and 1776 Weston Road into one statement and 2667 and 2677 Kipling Avenue into one statement. I directed Thyss to break each of these statements into one per building address, which Thyss did and filed as exhibit 7.

5 the reports were filed as exhibit 9.

6 Exhibit 2, tabs 542, 543, 544 and 545, served on the Owner before trial and challenged as to authenticity by the Owner

7 Technical Standards & Safety Authority

8 Exhibit 6.

9 $5,000.00 × 12 elevators = $60,000.00

10 Originally default judgments had been issued in the lien claim actions and Thyss had executed on the judgments with garnishments. When the default judgments were set aside the funds garnished were placed into the trust account of the Owner's counsel. The Owner changed counsel and ultimately the funds held in trust were placed in its counsel's trust account.

11 All submissions of Thyss and of Owner must be filed with ATC Backes at *6th floor*, 393 University Ave.

12 See footnote 12

13 It is the practice in construction lien references in Toronto to make settlement conferences available upon request if the case is suitable and another construction lien master is available. Settlement conferences are not mandatory and are only available if requested by all parties.

14 The timetable to prepare the motion provided for the motion record to be served by December 31, 2009, the responding motion record to be served by January 31, 2010, reply motion records to be served by February 28, 2010 and cross-examinations to be conducted by March 31, 2010. Thereafter dates available to the court to hear the motions in May, June and July, 2010 were not available to counsel.

15 Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd edition, LexisNexis Canada Inc. 2009.

16 Concise Oxford Dictionary, 10th edition, pages 330 and 1305.

17 Despite that his opinion is a dissenting one, there is no dissent as to the applicable test for reasonable apprehension of bias

18 [2010] O.J. No. 1631 (Ont. Master) at para. 111

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TAB 8

COURT FILE NO.: 96-CU-114241
DATE: 2004/10/12

2004 CanLII 54553 (ON SC)

ONTARIO
OF
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JANET MERKLINGER	William G. Dingwall Q.C., for the Plaintiff/Applicant
Plaintiff/Applicant	
- and -	
JANTREE NO. 3 LIMITED PARTNERSHIP & SNAPDRAGON LTD.	John LoFaso, for the Defendant/Respondent
Defendant/Respondent	
	HEARD: January 26, February 3, 5, 11 & 12 2004.

REASONS FOR JUDGMENT

BRYANT J.

I: OVERVIEW

[1] The plaintiff Janet Merklinger was assigned units in a limited partnership in 1989 representing a 25% interest in the partnership. The limited partnership owned a commercial building valued at approximately $800,000 in 2003. The general partner refused to record her interest in the register of the limited partnership. In 1996, the plaintiff issued a statement of claim against the general partner and the limited partnership seeking declaratory relief that she was a limited partner and an order that the partnership record her interest in the partnership register. The parties believed they had reached a settlement, subject to the plaintiff satisfying a specified condition. The parties then engaged in fruitless negotiations and litigation from 1997 until 2002.

[2] In 2002, the plaintiff brought a motion in Superior Court to break the barrier to registering her interest in the limited partnership. The Court ruled the registration could take effect without the need to satisfy the specified condition. The general partner and the limited partnership appealed the decision to the Divisional Court. Although the Divisional Court upheld the decision of the learned motion court judge, the general partner did not register the plaintiff's interest.

[3] On August 20, 2003, the plaintiff filed a notice of motion requesting the following: a motion for summary judgment on the statement of claim; an order for production of the books and records of the limited partnership from 1993 onwards; an order for an accounting of any distributions; an order for recalculation and redistribution of the proceeds of any distribution; and an order for removal of the general partner.

[4] During the course of cross-examining the general partner on the motion in the fall of 2003, the plaintiff learned the following information: the partnership's property had been refinanced in the spring of 2003; a corporation owned by the partnership's accountant had recently purchased the other limited partners' units; and the general partner had recently distributed surplus proceeds from the refinancing to the general partner and the accountant's corporation. The general partner set aside monies from the refinancing proceeds representing the partnership units claimed by the plaintiff.

[5] The major points of dispute in this case are as follows:

1. whether the general partner stood in a fiduciary position in relation to the plaintiff and if so, whether it breached its fiduciary duty;

2. whether the general partner distributed monies to itself in accordance with the terms of the partnership agreement; and

3. whether the court has the authority to remove a general partner and if so, whether the general partner in this case should be removed.

[6] It is necessary to set out the events, which occurred, during the protracted litigation in order to determine these and other contested issues.

II: THE FACTS

A. 1989 to 1997: Creation of the Limited Partnership and the Commencement of Litigation

[7] Paul Merklinger ("PM") proposed to develop a real estate property and market it to investors through a tax sheltered limited partnership. On December 2, 1986, Jantree No. 3 Limited Partnership ("Limited Partnership") was created to develop, own, and operate a single tenant industrial building on lands to be acquired in Oakville, Ontario. PM or a corporation controlled by him would be the general partner while investors would be limited partners along with PM or one of his controlled corporations. PM conceived the development and found the

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investors. Jantree Growth Properties Inc. ("Growth"), a corporation controlled by PM was the initial general partner from 1986 until January 11, 1993.

[8] As of January 31, 1987, 80 units of the Limited Partnership were issued at a value of $10,000 a unit with a minimum subscription requirement of 10 units. The total value of all 80 units was $800,000. PM owned 20 units through a controlled corporation called Jantree Development Corporation ("Development"). Six individual investors were issued the remaining 60 units in blocks of 10 units each. PM's interest eventually devolved upon his spouse Janet Merklinger ("Janet M").

[9] A Partnership Agreement dated December 2 1986, set out the respective rights and obligations of the general partner Growth and the limited partners. It also set out the scope of the business and other matters concerning the Limited Partnership.

[10] The following transactions occurred on December 31, 1989: Growth, a corporation controlled by PM, executed a promissory note in the amount of $400,000 in favour the plaintiff Janet M; Development transferred 20 units of the Limited Partnership to Growth; and Growth transferred those 20 units to the plaintiff Janet M. The assignment of these 20 units from Growth to Janet M was not recorded on the register of the Limited Partnership as was required by Article 3.11 of the Partnership Agreement.

[11] As of December 31, 1989, Janet M owned 20 units of the Limited Partnership constituting a 25% interest in the Partnership. The original six investors collectively owned 60 units constituting 75% interest in the Partnership. Growth remained the general partner and Development, PM's other controlled corporation, was no longer a limited partner.

[12] In late 1991, the Ontario Securities Commission ("OSC") was conducting an investigation of PM and Growth for alleged violations of the *Securities Act*, R.S.O. 1990, c. s.5. PM disappeared around 1993; to this day his whereabouts remain a mystery. PM's disappearance became significant because the assignment of 20 units of the Limited Partnership from Development to Growth and from Growth to Janet M was never recorded in the Limited Partnership's register.

[13] On January 11, 1993, Snapdragon Ltd. ("Snapdragon") became the Limited Partnership's general partner and assumed all of the rights and obligations of that position under the Partnership Agreement. David Cale is an officer and director of Snapdragon, its sole shareholder, and was at all times its directing mind. Snapdragon did not own any units in the Limited Partnership and was not a limited partner. There was no evidence in the record concerning the circumstances surrounding the removal of Growth as the general partner and the appointment of Snapdragon in its place.

[14] Janet M notified Snapdragon that Growth had assigned 20 units of the Limited Partnership to her and requested that it amend the partnership records to reflect her ownership. Snapdragon would not recognize the assignment of the 20 units and refused to record Janet M's ownership of the assigned units in the register of the Limited Partnership.

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[15] On or about February 15, 1993, Mr. Cale wrote to Janet M informing her that a capital call was required of all limited partners. Janet M was advised that she was required to make a capital payment of $4,065 representing either her or Development's interest. Snapdragon also advised Janet M that she was required to pay a monetary judgment registered against the original limited partner Development.

[16] The Ontario Ministry of Consumer and Commercial Relations (Companies Branch) dissolved Growth on March 29, 1993 and Development on July 26, 1993. Snapdragon was aware of the dissolution of PM's controlled corporations and the disappearance and unknown whereabouts of PM.

[17] In August 1993, Mr. Cale reminded Janet M/Development of the need to make a capital payment. In October 1993, Snapdragon informed Development that its interest in the partnership had been reduced by 90% for its failure to meet the capital call by September 30, 1993.

[18] Between 1993 and 1996, Janet M and Snapdragon were unable to reach an agreement concerning registration of Janet M's ownership of 20 units of the Limited Partnership. As of the early fall of 1996, Janet M was the assignee of 20 units of the Limited Partnership. The general partner Snapdragon made a capital call on Janet M with respect to the 20 units assigned to her through PM's controlled corporations. These corporations were now dissolved and Snapdragon would not recognize Janet M as a limited partner. The question of registration became very important and turned into a significant issue of dispute between the parties.

[19] An accountant named Mr. Posner purchased a 10-unit interest from one of the original limited partners. The record was not clear as to the precise date Mr. Posner purchased his interest in the Limited Partnership but the evidence is that the transaction took place in the early 1990's. Mr. Posner also became the Limited Partnership's accountant sometime in 1995 or 1996. Mr. Posner's position as both the accountant and a limited partner and his role in distributing the proceeds of refinancing the Limited Partnership's assets in 2003 become important in relation to the disputed issues in this proceeding.

[20] Janet M issued a statement of claim, dated November 14, 1996, against the Limited Partnership and Snapdragon. Mr. C. Stephen White represented Janet M and Mr. LoFaso represented the Limited Partnership and Snapdragon.

[21] The plaintiff Janet M requested the following relief in her statement of claim:

- a declaration that Janet M is and has been the owner of 20 units of the Limited Partnership since December 31, 1989;

- alternatively, Janet M is an assignee of 20 units of the Limited Partnership since December 31, 1989;

- an order requiring Jantree and Snapdragon to revise their corporate records to reflect Janet M's interest in the Limited Partnership;

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- an accounting of the Limited Partnership's distributions and allocations;
- an order requiring payment of funds owing pursuant to the accounting, or alternatively damages; and
- costs on a solicitor and own client scale.

[22] Snapdragon and the Limited Partnership filed a statement of defence dated January 7, 1997 disputing the transfer of the 20 Limited Partnership units to Janet M. It was the defendants' position that Janet M and her assignor had forfeited their right, title, and interest in the Limited Partnership.

[23] The litigation has dragged on for 7½ years. The reasons for this delay will emerge from the following narrative. The conduct of the parties and their respective positions are relevant to whether or not Snapdragon acted in good faith in its dealings with the plaintiff and whether the court should grant the plaintiff's request for an order removing Snapdragon as the general partner.

B. 1997 to 2003: Purported Settlement Agreement, Fruitless Negotiations, and Failed Resolution

[24] The parties attended a mediation session on May 30, 1997. While both parties believed they had reached an agreement, the settlement completely unravelled over the next 5½ years. Between May 30, 1997 and February 13, 2003, the parties engaged in fruitless negotiations. Motions were brought and there was an appeal to the Divisional Court from an interlocutory order of a motions judge. Neither the negotiations nor the litigation produced a settlement of the lawsuit.

[25] The post-settlement correspondence began in June 1997, a few days after the purported settlement. In a letter dated June 4, 1997, Mr. LoFaso sent Mr. White proposed terms of the negotiated settlement. The proposed settlement required Janet M to comply with Article 3.11 of the Partnership agreement, pay outstanding judgments against the Jantree group of companies, give full indemnity with respect to any claims that could be made by PM regarding title to his interest in the Limited Partnership, dismiss the civil suit except for the requirement for an accounting, and pay costs in the amount of $2,500. It was agreed that Janet M's solicitors would draft the minutes of settlement ("MOS") and provide evidence of compliance with paragraph 3.11 of the Partnership Agreement.

[26] Between June 4 and August 27, 1997, Mr. LoFaso wrote Mr. White on several occasions requesting a copy of draft MOS and inquiring whether Janet M wished to settle the matter or proceed with the action. Although Mr. White missed several promised deadlines, he produced a draft settlement agreement on August 28, 1997. Mr. White advised that he was in possession of the funds to satisfy the settlement's monetary condition and confirmed that his client wished to complete the settlement.

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[27] The draft settlement agreement of August 28, 1997 included the term that "Janet Marie Merklinger will provide evidence of full compliance with Article 3.11 of the Limited Partnership Agreement." Article 3.11 of the Partnership Agreement provides in part as follows:

> Assignment of Units by Limited Partners
>
> Subject to relevant securities regulations, a Unit may be assigned by a person or his agent duly authorized in writing to any person but such last mentioned person shall not be recorded on the Register as the holder of a Unit nor if such person is not a Limited Partner, be entitled to become a Limited Partner unless such person:
>
> [completes declaration forms …]
>
> … and no such person will become a Limited Partner until all filings and recordings required by law have been duly made.

The interpretation and application of Article 3.11 of the Partnership Agreement became the focus of protracted negotiations and litigation that commenced on May 30, 1997 and continued throughout the proceedings.

[28] On September 11, 1997, Mr. LoFaso proposed an amended version of the MOS. In a letter dated October 14, 1997, Mr. White accepted the amended MOS except for a new clause inserted by Mr. LoFaso that Janet M's ownership rights to the 20 units were "subject to the rights of PM or Jantree [the Limited Partnership]." This additional term was neither discussed at the mediation session nor referred to in Mr. LoFaso's letter of June 4, 1997. The proposed term raised a fresh subject of dispute.

[29] In a letter to Mr. White dated November 10, 1997, Mr. LoFaso maintained that the clause was necessary. Mr. LoFaso wrote that "[t]he defendants have always taken the position that Paul Merklinger and/or his companies have an interest in the property and not Janet Merklinger." In this letter, Mr. LoFaso raised the issue that Snapdragon required a certificate from the Ontario Securities Commission ("OSC") consenting to the transfer of the partnership interest. This certificate had not been mentioned in the draft MOS or the amended draft MOS.

[30] The parties held further discussions to resolve the dispute. In a letter to Mr. White, dated December 18, 1997, Mr. LoFaso confirmed the terms discussed in a telephone conference with him to finalize settlement of the lawsuit. Mr. LoFaso confirmed that Snapdragon required that a Form 2 be completed and filed with the OSC by the transferor (PM or Development) of the Limited Partnership units to Janet M. He advised that he was unable to provide the regulations relating to Form 2. The letter also confirmed that Janet M would complete and file the Form 2 or obtain a court order dispensing with its filing. Upon receipt of the Form 2 filing or an order dispensing with filing, Snapdragon would agree to delete the contested clause from the MOS. On January 5, 1998, Mr. White confirmed that he would take "the necessary steps to obtain and file the Form 2, as required by the Ontario Securities Commission."

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[31] On February 3, 1998, Mr. White advised Mr. LoFaso by letter that he was encountering difficulty determining the procedure for obtaining a Form 2. He requested further information to assist him with respect to the Form 2. In a letter of response dated February 25, 1998, Mr. LoFaso advised that the required document in question was a Form 21 under the *Securities Act*, not a Form 2. On March 17, April 1 and May 20, 1998, Mr. LoFaso wrote Mr. White requesting the documentation to settle the dispute.

[32] On June 15, 1998, Mr. White advised Mr. LoFaso that the required Form 2 was a Form 2 under the *Limited Partnerships Act* and was not a requirement under the *Securities Act*. Mr. White stated that it was no longer necessary to file a Form 2 because O.Reg. 11/91 revoked the need for it. He proposed that the settlement be completed per his August 28, 1997 draft MOS.

[33] On July 22, 1998, Mr. LoFaso advised that his client required Janet M to file a Form 20 with the OSC with respect to a trade in a security. He advised that the vendor of the security, namely Growth, must file the Form 20. On September 14, 1998, Mr. LoFaso wrote Mr. White requesting information concerning the status of the execution and filing of the Form 20 with the OSC. On September 30, 1998, Mr. White, after obtaining advice from the securities department at his law firm, advised Mr. LoFaso that the relevant provision of the *Securities Act* did not apply to secondary market trades. He further advised that since the Form 20 was only a disclosure requirement, the trade was valid and the OSC did not require Janet M, Snapdragon, or the Limited Partnership to file a Form 20.

[34] On November 17, 1998, Mr. LoFaso informed Mr. White that in his opinion the Form 20 requirement applied to secondary trades. He agreed that a completed Form 20 was only a disclosure requirement and its completion was not a prerequisite to a valid trade. He also agreed that the obligation to complete a Form 20 rested with Development and Growth for their respective transfer of the units and that Janet M, in her capacity as transferee, was not required to complete a Form 20. However, the defendants asserted that Article 3.11 restricted the general partner's authority to recognize Janet M as a limited partner so Janet M's interest would not be recognized until she complied with Article 3.11. Mr. LoFaso's position was that Janet M was required to apply to a court or the OSC to waive the statutory filing requirement.

[35] Between November 1998 and January 13, 1999, Mr. LoFaso wrote Mr. White on five occasions requesting information with respect to the steps Mr. White had taken to complete the Form 20 requirement. On January 19, 1999, Mr. White notified Mr. LoFaso that he would be bringing an application to waive the *Securities Act* filing requirements. Between January 21, 1999 and May 13, 1999, Mr. LoFaso wrote Mr. White on four occasions requesting particulars of the proposed application but he received no response to his inquires.

[36] On February 14, 2000, Mr. White served a Notice of Motion returnable on February 21, 2000. The motion was adjourned to March 9, 2000 for argument. In Mr. Cale's affidavit dated November 12, 2003, he refers to a letter from Mr. LoFaso to Mr. White dated February 24, 2000. In the letter, Mr. LoFaso advised that the defendants would not oppose the motion to obtain a waiver to comply with the OSC but that counsel would attend to inform the court of the general

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partner's limited authority under the Partnership Agreement. On March 9, 2000, Mr. White requested an adjournment to review his position and the motion was re-scheduled to May 4, 2000. On March 28, 2000, Mr. White advised Mr. LoFaso that he did not intend to proceed with the motion but was considering alternative courses of action to address the defendants' concerns with respect to the OSC filing.

[37] On April 10, 2000, Snapdragon brought a motion for summary judgment returnable on May 4, 2000. On May 2, 2000, Mr. White informed Mr. LoFaso that he would seek to adjourn the motion in order to allow Janet M to contact the OSC to determine if it was possible to comply with the disclosure obligation in PM's absence and without having to revive the dissolved corporations. Jennings J. adjourned the summary judgment motion to June 2, 2000 and ordered that Snapdragon and the Limited Partnership could return the motion on 3 days notice if the plaintiff's solicitors failed to make the inquiry/application to the OSC on or before May 12, 2000. The motion was never returned.

[38] In a letter to Mr. LoFaso dated May 12, 2000, Mr. White provided an opinion interpreting the applicable provisions of the *Securities Act* governing the transfer of units from Growth to Janet M. He opined that a Form 20 was not required for the transfer. Janet M brought a fresh summary judgment motion that was returnable on May 31, 2000. On the eve of this motion, Mr. White adjourned it *sine die*.

[39] In a letter dated September 6, 2000, Mr. LoFaso informed Mr. White that the settlement negotiations were concluded and that no agreement had been reached. The plaintiff in a supplementary factum on this motion, dated December 15, 2003, agreed that there was no settlement agreement.

[40] On January 19, 2001, Ms. W.A. McLauchlin of Glaholt & Associates served a notice of change of solicitors on behalf of Janet M. Mr. White took no further part in these proceedings.

[41] In a letter dated August 9, 2001, Mr. LoFaso informed Ms. J. Becker of Glaholt & Associates that Snapdragon did not have authority under the Partnership Agreement to recognize Janet M. as a limited partner unless she complied with Article 3.11 of the Partnership Agreement. Mr. LoFaso further advised that Janet M's entitlement to the 20 units "has not been the topic of discussion since" the ADR meeting in May 1997. The focus of the matter had been whether Janet M would be able to comply with Article 3.11 of the Partnership Agreement. Mr. LoFaso advised the new solicitors that Snapdragon and the Limited Partnership were prepared to recognize Janet M as the owner of 20 units in accordance with the terms set out in the draft MOS. In addition, Janet M had to satisfy the following conditions: (1) Janet M must pay the Limited Partnership for its legal costs from 1996 to the conclusion of the litigation; (2) Janet M must dismiss the claim against Snapdragon and the Limited Partnership; and (3) Janet M must execute a full and final release in favour of Snapdragon, the Limited Partnership and the limited partners.

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[42] There is no evidence that Glaholt & Associates participated in any negotiations or took any steps to resolve matters or advance the litigation. On May 30, 2002, Mr. William Dingwall Q.C. filed a notice of change of solicitors on behalf of Janet M. Glaholt & Associates took no further part in the proceedings.

[43] In summary, Janet M. was assigned 20 units of the Limited Partnership in 1989 and issued a statement of claim in November 1996. As of May 30, 2002, Snapdragon would not unconditionally recognize Janet M. as a limited partner notwithstanding there were no competing claims from her ex-spouse or any other person. More than five years after the purported settlement agreement, Janet M.'s application to be recorded as a limited partner was at a standstill.

C. Motion to Waive the Requirement to File a Form 20

[44] On October 8, 2002, Mr. Dingwall brought a motion before the Superior Court in Toronto for an order that the defendants comply with the settlement agreement, a declaration that Article 3.11 of the Partnership Agreement did not require a Form 20 to be filed under the *Securities Act* and an order that Snapdragon be removed as general partner. The defendants objected to the motion being heard in Toronto. Somers J. dismissed the motion on this ground and reserved costs to the judge ultimately hearing the motion.

[45] The motion was brought on again in Newmarket and Salmers J. heard the motion on November 21, 2002. Snapdragon and the Limited Partnership argued that the disputed 20 Limited Partnership units escheated to the Crown. Therefore, Janet M was required to give notice to the public trustee in order to allow it to appear and inform the court of its position on the motion. The defendants submitted that the Superior Court lacked the authority and/or jurisdiction to order that the 20 units could be transferred without filing a Form 20 under the *Securities Act*; however, they also agreed that they would not object to such an order if the court determined that the *Securities Act* requirements could be waived. Counsel for the defendants also argued that the parties never completed the terms of the 1997 settlement agreement so the defendants were not bound by the terms of the draft MOS.

[46] On November 21, 2002, Salmers J. held that the ownership of the 20 units should not be rendered insolvable due to the dissolution of Development and Growth and their consequent inability to file the Form 20. Without ruling on the validity of the defendants' position that the plaintiff must satisfy the *Securities Act* requirement, Salmers J. ordered that "the transfers may take effect without the filing of the Form 20 and therefore the lack of Form 20's with respect to the transfers does not contravene s. 3.11 of the Limited Partnership Agreement."

[47] Salmers J. did not rule on the plaintiff's request for an order that the defendants must comply with the purported settlement agreement because there was insufficient evidence to grant such relief. Costs of the motion and the earlier appearance before Somers J. were reserved to the ultimate disposition of the matter.

D. Appeal From Salmers J.'s Order

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[48] On November 28, 2002, Snapdragon and the Limited Partnership appealed Salmers J.'s ruling to the Court of Appeal. Their notice of appeal requested an order to set aside the ruling of Salmers J. on the following grounds: (1) the motions judge lacked authority to dispense with the need to file a Form 20 as required under the *Securities Act*; (2) the motions judge lacked authority to amend Article 3.11 of the Limited Partnership Agreement by dispensing with the requirement to file a Form 20; and, (3) the motions judge failed to find that Article 3.11 of the Partnership Agreement was subject to the relevant securities regulations (a Form 20 filing). The defendants sought costs on a substantial indemnity basis. On December 18, 2002, the defendants filed a second notice of appeal to the Court of Appeal based on the same grounds of appeal and for the same relief as contained in the November 28, 2002 notice of appeal.

[49] On December 6, 2002, Snapdragon and the Limited Partnership appealed to the Divisional Court. They sought a declaration that Salmers J.'s order was a final order from which leave is not required under s. 19(a) of the *Courts of Justice Act*. In the alternative, they sought leave to appeal to the Divisional Court from the interlocutory order of Salmers J. pursuant to s. 19(b) of the *Courts of Justice Act*.

[50] On January 13, 2003, on the return of the motion, C. Campbell J. ruled that Salmers J.'s order was interlocutory and was not a final order. In the course of his reasons, C. Campbell J. set out the defendants' grounds for the leave to appeal application: (1) the learned motions judge erred because he did not comply with the mandatory requirements of the *Securities Act*; and (2) the motions judge lacked jurisdiction to make the order. C. Campbell J. rejected these submissions and ruled that a Superior Court judge has inherent jurisdiction to grant the relief sought in order to achieve justice. Therefore Salmers J. had the authority to alleviate any impediments to transferring Janet M's interest arising from the dissolution of the transferor corporations. The motion for leave to appeal was dismissed and costs were awarded against the defendants.

[51] On February 13, 2003, the Court of Appeal dismissed the defendants' appeal for delay.

[52] Mr. Cale, at paragraphs 85-86 of his affidavit sworn on November 12, 2003, justified the decision to appeal the order of Salmers J. on two bases: (1) to ensure that Snapdragon was protected from a claim by the limited partners that the general partner had not fully complied with the requirements of the Partnership Agreement; and (2) to avoid any potential claim that Snapdragon failed to fulfill its duties under Article 7.07 of the Partnership Agreement by not appealing the decision to the Divisional Court.

III: THE EVIDENCE OF MR. CALE

A. Assignment of Units of the Limited Partnership to Mr. Posner (October 2, 2003 Cross-Examination of Mr. Cale

[53] Mr. Cale provided the sole evidence relating to the activities of the general partner and Limited Partnership for the 1993-2003 period. Janet M was unable to provide any evidence with respect to this period because Snapdragon had refused to recognize her as a limited partner or

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provide her with any financial or other information related to the Limited Partnership. The General Partner's knowledge and conduct during this period provides part of the factual basis for determining the related issues of distributing the proceeds from the refinancing and whether Snapdragon should be removed as the general partner.

[54] Mr. Cale was cross-examined on October 2, 2003. He stated that he is the sole shareholder, officer and director of Snapdragon. He was called to the bar of Ontario in 1972 and has a Masters degree in Business Administration. He practiced commercial law with a focus on financing and real estate and retired from the practice of law in 1991.

[55] Mr. Cale's evidence was that Brian Syvert was the accountant for the Limited Partnership for a few years after 1993, after which Mr. Gary Posner took over. The accountants were responsible for preparing the Limited Partnership's financial statements. Prior to 2003, a numbered company that Mr. Posner owned and controlled had purchased 10 units. Barter Alliance & Exchange Ltd. ("Barter Alliance"), another company Mr. Posner owned and controlled, acquired 50 units of the Limited Partnership in May 2003. The change of ownership in the 50 units was first disclosed to Janet M's solicitors during this cross-examination, even though Mr. Dingwall had previously requested this information after the May 2003 transfers had been made. As of October 2, 2003, Mr. Cale had not received any documentation from Barter Alliance in relation to the 50-unit transfer.[1]

[56] Snapdragon did not register Janet M as the owner of the 20 units notwithstanding Salmers J.'s order and C. Campbell J.'s refusal to grant leave to appeal. The 2002 financial statements listed six limited partners and set up an unallocated capital account equivalent to 20 Limited Partnership units. During cross-examination of Mr. Cale in relation to the Limited Partnership's 1996 financial statements, Mr. Dingwall referred to the 20 units as "Janet M's interest." It was the defendants' position that ownership of the 20 units was in dispute and that they should be referred to as disputed units and not as "Janet M's units."[2]

[57] Mr. Cale's evidence was that a payment was made to the limited partners in 1989, a payment representing a return on capital was made in 1992, and a distribution of $12,195 was made in 1996. The latter payment was a return on capital for the 1993 capital call of the same amount. Mr. Cale acknowledged that the profits and losses recorded in the financial statements were attributed only to six partners and did not reflect Janet M's interest in the 20 units.[3] The financial statements for the years 1996 and 2000 were calculated on the basis of six unit holders except that the capital cost allowance for the year 2000 was based on 6 unit holders and 2 unallocated units. Mr. Posner, in his capacity as an accountant for the Limited Partnership, handled the calculations and prepared the financial statements for 1996 and the following years.[4]

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[1] Q.35-Q.85- transcript of cross-examination of David Cale, October 2, 2003
[2] Q.248-Q.259; Q.273–Q.274.
[3] Q.139-Q.140; Q.220-Q.222.
[4] Q.276.

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[58] Mr. Cale stated that one formal partnership meeting was held in 1993 when he became the general partner. After 1993, there were two informal meetings at unspecified dates.[5] Mr. Cale produced no minutes of these meetings.

[59] In Mr. Cale's reply evidence, he stated that after 1993 the 20 units were treated as unallocated capital. The unallocated 20-unit interest had received a recent distribution from the refinancing and Mr. Cale had invested those funds in banker's acceptances at the Toronto-Dominion Bank. He stated that the other 6 unit holders paid income tax on money they did not receive because 25% of the units were not allocated to an individual or a corporation.[6]

[60] Mr. Cale brought 3 boxes of records with him to the examination. At the conclusion of the cross-examination, Mr. Cale informed Mr. Dingwall that the assets had been re-mortgaged for $550,000 and that the original mortgage had been discharged.

B. Distribution of Funds from the Refinancing (November 26, 2003 Cross-Examination of Mr. Cale)

[61] On the return of a motion on September 2, 2003, Perkins J. ordered the defendants to produce the books and records of the Limited Partnership from 1993 to September 26, 2003 and scheduled cross-examination of Mr. Cale on his affidavits dated April 10, 2000 and November 13, 2002. Costs were reserved to the judge hearing the motion.

[62] On September 17, 2003, the defendants forwarded copies of the financial statements for the years 1989 to 2002, except for those from 1990 and 1998, which they were unable to locate. In a letter dated September 19, 2003, Mr. Dingwall advised that he required Mr. Cale to bring with him for inspection and cross-examination the minutes of partnership meetings from 1996 onwards, any partnership agreements, and all records in relation to any transfer of units since January 1, 1989.

[63] The motion was spoken to in motions court on November 18, 2003. DiTomaso J. scheduled the continued cross-examination of Mr. Cale and set out timelines for the production of documents, etc. He made the following orders: (1) that Mr. Cale re-attend for his continued cross-examination and bring with him all minutes of partnership meetings since commencement of the litigation; (2) that the defendants produce for inspection all records and supporting materials for any transfers of any kind in respect of the units that have occurred since January 1, 1989; (3) that the defendants comply with Perkins J.'s order for production; (4) that the defendants pay Mr. Dingwall, in trust, all monies held or controlled by them on behalf of the plaintiff, subject to an accounting; and (5) that the costs of expedited transcripts, continued cross-examination, and attendance before DiTomaso J. be reserved to the judge hearing the motion.

[64] Cross-examination of Mr. Cale continued on November 26, 2003. For the period of 1993 to September 26, 2003 (the effective date of Perkins J.'s order requiring the defendants to

[5] Q.310-Q.311.
[6] Q.317–Q.322.

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produce the Limited Partnership's books and records), the only financial information provided to Janet M occurred shortly after Snapdragon became general partner in 1993. Mr. Dingwall referred Mr. Cale to his letter to Mr. LoFaso dated May 30, 2002, in which he requested financial information about the Limited Partnership. Mr. Cale refused to answer whether he had ever supplied any of the listed information. Mr. LoFaso stated on behalf of his clients that the information was not provided because until Janet M obtained an order dispensing with the requirements of the *Securities Act*, Mr. Cale refused to recognize Janet M as a limited partner.[7] I note that Salmers J.'s decision of November 21, 2002 did not alter the defendant's position on the issue of disclosure.

[65] Prior to February 13, 2003, Mr. Cale, in his capacity as general partner, applied to Empire Life for a new mortgage. In a letter dated February 13, 2003, Empire Life committed to provide new mortgage financing to the Limited Partnership.

[66] A property appraisal, dated February 20, 2003, valued the property as a vacant building at $875,000. Using an income approach, the property was valued at $825,000. In April 2003, the original mortgage had been paid down to approximately $179,000. On April 22, 2003, Empire Life advanced a mortgage loan to the Limited Partnership in the amount of $550,000 for a term of 10 years at 6.75% interest.

[67] Mr. Cale did not provide Janet M or the original limited partners with a copy of the appraisal.[8] On the advice of counsel, Mr. Cale refused to explain why he did not do so before or after they transferred their interests to Mr. Posner's corporation.[9] Snapdragon did not inform Janet M or the original limited partners that it intended to re-mortgage the property prior to April 22, 2003, nor did it advise them that the property had been re-mortgaged for $550,000. Mr. Cale stated that he did not consult with Janet M or the other original limited partners because it was not necessary and he was not required to do so under the Partnership Agreement.[10]

[68] Mr. Cale's evidence was that Mr. Posner would have known about the refinancing "once the mortgage had been finalized."[11] The Empire Life commitment letter was dated February 13, 2003 and Mr. Cale's evidence was that Mr. Posner would have known of the mortgage commitment in that time period.[12]

[69] Mr. Cale was aware that a corporation controlled by Mr. Posner had purchased units from the original partners. The acquisition and assignment of the five original partners' interests in the Limited Partnership to Barter Alliance were dated April 30, 2003, except for one original partner's interest, which was transferred in May 2003. The limited partners each received

[7] Q.50 –transcript of the cross-examination of David Cale, November 26, 2003.
[8] Q.164.
[9] Q.138-Q.139.
[10] Q.104-Q.106; Q.165-Q.167; Q.140.
[11] Q.378.
[12] Q.378-Q.384.

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$65,000 for their respective 10 unit interests.[13] Mr. Cale was unable to recall when he received a copy of the transfers from the original limited partners to Mr. Posner's corporation. Mr. Cale's evidence was that he was unaware that Mr. Posner had offered to purchase Janet M's 20-unit interest in the Limited Partnership for $60,000.[14]

[70] Mr. Cale's evidence was that Snapdragon was not in a position of trust in relation to the limited partners. It was his position that the general partner's duty was contractual. He agreed that Snapdragon received funds on behalf of the Limited Partnership and that the general partner was responsible for reporting to the limited partners. He agreed that "in theory" he had a duty to report to all the limited partners.[15]

[71] Mr. Posner's controlled corporations received a capital distribution of $195,941. Snapdragon received a payment of $111,966.83 from the refinancing. Mr. Cale's evidence was that Snapdragon was entitled to the payment pursuant to Article 5.10 of the Partnership Agreement. Snapdragon also received a mortgage fee in the amount of $5,885.

[72] Snapdragon received an additional sum of $11,694. Mr. Cale's evidence was that Snapdragon was entitled to this payment pursuant to Article 5.03 of the Partnership Agreement. It was Mr. Cale's position that he was entitled to 30% of the cash receipts of the Limited Partnership. Mr. Cale calculated that the general partner was entitled to 30% of the Limited Partnership's net income ($23,400) plus 30% of the non-cash amortization expense ($15,559). Mr. Cale's evidence was that "we added back the amortization expense of $15,559."[16] Snapdragon distributed 30% of the total cash ($11,694) to itself as the general partner. Mr. Cale did not tell any of the original limited partners that he received these payments.[17]

[73] Mr. Cale agreed that Snapdragon received approximately $130,000 in 2003 as the general partner. Mr. Cale did not inform the original limited partners that Snapdragon had received any payments from the proceeds of the refinancing.[18] Mr. Cale did not inform Janet M or any of the original partners of the payments to Snapdragon totalling $129,491.83.[19] Mr. Cale stated that he would have informed Mr. Posner of the payment to Snapdragon around the time that the mortgage had been finalized. The mortgage advance was made on April 22, 2003.[20]

[74] Mr. Cale agreed that the total subscription price was $800,000 for all the subscribed units. PM or his corporations' share of the subscription price was $200,000. Mr. Cale did not know whether PM or his corporations advanced $200,000. The other limited partners' subscription

[13] Q.38.
[14] Q.83 & Q.96.
[15] Q.155-Q163.
[16] Q.328.
[17] Q.355, Q.360.
[18] Q.349-Q.360.
[19] Q.356.
[20] Q.362-Q.378.

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price totalled $600,000. Mr. Cale's evidence was that the initial mortgage of $400,000 reduced the subscription price for the original limited partners.[21]

[75] Mr. Cale presumed that the subscription price for Janet M's units and the other limited partners was nil on the basis that at the time of the distribution in 2003, none of the limited partners were original partners who had contributed capital. Mr. Cale conceded that he calculated his fee of approximately $111,000 based on attributing no value to the limited partners' interests.[22] Mr. Cale did not make any calculations in the event that the net subscription price of the substituted limited partners was greater than zero.

[76] The five original limited partners who sold their units did not receive any distribution from refinancing the property.[23] The distribution to Snapdragon occurred at the same time as the distribution to Mr. Posner's corporations. Mr. Cale responded that it was done "the same way that we did the transfer units at all the same time."[24] In reference to the time period of Mr. Posner's knowledge of the payment to Snapdragon, his evidence was "[i]t certainly would have been on or around the time that we knew that the cheques were coming."[25]

[77] Mr. Cale arrived at a figure of $73,010.82 for the unallocated 25% interest. He explained his calculations as follows. The net proceeds for the refinancing were $373,222.77. He multiplied that amount by .7 ($261,255 - representing 70% of the distribution), divided by 8 (representing the total number of units broken down into lots of 10 units each), and multiplied by 2 ($65,313.96 - representing Janet M's 20 units). The original limited partners did not receive any distribution from the mortgage refinancing because they had sold their units to Mr. Posner's corporations.[26]

[78] Mr. Cale acknowledged that there was no record that a Form 20 had been filed for the pre-2003 transfer from one of the original limited partners to Mr. Posner's numbered company. Mr. Cale undertook to produce a copy of a Form 20 filed for that transfer if he found one in the corporate records. Snapdragon issued a unit certificate dated October 15, 2003 on behalf of the Limited Partnership. It recognized the transfers to Barter Alliance on October 15, 2003. No Form 20's were produced for any of these transfers to Mr. Posner's corporations.[27]

[79] Snapdragon would not agree to return the funds it had received pending the outcome of the litigation because it was Mr. Cale's position that he had the authority under the Partnership Agreement to receive the various payments.[28] On December 18, 2003, Glass J. ordered Mr. Cale not to remove any funds from Snapdragon or the Limited Partnership and to return $32,500 to

[21] Q.225-Q.254.
[22] Q.255-Q.263; Q.432-Q.439.
[23] Q.268.
[24] Q.347.
[25] Q.367.
[26] Q.389-Q.401.
[27] Q.410-Q.423, Q.430.
[28] Q.443.

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the Limited Partnership as possible unallocated funds belonging to the plaintiff. Costs were reserved to the judge hearing the motion.

[80] At the completion of the cross-examination in respect of the August 20, 2003 motion, none of the original investors were limited partners. As a result of the cross-examination of Mr. Cale in October and November 2003, the plaintiff first learned that Mr. Posner had purchased the interests of the remaining original partners through a controlled corporation (Barter Alliance). Thus, Mr. Posner's controlled corporations owned 60 units of the Limited Partnership. Mr. Cale also revealed that Snapdragon refinanced the Limited Partnership's sole asset, made a distribution to Mr. Posner's corporations, and reserved approximately $72,000 as unallocated capital representing the 20 unit interest claimed by Janet M. Snapdragon paid itself a mortgage fee, a percentage of the refinancing proceeds, and a percentage of the 2003 cash receipts. Snapdragon did not register Janet M. as a limited partner on the Limited Partnership register.

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IV: THE SUMMARY JUDGMENT MOTION

A. The Statement of Claim

[81] The statement of claim dated November 14, 1996 requests the following relief:

1. a declaration that Janet M is and has been a substituted limited partner in respect of 20 units of the Limited Partnership since December 31, 1989 [paragraph 1(a)];

2. in the alternative, a declaration that Janet M is and has been an assignee of 20 units of the Limited Partnership since December 31, 1989 [paragraph 1(b)];

3. an order requiring Snapdragon and the Limited Partnership to revise their records to reflect Janet M's interest [paragraph 1(c)];

4. an accounting of the distributions and allocations of the Limited Partnership since December 1989, together with an order requiring payment of any funds owing pursuant to such an accounting [paragraph 1(d)]; and,

5. in the alternative, damages in the amount of $500,000 [paragraph 1(e)].

B. The Notice of Motion

[82] The notice of motion dated August 20, 2003 sought the following relief:

1. an order for judgment on the terms outlined in the statement of claim (summary judgment motion);

2. an order requiring the defendants to produce the books and records of the Limited Partnership from 1993 onwards;

3. an order requiring the defendants to account for all distributions made to the limited partners;

4. an order requiring the recalculation and distribution to Janet M of her share of any distributions plus interest; and,

5. an order removing Snapdragon as general partner and appointing a new general partner, as nominated by Janet M.

[83] As noted above, on September 2, 2003, Perkins J. ordered the defendants to produce the books and records of the Limited Partnership from 1993 to September 26, 2003. On November 18, 2003, DiTomaso J. ordered the defendants to produce for inspection all records and supporting materials for the transfers of partnership units after January 31, 1989. These interlocutory orders were not appealed.

C. The Defendant's Admissions

[84] In their factum dated November 25, 2003, Snapdragon and the Limited Partnership responded to the relief claimed in the plaintiff's statement of claim. It was the defendants' position, subject to qualifications concerning the effective dates, that they did not dispute the relief claimed in sub-paragraphs 1(b), 1(c) and 1(d) of the statement of claim. The defendants agreed to the following:

1. the plaintiff is an assignee of 20 units of the Limited Partnership as of January 11, 1993, as requested in paragraph 1(b) of the statement of claim;

2. the defendants consent to an order to revise the records of the general partner to reflect the plaintiff Janet M's interest in the Limited Partnership as of January 11, 1993, as requested in paragraph 1(c) of the statement of claim; and

3. the defendants shall conduct an accounting of the distributions and allocations of the Limited Partnership since January 11, 1993, as requested in paragraph 1(d) of the statement of claim.

[85] Snapdragon submitted that the effective date of the assignment etc. should be January 11, 1993 because it did not know of the activities of the former general partner or the Limited Partnership prior to becoming the general partner in 1993.

[86] During the course of the oral argument, Snapdragon and the Limited Partnership made the following admissions:

1. Janet M is the owner of 20 units of the Limited Partnership;

2. Janet M was assigned the 20 units on or about December 31, 1989;

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3. Janet M has been and continues to be a substituted partner of the Limited Partner since December 31, 1989; and

4. Snapdragon and the Limited Partnership will revise their corporate records to reflect Janet M's 20-unit interest in the Limited Partnership as of December 31, 1989.

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V: THE ISSUES

A. Ruling on the Summary Judgment Motion

[87] As a result of the concessions and admissions set out in paragraphs 84 and 86, I grant summary judgment with respect to paragraphs 1(a), 1(b) and 1(c) of the statement of claim. Paragraph 1(d) is satisfied to the extent that the defendants will conduct an accounting of the distributions and allocations of the Limited Partnership for the period commencing January 11, 1993. I so order.

B. The Outstanding Issues

[88] The outstanding issues are:

1. should Snapdragon produce the books and records of the Limited Partnership from 1993 onwards?

2. are Snapdragon's obligations contractual or does it owe a fiduciary duty to the limited partners?

3. if Snapdragon is a fiduciary, did it breach its fiduciary duty to Janet M? Should Snapdragon be required to repay some, or all, of the monies received from the Limited Partnership? and

4. should Snapdragon be removed as the general partner?

[89] The summary judgment decision granted the relief sought in the statement of claim and an order was made that the defendants shall conduct an accounting of the distributions and allocations of the Limited Partnership since January 11, 1993, as set out in sub-paragraph 84(3). The notice of motion requested additional orders, as specified in paragraphs 82(2)-82(5). These issues are distinct from the relief sought in the statement of claim.

[90] I raised the issue of the court's jurisdiction to hear and determine these related issues with counsel. They submitted that the court had jurisdiction to hear the additional issues. Neither counsel filed any case law or authorities with respect to the court's jurisdiction to hear and determine the remaining issues set out in the notice of motion. Counsel submitted that there was a long history of litigation and that both parties wished all outstanding issues to be resolved in this proceeding. Counsel further submitted that the litigation had become a financial drain on all

parties and that their clients did not wish to further deplete their resources litigating this case. The parties agreed and consented that all issues raised in the motion and oral argument should be determined on the basis of the evidence filed by the parties, and that no additional evidence was required to decide the outstanding issues. Counsel for the applicant/plaintiff and counsel for the respondents/defendants addressed these issues in their facta and oral arguments.

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C. The Positions of the Parties

a. Plaintiff Janet Merklinger

[91] The plaintiff seeks an order removing Snapdragon as the general partner. It is the plaintiff's position that Snapdragon breached its fiduciary duty when it prevented Janet M from becoming a substituted limited partner. The plaintiff submits that the defendants negotiated in bad faith by requiring her to file a Form 20, especially when other transferees were not required to do so. The plaintiff argues that the defendants' appeal of Salmers J.'s order is further evidence of the defendants' bad faith.

[92] Janet M submits that Snapdragon failed to disclose financial information in a timely manner. Snapdragon did not inform Janet M or the other original unit holders of the refinancing or related information. Snapdragon paid itself monies and fees from the proceeds of the refinancing and only disclosed this information after the fact during cross-examination of Mr. Cale. Counsel for the plaintiff argues that Snapdragon received funds contrary to the provisions of the Agreement and thereby deprived the Limited Partnership and the plaintiff of monies. Counsel further alleges that Mr. Cale and the accountant Mr. Posner conspired to benefit themselves in contravention of their fiduciary duties.

[93] The plaintiff also seeks an order requiring Snapdragon to repay the Limited Partnership monies it received in 2003. The plaintiff's position is that Snapdragon incorrectly assumed that the subscription price of her 20 units and the other limited partners' units were nil and therefore, incorrectly calculated the amount of its entitlement from the refinancing proceeds. The plaintiff submits that Snapdragon breached its fiduciary duty by taking funds from the Limited Partnership without legal entitlement.

b. Defendant Snapdragon

[94] Snapdragon's position was that its duties under the Partnership Agreement were strictly contractual. Snapdragon was not required to inform the limited partners about the refinancing. Snapdragon submits that Article 3.11 of the Partnership Agreement incorporated by reference provisions of the *Securities Act* that required the transferor to file a Form 20 with the OSC; therefore, Snapdragon's authority to recognize the transfer of Janet M's interest was restricted. Counsel argues that from 1993 to the present, they did not dispute the transfer of ownership of the 20 units.

[95] Snapdragon denies it acted in bad faith towards the plaintiff and submits that it acted only in the best interests of the Limited Partnership and limited partners. It is the defendants'

position that Snapdragon attended a mediation session in an attempt to reach a settlement. Janet M's failure to fulfill the terms of the settlement agreement caused delays and precluded her registration as a limited partner. Counsel argues that Snapdragon carried out its duties in accordance with the terms of the Partnership Agreement.

[96] Snapdragon submits that it was entitled to receive a percentage of the income of the Limited Partnership pursuant to the terms of the Partnership Agreement. Snapdragon further submits that it was entitled to receive a distribution from the proceeds of the refinancing pursuant to the terms of the Agreement. The basis for its distribution calculation was that the limited partners net adjusted subscription price was nil because they were not original investors. Snapdragon created a reserve for the unallocated 20-unit interest. In the alternative, if Snapdragon made an error calculating monies payable under the Agreement, counsel for Snapdragon argues that monies owing to Snapdragon should be calculated on the basis of the unaudited 2003 financial records.

D. Issue 1: Production of Records

a. Should Snapdragon produce the Limited Partnership's Books and Records for the years 1993-2004?

[97] The plaintiff seeks an order requiring Snapdragon to produce the Limited Partnership's books and records from 1993 to the date of the court's decision. Janet M's position is that she requested these records without success and that she is entitled to review them in her capacity as a substituted limited partner.

[98] The defendant's position, as set out in its factum and in oral argument, is that it has provided Janet M or her counsel with all the accounting records, including financial records, in its power. In mid-November 2003, Mr. LoFaso offered the plaintiff's counsel an opportunity to inspect the Limited Partnership's records at his office.[29] Snapdragon is prepared to consent to an order that Janet M may inspect the books and records, including financial statements, and that Snapdragon must co-operate and assist Janet M in conducting such an inspection.

[99] The defendant Snapdragon's offer mirrors the statutory requirements of the *Limited Partnerships Act*. Section 10 of the *Act* states that "[a] limited partner has the same right as a general partner to inspect and make copies of or take extracts from the limited partnership books at all times."[30] Section 34 of the *Act* provides that where a person who is required to permit inspection of a document refuses to do so, the Superior Court may direct the custodian of the record to permit inspection of the records upon application of the aggrieved person.

[100] On September 2, 2003, Perkins J. ordered the defendants to produce the Limited Partnership's books and records from 1993 to the date of the hearing of the motion. The defendants have not complied with this order. The order was not appealed and there was no

[29] November 26, 2003 transcript of cross-examination of David Cale, pp. 2-4.
[30] *Limited Partnerships Act*, R.S.O. 1990, c. L.16, s.10 (a).

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motion to set aside the order. The defendants did not suggest that the Limited Partnership, the general partner, or the limited partners (past or present) would suffer prejudice if an order for production were granted. I also find that the defendants failed to produce or disclose important information to the plaintiff in a timely manner (see also paragraphs 165-175 herein).

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b. Conclusion

[101] Given the history of the litigation and for the reasons set out in paragraphs 97-100, I order the defendants to produce forthwith a copy of all books and records of the Limited Partnership from January 11, 1993 to the date of the release of this judgment.

E. Issue 2: Existence of a Fiduciary Duty

a. Is Snapdragon a Fiduciary?

[102] Counsel for the plaintiff filed a copy of the headnote of *International Corona Resources Ltd. v. Lac Minerals Ltd*[31] and a two-page excerpt of the case (pp. 543-44) in support of its position that Snapdragon owed Janet M a fiduciary duty. Counsel for the defendants filed no case law in support of Snapdragon's position that its obligations to Janet M were solely contractual. Neither counsel referred the court to authoritative texts or other legal publications to support their respective positions.

[103] In *Molchan v. Omega Oil and Gas*,[32] the Supreme Court of Canada held that the corporate general partner owed a fiduciary duty to the sole limited partner.[33] The Court found, however, that the general partner did not breach its duty to the sole limited partner.

[104] More recently in *Rochwerg et al v. Truster et al.*,[34] the Ontario Court of Appeal considered the duty of an individual partner to disclose financial information to other partners in a professional partnership. The Court examined the principles underlying the duties of a partner:

> Equitable principles recognized by the courts during the last 100 years impose on partners duties of loyalty, utmost good faith and avoidance of conflict and self-interest. In Ontario, the principles which inform these duties are partially reflected in the [*Partnership*] *Act*.[35]
>
> …
>
> It has long been established that partners owe a fiduciary duty to each other, and that equitable principles hold fiduciaries to a strict standard of conduct, encompassing duties of loyalty, utmost good faith and avoidance of conflict of

[31] (1986), 25 D.L.R. (4th) 504 (H.C.J.).
[32] [1988] 1 S.C.R. 348.
[33] *Ibid*., at 371.
[34] (2002), 58 O.R. (3d) 687.
[35] *Ibid*., at para. 22.

> duty and self-interest. These are well recognized, core principles of the law of partnership.[36]

[105] The Court analyzed the basis for a fiduciary duty amongst partners:

> The fiduciary duty between partners thus arises not only from the reciprocal agency relationship between them but, also, from the duty of utmost good faith which each partner owes to the other. Fundamental to this overarching fiduciary duty is the requirement that each partner place the interests of the partnership, and the avoidance of situations which create, or could create, a conflict between fiduciary duty and the interests of the partnership, ahead of a partner's private interests. Accordingly, partners are required to prefer the interests of the partnership over their own personal interests. The scope of the fiduciary duty in partnerships is of the broadest nature.[37]

The Court suggested that in the context of modern partnerships, fiduciary concepts should be applied in a flexible manner.[38]

[106] Thus the case law is clear that the equitable principles of a fiduciary apply to a general partner in a limited partnership. There are no practical or policy reasons for excluding limited partnerships from the application of the core principles of the law of partnership. A flexible approach allows courts to apply these principles in the context of the structure of limited partnerships.

[107] In the chapter entitled "The Consequences of Being a Partner: Fiduciary Obligations" in *A Practical Guide to Canadian Partnership Law,*[39] M. Ellis & A. Manzer stated that the duty which arises in a fiduciary relationship is often described as one of "utmost good faith" (*uberminae fides*). This imports a requirement that the fiduciary act toward the beneficiary with an absolute sense of loyalty and fidelity. The result is that the fiduciary is required to act in a manner consistent with the best interests of the beneficiary in all matters related to the undertaking of the matters done in confidence. The fiduciary is required to favour the interests of the beneficiary over his own. The fiduciary is unable to profit or gain from any matter which comes to the knowledge of the fiduciary, as to the beneficiary or matters undertaken for the beneficiary, while acting in, or arising out of, the fiduciary role.

[108] As stated by LaForest J. for the Supreme Court of Canada in *Frame v. Smith*,[40] the characteristic elements of a fiduciary relationship are:

1. the fiduciary has scope for the exercise of some discretion or power;

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[36] *Ibid*., at para. 36.
[37] *Ibid*., at para. 62
[38] *Ibid*., at para. 63
[39] Aurora, On., Canada Law Book, loose-leaf ed., at 5-1.
[40] [1987] 2 S.C.R. 99 at para. 60.

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2. the fiduciary can unilaterally exercise that discretion or power so as to affect the beneficiary's legal or practical interests; and,

3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

These three elements are present in the relationship between Snapdragon and Janet M in the context of this commercial venture.[41]

[109] Accordingly, I find that Snapdragon stood in a fiduciary position in relation to Janet M, who was a substituted limited partner since December 1989. The bases of the common law fiduciary duties are the principles of equity and agency. I find that the minimum fiduciary obligations Snapdragon owed to the limited partners are as follows: the duties of loyalty and good faith; the duty to act in the best interests of the fiduciary; the duty to avoid creating a conflict between the best interests of the fiduciary and those of the partnership; and the duty to not put its own interest ahead of those of the limited partners.

[110] A narrow construction of the fiduciary duties of a general partner is that their fiduciary duties are circumscribed by the terms of the Partnership Agreement. Article 7.07 of the Partnership Agreement states as follows:

> The General Partner will exercise its powers and discharge its duties under this Agreement honestly, in good faith and in the best interest of the Limited Partners and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

[111] The language of Article 7.07 adopts the core principles of fiduciary duties at common law for a general partnership. Even if I accepted Snapdragon's submission that its duties to the limited partners are strictly contractual, which I do not, Article 7.07 incorporates the common law principles that Snapdragon, in its capacity as general partner, stands in a fiduciary position in relation to the limited partners. Thus, Article 7.07 requires Snapdragon to carry out its powers and authority under the Partnership Agreement honestly, in good faith, and in the best interest of the Limited Partnership and the limited partners.

[112] I find that Snapdragon's obligations for the Limited Partnership's day-to-day activities were of a commercial nature. The general partner owed a general duty to exercise the care, diligence and skill of a reasonably prudent manager with respect to running the Partnership's business affairs. For example, a general partner is responsible for administrative matters, such as paying the municipal realty taxes, and has managerial responsibilities, such as negotiating the terms of the lease with the tenant. The general partner was required to exercise reasonable skill in performing these tasks in a reasonable and prudent fashion similar to a manager of any business enterprise.

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[41] See for example Articles 2.07, 2.08, 3.10, 3.11, 5.03, 5.10, 7.01-7.04, 7.06, 7.08, 8.02 and 9.01 of the Partnership Agreement.

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[113] Snapdragon holds a position of trust arising out of the performance of other aspects of its duties. For example, Snapdragon owes a fiduciary duty to the limited partners when it receives monies from the Limited Partnership's business activities to distribute the monies amongst the limited partners and itself in accordance with the Partnership Agreement. In the performance of this function, the general partner's responsibility to the limited partner is similar to that of a traditional trustee.

[114] Article 2.05 of the Partnership Agreement provides:

> The General Partner represents and warrants to and covenants with each Limited Partner that the General Partner … shall act with the utmost fairness and good faith towards the other Partners in the business of the Partnership.

[115] Thus, in addition to its fiduciary duties under the common law and Article 7.07 of the Partnership Agreement, Snapdragon represents, covenants, and warrants that it shall act with utmost fairness and good faith towards each limited partner. This provision of the Agreement reinforces my finding that Snapdragon stands as a fiduciary with respect to Janet M.

[116] Mr. Cale is a retired member of the bar who practiced commercial law with a focus on financing and real estate. Mr. Posner is the Limited Partnership's accountant and his duties included preparing the financial statements and reporting to the Limited Partnership on financial matters. As legal and accounting professionals, they knew or ought to have known the responsibilities of a person holding a fiduciary position and the obligation to comply with their fiduciary duties in a commercial venture. I find that Snapdragon stood in the position of a professional fiduciary in its relationship to each of the limited partners.

b. Conclusion

[117] I find that Snapdragon stood in a fiduciary position in relation to the limited partner Janet M.

F. Issue 3: Breach of Fiduciary Duty

a. The Test for Breach of Fiduciary Duty

[118] The duties owed by a fiduciary to a beneficiary can vary depending on the nature of the partnership and the duties and responsibilities of the partners. In the case at bar, the Limited Partnership is a commercial venture, the general partner is responsible for managing the single asset of the partnership and the limited partners are investors. Therefore, the principles of equity and agency governing a fiduciary relationship are determined in the context of the following factors: the commercial nature of the limited partnership; the relationship between the general partner and limited partner(s); the terms of the partnership agreement and the particular function performed by the general partner that allegedly gives rise to a breach. I examine the plaintiff's allegation of a breach of a fiduciary duty in this context.

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[119] The test to determine if a fiduciary has breached its fiduciary duty is an objective one. Assuming Mr. Cale believed Snapdragon's duties were contractual, that it did not have an obligation to inform investors that the property had been refinanced, or that a distribution to the limited partners was properly made, is not determinative of this issue. A fiduciary's subjective mental state is simply one of the circumstances the court considers in analyzing whether the fiduciary breached a particular duty.

b. Did Snapdragon Breach its Fiduciary Duty by Refusing to Recognize Janet M as a Substituted Limited Partner?

i. Snapdragon's Conduct toward Janet M

[120] Counsel for the plaintiff alleges that Snapdragon acted in bad faith commencing in 1993 and continuing into 2004. I will review the ongoing relationship between Snapdragon and Janet M in two distinct periods (1989-1997 and 1997-2003) for reasons that become apparent later in my decision.

1989 - 1997:

[121] I find that paragraphs 7 to 23 of this judgment accurately set out the relevant facts for the period commencing with the formation of the Limited Partnership in 1986 and ending with the issuance of the statement of defence in early 1997. Neither party disputed this evidence. The documentary evidence for the 1989-1993 periods is sparse. The only significant documents from this period are the Partnership Agreement and the two assignments (Development to Growth and Growth to Janet M). There is no evidence that Growth, in its capacity as the general partner, recorded the transfer of the 20 units to Janet M.

[122] As of January 11, 1993, Snapdragon replaced Growth as the new general partner. Mr. Cale's affidavit dated November 12, 2003, refers to a letter concerning PM's background dated December 10, 1991 from Cassels Brock to the Limited Partnership's former accountant Mr. Syvert. Mr. Cale's affidavit does not state when he became aware of that letter's contents. On the undisputed evidence, I find that Mr. Cale was aware of Development's business problems and PM's financial and other difficulties; however, the extent of his knowledge in the period 1993-1997 is not set out in the record.

[123] Counsel for the defendants submitted that the 20 units were never assigned to Janet M; rather, they were security for a loan because PM was in financial trouble. I do not accept this submission. The documentary evidence and the uncontradicted evidence of Janet M is that Development assigned 20 units of the Limited Partnership to Growth and that Growth in turn transferred these units to Janet M on December 31, 1989.

[124] On the undisputed evidence, I make the following factual findings: (1) Janet M was assigned 20 units of the Limited Partnership on December 31, 1989; (2) Snapdragon refused to recognize the transfer of the units from Development to Growth and subsequently from Growth to Janet M; (3) Snapdragon made a capital call on the other limited partners and Janet

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M/Development and demanded that Janet M pay Development's judgment debt(s); and (4) Janet M did not make a capital payment or pay the outstanding judgment against Development.

[125] I am not satisfied that Snapdragon acted in bad faith when it was concerned about the transfer of units from 1993-95. However, Snapdragon and the Limited Partnership both acted in an oppressive manner by demanding that Janet M satisfy the capital call and pay the outstanding judgment(s) against Development, while disputing her ownership of the 20 units and refusing to record her interest in the Limited Partnership's register. In these circumstances, Janet M. was not obligated to make a capital payment or pay Development's outstanding judgment(s) because Snapdragon refused to register her 20-unit interest and recognize her as a substituted limited partner.

1997 – 2003:

[126] I have reviewed the evidence in the record to determine whether Snapdragon acted in the best interest of the Limited Partnership or in utmost good faith during the years 1997-2003. The relevant evidence for the period commencing January 7, 1997 (the issuance of the statement of defence) and ending December 31, 2003 is set out in paragraphs 24-43 above. This undisputed evidence chronicles the events and respective positions of the parties during this period.

[127] The parties thought they had reached a settlement at the mediation session held on May 30, 1997. After the mediation session, Mr. LoFaso wrote Mr. White on several occasions requesting a copy of the draft MOS. The plaintiff's solicitor did not provide the draft MOS until the end of August 1997, resulting in a 3-month delay. The next delay was caused when Mr. LoFaso inserted a new term in his amended version of the draft MOS. This term was not discussed at the mediation session and was inconsistent with the defendants' professed acknowledgment that Janet M owned 20 units. The insertion of this new term created a fresh controversy and resulted in a further 3½-month delay.

[128] In mid-December 1997, the solicitors attempted to finalize the settlement. Mr. LoFaso advised the plaintiff's solicitors that Mr. Cale required Janet M to either file a form with the OSC or obtain a court order dispensing with the need to file the form. The form was erroneously identified as a Form 2 under the *Securities Act.* It was not a relevant document and the plaintiff's solicitor asked Mr. LoFaso for assistance and information regarding the form. After a two-month delay, Mr. LoFaso advised Mr. White by letter dated February 25th 1998 that pursuant to the Regulations under the *Securities Act*, the required form was a Form 21 and not a Form 2. This information was erroneous because the form that supposedly needed to be filed was a Form 20. Although Mr. LoFaso requested that Mr. White proceed with the filing, Mr. White caused another 3½-month delay by delaying his response until mid-June 1998.

[129] The inability of either solicitor to identify the correct form, and their lack of knowledge of its scope and purpose, demonstrates their lack of familiarity with this area of the law. I find that neither solicitor appreciated the full implications of the Form 20 requirement when they attended the mediation session in May 1997. Also, the solicitors did not understand the purported

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relationship between Article 3.11 of the Partnership Agreement and the provisions of the *Securities Act* in the months following the mediation session.

[130] The plaintiff submits that the defendants acted in bad faith in their negotiations with the plaintiff commencing in 1997 when they insisted that a Form 20 be filed with the OSC as a pre-condition to recognizing Janet M as a substituted limited partner. Counsel argues that I can use the evidence of events that occurred in 2003 to infer that the general partner was acting in bad faith in prior years.

[131] As stated, the test whether Snapdragon acted in bad faith is determined objectively in the context of the actor's position in performing a particular activity or duty. After reviewing the record for the 1996 to November 1998 period, I find that during the initial stages of the negotiations, the solicitors for both parties were unaware of the significance of the terms of the purported settlement agreement and the purpose of a Form 20 filing. The plaintiff retained a large full-service law firm with expertise in corporate and securities law. Janet M's solicitors agreed to terms of settlement and drafted minutes of settlement that they should have known were impossible to satisfy. The plaintiff's solicitors caused unnecessary delays by failing to respond to correspondence in a timely manner. In light of these circumstances, I do not find that the defendants acted in bad faith in relation to Janet M in the period 1997-1998.

[132] In the period from September 1998 to mid-November 1998, the undisputed evidence is that Snapdragon and its counsel were aware that filing a Form 20 was the transferor's disclosure obligation and was not the transferee's responsibility. The defendants' solicitor also knew that the lack of a Form 20 filing did not affect the validity of the transfers from Development to Growth or from Growth to Janet M. Almost 1½ years after the mediation session, the parties were no closer to resolving the dispute.

[133] In January 1999, Mr. White brought a motion to seek relief from the requirements of the *Securities Act* in order to resolve the impasse. In early April 2000, the defendants served a motion for summary judgment. On May 4th 2000, the plaintiff withdrew the motion and requested an adjournment of the defendants' motion in order to allow the plaintiff an opportunity to apply to the OSC to waive the Form 20 requirement. On May 31st 2000, the defendants' summary judgment motion was adjourned *sine die* and was never revived. The parties were no closer to a resolution of the dispute after the passage of another four months.

[134] In early September 2000, the defendants informed the plaintiff that the settlement negotiations were at an end and that the parties should proceed to trial. The plaintiff changed solicitors and retained Glaholt and Associates in January 2001. There is no evidence that Glaholt entered into any negotiations or took any steps to advance the litigation. On May 30, 2002, the plaintiff retained Mr. Dingwall who brought a motion in October 2002 to waive the requirement for filing a Form 20 with the OSC.

[135] I make factual findings in this and the following paragraphs. In November 1998, Mr. LoFaso, on behalf of the defendants, acknowledged that the completion of a Form 20 was a

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disclosure obligation of the transferor and was not the transferee's responsibility. The defendants knew that the lack of a completed Form 20 did not affect the validity of the transfers from Development to Growth or from Growth to Janet M. The defendants were aware that Development and Growth had been dissolved and that PM's whereabouts were unknown. The defendants also knew that the dissolved corporations could not execute the Form 20 and that it was most unlikely that PM, their directing mind and signing officer, would return to the jurisdiction. It would be extremely unlikely that the dissolved corporations would be revived or could, if revived, make any claim of ownership in the 20 units. In their submissions before Salmers J. in 2002, the defendants continued to argue that there was a possibility PM could return. Salmers J. summarily rejected this submission.[42]

[136] Recognition of Janet M as a substituted limited partner with a 20-unit interest would not have jeopardized the other limited partners' interests. Leaving aside the issue of whether or not a Form 20 filing was a mandatory requirement under Article 3.11 of the Partnership Agreement, the *bona fides* of the defendants' position became less tenable with the passage of time. Even assuming that a Form 20 was required to be filed in order to comply with Article 3.11, it was a matter of form and not substance.

[137] The undisputed evidence is that from 1998, and continuing during the subsequent years, the defendants knew that their insistence on a Form 20 filing would preclude recognition of Janet M's partnership interest. Notwithstanding this knowledge, on January 19, 2001, Snapdragon advised Glaholt & Associates that recognition of Janet M's 20-unit interest was conditional upon her filing a Form 20 with the OSC. Paragraphs 13 and 25 of the defendants' factum dated January 9, 2003 and filed on the motion before Salmers J., state that because PM is unavailable to either revive the dissolved corporations or execute the Form 20,"it is a legal and factual impossibility to effect the transfer of units requested by the plaintiffs." Thus, the defendants insisted on a condition that they knew was factually and legally impossible to perform.

[138] I find that Snapdragon's broad interpretation of the scope of Article 3.11 of the Partnership Agreement and its insistence that the plaintiff file a Form 20 with the OSC created a catch-22 situation. Snapdragon would only recognize the 20 unit transfer if Janet M obtained an executed Form 20 from the corporate transferors and filed it with the OSC. However, the transferors (Development and Growth) did not exist and the whereabouts of their directing mind and signing officer was unknown. Because the plaintiff did not have the power to fulfill the pre-condition, the condition could never be satisfied and Janet M could never be registered as a limited partner in the Limited Partnership's records.

[139] As of November 1998, the defendant Snapdragon knew that the Form 20 condition could never be satisfied in the subject circumstances, that the lack of Form 20 did not affect the validity of the transfer, and that the registration of Janet M's 20 unit interest did not prejudice the rights or interests of the general partner or the other limited partners. I find that after November 1998, the defendants did not negotiate in good faith when they insisted that the plaintiff must file

[42] Transcript of proceedings on November 21, 2002, p.11, l.26-p.12, l.9.

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a Form 20 with the OSC as a pre-condition for Snapdragon recording the transfer on the Limited Partnership's register. The sole purpose for imposing the Form 20 precondition was to prevent Janet M from becoming a limited partner.

[140] Snapdragon did not act with utmost fairness and good faith toward Janet M when it refused to recognize her as a limited partner. It acted contrary to Janet M's best interest without any valid business reason for doing so.

ii. Snapdragon's Submission that it did Not Dispute the Plaintiff's Claim to become a Limited Partner

[141] In their factum dated November 25, 2003, and during oral argument, the defendants' counsel forcefully argued that they did not dispute the plaintiff's claim with respect to her partnership interest. It was their position that Snapdragon was required to ensure that Janet M complied with Article 3.11 of the Partnership Agreement.

[142] However, the statement of defence dated February 1997 stated that Janet M and her assignor had forfeited their right, title, and interest in the Limited Partnership. Snapdragon's position in the fall of 1997 was that PM and his controlled corporations had an interest in the corporation whereas Janet M did not. In September 2000, the defendants' solicitor notified the plaintiff's solicitor that the settlement negotiations were concluded and that the action should proceed in its normal course. These pleadings were never amended.

[143] Between issuance of the statement of defence in February 1997 and the motion before Salmers J in November 2002, Snapdragon's position concerning Janet M's entitlement to be recognized as a partner was either disputed or conditional. In the proceedings before Salmers J. on November 21, 2002, the defendants' position was that the disputed 20 units of the Limited Partnership escheated to the Crown. During cross-examination of Mr. Cale on October 2, 2003, the defendants disputed the suggestion that Janet M owned 20 units of the Limited Partnership. Snapdragon referred to the 20 units as an unallocated interest in the 2003 financial statements.

[144] At the commencement of oral arguments the defendants recognized the 20 unit transfer to Janet M effective January 15, 1993; however, they would not recognize Janet M as a substituted limited partner as of December 31, 1989. During the course of oral argument, the defendants conceded that the transfer to Janet M was effective December 31, 1989, and near the end of oral argument they acknowledged that Janet M was a substituted limited partner.

[145] I do not accept Snapdragon's submissions that it did not dispute Janet M's claim to be a limited partner. I find that the defendants disputed the transfer of the 20 units to Janet M and refused to register her interest as a substituted limited partner from 1996 until late in the oral argument. I find that it was necessary for the plaintiff to apply to the Superior Court to obtain a waiver of the Form 20 requirement and to continue litigating the matter in order to force Snapdragon to recognize Janet M as a substituted limited partner. Had the plaintiff not persevered, Snapdragon and the Limited Partnership would not have recognized her interest in the Limited Partnership.

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[146] The fiduciary Snapdragon did not act toward Janet M. with a sense of loyalty and fidelity, and it clearly did not act in her best interests. Snapdragon and the Limited Partnership affected Janet M's legal and financial interests while she was in a vulnerable position. There was no evidence that registration of Janet M's shares could adversely affect the legal or economic interests of the other limited partners. Indeed, the failure to recognize Janet M's interest meant that the other limited partners had to pay taxes on the income attributed to the unallocated units without receiving the financial benefit.

iii. Janet M's Application to Waive the Requirements of the *Securities Act*

[147] The alternative route to perfect Janet M's registration as a substituted limited partner was to apply to a court of competent jurisdiction for an order waiving the requirement to file a Form 20. On December 18, 1997, Mr. LoFaso confirmed that Janet M's solicitor should file a Form 2 [*sic* Form 20] or should obtain an order dispensing with the filing. In a letter dated November 17, 1998, Mr. LoFaso advised Janet M's solicitors as follows in relation to the waiver alternative:

> … it is my position that your client must make the appropriate application to a court of competent jurisdiction, or to the Ontario Securities Commission, at her own expense, to have the statutory fillings waived so that this matter can be finalized. In this regard, I can advise that I have been instructed not to oppose any such application, however, I will require to be kept apprised of the steps taken in furtherance of this objective.

[148] Mr. LoFaso, in a letter to Mr. White dated February 24, 2000, advised that the defendants would not oppose the motion to obtain a waiver to comply with the OSC; however, counsel would attend to inform the court that the general partner's powers were limited under the Partnership Agreement. As noted, Mr. White subsequently abandoned this motion.

[149] In the motion before Salmers J., counsel for the defendants opposed the plaintiff's application. Counsel's primary submission was that the 20-unit interest escheated to the Crown or, in the alternative, PM might return to claim his interest. The defendants further submitted that the court did not have the authority to waive the mandatory requirements of the *Securities Act* as incorporated by Article 3.11 of the Partnership Agreement.

[150] Mr. LoFaso, in his November 17, 1998 letter, advised the plaintiff to bring an application to a court of competent jurisdiction. When the plaintiff made an application to the Superior Court, the defendants objected to the court's jurisdiction to grant relief. In oral argument before me, Snapdragon attempted to maintain its position that the defendants were merely bringing to the court's attention the limitations of the general partner's authority to recognize an assignment of the transfer of units. I do not accept the defendants' submission. I find that the defendants opposed the plaintiff's application to waive the Form 20 requirement. I find that some time after Mr. LoFaso's November 17, 1998 letter, the defendants changed their

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instructions to Mr. LoFaso and instructed him to oppose Janet M's application to waive the Form 20 requirement.

[151] Snapdragon and the Limited Partnership appealed Salmers J.'s decision and sought to overturn his ruling. The notice of appeal to the Court of Appeal sets out the grounds of appeal. The defendants' position was that Salmers J. lacked jurisdiction or authority to make the order and sought costs against the plaintiff on a substantial indemnity basis. The defendants knew that Janet M was unable to file a Form 20 with the OSC because doing so was legally and factually impossible. When Janet M's solicitors obtained an order from a Superior Court judge waiving the requirement of a Form 20 (as suggested by Mr. LoFaso in his letter of November 17, 1998), the defendants did not accept the decision.

[152] In oral argument, counsel for the defendants attempted to justify their appeals on the basis that they were necessary to protect the general partner from a lawsuit. It is difficult to conceive how the general partner could become liable for recording the interest of a valid transfer in accordance with a Superior Court ruling that a Form 20 was not necessary and that the transfer of the interest did not contravene Article 3.11 of the Partnership Agreement. I find that the ruling by a Superior Court judge should have concluded the litigation; it satisfied the sole barrier that the defendants had erected to deny registration of the 20-unit transfer to Janet M.

[153] Mr. Cale, in his affidavit dated November 12, 2003, attempted to justify the decision to appeal Salmers J.'s decision on the grounds that Snapdragon could incur liability if it failed to fulfill its duties under Article 7.07 of the Partnership Agreement. Article 7.07 provides:

> The General Partner will exercise its powers and discharge its duties under this Agreement honestly, in good faith and in the best interest of the Limited Partners and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

[154] I do not accept Mr. Cale's justification for appealing Salmers J.'s decision. I find that Snapdragon had no exposure to any potential liability from the other limited partners if it failed to prosecute the appeal. The sole purpose of the appeal was to prevent the plaintiff from becoming a substituted limited partner. I find that Snapdragon failed to discharge its fiduciary duties of loyalty and good faith by failing to act in the best interests of Janet M or the other limited partners and by not exercising its powers in a reasonably prudent manner. I find that Snapdragon breached Articles 7.07 and 2.05 of the Partnership Agreement by unnecessarily continuing the litigation.

iv. Steps Taken by Snapdragon to Recognize Janet M's Interest

[155] Section 4 of the *Limited Partnerships Act* provides that the general partner shall maintain a register to record the limited partners. Article 3.11 of the Partnership Agreement incorporates this statutory requirement by requiring the general partner to maintain a register to record the assignment of units by a limited partner. Assuming, for the purpose of argument, that Article 3.11 precluded Janet M's registration as a limited partner as advocated by Snapdragon.

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Janet M was dependent upon Snapdragon to exercise its authority under Article 3.11 with utmost fairness and good faith. She was in a vulnerable position in the subject circumstances.

[156] In oral argument counsel referred to s. 18(1) of the *Limited Partnerships Act*, which provides that a limited partner's interest is assignable. Neither counsel referred to s. 17 of the *Act* or to Article 12.01 of the Partnership Agreement in their facta or oral argument. Section 17 of the *Act* states:

> After the formation of the limited partnership, additional limited partners may be admitted by amendment of the record of the limited partners.

Article 12.01 of the Partnership Agreement provides as follows:

> This Agreement may be amended by the General Partner, without notice to or consent of the Limited Partners, to reflect the admission, resignation or withdrawal of any Limited Partner, or the assignment by any Limited Partner of the whole or any part of its interest in the Partnership, under or pursuant to the terms hereof or of the Limited Partnerships or [sic] Act.

[157] Snapdragon had the power and authority to amend the Agreement to record the assignment of the 20-unit interest to Janet M. There is no evidence in the record that Snapdragon took any positive steps to accommodate the plaintiff's request for recognition. For example, Snapdragon did not attempt to obtain consent from the other limited partners to register Janet M as a substituted limited partner as provided s.18 (4) in the *Limited Partnerships Act*. Snapdragon failed to take any measures to assist Janet M when it knew that the Form 20 precondition was factually and legally impossible to fulfill.

[158] As stated by the Court of Appeal in *Rochwerg v. Truster*,[43] the fiduciary duty between partners arises from their reciprocal agency relationship and the duty of utmost fairness that each partner owes to the other. Rather than attempting to assist a partner, Snapdragon and the Limited Partnership blocked Janet M's request to become a substituted limited partner when it knew the precondition was legally and factually impossible to satisfy. The failure to positively act was a breach of Articles 2.05 and 7.07 of the Partnership Agreement and Snapdragon's common law fiduciary duty.

v. The Form 20 requirement for Mr. Posner's Corporations

[159] On September 2, 2003, Perkins J. ordered the defendants to produce the books and records of the Limited Partnership to Janet M from 1993 onwards. On November 18, 2003, DiTomaso J. ordered the defendants to produce for inspection all records and supporting materials for the transfers of partnership units after January 31, 1989.

[160] Mr. Cale acknowledged that there was no record of a Form 20 filing with respect to transferring units in the early 1990s from one of the original limited partners (Gross) to Mr.

[43] *Supra* note 34 at para. 62.

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Posner's numbered company. Mr. Cale undertook to produce a copy of a Form 20 for that transfer if he found one in the corporate records.[44] Mr. Cale was also aware that the other original limited partners transferred their units to Barter Alliance in May 2003. On October 15, 2003, Snapdragon issued 5 certificates representing the transfer of 50 units of the Limited Partnership from the remaining original limited partners to Mr. Posner's corporation. Snapdragon did not produce a Form 20 for these transfers[45] notwithstanding that Mr. Cale had undertaken to produce a Form 20 if he found one. The record does not contain Form 20 filings for any of the transfers from the original limited partners to the numbered corporation or Barter Alliance.

[161] On the undisputed evidence, I find that Snapdragon and the Limited Partnership recognized transfers of units without requiring the assignees, namely the numbered corporation and Barter Alliance, to file a Form 20 with the OSC.

[162] Snapdragon applied different rules for assigning units to Janet M than for Mr. Posner's controlled corporations. The fiduciary cannot favour the interests of one beneficiary but not another in identical circumstances. This contravenes the duty of loyalty owed by the fiduciary to Janet M. The application of different standards in like situations also contravenes Snapdragons' covenants and warranties under the Agreement.

vi. Conclusion

[163] I make the following factual findings. After 1998, Snapdragon's sole purpose for insisting on the Form 20 OSC filing was to defeat Janet M's entitlement to be recognized as a limited partner. Snapdragon acted in bad faith and breached its warranty and its fiduciary duty by requiring Janet M to file a Form 20 after it was aware that it was legally and factually impossible to do so. Snapdragon breached its warranty to act with utmost fairness and good faith. It breached its common law fiduciary duty to Janet M when it contested the plaintiff's application to waive the Form 20 filing, refused to accept Salmers J.'s decision, and appealed Salmers J.'s ruling to the Divisional Court and Court of Appeal.

[164] I find that Snapdragon and the Limited Partnership acted unfairly and in bad faith when they required Janet M, but not Mr. Posner's controlled corporations, to file a Form 20 as a condition precedent to recording her 20-unit interest in the Partnership's register. Snapdragon also breached the representations, warranties and covenants set out in Article 2.05 of the Partnership Agreement to act in utmost good faith and fairness. Snapdragon and the Limited Partnership breached their fiduciary duty to Janet M by applying a different and more onerous procedure to record the transfer of units to her than to Mr. Posner's controlled corporations. Finally, Snapdragon and the Limited Partnership's failure to take any steps to accommodate Janet M in becoming a substituted limited partner was a breach of their fiduciary duty.

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[44] *Supra* note 29.
[45] *Ibid*. Q.410-Q.423; Q.430.

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c. Did Snapdragon Breach its Fiduciary Duty by Failing to Disclose Financial Information?

i. Analysis

[165] Article 9.01 of the Partnership Agreement requires the general partner to call an annual general meeting. Mr. Cale's evidence was that he held one formal partnership meeting in 1993 and reported to the limited partners "in theory" only.

[166] Section 10(b) of the *Limited Partnerships Act* provides that, on demand, a limited partner has to be given true and full information concerning all matters affecting the Limited Partnership and a complete and formal account of the Partnership's affairs. Snapdragon did not provide any financial information to Janet M after 1993. In 2003, Janet M's solicitor requested information about the share transfers, the financial statements, and the Limited Partnership's books and records. Mr. Cale did not produce the requested information and documents in a timely manner.

[167] On September 2, 2003, Perkins J. ordered the defendants to produce the Limited Partnership's books and records from 1993 onwards on or before September 26, 2003. This order was not complied with in a timely manner. Snapdragon produced financial statements for some years (but not others) but did not produce other documents before the deadline. There were other problems as well. For example, the information about the transfers to Barter Alliance was disclosed only after there had been a distribution to Snapdragon and Mr. Posner's controlled corporations from the surplus refinancing proceeds.

[168] Mr. Cale's evidence was that the mortgage transaction would have occurred in any event because the mortgage was coming due and the limited partners were interested in receiving funds. Snapdragon knew that upon the completion of the refinancing, surplus funds would be available for distribution to the limited partners and the general partner. Snapdragon did not inform the limited partners that the sole asset would be re-mortgaged or that there would be a surplus available for distribution. The refinancing and the surplus funds were not routine transactions of the Limited Partnership and information about the transaction was very important to the limited partners. The purpose of the investment was to receive a return on capital and to obtain a tax savings. The refinancing was an opportunity for the limited partners to receive a return on their 1987 capital investment in accordance with the terms of the Partnership Agreement.

[169] Mr. Cale's reason for not reporting the financial information was that he was not required to do so. I do not accept Mr. Cale's excuse for failing to disclose the financial information to the limited partners. I find the mortgage refinancing and the availability of a surplus for distribution was important material information that should have been disclosed to all the limited partners in a timely manner.

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[170] In *Tzembelicos v. Tzembelicos*,[46] Ground J. discussed the duty of a partner in a general partnership to disclose information to the other partners prior to the sale of partnership interests. He stated:

> I am of the view that the provisions of the *Partnership Act* and the common law fiduciary duty among partners requires the disclosure of any transaction, agreement or understanding affecting the partnership, the partnership business or the partnership property and extends to any agreement relating to a partner selling or purchasing a partnership interest within the partnership.

[171] The general partner retains the auditor to review and report to the general and limited partners on the financial statements pursuant to Article 8.02 of the Partnership Agreement. The accountant, Mr. Posner, held a position of trust with respect to the limited partners. Mr. Dingwall attempted to examine Mr. Posner as a witness in mid-January 2004 but the witness did not attend. I was prepared to grant an adjournment of the proceedings on terms to allow Mr. Dingwall an opportunity to examine Mr. Posner. Mr. Dingwall elected to proceed with the hearing.

[172] Mr. Posner possessed information of fundamental importance about the Limited Partnership's financial affairs. This information was critical with respect to the valuation of the limited partners' investment. I find that Mr. Posner, in his capacity as the Limited Partnership's accountant, had a duty to report to the limited partners. He was a fiduciary in that capacity and was obligated to inform Janet M and the other limited partners of the material financial information. Based on the undisputed evidence that Mr. Posner did not inform Janet M of the important financial information before he attempted to purchase her shares, I find Mr. Posner breached his fiduciary duty to Janet M. Mr. Posner did not attempt to avoid a conflict of interest; instead he contravened one of the underlying principles of a fiduciary duty when he attempted to advance his own self-interest as purchaser over the interest of the beneficiary Janet M.

[173] Mr. Posner, in his capacities as the accountant and as a unit holder, knew that there was a mortgage commitment, that there would be a surplus from the refinancing, and that these surplus funds would be available for distribution. Mr. Posner received approximately $195,000 as a capital distribution from the proceeds of the refinancing and received $20,464.50 as a distribution from the cash receipts. Mr. Cale's evidence was that "we did the transfer units at all the same time" and "we knew the cheques were coming."[47] These statements show that Mr. Cale and Mr. Posner worked together to allocate the surplus. I find that Mr. Posner, as the accountant, was aware how the surplus funds could be distributed and the approximate amount of funds available for distribution. I find that the following events were not coincidental: the timing of the refinancing; the availability of surplus funds; the failure to disclose; the purchase of the other limited partners' interest by Mr. Posner's corporations; Mr. Posner's attempt to purchase Janet M's units; and the distribution of the surplus funds to Mr. Posner and Snapdragon. It is

[46] [2004] O.J. No. 154.
[47] Supra note 29 Q.347, Q.367.

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unnecessary for the purposes of these reasons to decide whether or not there was some kind of conspiracy as alleged by Mr. Dingwall.

[174] Mr. LoFaso submitted that the limited partners, as reasonable persons, might or would have sold their shares rather than receiving a distribution because of their individual tax positions. However, because the original partners did not give evidence, there is no evidence of their individual tax positions. I find that the fiduciary cannot claim that the beneficiary would have acted in the same manner in any event where the fiduciary withholds critical information preventing him or her from making an informed decision. Had Snapdragon informed the original limited partners of the financial information in a timely manner, each original investor would have been in a position to elect whether to receive a capital and income distribution and maintain their investment or to sell their units to Mr. Posner's controlled corporation. There was an imbalance of power that resulted in an uneven playing field. The purchaser of the units possessed information gained from a fiduciary position and this information was not shared with the beneficiaries, namely Janet M and the other limited partners. Janet M and the original limited partners were not given the full and complete disclosure they needed to make an informed election. Snapdragon failed to provide the material financial information to the other limited partners and thereby breached its fiduciary duty to them.

[175] Mr. LoFaso alternatively argued that the original limited partners received fair compensation for their units. Counsel submitted two alternative calculations of share valuation. There was, however, no opinion evidence of the value of the shares before and after the refinancing and distribution. The issue before me is not whether a hypothetical unit holder received fair compensation but rather whether the fiduciary made full disclosure in discharge of his or her duty such that the beneficiary made a decision to sell units in the Partnership with full knowledge of all relevant circumstances. I do not accept Mr. LoFaso's alternative submissions for the above reasons.

ii. Conclusion

[176] I find Snapdragon had a fiduciary duty pursuant to the Partnership Agreement and at common law to report the important financial information to the limited partners in a timely manner. In any event, this information should have been reported prior to the transfers of units to Barter Alliance in 2003. Snapdragon breached its fiduciary duty to disclose the financial information to the limited partners and breached the representation, covenant, and warranty provision of the Agreement to act with utmost fairness and in good faith.

d. Did Snapdragon Breach its Fiduciary Duty by Paying Itself a Mortgage Fee?

i. Analysis

[177] Snapdragon paid itself a mortgage fee in the amount of $5,885 from the Limited Partnership's funds. The mortgage fee was first disclosed during the proceedings on this motion. Counsel for Snapdragon did not point to any provision of the Partnership Agreement allowing

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Snapdragon to charge or collect a mortgage fee. During oral argument, Snapdragon abandoned its entitlement to receive a mortgage fee.

ii. Conclusion

[178] Snapdragon was in a position of trust in relation to the distribution of surplus funds. I find that Snapdragon breached its fiduciary duty to Janet M and the other limited partners by receiving monies it was not entitled to under the Partnership Agreement. Snapdragon put its own self-interest ahead of those of the limited partners. The mortgage fee payment to itself constitutes a breach of Articles 2.05 and 7.07 of the Partnership Agreement and a breach of Snapdragon's common law fiduciary duty to Janet M. The fact that Snapdragon agreed to repay the mortgage fee to the Limited Partnership does not retroactively cure these breaches.

e. Did Snapdragon Breach its Fiduciary Duty by Distributing to itself Proceeds from the Refinancing?

i. Analysis

[179] Article 5.10 of the Partnership Agreement provides:

> The General Partner will, to the extent that Refinancing Proceeds are not used for the business of the Partnership, distribute Refinancing Proceeds arising from any Refinancing as follows:
>
> (1) until the Limited Partners have been allocated Refinancing Proceeds to the extent of the Net Adjusted Subscription Price, 100% to the Limited Partners; and
>
> (2) then to pay any credit amount, proportionately, in any Partner's Current Account; and
>
> (3) thereafter any balance as follows:
>
> (a) 70% to the Limited Partners; and
>
> (b) the remainder to the General Partner.
>
> The amount of Refinancing Proceeds to be distributed will be distributed within a reasonable time following the date upon which such Refinancing Proceeds are received.

Article 1.01, paragraph 31 of the Agreement defines "Net Adjusted Subscription Price" as follows:

> "Net Adjusted Subscription Price", at any time, means that portion of the Subscription Price that has been paid in respect of the Units at or prior to such time less Refinancing Proceeds and Sale Proceeds distributed at or prior to such time in respect of the Units.

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[180] There was no evidence that the refinancing proceeds were used for business purposes other than the payout of the existing mortgage. Mr. Cale decided, for the purposes of determining the net adjusted subscription price of the units, that only the original investors had paid for their units. Mr. Cale's evidence was that he assumed the net subscription price of each of the limited partners' units was zero for the purpose of the Article 5.10 calculation because "none of the individual unit holders at this point in time had paid for their subscriptions to the partnership."

[181] Mr. Cale did not know how much each original investor had paid for their respective units. Although Mr. Cale believed that neither PM nor his controlled corporations paid for the 20 unit interest, he did not know if a payment had in fact been made. Mr. Cale did not perform any alternative calculations based on an assumption that the substituted limited partners had paid an amount greater than zero for their units.

[182] The mortgage was advanced on April 22, 2003 and the distributions were made on June 4, 2003. As noted, Mr. Cale determined that the persons entitled to the refinancing proceeds were the limited partners at the time the cheques were drawn for the distribution. There is no evidence explaining the delay between the date of the receipt of the mortgage funds on April 22, 2003 and the date of the distribution on June 4, 2003. Article 5.10 of the Partnership Agreement sets out the timeline for distributing the refinancing proceeds: "The amount of the refinancing proceeds to be distributed will be distributed within a reasonable time following the date upon which such refinancing proceeds are received." The Partnership agreement does not, however, specify when the refinancing proceeds become vested. Mr. Cale did not consider whether the transferors (the original unit holders) were entitled to receive a distribution from the refinancing proceeds on the basis that the refinancing proceeds were received while they were limited partners.

[183] The general partner cannot arbitrarily delay the distribution of refinancing proceeds in order to benefit the interest of the transferee of the units. Snapdragon issued unit certificates, dated October 15, 2003, on behalf of the Limited Partnership, to recognize the transfer of units from the original limited partners to Barter Alliance. There is no evidence of the exact date the units were transferred or why Snapdragon distributed the refinancing proceeds to a limited partner prior to recognizing the transfer of units.

[184] Section 18(2) of the *Limited Partnerships Act* states, "[a] substituted limited partner is a person admitted to all the rights and powers of a limited partner who has died or who has assigned the limited partner's interest in the limited partnership." Section 18(6) states, "[a] substituted limited partner has all the rights and powers and is subject to all the restrictions and liabilities of the limited partner's assignor …"

[185] I find as follows. The assignee (a substituted limited partner) stands in the position of the assignor (original limited partner) for the purpose of calculating the net adjusted subscription price of the units owned by the substituted limited partner. Mr. Cale did not calculate the distribution from the refinancing proceeds in accordance with Article 5.10 of the Partnership Agreement because he wrongly assumed that the net adjusted subscription price was zero for the substituted limited partners. He made this assumption solely on the basis that they were not the

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original investors at the time the distribution was made. Also, Mr. Cale did not direct his mind to whether the transferor or the transferee was entitled to the distribution of the refinancing proceeds.

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[186] I make the following factual findings. There was no basis in the Partnership Agreement for Mr. Cale's assumption that the net subscription price was zero for the substituted limited partners. Accordingly, Snapdragon did not distribute the refinancing proceeds in accordance with Article 5.10 of the Partnership Agreement and therefore breached this term. Snapdragon arbitrarily assumed the zero value, which had the effect of maximizing the distribution to the general partner at the expense of the original limited partners or the substituted limited partners.

[187] Counsel for Snapdragon made alternative calculations of the net subscription price based on the capital account set out in the financial statements. He acknowledged that Mr. Cale did not know the amount the original investors had invested; however, he submitted that Mr. Dingwall should know because his former firm was the solicitor for PM and the Limited Partnership during the initial years. Mr. LoFaso also submitted that if the court found Mr. Cale's interpretation and application of Article 5.10 incorrect, the court should decide the amount of the distribution to Janet M on the basis of the financial statements in the Limited Partnership's records. Mr. Cale did not consider this alternative method of valuation. There is no evidence as to the reliability of the financial statements as a basis for determining the net subscription price since the accountant who prepared the statements declined an opportunity to give evidence. There was no expert evidence to assist the court to determine the validity of Mr. LoFaso's method for determining the adjusted subscription price of the units.

[188] There is insufficient evidence in the record to determine the net adjusted subscription price paid for the units by the original limited partners. Thus, I am unable to calculate the amount of the distribution payable to the original limited partners or the substituted limited partners and the general partner pursuant to article 5.10 of the Partnership Agreement. I am also unable to determine whether refinancing proceeds should be distributed to the original limited partners or the substituted limited partners due to the insufficient evidence in the record of the dates and other circumstances surrounding the unit transfers to Barter Alliance.

[189] Snapdragon agreed to conduct an accounting of the Limited Partnership's distributions and allocations from January 11, 1993. As well, I ordered Snapdragon to produce copies of the Limited Partnership's books and records for Janet M from 1993 to the release of this decision. Upon the receipt of this information, documents, and some of the original documentation, the parties and the general partner will be in a position to calculate the net adjusted subscription price of the units owned by each limited partner or substituted limited partner. Once this calculation is made so that there is reliable financial information and all the circumstances concerning the transfer of units are known, an independent general partner exercising reasonable skill and acting in utmost good faith will be able to distribute the refinancing proceeds in accordance with Article 5.10 of the Limited Partnership Agreement.

ii. Conclusion

Snapdragon breached its fiduciary duty under Article 7.07 of the Agreement and at common law. It calculated the distribution of the proceeds from the refinancing on a basis that maximized the financial benefits to itself and failed to consider the interests of the original limited partners. Snapdragon acted in its own self-interest and failed to favour the interest of the beneficiary over its own. Snapdragon also breached its covenant to act with utmost good faith towards the limited partners in the business of the Limited Partnership. Snapdragon repaid $32,500 to the Limited Partnership pursuant to the order of Glass J. I order Snapdragon to repay the Limited Partnership the balance of monies it received from the distribution of the refinancing proceeds pursuant to Article 5.10.

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f. Did Snapdragon Breach its Fiduciary Duty by Distributing to Itself a percentage of the 2003 Cash Receipts?

i. Analysis

[190] Article 5.03 of the Partnership Agreement directs the general partner to distribute cash in respect of fiscal periods to the limited partners and the general partners. Article 1.01, paragraph 14 defines the term distributable cash as the amount by which the Limited Partnership's aggregate cash receipts in a fiscal period exceed the defined aggregate expenses. Mr. Cale's evidence is that the Partnership's net income for 2002 was $23,421. He then added an amortization expense of $15,559, a non-cash item, to determine the total cash receipts ($38,980). Pursuant to Article 5.03, the general partner receives 30% of the cash receipts, which was calculated to be $11,694. Snapdragon paid itself $11,694 representing a distribution of 30 percent of the cash receipts.

[191] Janet M adduced no evidence to challenge Mr. Cale's interpretation or calculation of cash receipts. There is no evidence that the distribution of the cash receipts was not done in accordance with the Article 5.03 of the Agreement.

ii. Conclusion

[192] I find that Snapdragon did not breach its fiduciary duty in the distribution of cash receipts to itself in respect of the 2003 income. Subject to a confirmatory audit of the 2003 financial statements, I find that Snapdragon is entitled to receive a distribution of cash receipts in the amount of $11,694.

G. Issue 4: Removal of Snapdragon as the General Partner

a. Should Snapdragon be Removed as the General Partner?

i. Analysis

[193] Janet M seeks to remove Snapdragon as the general partner because it breached its fiduciary duty to her. The Partnership Agreement specified the procedure for removing the general partner. It is Snapdragon's position that its removal should be done in accordance with

the terms of the Partnership Agreement. Neither counsel cited case law or authoritative texts with respect to their positions on this issue.

[194] Article 10.04 of the Partnership Agreement provides:

> The General Partner may not be removed as the General Partner except for cause and in accordance with Article 10.05.

Article 10.05, titled "Conditions of Removal of General Partner," provides in part as follows:

> The right of the Limited Partners to remove the General Partner by Ordinary Resolution and to admit a replacement thereof shall not be effective in any manner unless and until the General Partner has received a written notice from a Limited Partner stating that the General Partner has failed to exercise its powers and carry out its duties as required by this Agreement or by law and describing, in general terms, the event giving rise to such failure and
>
> 1. the General Partner has not, within 21 days of the receipt of such notice by the General Partner, delivered a written notice to such Limited Partner denying the existence, or continuance, of the failure described in such notice; or
>
> 2. a single arbitrator appointed by the General Partner and such Limited Partner pursuant to the [*Arbitration*] *Act* … has determined that by reason of the failure described in such notice the General Partner has failed to exercise its powers and carry out its duties as required by this Agreement or by law and by reason thereof, it is reasonable to expect the Limited Partners to have a justifiable lack of confidence in the ability of the General Partner to continue to exercise its powers and carry out its duties as such.

The procedure for the appointment and remuneration of an arbitrator is then set out in Article 10.05. The section continues as follows:

> The arbitrator so appointed shall hear submissions from the Limited Partner and the General Partner within fifteen (15) days of his appointment and shall render his decision within thirty (30) days of the conclusion of those submissions. The decision of the arbitrator when rendered shall be final and binding upon both the General Partner and is not subject to appeal.

[195] Article 9 of the Partnership Agreement sets the procedures for meetings, including notice requirements, the quorum requirements, voting rights (one vote for each one unit), the chair, etc. Article 9.21 stipulates that any action to remove the general partner shall not be effective until the Limited Partnership has received the opinion of legal counsel on the effects that such a removal may have on the limited liability of the limited partners.

[196] Mr. LoFaso submitted that pursuant to Article 10.04 of the Partnership Agreement, the removal of the general partner must be for cause and in accordance with Article 10.05. Mr.

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LoFaso acknowledged during the course of oral argument that the court had jurisdiction to remove the general partner but that the court ought not to do so in the subject circumstances.

[197] Mr. LoFaso addressed the procedure for the removal of the general partner. He submitted that the removal of the general partner by the limited partners must be done by an ordinary resolution, which requires a quorum of not less than 2 persons representing 50% of the units. He further submitted that the combined effect of s. 18(6) of the *Limited Partnerships Act* and Article 3.21 of the Partnership Agreement preclude Janet M from voting to remove Snapdragon as general partner. Leaving aside the correctness of Mr. LoFaso's interpretation of the combined effect of the *Act* and Article 3.21 when neither PM nor a controlled corporation is the general partner, these arguments support the practical need to determine this issue outside the procedural restrictions of the Agreement. In light of the history of this dispute, it is most unlikely that the process to remove the general partner would be completed in a co-operative spirit but, to the contrary, it is likely that there would be endless disputes over the interpretation and application of the procedural requirements. Even if Janet M follows all the procedural requirements of Articles 9 and 10, Mr. Posner's corporations have the controlling vote on an ordinary resolution to remove the general partner. I conclude that the removal of the general partner pursuant to the procedural provisions under the Partnership Agreement would not resolve this issue in a timely, co-operative or fair manner.

[198] The difficult issue is whether the court should order the removal of Snapdragon as the general partner. The jurisprudence on this issue is sparse and divided. In *Bates v. Brownstones East II Properties Ltd.*[48] the plaintiffs applied to the court to remove the defendant as general partner and to appoint a new one. In that case, the defendants refused to provide information to the limited partners. The limited partners obtained a mandatory order for the general partner to produce the requested information and subsequently obtained an order for the appointment of a receiver. The court found that the general partner and its solicitor continued to stonewall the limited partners. O'Driscoll J. removed the defendant as general partner and appointed a new general partner because he lacked confidence that the incumbents would fulfill their duties.

[199] In *Colville-Reeves v. Canadian Home Publishers*,[49] the plaintiff was a limited partner who invested capital and the defendant general partner managed the business. The partnership was formed when the plaintiff and defendant were married. The plaintiff's application to recover his capital investment and to remove the general partner was made after a breakdown in the matrimonial relationship. There was no written partnership agreement. D. Lane J. found there was no conclusive agreement between the parties as to how the plaintiff was to recover his capital contributions and as such, there was no basis for such a declaration. D. Lane J. also found there were no grounds to remove the general partner.

[200] Because D. Lane J. found that the *Limited Partnerships Act* did not authorize the court to remove the general partner, he found that the remedies open to a disaffected partner are limited to withdrawal, appointment of a receiver or a motion to wind-up. He respectfully

[48] [1993] O.J. No. 717 (Gen. Div.).
[49] [1993] O.J. No. 3367 (Gen. Div.).

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declined to follow the decision of O'Driscoll J in *Bates*. I point out that there was no finding of mismanagement or a breach of the partnership agreement in *Colville-Reeves*. Also, there was no suggestion of bad faith or a breach of any fiduciary duty by the general partner. In my view, there was no basis in fact or law to remove the general partner in the *Colville-Reeves* case.

[201] The future relationship of the parties in a continued partnership is a relevant factor. The defendants have resisted recognizing the plaintiff as a limited partner for more than 10 years. The parties were unable to resolve their differences concerning Snapdragon's demand to satisfy a procedural requirement, namely to file a Form 20 with the OSC. Given the history of the litigation, it is most unlikely that Snapdragon would be co-operative or that Snapdragon and Janet M would be able to resolve future disagreements. The proceedings since 2002 have been acrimonious and marked by uncivil conduct by counsel both prior to and during the course of argument before me. In my view, the antagonistic behaviour of both counsel militated against a proper resolution of this matter and adversely affected the oral advocacy before me. I find that there is no reasonable expectation that the parties or their counsel will co-operate in the future in a mutually beneficial manner to resolve the capital distribution or to whom the monies are owed.

[202] If the court lacks the authority to remove the general partner as found by Lane J. in *obiter,* Janet M would be limited to the remedies set out in the *Limited Partnerships Act*. Alternatively, Janet M could attempt to remove Snapdragon under the Partnership Agreement. Assuming Janet M takes all the necessary steps to comply with the procedural requirements of Articles 9 and 10 of the Partnership Agreement, and she obtains a favourable ruling from the arbitrator, the likely outcome of an ordinary resolution of the limited partners will be determined by Mr. Posner's voting control. Mr. Posner and Mr. Cale decided to pay a mortgage fee to Snapdragon and to distribute the proceeds from the refinancing in contravention of the terms of the Partnership Agreement and Snapdragon's fiduciary duties. It is apparent that Mr. Posner and Mr. Cale have worked together in the past and the former would likely support Snapdragon's continuance as the general partner in the future.

[203] In limited partnerships, it is not uncommon for disputes to arise because of the partnership's commercial nature. In some limited partnership activities, a conflict of interest may arise between the goals of the business enterprise and the desire of a limited partner(s) to receive a return on capital. Such was the case in *Colville-Reeves*. However, this conflict may be part of the normal limited/general partner relationship because of the commercial nature and structure of a particular limited partnership. In other limited partnerships, the venture may contemplate a conflict of interest between the business activity of general partner and limited partners.[50] The venture's direction and day-to-day operational decisions are part of the general partner's managerial function and in this area the courts would be reluctant to intervene. It is clear that if, as in *Colville-Reeves*, there is no breach of a partnership agreement or a fiduciary duty, and the general partner is performing his or her managerial duties with reasonable skill and in good faith, there is no basis for the removal of the general partner.

[50] See *337965 B.C.Ltd. et al v. Tackama Forest Products Lid. et al* (1992), 67 B.C.L.R. (2d) 1 (B.C.C.A.).

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[204] The question that arises is whether the court has the power to remove a general partner in the absence of statutory authority where the general partner acted in bad faith toward one limited partner, breached its obligations under the Partnership Agreement, breached its fiduciary duties at common law and under the Agreement, and breached its covenant and warranty to act with utmost fairness. Is the limited partner, who has done nothing wrong, forced to continue in a partnership arrangement with the general partner for whom there is a *bona fide* lack of confidence? I find that the Superior Court has the inherent jurisdiction to remove the general partner in the special circumstances of this case. I rely upon the decision of O'Driscoll J. in *Bates v. Brownstones East II Properties Ltd.* as authority for this conclusion.

[205] Janet M did not demand a voice in management or a change in the partnership's direction; rather, she only sought the rights and responsibilities of a substituted limited partner. She has pressed this claim since 1993. Since 1998, the general partner has engaged in conduct that has prejudicially affected its relationship with Janet M. An aggravating factor is that Snapdragon's misconduct has increased in severity and was most egregious in 2003 during the course of the litigation. I find that Snapdragon's conduct, objectively viewed, would erode the trust and confidence of a limited partner and has unilaterally undermined the continued maintenance of the partnership relationship.

[206] Snapdragon was neither the initiator of the project nor did it find the investors. Snapdragon is a professional management company that came on the scene after the financing was in place and the limited partnership was operational. Snapdragon does not possess unique skills that are needed for the continuation of the partnership. A review of Mr. Cale's evidence shows that he was not interested in performing the routine matters of governance, such as calling annual meetings, and his evidence demonstrates a professed lack of knowledge of the activities of the partnership.

[207] The plaintiff Janet M is a limited partner that Snapdragon has mistreated. Snapdragon has continuously engaged in conduct that undermines a future relationship with Janet M. It has breached the Partnership Agreement relating to core partnership principles and it has allowed its own self-interest to take precedence over the interests of the limited partners. I find that Janet M would have a justifiable lack of confidence in Snapdragon's ability to exercise its powers in good faith and in the interests of the limited partners. I find that it is not reasonably practicable for Snapdragon to carry on the business because of its own actions and not Janet M's. When weighing the equities of the case, I find that the general partner should be removed.

[208] Concerning the future of the Limited Partnership, Mr. Posner has a conflict of interest between his role as auditor and controlling limited partner. The Limited Partnership must retain an independent auditor to audit the Partnership's books and records and to calculate the distribution of the cash receipts and the proceeds from the refinancing. This is a necessary step to restore confidence in the Limited Partnership's financial affairs. Since Janet M may have liabilities as a substituted limited partner from 1989, and since the original limited partners' capital accounts must be determined, an independent auditor must conduct a proper audit. I find that the limited partners must appoint a new auditor. In the special circumstances of this case, I

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order that Janet M and Mr. Posner, the substituted limited partners representing 100% of the units, must jointly agree on the appointment of the new auditor.

ii. Conclusion

[209] I order the removal of Snapdragon as the general partner for all the reasons stated above. A new general partner shall be selected pursuant to the procedure set out in paragraph 208.

VI: COSTS

[210] Parties may address the issue of costs. I received submissions from counsel on this issue during the course of the hearing and I will consider any additional submissions on the issue of costs. The plaintiff shall have 30 days to make its submissions (5 pages plus appendices). The defendant will have 20 days to respond (5 pages plus appendices).

_____

Bryant J.

Released: October 12, 2004

2004 CanLII 54553 (ON SC)

COURT FILE NO.: 96-CU-114241
DATE: 2004/10/12

2004 CanLII 54553 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JANET MERKLINGER

Plaintiff/Applicant

- and –

JANTREE NO. 3 LIMITED PARTNERSHIP & SNAPDRAGON LTD.

Defendant/Respondent

REASONS FOR JUDGMENT

BRYANT J.

Released: October 12, 2004

TAB 9

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

2002 SCC 41 (CanLII)

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(*b*) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale* (« *LCÉE* ») exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la *Charte* parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2*b*). On ne doit l'accorder que (1) lorsqu'elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

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Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

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both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

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Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(*b*), 8, 54, 54(2)(*b*).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and *Peter Chapin*, for the appellant.

Timothy J. Howard and *Franklin S. Gertler*, for the respondent Sierra Club of Canada.

Graham Garton, *Q.C.*, and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)*b*), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et *Peter Chapin*, pour l'appelante.

Timothy J. Howard et *Franklin S. Gertler*, pour l'intimé Sierra Club du Canada.

Graham Garton, *c.r.*, et *J. Sanderson Graham*, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le

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issues of when, and under what circumstances, a confidentiality order should be granted.

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

II. Facts

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

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

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

In the course of the application by Sierra Club to set aside the funding arrangements, the appellant

pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

2 Pour les motifs qui suivent, je suis d'avis de rendre l'ordonnance de confidentialité demandée et par conséquent d'accueillir le pourvoi.

II. Les faits

3 L'appelante, Énergie atomique du Canada Limitée (« ÉACL »), société d'État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l'intimé, Sierra Club du Canada (« Sierra Club »), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d'emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l'appelante. Les réacteurs sont actuellement en construction en Chine, où l'appelante est entrepreneur principal et gestionnaire de projet.

4 L'intimé soutient que l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, ch. 37 (« *LCÉE* »), qui exige une évaluation environnementale avant qu'une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d'évaluation entraîne l'annulation des ententes financières.

5 Selon l'appelante et les ministres intimés, la *LCÉE* ne s'applique pas à la convention de prêt et si elle s'y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L'article 8 prévoit les circonstances dans lesquelles les sociétés d'État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu'elles soient compatibles avec les dispositions de la *LCÉE*.

6 Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l'appelante a

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

déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l'affidavit, M. Pang mentionne et résume certains documents (les « documents confidentiels ») qui sont également mentionnés dans un affidavit de M. Feng, un expert d'ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu'il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L'appelante s'oppose pour plusieurs raisons à la production des documents, dont le fait qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l'autorisation de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, l'appelante a cherché à les produire en invoquant la règle 312 des *Règles de la Cour fédérale (1998)*, DORS/98-106, et a demandé une ordonnance de confidentialité à leur égard.

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

Aux termes de l'ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l'accès du public aux débats. On demande essentiellement d'empêcher la diffusion des documents confidentiels au public.

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

Les documents confidentiels comprennent deux Rapports d'impact environnemental (« RIE ») sur le site et la construction, un Rapport préliminaire d'analyse sur la sécurité (« RPAS ») ainsi que l'affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S'ils étaient admis, les rapports seraient joints en annexe de l'affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l'appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l'évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

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

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

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

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

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

IV. Judgments Below

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

Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought

9 Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

10 La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

11 *Règles de la Cour fédérale (1998)*, DORS/98-106

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. *Cour fédérale, Section de première instance*, [2000] 2 C.F. 400

12 Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes

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interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

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

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

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

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the

interlocutoires qui ont entraîné les délais, les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : « J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne » (par. 23).

Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante,

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appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

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

Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

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

par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

17 En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL, le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, « les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité » (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

18 Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

19 Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

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

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

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

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

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

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

Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. *Cour d'appel fédérale*, [2000] 4 C.F. 426

(1) Le juge Evans (avec l'appui du juge Sharlow)

ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*, et Sierra Club forme un appel incident en vertu de la règle 312.

Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)*b*) de la *LCÉE* doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la *LCÉE*. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids

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the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

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

Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without

comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

24 À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360 (C.A.), où la cour a tenu compte du peu d'intérêt du public, et *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la *LCÉE*, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

25 Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doive être écartée. Le juge Evans est d'avis que l'erreur n'entâche pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

26 Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

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reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

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

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

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

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

sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

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

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

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

Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l'imputabilité dans l'exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l'emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

Il fait observer qu'en droit commercial, lorsque les renseignements qu'on cherche à protéger ont trait à des « secrets industriels », ils ne sont pas divulgués au procès lorsque cela aurait pour effet d'annihiler les droits du propriétaire et l'exposerait à un préjudice financier irréparable. Il conclut que, même si l'espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d'une ordonnance de confidentialité (au par. 13) :

1) les renseignements sont de nature confidentielle et non seulement des faits qu'une personne désire ne pas divulguer; 2) les renseignements qu'on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont « nécessaires » à la résolution de ces questions; 6) l'octroi d'une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l'intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l'ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l'ordonnance de confidentialité. Pour le septième critère, c'est la partie adverse qui doit démontrer que le droit *prima facie* à une ordonnance de non-divulgation doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l'ai dit au tout début, je ne crois pas que le degré d'importance qu'on croit que le public accorde à une affaire soit une considération pertinente.

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

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

V. Issues

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

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

VI. Analysis

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

(1) The General Framework: Herein the *Dagenais* Principles

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

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

Appliquant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. *Méthode d'analyse applicable aux ordonnances de confidentialité*

(1) Le cadre général : les principes de l'arrêt *Dagenais*

Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480. Le juge La Forest l'exprime en ces termes au par. 23 :

> Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2*b*). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur

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freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place.

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

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

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

Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at

le fonctionnement des tribunaux relève clairement de la liberté garantie à l'al. 2*b*), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

37 L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

38 Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans *Dagenais* fait appel aux principes déterminants de la *Charte canadienne des droits et libertés* afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par *Dagenais*, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

39 L'affaire *Dagenais* porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et

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religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

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

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

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

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

sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la *Charte*. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la *Charte* de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103. À la page 878 de *Dagenais*, le juge en chef Lamer énonce le critère reformulé :

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

Dans *Nouveau-Brunswick*, précité, la Cour modifie le critère de l'arrêt *Dagenais* dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un « préjudice indu » aux victimes et à l'accusé.

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2*b*) en créant un « pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux

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however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

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

This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(*d*) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the

tribunaux » (*Nouveau-Brunswick*, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la *Charte*. Donc l'analyse de l'exercice du pouvoir discrétionnaire en vertu du par. 486(1) du *Code criminel*, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par *Dagenais* :

a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;

b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et

c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la « nature délicate » des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

43 La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, et l'arrêt connexe *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77. Dans *Mentuck*, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11*d*) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

44 La Cour fait remarquer que *Dagenais* traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, le

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accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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

A publication ban should only be ordered when:

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

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to

droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d'ordonner des interdictions de publication n'est pas assujetti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l'essence de l'article premier de la *Charte* et le critère *Oakes* dans l'analyse applicable aux interdictions de publication. Comme le même objectif s'applique à l'affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l'accusé à un procès équitable) de manière à fournir un guide à l'exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression « bonne administration de la justice » doit être interprétée

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allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

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

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

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

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

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

47 Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

> Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [. . .] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

48 *Mentuck* illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

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However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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

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

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

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demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

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(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

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

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

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branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

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

B. *Application of the Test to this Appeal*

(1) Necessity

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

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

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. nº 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

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by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

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

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

l'exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu'ils ont été « recueillis dans l'expectative raisonnable qu'ils resteront confidentiels », par opposition à « des faits qu'une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l'appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu'il s'agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d'ÉACL (par. 16). Par conséquent, l'ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

Le premier volet de l'analyse exige aussi l'examen d'options raisonnables autres que l'ordonnance de confidentialité, et de la portée de l'ordonnance pour s'assurer qu'elle n'est pas trop vaste. Les deux jugements antérieurs en l'espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l'appelante en vertu de la *LCÉE*, et cette conclusion n'est pas portée en appel devant notre Cour. De plus, je suis d'accord avec la Cour d'appel lorsqu'elle affirme (au par. 99) que vu l'importance des documents pour le droit de présenter une défense pleine et entière, l'appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l'appelante, il ne reste qu'à déterminer s'il existe d'autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

Deux options autres que l'ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

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filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

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

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

La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

64 Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

65 De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de

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authorities require prior approval for any request by AECL to disclose information.

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

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

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

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour « dans une large mesure, compenser [leur] absence » (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une « autre option raisonnable » à la communication aux parties des documents de base.

Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) L'étape de la proportionnalité

Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit

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expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

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

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

Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and

à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) *Les effets bénéfiques de l'ordonnance de confidentialité*

70 Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la *Charte*; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : *Ryan*, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la *Charte*, la bonne administration de la justice exige une ordonnance de confidentialité : *Mentuck*, précité, par. 31. En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

71 Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la *LCÉE* s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

72 En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au

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permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

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

(b) *Deleterious Effects of the Confidentiality Order*

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

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

b) *Les effets préjudiciables de l'ordonnance de confidentialité*

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2*b*) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

Les valeurs fondamentales qui sous-tendent la liberté d'expression sont (1) la recherche de la vérité et du bien commun; (2) l'épanouissement personnel par le libre développement des pensées et des idées; et (3) la participation de tous au processus politique : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; *R. c. Keegstra*, [1990]

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927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(*b*) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

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

3 R.C.S. 697, p. 762-764, le juge en chef Dickson. La jurisprudence de la *Charte* établit que plus l'expression en cause est au cœur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la *Charte*, une atteinte à l'al. 2*b*) à son égard : *Keegstra*, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la *Charte*, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

76 La recherche de la vérité est non seulement au cœur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : *Edmonton Journal*, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

77 Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appelante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-

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documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

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

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

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would

interrogatoire. De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même

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restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

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

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

81 La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans *Edmonton Journal*, précité, p. 1339 :

> On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

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

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

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

82 Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court

83 Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur

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principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

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

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accentue lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

> Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la *LCÉE*. En effet, par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection. À cet égard, je suis d'accord avec le juge Evans pour conclure que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés.

J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accentue le besoin de transparence, et cette nature publique ne se reflète

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I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity".

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

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

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:

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

pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans *Keegstra*, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, « nous devons veiller à ne pas juger l'expression en fonction de sa popularité ».

86

Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

> Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans *Edmonton Journal*, précité, p. 1353-1354 :

> Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

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

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

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

À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. La portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires.

Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la *LCÉE*, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la *LCÉE* ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la *LCÉE* ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la *LCÉE*, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès

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scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

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

VII. Conclusion

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

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

équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

90 En résumé, les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

91 Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la *LCÉE*, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

92 Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*.

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Appeal allowed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Procureur des intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada : Le sous-procureur général du Canada, Ottawa.

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2504670 CANADA INC. et al.	-and-	CRESFORD CAPITAL CORPORATION et al. Court File No. CV-20-00650224-00CL
2583019 ONTARIO INCORPORATED et al.	-and-	9615334 CANADA INC. et al. Court File No. CV-21-00661530-00CL
Applicants		Respondents

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