TAB 6

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Regal Constellation Hotel Ltd., Re

In the Matter of the Receivership of **Regal Constellation** Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and **Regal** Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Ontario Court of Appeal

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

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Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.

Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited

Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.

James P. Dube for Aareal Bank A.G.

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Subject: Contracts; Property; Corporate and Commercial; Insolvency

Sale of land --- Judicial sale — Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Cases considered by *Blair J.A.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

Durrani v. Augier (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — referred to

National Life Assurance Co. of Canada v. Brucefield Manor Ltd. (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

Regal Constellation Hotel Ltd., Re (July 4, 2003), Cumming J. (Ont. S.C.J.) — referred to

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

Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

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Statutes considered:

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

s. 100 — considered

Land Titles Act, R.S.A. 2000, c. L-4

s. 191 — referred to

Land Titles Act, R.S.O. 1990, c. L.5

Generally — referred to

Pt. IX — referred to

Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

s. 78(4) — considered

ss. 155-157 — referred to

Regulations considered:

Land Titles Act, R.S.O. 1990, c. L.5

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General, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

***Blair J.A.*:**

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.[FN1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003.

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It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

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15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of $27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been

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sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> .....
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of the parties;

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(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working our of the process.

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

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> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions[FN2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

> 69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the

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land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,

(a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or

(b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.

78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.[FN3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset [italics

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added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

> [40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.
>
> [41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> [42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,
>
> "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,[FN4] in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier, supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way

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of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

> Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The Appeals on the Merits

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2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 - just the day before the First 203 Offer for $25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

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57 I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

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Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919.00 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

a) To the receiver, in that amount of $40,000;

b) To 203, in the amount of $40,000; and,

c) To Aareal Bank, in the amount of $12,225.

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69 These amounts are inclusive of fees, disbursements and GST.

***Laskin J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal dismissed.

FN1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

FN2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

FN3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

FN4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

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TAB 7

H

2011 CarswellOnt 4170, 2011 ONCA 414, 78 C.B.R. (5th) 97, 204 A.C.W.S. (3d) 69

Canrock Ventures LLC v. Ambercore Software Inc.

In the Matter of the receivership of Ambercore Software Inc. and Terrapoint Canada (2008) Inc.

And In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1), as amended

Canrock Ventures LLC (Applicant / Respondent) and Ambercore Software Inc. and Terrapoint Canada (2008) Inc. (Respondents / Respondents)

Ontario Court of Appeal

S.T. Goudge, J.C. MacPherson, Karakatsanis JJ.A.

Heard: May 20, 2011
Oral reasons: May 20, 2011
Docket: CA C53668

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Proceedings: affirming *Canrock Ventures LLC v. Ambercore Software Inc.* (2011), 2011 CarswellOnt 2505, 2011 ONSC 2308, 75 C.B.R. (5th) 94 (Ont. S.C.J. [Commercial List])

Counsel: Fred E. Seller, Marcia A. Green for Appellant, Quorum Oil and Gas Technology Fund Limited

J. Brian Casey, Frank Spizzirri for Receiver of the respondents, Shimmerman Penn Title & Associates Inc.

E. Patrick Shea, Calvin J. Ho for Canrock Ventures LLC

Andrea Rush, Renée Brosseau for GeoDigital International Inc.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Civil Practice and Procedure

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Debtors A Inc. and T Inc. were providers of spatial data and technology solutions — Court refused to approve receiver's proposed sale of all assets of A Inc. and T Inc. to C LLC and GD — Receiver obtained valuations of A Inc.'s intellectual property — Receiver entered into agreement to sell assets of T Inc. and grant technology licence agreement (TLA) to GD — Receiver brought motion for orders approving sale agreement and TLA, and sealing sale agreement and valuations — Motion was granted — Trial judge held that receiver acted prudently and reasonably in its efforts to secure sale of some assets of T Inc. — Sale process and proposed agreements satisfied criteria for approval — Sale of all assets of A Inc. and T Inc. en bloc was not realistic in circumstances

— Debtors lacked cash to fund extensive round of marketing — Receiver used sufficient efforts to pursue sale of assets — Price of proposed sale was reasonable when measured against valuations — It was reasonable to provide GD with access to source code in TLA as provider of software, A Inc., may not be able to maintain source code on go-forward basis — Third ranked secured creditor appealed — Appeal dismissed — Second proposal was different from first — For example, receiver retained T Inc.'s accounts receivable, cash and work in progress, and A Inc. retained ownership of its intellectual property — Motion judge explained why proposed transaction was reasonable in new circumstances, including why earlier concerns were either addressed by receiver's subsequent actions or outweighed by changed facts.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Debtors A Inc. and T Inc. were providers of spatial data and technology solutions — Court refused to approve receiver's proposed sale of all assets of A Inc. and T Inc. to C LLC and GD — Receiver obtained valuations of A Inc.'s intellectual property — Receiver entered into agreement to sell assets of T Inc. and grant technology licence agreement (TLA) to GD — Receiver brought motion for orders approving sale agreement and TLA, and sealing sale agreement and valuations — Motion was granted — Trial judge held that receiver acted prudently and reasonably in its efforts to secure sale of some assets of T Inc. — Sale process and proposed agreements satisfied criteria for approval — Sale of all assets of A Inc. and T Inc. en bloc was not realistic in circumstances — Debtors lacked cash to fund extensive round of marketing — Receiver used sufficient efforts to pursue sale of assets — Price of proposed sale was reasonable when measured against valuations — It was reasonable to provide GD with access to source code in TLA as provider of software, A Inc., may not be able to maintain source code on go-forward basis — Third ranked secured creditor appealed — Appeal dismissed — Second proposal was different from first — For example, receiver retained T Inc.'s accounts receivable, cash and work in progress, and A Inc. retained ownership of its intellectual property — Motion judge explained why proposed transaction was reasonable in new circumstances, including why earlier concerns were either addressed by receiver's subsequent actions or outweighed by changed facts.

Cases considered:

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

APPEAL by secured creditor from judgment reported at *Canrock Ventures LLC v. Ambercore Software Inc.* (2011), 2011 CarswellOnt 2505, 2011 ONSC 2308, 75 C.B.R. (5th) 94 (Ont. S.C.J. [Commercial List]), granting receiver's motion for orders approving sale agreement of debtors' assets.

***Per curiam*:**

1 The appellant, the third ranked secured creditor of the respondents, appeals the order of Brown J. dated April 13, 2011, granting the motion of the respondents' court appointed receiver for approval of a proposed purchase agreement and technology license agreement and approving the reports, activities, conduct and decisions of the receiver.

2 On February 18, 2011, Newbould J. rejected the receiver's proposal to sell en block the assets of Ambercore, and its wholly owned subsidiary, Terrapoint. The appellant says that nothing has changed between that date and the order appealed from. We do not agree. We see the proposal that was approved by Justice Brown as being different from the proposal before Justice Newbould. The new proposal is different in several respects. For example, the receiver retains Terrapoint's accounts receivable, cash, and work in progress;

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Ambercore retains ownership of its intellectual property; and time has passed, so much so that the time to conduct a new sales process would preclude sale of Terrapoint as a going concern.

3 The motion judge considered the receiver's conduct and the reasons for not engaging in a further sales process (but rather pursuing the sale of Terrapoint on its own), the submissions of other creditors and the sale price in light of the valuation of the most significant asset. He considered the expert evidence led by the appellant and the receiver's report outlining the change in circumstances from February 2011. He concluded as follows at paras. 33, 34 and 41:

> I am satisfied that since the release of the Reasons of Newbould J., the Receiver has used sufficient efforts, appropriate in the circumstances, to pursue the sale of the assets. Some degree of urgency surrounded the need to secure the sale of Terrapoint while still a going concern, so the Receiver's decision to pursue the sale of Terrapoint on its own was reasonable. Further, it is apparent that the Receiver has tried to take into account the interests of all parties, giving due recognition to the overall amount of liabilities attaching to both companies and the priorities amongst the secured creditors, and it has attempted to consult with the secured parties to ensure a fair sales process.
>
> As to the proposed transaction, I am satisfied that the price in the Purchase Agreement, together with the allocation of the purchase price, when measured against the valuations obtained by the Receiver, is reasonable in the circumstances.
>
> Balancing all these factors, I conclude that the Receiver has acted prudently and reasonably in its efforts to secure the sale of some of the assets since the release of the decision of Newbould J. and that the sale process, and the resulting proposed Purchase Agreement and associated Technology License Agreement, satisfy the principles set out in the *Soundair* decision. Accordingly, I approve the proposed sale.

4 The motion judge appropriately applied the analysis in *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)] in approving the sale agreement and technology license agreement. He explained why the proposed transaction was reasonable in the new circumstances, including why the earlier concerns were either addressed by the receiver's subsequent actions or outweighed by the changed facts at the time of the motion before him. Given the deference that must be given to his decision, we see neither an error in principle nor any reason to interfere with his exercise of discretion.

5 The appeal is dismissed. Costs of $20,000 to be paid by the appellant to the receiver inclusive of disbursements and applicable taxes.

Appeal dismissed.

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TAB 8

C

1998 CarswellOnt 1787, (sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440) 110 O.A.C. 297, (sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440) 38 O.R. (3d) 448, 98 C.L.L.C. 220-046, (sub nom. Ogden Entertainment Services v. Kay) 43 C.L.R.B.R. (2d) 48

Ogden Entertainment Services v. Retail, Wholesale/Canada Canadian Service Sector, U.S.W.A., Local 440

Ogden Entertainment Services, Plaintiff/Respondent Moving Party and Al Kay, in his representative capacity as Area Representative of Retail, Wholesale/Canada Canadian Service Sector Division of The United Steel Workers of America, Local 440, Jack Davis, in his capacity as Picket Captain and on behalf of all members of the aforementioned Union, Defendants/Appellants Responding Parties

Ontario Court of Appeal

Robins, McKinlay, Weiler JJ.A.

Heard: April 24, 1998
Oral reasons: April 24, 1998
Docket: CA M22334, C29462

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Counsel: *F. Paul Morrison* and *Steven G. Mason*, for the moving party.

Dougald Brown, for the responding parties.

Anita Lyon, for Her Majesty The Queen In Right of Ontario as represented by the Ontario Provincial Police.

Subject: Civil Practice and Procedure; Labour and Employment

Injunctions --- Form and operation of order — Suspension of operation — Pending appeal — General

Plaintiff stadium operator moved to set aside order of appeal judge staying injunction granted in favour of plaintiff pending appeal — Injunction restrained defendant union picketers during lawful strike from obstructing vehicles or people entering or leaving stadium — Trial judge's findings must be prima facie accepted and strong case in favour of stay made out in determiing whether stay granted pending appeal — Actions of picketing union members unsafe and caused incidents of dangerous driving and assault — Injunction did not constitute ban on lawful picketing but restricted it to certain areas — No valid reason to stay injunction except with respect to police enforcement of order — No basis for directing police to enforce order arising out of civil proceeding — Stay of injunction vacated except with respect to enforcement provision.

Cases considered by *Robins J.A.*:

RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — applied

Statutes considered by *Robins, J.A.*:

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

s. 7(5) — pursuant to

s. 102(3) — referred to

s. 141 — referred to

MOTION by stadium operator for lifting of stay imposed on injunction restraining picketing union from obstructing stadium traffic.

***Robins J.A.* (*Orally*):**

1 This is a motion by the plaintiff Ogden Entertainment Services (the respondent in the appeal) under s. 7(5) of the *Courts of Justice Act* to set aside the order of Abella J.A. staying the order of McKinnon J. dated April 2, 1998 granting an injunction restraining the defendants and others from:

> ...intimidating, molesting or interfering with or blocking or physically obstructing or delaying whatsoever any person or vehicle from entering or exiting the property administered by Ogden Entertainment Services located at 1,000 Palladium Drive in the City of Kanata, including but not limited to all parking areas and parking lots where Ogden Entertainment Services carry on its operations.

2 The defendants (the appellants in the appeal), who shall be referred to as "Local 440", hold bargaining rights for approximately 90 cleaners employed by the plaintiff at the Corel Centre in Ottawa. On February 5, 1998 the union commenced a lawful strike. On March 20, 1998 the plaintiff brought this application contending that picketers were improperly impeding and obstructing traffic to and from the Corel Centre, which is a multiple-purpose arena located to the west of Ottawa. It appears that on the days when the events were scheduled anywhere from 40 to 120 picketers were present at 11 different locations in the area.

3 It is uncontroverted that union members and their supporters impeded the access of passenger vehicles, transport buses carrying event spectators, passenger vehicles carrying employees, commercial vehicles, team buses and vehicles carrying performers to the centre. During these events, and particularly events involving the Ottawa Senators Hockey Club, between 17,500 and 18,500 members of the public have attended the Corel Centre. Approximately 7,500 passenger vehicles entered the Centre over a 90 minute period prior to each game.

4 In determining whether a stay should be granted pending appeal, the appropriate test to be applied is that set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.). This test is the same as the test for an interlocutory injunction. Generally, the court must decide whether the interests of justice call for a stay.

5 In determining whether a stay should be granted, regard must be had to the judgment under appeal and a

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strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

6 In this case, there are factual disputes that will have to be dealt with on the appeal. However, there is no basis at this stage for rejecting the findings of the motions judge. He stated in granting the injunction in question, that:

> During the normal course of events, the OPP have nine officers monitoring the Corel Centre. Since the protocol was developed the OPP have had to send as many as 43 officers in an attempt to maintain order. Numerous troubling incidents have occurred, particularly during hockey events. Because the picketers have stood on public roadways leading to the Corel Centre and stopped vehicles for two minutes per vehicle, traffic on Highway 417 has been backed up for many miles. Some patrons have parked their cars on the side of the Highway 417 and walked to the Corel Centre. OC Transpo buses have not been permitted entry, requiring passengers to be let off at some distance from the Corel Centre and having people walk to the arena. Predictably and inevitably, this situation has led to numerous incidents of "road rage" on the part of patrons, who have on numerous occasions nudged picketers with their cars, become involved in emotionally charged verbal exchanges with picketers and on a number of occasions have caused minor injury to picketers. To date, five members of the public have been charged with dangerous driving, and one other person has been charged with assault. Luckily, no serious injuries have occurred.
>
> .....
>
> All the picketers have placards. Vehicle traffic is backed up; various vehicles have tried to circumvent the picketers; squealing tires can be heard; shouts can be heard; and, during the video, Inspector Beechey can be heard to say, "We have a real unsafe situation here".
>
> .....
>
> Inspector Beechey of the OPP is the officer in charge of maintaining order relating to the strike. If his examination for discovery, he stated that in his opinion there was an unsafe situation he was concerned about the picketers; about his own officers, one of whom had had a flashlight ripped out of his hand; about the pedestrians entering the Corel Centre, trying to run through the line of cars, some of which were gunning their engines....
>
> .....
>
> He was asked whether or not he could prevent similar incidents at future events. His answer was this,
>
>> Gauging from the history of what has gone on, I would say that no way can we prevent incidents from happening. They are going to happen. You have, as you heard before, in the neighbourhood of 7,500 vehicles for any events. And any place where there are picketers, we have always had nudging. We have had people hit. We have had cars running through and those type of things. They are really unforeseeable and uncontrollable. Our presence out there should deter most of this, but it seems that the people getting held up for long periods of time don't even consider that.

7 The defendants' argument in favour of a stay appears to be based primarily on two grounds. First, it is

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contended that the plaintiff has not satisfied the requirements of s. 102(3) of the *Courts of Justice Act* in that it has not established that reasonable efforts to obtain police assistance, protection and action to prevent or remove any obstruction of or interference with lawful entry or exit from the plaintiffs premises have been unsuccessful. While this will properly be a matter of argument on the hearing of the appeal, at this stage, the judge's finding must *prima facie* be accepted. The evidence of the police, as the motions judge interpreted that evidence, appears sufficient to satisfy the requirements of s. 102(3). It is not for this panel on a stay application to place a contrary interpretation on this evidence of the police action and the safety factors that came under consideration.

8 The second ground advance in support of the stay is to the effect that the defendants are entitled to impede or delay traffic by stopping cars for short periods in furtherance of their acknowledged right to picket in the course of their lawful strike. We have set out the terms of the order. It is clear that this order does not, as suggested, constitute a ban on picketing. Nor can the order be said to be analogous to a ban. The striking employees remain fully entitled to peacefully picket the plaintiffs premises in the locations where they have been doing so. They are restrained only from engaging in the type of conduct specified in the order, in particular, from interfering with or blocking or physically obstructing or delaying any person or vehicle from entering or exiting the property. The prohibition is against engaging in conduct of that nature.

9 A question arose during argument today as to the interpretation of the order as a result of comments which were apparently made during the hearing before the motions judge. The question is whether picketers are entitled to offer leaflets or pamphlets to motorists who may be stopped while waiting to enter the parking lots or who may of their own free will stop in order to accept information of this nature. The injunction does not appear to restrain this type of activity and Mr. Morrison, counsel for the plaintiff, agrees that such conduct would not, in and of itself, constitute a violation of the order. We make this comment in the hope of avoiding any misunderstanding as to what is covered by the order.

10 Applying the test in *R.J.R. v. MacDonald* to the facts as found by the motions judge, we have concluded that there is no valid reason to stay his order, save in one respect. Counsel has appeared here today, with our leave, representing the Ontario Provincial Police. She takes the position that there was no jurisdiction on the part of the motions judge to direct, quoting the order, that "the Ontario Provincial Police enforce the Order of this Honourable Court". Counsel for the parties do not argue against the position advanced on behalf of the OPP. We are of the opinion that there is no basis for directing the OPP to enforce an order arising out of a civil proceeding. Unless a statute directs the contrary, such an order should be directed to a sheriff for enforcement. In the present circumstances, there is no statute directing the contrary. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance. Reference may be had to s. 141 of the *Courts of Justice Act*.

11 Accordingly, in so far as paragraph 4 of the order of McKinnon J. is concerned, the stay previously granted will be continued. Otherwise, the stay is vacated. Costs of this application will be reserved to the panel hearing the appeal.

Motion granted in part.

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TAB 9

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2009 CarswellOnt 4257, 55 C.B.R. (5th) 271, 179 A.C.W.S. (3d) 114

Ron Handelman Investments Ltd. v. Mass Properties Inc.

B&M HANDELMAN INVESTMENTS LIMITED et al v. MASS PROPERTIES INC. AND MASS BANQUET HALLS INC.

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: July 14, 2009
Docket: 09-CL-7995

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Counsel: David Preger for Receiver, Harris and Partners Inc.

Allan V. Mills for Mass Properties Inc., Mass Banquet Halls Inc.

James S.G. Macdonald for Samra Singh

Satwant Merwar for 2205884 Ontario limited

S. Sood for Castimis Inc., Manjit Kaur Sidhu

S. Schneiderman for Tara Singh

Subject: Property; Corporate and Commercial; Insolvency; Contracts

Real property --- Mortgages — Sale — Judicial sale — Application for order confirming sale — Miscellaneous

Mortgagors owned property on which they operated banquet hall — Mortgagee held first mortgage on property — Property was also subject to second mortgage, tax liens, construction liens, and one-half interest of judgment creditor — Mortgagee successfully brought application for appointment of receiver over all of mortgagors' assets — Offers made to receiver for property ranged from $2,400,000 to $3,750,000 — Receiver accepted unconditional offer of $3,735,000 with $500,000 deposit from prospective purchaser — Second prospective purchaser made offer directly to mortgagors — Judgment creditor wished to redeem mortgage or purchase property for higher price — Receiver brought application for approval of sale to first prospective purchaser and for vesting order — Application granted — Second prospective purchaser did not have standing — Judgment creditor was not entitled to redeem at this stage of proceedings — Receiver was exclusively authorized and empowered to pursue sale of property to exclusion of all other persons — Allowing redemption at this stage

would make mockery of practice and procedures relating to receivership sales — Receiver had acted properly in sale of property — While advertising in ethnic newspapers would have been preferable, receiver had not acted improvidently — Receiver's efforts to obtain best price were certainly sufficient and best offers were above both appraised value and listing price — Prospective buyer was serious buyer — Receiver had considered interests of all parties.

Cases considered by *Pepall J.*:

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303, 1981 CarswellNS 47 (N.S. C.A.) — considered

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

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

Winick v. 1305067 Ontario Ltd. (2008), 41 C.B.R. (5th) 81, 2008 CarswellOnt 900 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 47(1) — referred to

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

s. 101 — referred to

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

Generally — referred to

Mortgages Act, R.S.O. 1990, c. M.40

s. 31 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 63(4) — referred to

APPLICATION by receiver for approval of sale of mortgagors' property and for vesting order.

***Pepall J.*:**

Relief Requested

1 Harris and Partners Inc., the Receiver of the debtor respondent companies, Mass Properties Inc. ("MPI") and Mass Banquet Halls Inc.("MBHI") (the "Receiver"), seeks an order approving a sale transaction contemplated by an agreement of purchase and sale between the Receiver and Balbir Bharwalia dated May 8,

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2009. It also seeks a vesting order. The Receiver's motion is supported by the Applicant mortgagees and the purchaser, Mr. Bharwalia.

2 There is opposition to the motion. There are two cross-motions. Tara Singh is a 50% owner of the subject real estate. She seeks a discharge of the Applicants' mortgage and a discharge of the Receiver. The debtors, Mass Properties Inc. and Mass Banquet Halls Inc., seek declaratory relief, an order withholding approval of Mr. Bharwalia's agreement of purchase and sale and directing the Receiver to accept any counter-offer proposed by the Respondents. Others opposing the motion consist of Daljit Samra and Sukhvinder Singh, plaintiffs in an action against the debtors commenced in September, 2007 in which they claim a 50% interest in the subject real estate, and Castimis Inc., a lien claimant owed approximately $16,271 and the principal of whom, Manjit Kaur Sidhu, also wishes to purchase the property.

Facts

3 The relevant facts are as follows. On March 31, 2009, Hoy J. appointed Harris and Partners Inc. as Receiver of all of the assets of the debtor Respondent companies. The appointment order was made after four adjournments of the application to appoint the Receiver were granted by Hoy J. According to the Receiver, these were at the request of the debtor Respondent companies and the premise of the adjournments was imminent refinancing that did not materialize.

4 The assets under the Receiver's administration consist of real property known as 75 Hedgedale Road, Brampton and personal property (the "Property"). The former is a 2.478 acre parcel of land with a one storey, 12,603 sq foot building which is used as a banquet hall. The latter consists of chattels in connection with the banquet hall, the liquidation value of which was appraised as being $17,900.

5 The Applicants hold a first mortgage over the real property that was registered on September 26, 2005. As at June 24, 2009 the Applicants state that $2,259,498.31 is due and owing to them by the debtors pursuant to the mortgage. There is a second mortgage in the amount of $184,882.00 that is registered against the real property but the Receiver has been unable to locate the second mortgagee, Kishor Kamal. The City of Brampton is owed $265,076.68 on account of realty taxes as of January 22, 2009 and there are construction liens of approximately $100,000 registered against the real property along with a tax lien registered in the amount of $94,538.67 pursuant to the *Excise Tax Act*.

6 The registered owner of the real property is the debtor Respondent, MPI. Manjit Singh Saini ("Manjit") is the principal of MPI. He is also the principal of the other debtor Respondent, MBHI, which owns the personal property.

7 On January 13, 2009, Klowak J. granted a judgment in favour of Tara Singh in an action she brought against Manjit, the debtor Respondent companies and certain others. On consent of Manjit and the debtor Respondent companies, Klowak J. granted Ms. Singh a 50% interest in the real property subject to encumbrances registered between August 2, 2002 and October 4, 2005. Her interest was therefore subject to the Applicants' mortgage. Klowak J. ordered that the real property immediately be listed for sale at a price to be determined by Ms. Singh and MPI. According to the Receiver, Ms. Singh through her counsel has had notice of each Court appearance in this proceeding and did not oppose the appointment of the Receiver.

8 Upon the granting of the appointment order, the Receiver negotiated an arrangement with Manjit to permit him to remain in occupation and continue to operate the banquet hall business. In return, he agreed to pay

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ongoing expenses and occupation rent. The Receiver was of the view that a better realization would result if the banquet hall business continued to operate.

9 The Receiver also engaged Chris Kelos of Coldwell Banker Case Realty, an agent with significant experience selling commercial real estate on behalf of secured lenders and secured creditors. The Receiver set May 7, 2009 as a deadline for submission of offers. The Property was listed for $3,690,000 pursuant to a listing agreement dated April 8, 2009. The listing price was higher than the appraised value of the Property. The Property was listed on MLS and 1,573 hits were received on the MLS listing. In addition, advertisements for the Property were placed in the Globe and Mail on April 23 and 28, 2009. The Receiver sent 49 detailed information packages to prospective purchasers, select real estate agents and persons who responded to the advertisements. 97 showings of the Property were conducted and the Receiver received 9 offers to purchase the Property ranging from a high of $3,750,000 to a low of $2,400,000.

10 On May 8, 2009, the Receiver accepted an unconditional offer of $3,735,000 from Mr. Bharwalia who paid a deposit of $500,000. The purchase agreement imposed an obligation on the Receiver to apply for court approval of the purchase agreement and a vesting order. The allocation of the purchase price as between the real and personal property was to be determined at a later date and on June 4, 2009, the purchaser and the Receiver agreed to allocate $18,000 towards the personal property and $3,717,000 towards the real property. Mr. Bharwalia secured private financing for the purchase. He has had to pay both lenders' fees and legal fees in that regard. The price offered was the second highest offer received by the Receiver prior to the May 7, 2009 deadline. The highest offer received was for $3,750,000 but it was conditional on obtaining financing. Due to market volatility, uncertain market conditions, the difficult credit environment, and the $15,000 price differential, the Receiver was of the view that acceptance of the higher offer presented significant downside risk and for those reasons, did not accept it. The Receiver was and remains of the view that Mr. Bharwalia's terms including the price represent the best offer in the circumstances. Acceptance of his offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. The price proposed is both higher than the appraised value and the listing price and the offer is unconditional. The Receiver entered into an agreement of purchase and sale with Mr. Bharwalia that is subject to Court approval. The Receiver now recommends that the Court approve that purchase agreement and grant a vesting order.

11 Turning to those opposing the order requested, on June, 9, 2009, the Receiver received an agreement of purchase and sale dated May 29, 2009 between Manjit Kaur Sidhu as purchaser and MPI as vendor. Manjit purported to bind MPI even though only the Receiver had power to do so and the listing agent was described as Homelife/Miracle Realty Ltd. even though the property had been listed with Coldwell Banker. The purchase price was $4,200,000 which is $465,000 more than the price offered by Mr. Bharwalia. No deposit was paid but the agreement stated that a deposit of $600,000 would be payable upon acceptance. There are various purchaser's conditions contained in the offer. Ultimately Manjit Kaur Sidhu provided the Receiver with an unconditional offer to purchase the real and personal property for $4,300,000 however, the closing date is 50 days following court approval in contrast with the 10 days provided for in Mr. Bharwalia's offer. The Receiver has asked but received no explanation as to why the offer of Manjit Kaur Sidhu was outside the May 7, 2009 deadline; why 50 days are required for closing; why Manjit purported to bind MPI and why Homelife Miracle Realty Ltd. was described as the agent; and why, according to the Receiver, there is an apparent proximity of relationship between Manjit and Manjit Kaur Sidhu. In addition, although requested by the Receiver, no information on Manjit Kaur Sidhu's creditworthiness has been forthcoming.

12 MPI and MBHI bring a cross motion for a declaration that the mode of advertising was inadequate as the

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Receiver failed to advertise in any national paper or any Indian or South Indian paper thereby limiting the prospects of yielding maximum returns. They ask that approval of Mr. Bharwalia's offer be refused and that I grant an order directing the Receiver to accept a counter offer proposed by them. They also seek a declaration that they are entitled to a sale process that would yield maximum returns to creditors and that would guarantee a viable continuation of the debtors' business activities. Manjit states that it would have been far more productive to have enlisted the aid of a real estate agent of his ethnic backround and experience who might better understand the intrinsic value of the hall, the facilities and the nature of the events that take place at the premises. He does not take exception with the listing agent but does take exception to the mode of advertising chosen. The facility was not advertised in any Indian or South Asian paper or in any national publication that might be specifically seen and reviewed by persons of an Indian or South Asian backround. The advertisement, according to Manjit, did not include the correct size of the real property and the parking lot, understated the value of the chattels and failed to indicate that bookings were available as was the cooperation of the existing operators (being the debtors). He provided no particulars with respect to these complaints about the advertisement. He also notes that the equipment appraisers have the same address as Mr. Bharwalia. He says that he is familiar with the other offeror, Manjit Kaur Sidhu, and his group.

13 Daljit Samra and Sukhvinder Singh commenced their action in September, 2007 but have not obtained a judgment against the debtors. They state that they advanced funds to Manjit and MPI that were used to buy the 75 Hedgedale property. They learnt of the Receivership on March 31, 2009. They complain, amongst other things, that the Receiver's plan of action was to list the Property for sale but there was no mention of any sale of the on going banquet hall business. They state that the total claims amount to over $5,000,000 and question whether the Receiver's lack of knowledge of the quantum of debts caused it to assume that a sale of $3,500,000 would satisfy all of the creditors. They also complain that the marketing and sale process was without any consultation with creditors other then the Applicants. In addition, the Receiver should have retained a business valuator. They also complain that the one month listing was too short a time period. They say that the Sidhu offer indicates that the Receiver's sales and marketing process did not attract the attention of at least one serious buyer. They ask the Court to refuse the approval of the Bharwalia agreement of purchase and sale and accept submissions from other interested parties. They state that the Court should be concerned as to how the Receiver came to determine a list price, the listing period and the deadline for submission of offers. The failure of the Receiver to consider the value of the business was a glaring omission. They further state that there was a lack of consideration of the interests of all parties.

14 In response, the Receiver states that it did not disregard their interests and the Property was appraised on the basis of its continued use as a banquet hall which the appraiser considered to be the highest and best used for the real property. The appraiser used a direct sales approach to value in part because although requested by the Receiver, no income and expense statements were forthcoming from Manjit and it appeared likely that none existed. The appraiser did prepare a reconstructed income and expenses statement based on industry norms but the income approach yielded a considerably lower value.

15 As to the one month time period, no prospective purchasers or agents suggested that they would have submitted an offer have they had more time.

16 Turning to Tara Singh, she states that she advanced $946,000 for the purchase of the Property of which she has been repaid $427,000. She wishes to discharge the mortgage of the Applicants. Her position is that there is no binding agreement of purchase and sale in that Mr. Bharwalia's has been terminated and she therefore retains the right to redeem. As mentioned, she had commenced an action against the debtors and Manjit. The

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parties to that action signed minutes of settlement in which the defendants were to pay Tara Singh $600,000 within 120 days during which time she was not to act upon a consent judgment given to her as part of the settlement and she also was not to have any dealings with mortgagees of the Property. The 120 days expired on May 13, 2009. Meanwhile, on May 8, 2009, the Receiver had entered into an agreement to sell the Property. Section 6 of Mr. Bharwalia's purchase agreement states that there is no agreement of purchase and sale until the offer has been accepted by the vendor and approved by the Court. As such, Ms. Singh maintains that she is still entitled to redeem. Alternatively, she states that if Court approval has not been granted within 21 days of waiver of the purchaser's conditions, the agreement automatically terminates. Ms. Singh submits that 21 days had elapsed and therefore there is no agreement. Ms. Singh wishes to discharge the mortgage or failing same, she is prepared to purchase the Property for $4,220,000, closing to occur within 14 days of June 29, 2009 with no conditions for financing. This is $485,000 higher than Mr. Bharwalia's offer and $20,000 higher than that of Manjit Kaur Sidhu but with an early closing date. There is no evidence of any deposit having been paid.

17 The Receiver states that before the Receivership proceeding was launched, the option of obtaining an assignment of the Applicants' security was canvassed with Ms. Singh's counsel on January 22, 2009. On February 5, 2009, the option of purchasing the Property was also canvassed with her counsel. The Receiver states that the sale process would be undermined if stakeholders were permitted to wait by the sidelines until an offer is accepted before acting to protect their equity.

Issues

18 The issues to consider are:

(i) Does Manjit Kaur Sandu have standing?

(ii) May Tara Singh redeem the Applicants' mortgage?

(iii) Should the agreement of purchase and sale between the Receiver and Mr. Bharwalia be approved as recommended by the Receiver?

Discussion

(a) Standing

19 Manjit Kaur Sandu does not have standing in his capacity as a prospective purchaser. In contrast to a successful purchaser, an unsuccessful prospective purchaser has no standing on a sale approval motion: *Skyepharma PLC v. Hyal Pharmaceutical Corp.*[FN1] and *Winick v. 1305067 Ontario Ltd.*[FN2]

(b) Redemption

20 The Receiver accepts that Ms. Singh is a mortgagor but states that she is not entitled to redeem at this stage of the proceedings. I agree.

21 The Receiver was appointed pursuant to section 47(1) of the BIA and section 101 of the Courts of Justice Act on March 31, 2009. The Court order empowered the Receiver to market the Property and to sell it out of the ordinary course of business with the approval of the Court if the purchase price exceeded $250,000. It was ordered that notices under section 63(4) of the Personal Property Security Act and section 31 of the Mortgages

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Act were not required. In each case where the Receiver took such steps, it was exclusively authorized and empowered to do so, to the exclusion of all other persons including the debtors and without interference from any other person. The order also provided that proceedings against the debtor, Mass Properties Inc., or its property were stayed. The order specifically addressed the exercise of rights and remedies against the debtor as follows:

> THIS COURT ORDERS that all rights and remedies against the Debtor, Mass Properties Inc., the Receiver or affecting Mass Property Inc.'s property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

22 In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

23 Secondly, I do not accept that the agreement of purchase and sale has been terminated. As in *Winick v. 1305067 Ontario Ltd.*[FN3], it is clear from the parties' position in Court and from their conduct that they both relinquished their right to insist on and rely on the 21 day time requirement and waived any rights in that regard. This was a mutual, not a unilateral waiver. In any event, subject to my discussion of the principles associated with sale approval, I would approve the agreement of purchase and sale nunc pro tunc.

(c) Approval of Mr. Bharwalia's Agreement

24 The leading case on approval of receiver sales is *Royal Bank v. Soundair Corp.*[FN4] In deciding whether a receiver has acted properly in the sale of property, the Court must consider:

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

25 While it would have been preferable had the Receiver advertised in the Indian and South Indian newspapers, it did not act improvidently and it certainly made sufficient effort to get the best price. It placed the property on MLS where there were 1573 hits, advertised twice in the Globe and Mail and contacted 49 prospects. The Property was shown 97 times and was on the market for a month. As to the listing of one month, there was never any suggestion made to the agent, Mr. Kelos, by any prospective purchaser or agent that an additional offer would have been submitted had there been more time. Nine offers were received and the

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Property sold for more than both the appraised value and the listing price. Mr. Bharwalia is a serious buyer as evidenced by the deposit of $600,000 that was paid and the absence of conditions to the offer.

26 The appraisal that was done by Lebow, Hicks Ltd., described the highest and best use of 75 Hedgedale Road as being continuation of its use as a banquet hall. The appraiser used a direct sales approach. Contrary to the submissions of the debtor corporations, an income approach was also used. Income approach indicates value based on the potential income stream that can reasonably be expected to result from the operation of the property. The validity of the income approach depends on the reliability of the underlying data. In that regard, the appraiser noted that no income or expense statements or operational information were supplied. A cursory income approach based on comparable lease rates and industry performance levels was included in the appraisal. The Receiver indicated that he sought information from the debtors but it was not forthcoming. The Receiver was of the view that it likely did not exist. The income approach used by the appraiser yielded a considerably lower value and was therefore dismissed as a proper approach to market value. As is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

27 The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair*[FN5], it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver. In this case, it is clear that the Receiver considered the interests of all relevant parties. It contacted Ms. Singh well before it entered into any agreement. Indeed, she was unopposed to the appointment of the Receiver. The Receiver also was in discussions with others including the debtors.

28 As to the efficacy and integrity of the process by which the offer was obtained, Macdonald J.A.'s commentary in *Cameron v. Bank of Nova Scotia*[FN6] continues to be apropos:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

29 There is nothing in the evidence that causes me to question the efficacy and integrity of the process by which offers were obtained. Furthermore, there was no unfairness in the process. In my view, the Receiver's recommendation that the purchase agreement with Mr. Bharwalia be approved should be accepted.

30 The proposed order is largely similar to the Commercial List Users' Committee model approval and vesting order and should be granted with the exception of paragraph 11 for which there is no compelling evidentiary support. The remaining provisions are reasonable in the circumstances.

Application granted.

FN1 (2000), 47 O.R. (3d) 234 (Ont. C.A.)

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FN2 (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]).

FN3 Ibid, at paras. 7 and 8.

FN4 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

FN5 Ibid, at paras. 39 - 40.

FN6 (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) at p.11.

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TAB 10

1994 CarswellQue 120, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1 , 60 Q.A.C. 241, 171 N.R. 402, 171 N.R. 402 (note), J.E. 94-423, 46 A.C.W.S. (3d) 40, EYB 1994-28671

RJR — MacDonald Inc. v. Canada

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Supreme Court of Canada

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

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

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Proceedings: Applications for Interlocutory Relief

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

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

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

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

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions

Injunctions --- Availability of injunctions — Public interest

Injunctions --- Availability of injunctions — Need to show irreparable injury

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal

Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the

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applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law. Where the government was the unsuccessful party in a constitutional claim, a plaintiff faced a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations required would therefore impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

I. Factual Background

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

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

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

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

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

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

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

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

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

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

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

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

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

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

II. Relevant Statutory Provisions

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

14

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

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

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

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

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

15

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

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

16

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

III. Courts Below

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

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

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

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

20 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be

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justified.

Court of Appeal (on the application for a stay)

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

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

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

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> . . . . .
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 , 127, 135). [Emphasis in original.]

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

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

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

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

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of

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the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

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

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

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

IV. Jurisdiction

27 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

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

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

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

Supreme Court Act

31

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

Rules of the Supreme Court of Canada

32

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

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

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

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135 . The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.) . Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

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

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

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

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

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

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

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

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

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

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

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

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

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

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

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

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

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

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to

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comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

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

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

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

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

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

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

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

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

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in

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order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

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

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

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

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

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

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

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

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these

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statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

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

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

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

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

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

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

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

D. The Balance of Inconvenience and Public Interest Considerations

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

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will

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vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

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

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

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

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

1. The Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the

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

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores* , it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

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

2. The Status Quo

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

E. Summary

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

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

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

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

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

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

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

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

B. Irreparable Harm

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

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more

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difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

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

91 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

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

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

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo cratically-elected legislatures and are generally passed for the common good, for instance: ... *the protection of public health* .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

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

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

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

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

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

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

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

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

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

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Applications dismissed.

Solicitors of record:

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

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

Solicitors for the respondent: *Côté & Ouellet* , Montreal.

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

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TAB 11

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1994 CarswellBC 1187, 34 C.B.R. (3d) 74, (sub nom. Yewdale (Bankrupt) v. Campbell, Saunders Ltd.) 53 B.C.A.C. 235, 9 B.C.L.R. (3d) 253, [1995] 9 W.W.R. 477, 87 W.A.C. 235

Yewdale v. Campbell, Saunders Ltd.

MURIEL AGNES YEWDALE, Bankrupt v. CAMPBELL, SAUNDERS LTD. (Trustee in Bankruptcy)

British Columbia Court of Appeal

Prowse J.A. [in Chambers]

Heard: December 8, 1994
Judgment: December 15, 1994
Docket: Doc. Vancouver CA019632

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Counsel: *H. Ferris*, for respondent Campbell, Saunders Ltd.

D.W. Donohoe, for appellant Mrs. Yewdale.

A. Wade, for Darren Gervais.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Civil Practice and Procedure

Bankruptcy --- Administration of estate — Sale of assets — Procedure on opposition to sale

Bankruptcy --- Practice and procedure in Courts — Appeals — Effect of appeal

Stay of proceedings — Appeals — Section 195 of Bankruptcy and Insolvency Act providing for automatic stay on filing of appeal — Whether stay to be cancelled depending on merits of appeal and prejudice to creditor and bankrupt — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 195.

The applicant made an assignment in bankruptcy as the result of a judgment against her for $4.3 million arising out of a motor vehicle accident. Her insurance covered only $1 million. Her principal asset was 1.8 acres of land in an urban area. Her home of 50 years stood on the land. The applicant resisted any sale of the property, relying particularly on the fact that she had outstanding actions against her former solicitors, insurer, insurance agents and others, arising out of the judgment against her, and she claimed that if successful, she would be able to satisfy the judgment. Her trustee made arrangements to subdivide the property and to sell it for $2.5 million. The terms allowed the applicant to remain in her home at a low rent and included an option to her to purchase. The court approved the sale, but the applicant appealed, resulting in an automatic stay under s. 195 of the *Bankruptcy*

and Insolvency Act. The trustee applied to cancel the stay.

Held:

The application was allowed.

The two principal factors that the court should examine in determining whether a stay under s. 195 of the *Bankruptcy and Insolvency Act* should be cancelled are the relative merits of the appeal and the relative prejudice to the creditor and the bankrupt. Here, a related consideration was whether, if the appeal was successful, there was a reasonable likelihood that the applicant would be able to pay the judgment in full. The appeal was unlikely to succeed. The applicant's lawsuits, which she hoped would produce funds, would not likely be resolved for a long time and, in the meantime, the injured judgment creditor was suffering prejudice. On the other hand, it was not a case where the applicant would be homeless if the stay was lifted.

Cases considered:

Westar Mining Ltd., Re (1993), 18 C.B.R. (3d) 154 (B.C.S.C.) — *referred to*

Statutes considered:

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

s. 195

Application by trustee in bankruptcy for order lifting automatic stay on appeal. For related proceedings, see *Yewdale v. Insurance Corp. of British Columbia*, [1994] B.C.W.L.D. 2261 (Master); (1995), 1 B.C.L.R. (3d) 278 (S.C.); (1995), 3 B.C.L.R. (3d) 240 (S.C.), leave to appeal to C.A. refused (1995), 3 B.C.L.R. (3d) 247 (C.A.); 6 B.C.L.R. (3d) 324 (S.C.); and *Re Yewdale*, 30 C.B.R. (3d) 194, 1 B.C.L.R. (3d) 119, [1995] 4 W.W.R. 458, 25 C.R.R. (2d) 197, 121 D.L.R. (4th) 521 (S.C.).

Prowse J.A.:

Nature of Application

1 On November 22, 1994 Mr. Justice Edwards made an order approving the sale of Mrs. Yewdale's former home from her trustee in bankruptcy, Campbell, Saunders Ltd. (the "Trustee"), as vendor, to Jubilee Estates and Lands Ltd. ("Jubilee"), as purchaser. On November 30, 1994, Mrs. Yewdale filed a Notice of Appeal from that decision to this Court. According to s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), the effect of such an appeal is to stay all proceedings under the order until the appeal is disposed of, subject to this Court, or a justice thereof, making an order varying or cancelling the stay. This is an application by the Trustee to cancel the stay to enable the sale of the property to proceed.

Background

2 In order to place this application in perspective, it is necessary to set out the unfortunate background which gave rise to this appeal.

3 In September, 1993, judgment was awarded against Mrs. Yewdale in the amount of approximately 4.3 million dollars as a result of a motor vehicle accident which left Mr. Gervais, a young man in his early twenties,

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with devastating injuries. The limit on Mrs. Yewdale's insurance was 1 million dollars, leaving her personally liable for the balance of approximately 3.3 million dollars.

4 Mrs. Yewdale filed an appeal with respect to liability and sought a stay of execution of the judgment. Her application for a stay was dismissed by Cumming J.A. on October 6, 1994. His primary reason for refusing the stay was that the evidence indicated that there would likely be a substantial shortfall in Mr. Gervais' recovery against Mrs. Yewdale and that granting a stay would, therefore, be unduly prejudicial to Mr. Gervais.

5 On December 1, 1993, Mrs. Yewdale made an assignment into bankruptcy. Her only creditor of note was Mr. Gervais. Her principal asset consisted of 1.8 acres of land near Deer Lake in Burnaby, including the home in which Mrs. Yewdale, who is now 86 years of age, had lived for 50 years. Mrs. Yewdale's other assets, now in the form of annuities, are valued in their present form at approximately $729,000.

6 Following Mrs. Yewdale's assignment into bankruptcy, the Trustee arranged to have the property subdivided into 6 lots, including the lot on which Mrs. Yewdale's home is built. The Trustee also listed the property for sale through a complex solicitation and tender process. As a consequence, six offers to purchase were received, the best of which was the "Shuang offer" for $2,688,888. At that time, Jubilee also offered to purchase the property for $2,500,000.

7 On application by the Trustee, Mr. Justice Bouck approved the Shuang offer on May 25, 1994, at which time he also dismissed Mrs. Yewdale's application for a stay of his order. In so doing, Mr. Justice Bouck made the following comments at pp. 1-2 of his reasons upon which the Trustee here relies:

> She [Mrs. Yewdale] voluntarily made an assignment into bankruptcy. Upon doing that, she lost any entitlement to deal with her property. It became vested in the trustee for the benefit of her creditors. He now has every right to sell the land and distribute the proceeds to them.
>
> As to the proposed sale, it appears from the material that the trustee has taken all reasonable steps in trying to get the best possible price. His conduct may fall short of perfection but the law does not impose a standard of perfection upon him. He need only act reasonably, which he did. The trustee contends the proposed sale price is beyond his original expectations. If he is forced to wait until the outcome of the appeal from the award of damages, the value of the property may increase, stay the same, or fall. The creditors should not be the ones who bear the risk of eventually receiving a lower offer.
>
> A court should not interfere with the way the trustee conducts his duties absent any evidence of fraud or gross misbehaviour on his part. Generally speaking, it is for the inspectors, not the court, to supervise the way he carries out his business responsibilities. Apparently, there are no inspectors at the present time. However, the judgment creditor who could be appointed an inspector is in favour of the sale.

8 On May 25, 1994, Mrs. Yewdale filed an appeal from the order of Mr. Justice Bouck, thus triggering the automatic statutory stay under s. 195 of the Act. On June 8, 1994, the Trustee applied before the Chief Justice to cancel the stay. This application was dismissed, with liberty to renew upon judgment being rendered in this Court on the liability appeal.

9 On October 18, 1994, this Court dismissed Mrs. Yewdale's liability appeal. In the meantime, the original Shuang offer had collapsed. Jubilee's back-up offer, however, was still outstanding in the amount of 2.5 million dollars and Shuang presented a new offer for $2,538,000. The Trustee preferred the Jubilee offer which

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contained terms more favourable to Mrs. Yewdale. I am advised by counsel for the Trustee that those terms provide that: Mrs. Yewdale can rent the lot including her home for a period of up to 5 years; that the first six months of that term will be rent free; that the rent for months 7-24 of the term will be $1,500 per month, and $2,000 per month thereafter; and that Mrs. Yewdale will have an option to purchase the subdivided lot on which her home is built at any time within the 5-year period at market value as of the date of exercise of the option. These terms are included in a letter dated November 18, 1994 from counsel for Jubilee to counsel for the Trustee which is incorporated by reference into Mr. Justice Edwards' order.

10 On November 22, 1994, Mr. Justice Edwards approved the Jubilee offer in the amount of 2.5 million dollars and further approved the Shuang offer as a backup offer. Counsel for Mrs. Yewdale opposed approval of these offers, but took the position that if an offer were to be approved, it should be the Jubilee offer.

11 On November 30, 1994, the Trustee was served with a Notice of Appeal from the order of Mr. Justice Edwards.

Submissions of Counsel

12 Counsel for the Trustee submits that the stay should be cancelled for three reasons:

(1) The appeal is without merit;

(2) Delay of the sale of the property will result in prejudice to Mr. Gervais and to Jubilee;

(3) Mrs. Yewdale's actions, including her current appeal, are solely for the purpose of delaying the sale of the property and constitute an abuse of the bankruptcy process.

13 Counsel for Mrs. Yewdale refutes these assertions. He also emphasizes the fact that, as a result of legal proceedings taken by Mrs. Yewdale against I.C.B.C. and her former solicitors with respect to Mr. Gervais' action against her, there is a reasonable prospect that she may realize sufficient monies to enable her to pay the full amount of the judgment against her without resort to the sale of her property. These actions are set for trial on a peremptory basis for three weeks in February, 1995. Counsel for Mrs. Yewdale also submits that she will suffer hardship if she is forced to vacate her home at her age and in her state of declining health.

Analysis

Section 195 of the Act

14 Section 195 of the Act provides as follows:

Stay of proceedings on filing of appeal

195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, *all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.* [Emphasis added]

15 Section 195 imposes a statutory stay on the order from which the appeal is taken upon the filing of a

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Notice of Appeal. It also places the onus on the person opposed to the stay to establish grounds for its cancellation. The Court of Appeal, or a justice thereof, is given a broad discretion pursuant to the section to cancel the stay for such reason as it deems proper.

16 In my view, two of the principal factors which the Court should examine in determining whether the stay should be cancelled are the merits of the appeal and the relative prejudice to the creditor and the bankrupt if the stay is cancelled. A related consideration in this case is whether, if the appeal is successful, there is a reasonable likelihood that Mrs. Yewdale will be able to pay the amount of the judgment in full or whether there is likely to be a shortfall. Prejudice to third parties and the presence or absence of fraud or bad faith on the part of any party to the proceedings are also relevant.

The Merits of the Appeal

17 With respect to the merits of the appeal, counsel agree that the duty upon a Trustee in circumstances such as these is to act reasonably in all of the circumstances for the good of the estate. (See *Re Westar Mining Ltd.* (1993), 18 C.B.R. (3d) 154 (B.C.S.C.).) Counsel also agree that the Trustee owes a duty of fairness to all parties in volved, including the bankrupt. Generally speaking, one would expect that the interests of the creditors and the bankrupt would be the same in terms of getting the best possible price for the property being sold, particularly where there is likely to be a shortfall, as here.

18 In addressing the merits of the appeal, counsel for Mrs. Yewdale submits that the method of marketing the property in this case was faulty in many respects. He submits that the property should have been marketed on the multiple listing service; that it should have been marketed as both subdivided property and as a single estate property; that it should have been re-marketed after the liability appeal was dismissed; and that there are appraisals which indicate the property may be worth as much as 3-3.5 million dollars. He also submits that when the Trustee took title to the property, he listed its value as 2.5 million dollars and that, because this was entered on the computer system available to agents and others, the transfer price may have acted to depress the market value of the property, thus discouraging higher offers.

19 Counsel for the Trustee submits that there is no merit to the appeal and notes that two Supreme Court justices have already approved sales with full knowledge of the marketing process. Counsel also submits that the affidavits filed on behalf of Mrs. Yewdale with respect to the value of the property are suspect, as is the suggestion that the Trustee's transfer of the property into its name at a "no cash" price of 2.5 million dollars was likely to be interpreted in the market in such a way as to depress the value of the property.

20 I note that the real estate agent who swore the key affidavit on Mrs. Yewdale's behalf is Mrs. Yewdale's niece and that the comparables which she has employed are properties fronting Deer Lake, whereas the property in question here is near Deer Lake, but not fronting on the water. The second affidavit upon which counsel for Mrs. Yewdale relies appends an incomplete appraisal obviously requested shortly before the hearing before Edwards J. and prepared in haste.

21 Finally, counsel for the Trustee submits that it is highly unlikely that a panel of this Court would interfere with a business decision made by a Trustee in the exercise of its duties in the absence of fraud or bad faith, neither of which are alleged here.

22 On the basis of the materials which were before Edwards J. when he made his order, and bearing in mind the role of the Trustee in realizing upon the property of the bankrupt, I conclude that it is extremely unlikely that

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a panel of this Court would interfere with his decision. On that basis alone, I would be prepared to grant the application and cancel the stay of Mr. Justice Edwards' order. I propose, however, to go on to deal with the issue of relative prejudice.

Relative Prejudice

23 It has now been 15 months since Mr. Gervais obtained judgment against Mrs. Yewdale. I am advised that, as of December, 1993, the balance of approximately 3.3 million dollars owing to Mr. Gervais on his judgment has not been accruing post-judgment interest with the result that the value of the judgment is declining on a daily basis.

24 As a result of the appeal from Bouck J.'s order, the Shuang sale was lost, with a loss to the estate, and, ultimately, to Mr. Gervais, of $188,000. In the meantime, the fees of the Trustee have been steadily mounting, as have legal fees, with a corresponding decrease in the amount Mr. Gervais is likely to realize from the estate. Real estate commission and property taxes which have not been paid are additional costs which will also absorb a portion of the monies available to the estate.

25 Although Mr. Gervais has received payment from I.C.B.C. of approximately 1 million dollars, he is unable to apply those funds as contemplated by the judgment. He has not been able to purchase a wheelchair-accessible residence and has been forced to make inroads into his capital. Since it is highly unlikely that he will realize on the full amount of his judgment, any further losses will work a significant prejudice to him both in the short and in the long term.

26 Even if Mrs. Yewdale succeeds in her actions against I.C.B.C. and her former lawyers, I view it as probable that the result will be appealed given the relatively untried nature of the issues and the amount of money involved. This will result in further substantial delays in Mr. Gervais realizing on his judgment.

27 While I am sympathetic to Mrs. Yewdale's desire to live out her life on the property she has owned for so many years, and to the undoubted stress which a sale of the property would cause her, I cannot conclude that the prejudice to her in lifting the stay outweighs the prejudice to Mr. Gervais if the stay remains. This is not a case where Mrs. Yewdale is going to be "on the streets" if the stay is lifted. Rather, Jubilee has made provision whereby she can remain in her home on the property for the foreseeable future, initially rent free, then as a renter, and, possibly, if she succeeds in her legal actions, as an owner. She will not suffer irremedial prejudice if the stay is lifted.

28 On the basis of a balancing of the interests of Mrs. Yewdale and the creditor, Mr. Gervais, I am satisfied that the stay should be cancelled.

29 Because of the view I have taken of the merits of the appeal and the relative prejudice to the bankrupt and the creditor if the stay is cancelled, it is unnecessary for me to discuss the question of whether the various steps taken by Mrs. Yewdale in these proceedings amount to an abuse of the bankruptcy process. Because of the nature of that allegation, however, I think it appropriate to state that I am not persuaded that the steps taken by Mrs. Yewdale in pursuing her various rights to appeal amount to an abuse of the bankruptcy process. To the extent that the provision for an automatic stay upon the filing of a Notice of Appeal thwarts the early and orderly distribution of the bankrupt's estate, that is a natural consequence of the legislation itself.

Conclusion

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30 In the result, I would allow the application and cancel the stay.

Application allowed.

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TAB 12

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2007 CarswellAlta 1336, 2007 ABCA 317, [2008] A.W.L.D. 135

Matco Capital Ltd. v. Interex Oilfield Services Ltd.

In the matter of an application under sections 46 and 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Matco Capital Limited (Plaintiff) and Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd. and Roblyn Oilfield Maintenance Ltd. (the Interex Group) (Defendants)

Midfield Supply Ltd., Spartan Controls Ltd., Startec Refrigeration Services Ltd., Cox Crane Service Ltd., Lampman Electric Ltd., A.M.E. Mechanical Ltd., Bergen Consulting, Millenia Resource Consulting, NIWA Crane Ltd., Lynco Construction Ltd., Border Insulators Inc., 779208 Alberta Ltd., Sabine C02 Logistics Inc., Bowridge Manufacturing (Appellants) and The Interex Group by its Receiver-Manager Hardie & Kelly Inc. (The Receiver) (Respondent)

Alberta Court of Appeal (In Chambers)

M. Paperny J.A.

Heard: October 10, 2007
Judgment: October 12, 2007
Docket: Calgary Appeal 0701-0273-AC

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Counsel: T.P. Lysak for Appellant

R.S. Van De Mosselaer for Respondent, Hardie & Kelly Inc.

R.S. Nishumura, C.A. Murray for Purchasers Arc Resources Limited

C. Nicholson for Purchasers Milagro Energy Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution

After receiver-manager H Inc. received bids for property of I Group in accordance with court-approved process, group of I Group's lien holders, appellant M Ltd., unsuccessfully sought disclosure of purchase prices and adjournment to determine possibility of submitting own bid — Chambers judge granted orders approving sale

and liquidation — M Ltd. brought application for stay of execution of orders approving sale — Application dismissed — Supreme Court of Canada case set out tripartite test for stay of enforcement of court orders: applicant must show that there is serious question to be tried; that applicant will suffer irreparable harm if stay is refused; and that balance of convenience favours applicant — Balancing of competing interests of disclosure to stakeholders and fair and equal treatment was serious issue — Although possible harm to M Ltd. was speculative, if relief sought would have been nugatory if stay was not allowed, that may have been sufficient to establish irreparable harm — Impact of stay on sale process and on stakeholders as whole had to be considered — Real prospect that sales would not proceed and market would be negatively affected with no assurance of forthcoming comparable offers tipped balance of convenience in favour of respondents — Potential harm to entire estate from granting stay far outweighed any benefit to M Ltd.

Cases considered by *M. Paperny J.A.*:

Bank of Nova Scotia v. Henuset Resources Ltd. (1989), 70 Alta. L.R. (2d) 320, 77 C.B.R. (N.S.) 121, 1989 CarswellAlta 366 (Alta. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Triple Five Corp. v. United Western Communications Ltd. (1994), 19 Alta. L.R. (3d) 153, 27 C.P.C. (3d) 201, 1994 CarswellAlta 100 (Alta. C.A.) — referred to

Triple Five Corp. v. United Western Communications Ltd. (May 5, 1994), Doc. 24150 (S.C.C.) — referred to

Words and phrases considered

irreparable harm

irreparable harm ... refers to the nature of the harm that would be suffered were a stay not to be granted

APPLICATION for stay of execution of orders for sale and liquidation of property.

***M. Paperny J.A.*:**

1 The appellants are a group of lienholders who seek to stay execution of the orders of the chambers judge granted September 28, 2007, approving the sale of various assets of Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd., and Roblyn Oilfield Maintenance Ltd. (the "Interex Group") to three different purchasers and liquidation of a CO2 plant.

2 By order dated July 26, 2006, Hardie & Kelly Inc. was appointed receiver-manager of the Interex Group. By orders dated February 9 and March 22, 2007, the court approved a process for the sale of the assets of the Interex Group. The appellants had notice of those orders and of the sale process, which included a deadline for the submission of sealed bids. Having determined the most favourable bids and negotiated agreements of purchase and sale with various purchasers, the receiver brought a motion seeking court approval of the sales and of the liquidation. That motion was returnable on September 26, 2007 but was adjourned to September 28, 2007 at the request of these appellants to give the stakeholders time to resolve their differences. At that time, the

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appellants sought disclosure of the purchase prices of all the assets (including the liquidation expenses and the projected liquidation revenues) and requested an adjournment for one week in order to determine their position, including the possibility that they might bid on the assets. The appellants submitted that as interested and affected stakeholders, they were entitled to disclosure of the purchase prices of each proposed sale before making submissions on the approval application.

3 The receiver agreed that in the usual course of a receivership, all affected stakeholders were entitled to know the purchase price on an approval hearing. However, he was of the view that the unique position of the appellants and the integrity of the sale process demanded that the purchase prices not be disclosed. Specifically, the receiver noted that the appellants had indicated early on that they might be interested bidders on the assets, and that despite their knowledge of the ongoing sale process, they chose not to bid but were now using their position as lienholders to require disclosure of the purchase prices to put together a competing late bid. The receiver submitted that that would work a fundamental unfairness to the court approved sale process it had undertaken. The chambers judge agreed and declined to disclose the purchase prices to the lienholders or grant the requested adjournment. She granted the four orders approving the sales and the liquidation.

4 The test for a stay of enforcement of a court order is well known and requires application of the tripartite test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.): the applicant must show there is a serious question to be tried; that the applicant will suffer irreparable harm if the stay is refused; and that the balance of convenience favours the applicant, namely, if the stay is refused the applicant will suffer greater harm than the respondent would if the stay was granted.

5 On the first branch of the test, this court must consider whether an appeal from the orders approving the sales and the liquidation raises a serious issue. The appellants submit that as a court-authorized process, the process as a whole should be transparent and fair. Accordingly, all interested parties should be given access to crucial information necessary for them to assess their positions, based on their respective rights and interests. As such, it was a reviewable error for the chambers judge to decline to provide the purchase prices for their consideration in the context of an approval application. The respondents to the application submit that a chambers judge supervising a receivership is often called upon to exercise a discretion to preserve the integrity of the process and there is no error in her having declined to disclose the purchase prices to the lienholders here.

6 In declining to require disclosure of the purchase prices, and approving the sales and liquidation as requested, the chambers judge stated:

> There has been a thorough and diligent sales process with respect to the CO2 assets, commencing in early February of this year through to mid-July. The deadline was extended twice for particular reasons in order to maximize value for the stakeholders. I note that unsecured creditors have little to hope for from the process so this is not a case of a last minute offer coming in that would improve matters for all stakeholders, recognizing of course that the lienholders certainly are major stakeholders.
>
> I also note that Mr. Busse and his clients [the lienholders] have been part of this process since the beginning, that they have participated in court applications and were certainly aware of the sales process as it occurred. ... [The lienholders] have come forward asking that approval of the sales to [purchasers] who have complied with the process and whose offers have been recommended by the receivers should be delayed to allow them to try to put together what they say should not be characterized as a competing bid, but certainly appears to be that[.] [T]hey wish to consider whether they want to put together a scheme to

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> have the assets turned over to the lienholders in settlement of their liens. This is not a firm proposal of any kind, but an idea and would require successful negotiations to take out the major secured creditor that have not yet been effected.
>
> The lienholders have made it clear that they are acting in two capacities, as creditors and as potential bidders of some kind. I have heard from the receiver the reason why the receiver felt that they — it would not be appropriate to provide information to the lienholders, given the two hats that they wore, that they wear, and I am satisfied that this is justifiable given what the lienholders have said in this court, they want to do with the information.

7 While recognizing that candour and fairness of process were critical, she further held ". . . fairness of process does not mean that lienholders are entitled to, in effect, lie in the weeds to see if they are happy with the price for the assets and then obtain that information in order to determine whether they can come up with something better."

8 The determination of whether there is a serious question to be tried is a preliminary assessment of the merits of the case only, and I need only be satisfied that the application is neither frivolous nor vexatious. I am satisfied that the appeal here raises a serious issue.

9 The sale process in the context of a court-appointed receiver includes both the submission of bids and the court approval process. Fairness and candour are paramount in both stages of the process. As this court noted in *Bank of Nova Scotia v. Henuset Resources Ltd.* (1989), 70 Alta L.R. (2d) 320, [1989] A.J. No. 945 (Alta. C.A.) the entire process must be objectively fair to all parties having a legitimate interest in it. The purchase price is material information to which a creditor would be entitled in the usual course. In other words, public disclosure is part of a judicial approval process. The integrity of the sale process is but one aspect of a court approval process that demands fairness and equality of treatment to all, including disclosure of all necessary information for stakeholders to make informed decisions. How those competing interests could or should be balanced to achieve these objectives is such an issue.

10 The second branch of the test, irreparable harm, refers to the nature of the harm that would be suffered were a stay not to be granted. The applicants submit that absent a stay, the sales "may be closed" and the disassembly of the Interex Group's CO2 plant will begin, thus precluding consideration of "potential alternatives available" to them. In other words, the appeal will be moot and as such, their interest in considering alternatives will be gone. However, the chambers judge found that the appellants were well aware of the orders authorizing the sale process and of the deadline for bids. They made no effort to pursue other alternatives or to make a reserve bid, an option that was open to them and that would have preserved the integrity of the court-ordered sale process. Any harm resulting from declining a stay is not entirely the result of the appellants' lack of access to the purchase prices. It was open to the appellants to prevent such potential harm earlier in the process. The lienholders also concede that there may be no harm at all if the prices are high enough to leave them with no concerns regarding approval of the sales. At its highest, the irreparable harm here is the loss of an opportunity to put a different deal together, an opportunity which is at best speculative. However, it may be sufficient to establish irreparable harm where it can be shown that the relief sought would be nugatory if a stay was not allowed: *Triple Five Corp. v. United Western Communications Ltd.* (1994), 19 Alta. L.R. (3d) 153, 27 C.P.C. (3d) 201 (Alta. C.A.), (motion for a stay of execution dismissed: [1994] S.C.C.A. No. 226 (S.C.C.)). I am prepared to so find for the purpose of this application.

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11 Finally, does the balance of convenience favour granting a stay? Do the interests of the appellants in a stay outweigh the interests of the other stakeholders and the estate as a whole? Serious potential consequences of a stay include a loss of all of the sales approved by the court below, and a "tainting of the market" such that the value of the assets are diminished in the eyes of prospective purchasers, a potential harm to all of the stakeholders, including the appellants. No one has challenged the propriety or efficacy of the receiver's sale process. In other words, there has been a broad canvassing of the available market with a view to maximizing the return to all stakeholders. The process undertaken by the receiver is not impugned. Nor are its conclusions that the sale agreements represent the best offers available for the assets. In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sales will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming from the appellants or elsewhere tips the balance of convenience in favour of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit to the appellants.

12 The application for a stay pending appeal is dismissed.

Application dismissed.

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TAB 13

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1995 CarswellOnt 143, 37 C.P.C. (3d) 142, 77 O.A.C. 50

Stan-Canada Inc. v. Calibrated Instruments Inc.

STAN-CANADA INC. v. CALIBRATED INSTRUMENTS INC.

Ontario Court of Appeal

Goodman J.A. [in Chambers]

Heard: January 10, 1995
Judgment: January 12, 1995
Docket: Docs. CA M15032, C20531

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Counsel: *Douglas G. Edward*, for applicant.

William H. Richardson, for respondent.

Subject: Civil Practice and Procedure; Corporate and Commercial

Personal Property Security --- Practice and procedure

Practice --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution

Practice on appeal — Staying of proceedings pending appeal — Stay of execution — Appeal not frivolous — Reasonably arguable grounds for appeal existing — Balance of convenience considered — Terms imposed — Ontario, Rules of Civil Procedure, r. 63.02(1)(b).

The applicant obtained a money judgment in the amount of $663,923.06 and authority to exercise its rights to seize equipment which was the subject of a general security agreement. The respondent appealed and brought a motion to stay the judgment pursuant to r. 63.02(1)(*b*).

Held:

The stay was granted on terms.

The appeal was not frivolous. There were reasonably arguable grounds for an appeal. Therefore, it was necessary to consider the balance of convenience of the parties in deciding whether to exercise the discretion to order a stay and, if ordered, what terms, if any, should be imposed. The respondent was a company with a shaky financial condition, and would be unlikely to satisfy the monetary judgment against it, or any substantial portion

thereof. The applicant's principal hope of recouping its loss was in recovering possession of the equipment.

The applicant appeared financially sound but was in need of as much cash as it could obtain. The applicant located a purchaser of the machines who was prepared to purchase the machines if they were available within the next several weeks. Such purchasers were not easily or readily found. If the stay was granted, the respondent would have the ongoing use of the machines and, unless strict terms were attached to such a stay, it could continue to use the machines as in the past, and, indeed, in a more extensive manner, without making any payment. Therefore, the following terms were imposed: (1) The respondent was to pay to the applicant the sum of $75,000 on or before January 19, 1995. In the event that the respondent failed to make such payment within the time limit, the stay would be terminated forthwith. The applicant could obtain an order terminating such stay by applying ex parte to a judge of the court; (2) The respondent was to pay to the applicant the sum of $12,313 on the 15th day of each and every month commencing on February 15, 1995 and continuing until the final determination of the appeal. In the event that the respondent failed to make any one of such payments on or before its due date, the stay would be terminated forthwith. The applicant could obtain an order terminating such stay upon applying ex parte to a judge of the court; (3) If the appeal was dismissed, the sum of $75,000 was to be credited on account of the money awarded ordered by the trial judge. The monthly payments were to be deemed to be in satisfaction of the payments owing under the assumption agreement for the periods during which they were paid; and (4) If the appeal was allowed, the panel hearing the appeal was to determine the manner in which such funds, if any, paid by the respondent pursuant to this order, were to be credited or returned to the respondent or were to be dealt with in some other manner.

Statutes considered:

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

s. 244(1) [en. S.C. 1992, c. 27, s. 89(1)]

Personal Property Security Act, R.S.O. 1990, c. P. 10 —

s. 63(5)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 63.02(1)(*b*)

Motion by appellant to stay judgment of Spence J. dated December 22, 1994, pending appeal.

Goodman J.A. **[In Chambers]:**

1 Calibrated Instruments Inc. (Calibrated), which is appealing from a judgment of Spence J. delivered on December 22, 1994, moves for a stay of the judgment pursuant to the provisions of r. 63.02(1)(*b*). The judgment contains a declaration that it was in breach of its obligation to Stan-Canada Inc. (Stan-Can), the respondent in the appeal, under a conditional sales contract dated April 16, 1991 and a conditional sales contract dated February 14, 1992 in which Stan-Can is named as the vendor and the obligations therein contained were assumed by Calibrated pursuant to an assumption agreement dated August 14, 1992. The judgment ordered that

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Stan-Can is allowed to exercise its right to seize the equipment that is the subject of the general security agreement and further ordered Calibrated to pay to Stan-Can the sum of $663,923.06 being the amount owing on account of principal and intereston October 29, 1994.

2 The equipment which is subject to the general security agreement consists of two duplicating machines which are very large, complex equipment systems used for milling and copying intricate surfaces such as dies and moulds. They are presently being extensively used by Calibrated and it is anticipated that they will be used even more extensively during the next year.

3 The assumption agreement called for payments by Calibrated to Stan-Can of $12,313 monthly commencing no later than November 15, 1992. Calibrated went into partial default almost immediately. On March 17, 1994, Stan-Can served notice of intention to enforce security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* on Calibrated and on March 29, 1994 served a notice of intention to sell pursuant to s. 63(5) of the *Personal Property Security Act*, R.S.O. 1990, c. P. 10.

4 Negotiations took place between the parties for settlement of Stan-Can's claim without success. Calibrated made no payments in respect of the equipment from the date of delivery of a demand letter on March 17, 1994. Calibrated prevented Stan-Can from obtaining the machines during an attempt to repossess them made by Stan-Can on June 29, 1994.

5 Stan-Can commenced proceedings in the Ontario Court (General Division) to enforce its rights by an application under the *Personal Property Security Act* on July 8, 1994. Calibrated made payments of $5,000 each on July 8 and July 18, 1994 for a total of $10,000 for the entire year of 1994. If Stan-Can is correct in its position that Calibrated was not entitled to withhold any of the payments said to be due under the assumption agreement, then Calibrated was at least $134,000 in arrears for payments due in 1994. There were also substantial arrears owing for the year 1993. Although Calibrated disputed the allegation that it was in default, Spence J. found otherwise.

6 Without going into detail with respect to the affidavit evidence and the cross-examinations thereon filed at the hearing before Spence J., and without indicating my opinion with respect to the ultimate strength of the grounds of appeal relied on by Calibrated, I am of the view that the appeal is not a frivolous one and that reasonably arguable grounds for appeal exist. In view of this conclusion it is necessary to examine the balance of convenience of the parties in deciding whether I should exercise my discretion to order a stay and if I do, to consider what terms, if any, should be imposed.

7 I am satisfied on the material before me that Calibrated is a company, the financial condition of which is somewhat shaky and which would be unlikely to satisfy the monetary judgment obtained against it or any substantial portion thereof. Stan-Can's principal hope of recouping its loss lies in recovering possession of the two machines. Although Calibrated has in past years not operated at a profit, it has reasonable prospects of enjoying a profitable year under present business conditions and anticipated orders. There can be little doubt but that the repossession of the two machines will result in the destruction of Calibrated's business enterprise.

8 Stan-Can appears to be a financially sound company which nevertheless is in need of obtaining as much cash as it can to fulfil increased needs for ready cash resulting from changed conditions in Russia where the company which supplies the machinery in dispute carries on its business. There is little doubt but that the only realistic method by which Stan-Can will be able to realize on its judgment is by repossession of the machines. I am satisfied that since the proceedings were commenced Stan-Can has looked for a customer who would

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purchase the machines when they are repossessed and has found at least one such customer who is prepared to purchase the machines if they are available within the next several weeks. I am also satisfied that a purchaser for machines such as those which are the subject matter of this dispute is not easily or readily found.

9 If Calibrated is granted a stay of the order, it will be in a position to continue to use the machines and unless strict terms are attached to such a stay, it may continue to use the machines as in the past and indeed in a more extensive manner to take care of the increased business it expects without making any payment for its use. Even if an order expediting the appeal is made it is reasonable to expect that the final determination of the appeal might not be made for a period of perhaps six months and even that period may be unduly optimistic.

10 Calibrated has already had the use of the machines during the year 1994 for which it has paid only the sum of $10,000, an amount far less than interest accruing on the unpaid sale price and undoubtedly far less than the amount by which the machines have depreciated during that period of time. It is also in arrears of payments for periods of time prior to 1994. Although Calibrated hopes to show on appeal that these amounts are not owing because of alleged oral agreements made between Calibrated and representatives of Stan — Can, the fact remains that an initial adjudication has taken place in favour of Stan-Can and in my view even if a stay is granted it must be on terms which will to some degree protect Stan-Can from further loss which it may suffer as a result of a stay such as a loss of an immediate resale of the machines and continued use of the machines by Calibrated without paying any amount pending the appeal.

11 In my opinion, the only way in which the interests of both parties can be reasonably protected pending the outcome of the appeal is to grant a stay of the order of Spence J. on the following terms:

(1) Calibrated shall pay to Stan-Can the sum of $75,000 on or before January 19, 1995. In the event that Calibrated fails to make such payment within the time limit, the stay hereby granted shall be terminated forthwith. Stan-Can may obtain an order terminating such stay by applying ex parte to a judge of this Court to obtain such order upon proof of non-payment.

(2) Calibrated shall pay to Stan-Can the sum of $12,313 on the 15th day of each and every month in each year commencing on the 15th day of February 1995 and continuing until the final determination on this appeal. In the event that Calibrated fails to make any one of such payments on or before its due date, the stay of the order shall be terminated forthwith. Stan-Can may obtain an order terminating such stay upon applying ex parte to a judge of this Court to obtain such order upon proof of non-payment.

(3) In the event that the appeal is dismissed the said sum of $75,000, if paid, shall be credited on account of the money award ordered by Spence J. The monthly payments shall be deemed to be in satisfaction of the payments owing under the assumption agreement for the periods during which they are paid.

(4) If the appeal is allowed, the panel hearing the appeal shall determine the manner in which such funds, if any, paid by Calibrated pursuant to this order, shall be credited or returned to Calibrated or be otherwise dealt with.

12 Costs of this application are reserved to the panel hearing the appeal.

Motion granted.

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TAB 14

C

1993 CarswellOnt 467, 20 C.P.C. (3d) 399

Babbitt v. Paladin Inc.

CYNTHIA A. BABBITT v. PALADIN INC., et al.

Ontario Court of Appeal

Galligan J.A.

Judgment: February 2, 1993
Docket: Doc. CA C14058

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Counsel: *Kirk M. Baert*, for moving party (respondent plaintiff).

Avrum D. Slodovnick and *Robert Bigioni*, for responding parties (appellant defendants).

Subject: Civil Practice and Procedure

Costs — Security for costs — Security for costs on appeal — Payment of security in lieu of lifting stay of proceedings pending appeal — Ontario, Rules of Civil Procedure, r. 63.01(1).

Practice on appeal — Staying of proceedings pending appeal — Lifting of stay necessary — Danger of assets being depleted — Lifting of stay would devastate appellants — Payment of security in lieu of lifting stay — Ontario, Rules of Civil Procedure, r. 63.01(1).

The plaintiff sought repayment from the defendant P on a loan. When payment was not made, the plaintiff initiated court action against P. The matter was settled on terms. One of the terms provided for a consent to judgment allowing the plaintiff default judgment without notice if P violated the terms of payment. After one year of compliance, P defaulted. The defendant H was the controlling mind of P. In the months leading up to the default, H shifted assets from P to the defendant E who was also under his control. A consent judgment was granted against P, but the company was insolvent. The plaintiff brought a motion for judgment against P, H and E. The motion was brought within the parameters of the first action. No new action was initiated. The court rejected argument that the motion was improperly constituted because of the addition of nonparties and the claiming of new relief after the earlier judgment. The court ordered a trial of an issue. Leave to appeal to the Divisional Court was dismissed. At trial, the court found the transfers from P to E were improper and personal liability was imposed on H. The defendants appealed. The plaintiff brought a motion to the Court of Appeal challenging the automatic stay of judgment pending the disposition of the appeal, pursuant to r. 63.01(1).

Held:

The defendants were required to provide security for the judgment and costs including costs of the appeal within ten days, or the stay would be lifted.

The plaintiff's fear that H would once again transfer assets and make E judgment-proof was well-founded given his past actions. However, in light of the argument by the defendants that lifting the stay on the judgment would devastate them, there should be payment of security into court, failing which the stay would be lifted.

Rules considered:

Ontario, Rules of Civil Procedure —

r. 63.01(1)

Motion by plaintiff challenging automatic stay of judgment pending appeal.

***Galligan J.A.* (Endorsement):**

1 While they will be attacked on the appeal, the findings of Carruthers J. lead me to the view that there has been one deliberate attempt by Mrs. Husbands to put assets beyond the reach of the plaintiff's original judgment. I think that her fears that the same thing could happen again are well-founded. In order to prevent a re-occurrence the stay provided for in r. 63.01(1) should not apply in this case.

2 The appellants contend that collection proceedings under the judgment would have devastating consequences for them. In order to alleviate that problem they will be given the opportunity to provide security for the judgment and costs including costs of the appeal.

3 An order will issue as follows:

1. The appellants shall, within 10 days hereof, give security in the amount of $50,000 to abide the outcome of the appeal. The security may be in the form of a letter of credit from a chartered bank or in such other form as the plaintiff may agree to.

2. In the event para.1 is not complied with the stay provided for in r. 63.01(1) shall forthwith cease to apply.

4 Costs of this motion will follow the event of the appeal.

Defendants to provide security for judgment and costs, failing which stay to be lifted.

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TAB 15

C

1994 CarswellOnt 523, 27 C.P.C. (3d) 104, 72 O.A.C. 303

Hall-Chem Inc. v. Vulcan Packaging Inc.

HALL-CHEM INC. v. VULCAN PACKAGING INC., VULCAN, EMBALLAGES INC. carrying on business under the firm name and style of VULSAY INDUSTRIES

VULCAN PACKAGING INC., VULCAN, EMBALLAGES INC. carrying on business under the firm name and style of VULSAY INDUSTRIES v. HALL-CHEM INC., MICHEL BELEC, LAWRENCE DEAKINS, QUALILAB MARKETING INC. and QUALILAB INDUSTRIES INC.

Ontario Court of Appeal

Weiler J.A. [in Chambers]

Heard: May 27, 1994
Judgment: June 9, 1994
Docket: Docs. CA C18618, M13523

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Counsel: *Kirk M. Baert*, for moving party (respondent) plaintiff-by-counterclaim Vulcan Packaging Inc.

John T. Zuber, for responding party (appellant) defendant-by-counterclaim Michel Belec.

Subject: Civil Practice and Procedure; Insolvency

Practice --- Practice on appeal — Staying of proceedings pending appeal — General

Costs — Security for costs — Security for costs on appeal — Grounds for requiring security — Special circumstances — Finding of fraud being special circumstance — Motion premature — Further motion to be brought when there being concrete indication of costs of trial, appeal, and appellant's financial circumstances — Ontario, Rules of Civil Procedure, r. 61.06(1)(c).

Practice on appeal — Staying of proceedings pending appeal — Automatic stay on monetary judgment — Appellant guilty of fraud, negligent misrepresentation, conspiracy and breach of trust — Automatic stay lifted on terms — Legitimate fear of dissipation of assets — Ontario, Rules of Civil Procedure, r. 63.01(3).

V was sued by H in relation to the sale of automotive chemical products. V issued a counterclaim against B and two companies which had been under the control and direction of B. At trial B was held personally liable to V for fraud, negligent misrepresentation, conspiracy and breach of trust. B appealed, alleging numerous errors by

the trial judge in making findings of fact. V moved for an order lifting the automatic stay and directing B to post security for costs. V did not seek an order for immediate pay-out of all or part of the judgment.

Held:

The motion was granted in part; the stay was lifted on terms, and the motion for security for costs was dismissed without prejudice to bring a further motion.

Although the findings of the trial judge would be challenged on appeal, they led to the conclusion that V was legitimately concerned that B would transfer or hide assets. It seemed unlikely that B would not be held personally liable to V. B was to post security in the amount of $150,000 to abide the outcome of the appeal. B was also to attend for examination in aid of execution.

An order for security for costs would not be made in a vacuum. Since the costs of trial had not yet been assessed, the motion was dismissed without prejudice to bringing a further motion once there was a concrete indication of the costs of trial, of the appeal, and of the financial position of B. The finding of fraud was a special circumstance to support the request for security for costs.

Cases considered:

Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787, 50 E.T.R. 225, 159 N.R. 1, 67 O.A.C. 1, 108 D.L.R. (4th) 592 — *referred to*

Babbitt v. Paladin Inc. (**1993), 20 C.P.C.** (**3d) 399** (Ont. C.A.) — *considered*

Fabing v. Conceicao (1986), 9 C.P.C. (2d) 36, 54 O.R. (2d) 402, 15 O.A.C. 66 (C.A.) — *followed*

GEAC Canada Ltd. v. Craig Erickson Systems Inc. (1994), 26 C.P.C. (3d) 355 (Ont. C.A.) — *distinguished*

Kennedy v. Kennedy (1985), 45 R.F.L. (2d) 109 (Ont. C.A.) — *referred to*

Leblanc v. Digiammatteo (1989), 35 O.A.C. 380, 64 D.L.R. (4th) 507, 71 O.R. (2d) 130 (C.A.) — *referred to*

Oswell v. Oswell (1991), 47 C.P.C. (2d) 209, 76 D.L.R. (4th) 444, 2 O.R. (3d) 145, 31 R.F.L. (3d) 441, 46 O.A.C. 316 (C.A.) [additional reasons at (1991), 76 D.L.R. (4th) 444 at 448, 2 O.R. (3d) 145 at 149, 31 R.F.L. (3d) 441 at 445, 46 O.A.C. 316 at 319 (C.A.)] — *referred to*

Peper v. Peper (1990), 45 C.P.C. (2d) 157, 73 D.L.R. (4th) 131, 29 R.F.L. (3d) 1, 1 O.R. (3d) 145, 46 O.A.C. 241 (C.A.) — *referred to*

Quabbin Hill Investments Inc. v. Yorkminster Investments Properties Ltd. (1992), 8 O.R. (3d) 278, (sub nom. *Quabbin Hill Investments Inc. v. Armour)* 55 O.A.C. 199 (C.A.) — *followed*

Stein v. "Kathy K" (The) ("Storm Point" (The)) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1 — *referred to*

Stein v. Sandwich West (Township) (1994), 16 O.R. (3d) 321 (C.A.) — *referred to*

Toronto-Dominion Bank v. Szilagyi Farms Ltd. (1988), 28 C.P.C. (2d) 231, 65 O.R. (2d) 433, 29 O.A.C.

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357 (C.A.) — *referred to*

Tricontinental Investments Co. v. Guarantee Co. of North America (1989), 39 C.P.C. (2d) 113, 70 O.R. (2d) 461, 35 O.A.C. 253 (C.A.) — *distinguished*

Walter E. Heller Financial Corp. v. American General Supply of Canada (1969) Ltd. (1986), 12 C.P.C. (2d) 129, 56 O.R. (2d) 257, 30 D.L.R. (4th) 600 (C.A.) — *referred to*

956513 Ontario Ltd. v. Anderson (1992), 10 C.P.C. (3d) 209, 95 D.L.R. (4th) 355, 10 O.R. (3d) 563, 57 O.A.C. 302 (C.A.) — *referred to*

Statutes considered:

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

s. 134(2)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 61.06

r. 61.06(1)(*c*)

r. 61.06(3)

r. 63.01

r. 63.01(1)

r. 63.01(3)

r. 63.03(2)

r. 63.03(3)

Motion by respondent for order lifting automatic stay and for order for security for costs.

***Weiler J.A.* [In Chambers]:**

1 Vulcan Packaging Inc. ("Vulcan") applies for an order pursuant to r. 63.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, lifting the automatic stay which applies to an order for the payment of money when a notice of appeal has been delivered. In addition, Vulcan seeks an order against Michel Belec ("Belec") directing him to post security for costs pursuant to r. 61.06.

I Background

2 The claims and counterclaims in this matter arise out of the dealings between the parties in connection

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with the sale of automotive chemical products from late 1990 to early 1992. At trial, Hall-Chem was successful in its claim against Vulcan for unpaid invoices and was awarded damages of $82,826.99. Qualilab Marketing Inc. ("Marketing") and Qualilab Industries Inc. ("Industries") were two companies under the control and direction of Belec and have since ceased to do business. Vulcan counterclaimed against Belec personally and recovered damages for losses it incurred as a result of its business dealings with Marketing and subsequently with the successor company to Marketing, Industries. Belec's cross-claim against Hall-Chem for contribution and indemnity in respect of damages awarded against him was dismissed. The action was settled prior to trial against other parties.

3 Belec has appealed the award of damages against him.

II Legal Principles Applicable re Lifting a Stay

4 Section 134(2) of the *Courts of Justice Act* states:

> On motion, a court to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

Rule 63.01(1) and (3) states:

> (1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order.
>
> . . . . .
>
> (3) A judge of the court to which the appeal is taken may order, on such terms as are just, that the stay provided by subrule (1) or (2) does not apply.

5 One of the principal reasons for the provision of an automatic stay of money judgments is so as not to hinder the impecunious defendant with a meritorious appeal (*Leblanc v. Digiammatteo* (1989), 71 O.R. (2d) 130 (C.A.)). The affidavit material before the court indicates that Belec is a person of modest means who has a job and whose main asset is his matrimonial home, which is owned in joint tenancy and likely has a mortgage on it.

6 In determining what is just in accordance with r. 63.01(3) it is appropriate to consider the grounds of the appeal, the general circumstances of the case, including the trial judge's reasons, and the probable delay between trial and appeal which cannot be controlled by the parties *Oswell v. Oswell* (1991), 2 O.R. (3d) 145 (C.A.) at p. 148.

a) General Circumstances of the Case

7 Hall-Chem carries on the business of packaging and selling various automotive chemicals in Quebec. Vulcan carries on a similar business in Ontario.

8 In early 1990, Hall-Chem agreed to assist Belec, who was experienced in the sales and marketing of automotive chemicals, in incorporating and operating a company, Marketing, to sell products supplied by Hall-Chem under the Qualilab name. Belec and Hall-Chem each owned 50% of Marketing. This arrangement lasted until the end of June 1991 when the parties, out of mutual dissatisfaction with the business and its results, agreed

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to terminate their association as shareholders in Marketing. Hall-Chem withdrew by transferring its shares in Marketing to Belec.

9 In the period leading up to the Hall-Chem withdrawal from Marketing, Belec negotiated an arrangement with Vulcan to facilitate the continuation of the business operations of Marketing. Under these arrangements, which took effect at the beginning of July 1991, Marketing would order automotive products to supply to its customers from Vulcan. Vulcan would in turn order the product from Hall-Chem. Vulcan was also to provide all administrative services for the business of Marketing while Belec was to be responsible for sales. This arrangement between Marketing, Vulcan and Belec lasted three months, until the end of September 1991 when it was terminated. Belec advised Vulcan that Marketing would no longer carry on business. A new company, Industries, would carry on Marketing's business. Industries was to be owned 50% by Belec and 50% by one Lawrence Deakins.

b) The Findings of the Trial Judge on the Issues Between Vulcan and Belec

(i) Negligent Misrepresentation

10 Vulcan was awarded damages in the amount of $150,000 for negligent misrepresentation by Belec in connection with what came to be known as the "Western Shipment." Belec told Mr. Ross Quantz of Vulcan that Belec had made a sale of $338,000 worth of product to a buyer in Western Canada. Belec knew that this was not true but expected to make such a sale. The sale never materialized and the shipment was not paid for.

11 In order to induce Vulcan to continue dealing with Marketing, Belec sent a fax on January 22, 1991, stating that Hall-Chem had agreed to spend more money to help with the sale of Marketing's inventory and that it had Hall-Chem's "assurance of continued endorsement regarding support on receivables." There was no evidence Hall-Chem had made any further commitment to Marketing beyond its original letter of credit or that Belec had any reason to believe it had done so. As a result of this second misrepresentation Vulcan agreed to take back the unsold inventory and suffered a loss of $150,000 in disposing of it. Spence J. found [reported (1994), 12 B.L.R. (2d) 274 (Ont. Gen. Div.)] that Vulcan's reliance on the misrepresentation did not end when it agreed to take back the product but that it was a form of mitigation. Belec was held personally liable for the damages flowing from the misrepresentations notwithstanding that Belec acted in his capacity as an officer and employee of Marketing when the representations were made. It must be borne in mind that Belec was also a 50% owner of Marketing.

(ii) Fraudulent Conveyance

12 Marketing ceased carrying on business at a time when it had uncollected receivables and outstanding accounts payable. In addition, Marketing owed Vulcan a debt in a significant amount. Vulcan was made aware in late September 1991 that it was proposed that the business of Marketing would cease to be carried on by Marketing and would instead be carried on by Industries which would begin operations with a clean balance sheet. Vulcan understood a letter sent by Marketing signed by Belec on October 3, 1991, to mean that Vulcan was to have an assignment of the receivables of Marketing from July 1 to September 30, 1991, the period covered by the Vulcan/Marketing relationship. Mr. Quantz anticipated that, because Marketing's mail had been going to Vulcan's offices, Vulcan would have little difficulty in collecting the receivables. Instead, letters were sent to former Marketing customers advising them to make payments of their accounts to Industries at Industries' new address. Belec knew his customers were likely to be confused as to the manner in which they were to pay outstanding accounts owed to Marketing and that some payments of such accounts were likely to go

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to Industries. It was shown that a cheque for about $152,000 from Uniselect Inc. was sent to Industries on account of a Uniselect debt to Marketing and that Industries improperly appropriated these funds for itself.

13 Spence J. found that there had been a fraudulent conveyance of the control and direction of a corporation with the intent to defeat creditors. As the controlling mind of Marketing and Industries insofar as the transitional arrangements were concerned and as a shareholder in each company, Belec was held personally liable. In addition, Marketing did not receive any consideration for allowing Industries to take over its client list or the Qualilab name. Spence J. found that Belec had entered into a conspiracy with Marketing and Industries to defraud creditors. Lastly, Spence J. found that there had been a breach of trust of the relationship between Marketing and Vulcan with respect to Vulcan's access to Marketing's account receivables. This breach of trust was caused by Belec.

14 Spence J. awarded further damages to Vulcan against Belec in the amount of $188,000 for conspiracy and $152,078.47 for breach of trust. The $152,078.47 was included in the $188,000 damages awarded for conspiracy.

c) Likelihood of Success on Appeal and Other Considerations

15 The trial judge made adverse findings against Belec of negligent misrepresentation, fraud, and breach of trust. The notice of appeal alleges numerous errors on the part of the trial judge in making findings of fact. On appeal, the appellant bears the significant burden of showing that the trial judge committed a palpable and overriding error with respect to the facts *Stein v. "Kathy K" (The) ("Storm Point" (The))*, [1976] 2 S.C.R. 802 at 808. Before me, counsel suggested that to hold an individual in Belec's situation liable, as opposed to the corporate entity, was a novel and doubtful proposition in law. It appears, however, that courts are beginning to recognize that tort principles may be used as a way of establishing personal liability: see J.H. Farrar, "Fraud, Fairness and Piercing the Corporate Veil" (1990) 16 Canadian Business Law Journal 474. An exception to the policy of not piercing the corporate veil may be called for in the case of misrepresentation to creditors as to the financial status of a firm. See: Jacob Ziegel et al., *Partnerships and Business Corporations*, vol. 1, 2nd ed. (1989), at p. 157. If a corporation is formed for the express purpose of doing a wrongful act or the person in control expressly directs a wrongful thing to be done, the individual may be held responsible: *Fraser & Stewarts Company Law of Canada*, 6th ed. (1993), at p. 19 and cases cited therein. Personal liability for breach of trust was found against a director of a closely held corporation in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787.

16 The estimated length of time before the appeal can be heard once it is perfected is 18 to 24 months.

17 Although there is always a risk of non-recovery in any litigation, in some types of cases courts have more readily found it appropriate that not all of the risk should fall on the respondent. A flexible approach is particularly indicated in family law disputes: *Peper v. Peper* (1990), 1 O.R. (3d) 145 (C.A.); *Oswell v. Oswell*, supra. These and other recent cases under r. 63.01(3), such as *Stein v. Sandwich West (Township)* (1994), 16 O.R. 321 (C.A.) indicate that the court is concerned with balancing the need to assure that an appellant, if successful, will not be prejudiced if a stay is lifted, and the respondent's need to realize some or all of the amount of the judgment awarded right away. In some cases, the pressing concern of the respondent is that assets, which presently exist, may not exist by the time the appeal is heard: *Kennedy v. Kennedy* (1985), 45 R.F.L. (2d) 109 (Ont. C.A.); *Walter E. Heller Financial Corp. v. American General Supply of Canada (1969) Ltd.* (1986), 56 O.R. (2d) 257 (C.A.) and *Babbitt v. Paladin Inc.* (1993), 20 C.P.C. (3d) 399 (Ont. C.A.).

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18 The position of counsel for Belec is that there is no indication that Belec will not pay the monetary judgment if the appeal fails and that this is not a clear case in which to lift the stay in any manner. The court declined to lift a stay in *GEAC Canada Ltd. v. Craig Erickson Systems Inc.* (unreported, May 18, 1994) [reported 26 C.P.C. (3d) 355 (Ont. C.A.)]. Laskin J.A. held that, while the conduct of the respondent on the motion was found by a judge to be in contempt, it had not been committed deliberately and there was no suggestion that the conduct had continued while the appeal was pending. Here the conduct of Belec was found by the trial judge to be deliberate. Moreover, Laskin J.A. specifically commented that there was no suggestion in the case before him that the appellants had concealed or disposed of their assets. Here there has been a finding of fraud with respect to disposition of assets.

19 Vulcan does not seek an immediate payout of all or part of the monetary judgment it obtained. This is not a case where failure to lift the stay will cause financial hardship to Vulcan. Rather, it is concerned that Belec will transfer or hide his assets. Vulcan asks that the appellant post a letter of credit or a bond in the amount of the judgment so that, in the event the appeal is unsuccessful, it will have a fund to look to. In *Babbitt v. Paladin Inc.*, supra, such an order was made against the individual who, following a consent judgment against a company, shifted assets out of the company so as to render it insolvent. In addition, or in the alternative, Vulcan also seeks to lift the stay to the extent of permitting it to examine Belec as to his assets and means in aid of execution. A stay does not prevent the issue of writ of execution or the filing of the writ in a sheriff's office or land registry office although enforcement of the writ of execution is prevented while the stay remains in effect: r. 63.03(3). Authority to make an order for examination in aid of execution where a notice of appeal has been filed stems from s. 134(2) of the *Courts of Justice Act* as well r. 63.01(3). Precedent is found in *Quabbin Hill Investments Inc. v. Yorkminster Investments Properties Ltd.* (1992), 8 O.R. (3d) 278 (C.A.).

III Conclusion re Application to Lift Stay

20 I appreciate that the findings of the trial judge will be attacked on appeal, but at present they lead me to the conclusion that the concern of Vulcan that Belec will dispose of assets is well-founded. As to the merits of the appeal, it seems to me unlikely that Belec will not be held personally liable for any of the loss it has caused Vulcan. The extent to which Vulcan seeks to have the stay lifted will not hinder Belec in the pursuit of his appeal and it will respond to the exigency of this case.

21 An order will issue as follows:

1. The appellant, shall, within 14 days of the issuance of this order, give security in the amount of $150,000 to abide the outcome of the appeal. The security may be in the form of a letter of credit from a chartered bank or in such other form as the respondent may agree to.

2. The appellant shall, on five days' notice, present himself at a time, date and place to be arranged by the respondent, to be examined in aid of execution.

IV Security for Costs

22 Rule 61.06(1)(*c*) states:

In an appeal where it appears that,

. . . . .

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(*c*) for other good reason, security for costs should be ordered,

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

23 This court has no inherent power to order security for costs and it may do so only where the relevant rules so provide: *Toronto-Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433 (C.A.). The automatic stay which applies to monetary judgments under r. 63.01 does not prevent the assessment of costs: r. 63.03(2). It does, however, prevent the enforcement of their payment. Prior to an amendment to the rule in 1989 a defendant/appellant could not be required to post security for costs: *Toronto Dominion Bank v. Szilagyi*, supra. In *Tricontinental Investments Co. v. Guarantee Co. of North America* (1989), 39 C.P.C. (2d) 113 (Ont. C.A.) the court also held that the rule as then drafted did not give this court jurisdiction to order security for costs when the costs had yet to be assessed. The wording of the rule, prior to its most recent amendment in 1993, permitted only the estimated costs of appeal to be secured and did not permit the making of an order for security of the costs of a trial: *956513 Ontario Ltd. v. Anderson* (1992), 10 O.R. (3d) 563 (C.A.). The wording of the present rule appears to overcome all of these limitations.

24 On a motion for security for costs pending an appeal, the judge hearing the motion is entitled to make an assessment as to the merits of the appeal: *Fabing v. Conceicao* (1986), 54 O.R. (2d) 402 (Ont. C.A.).

V Conclusion re Security for Costs

25 I have already indicated my conclusion as to the merits of the appeal, namely, that I think it unlikely Belec will be found to owe nothing to Vulcan. While Belec's counsel argued that this case is not one which comes within the definition of "special circumstances," I am of the view that a finding of fraud is a special circumstance.

26 From the scant information which is before me, it appears that an order for some security for costs will not prevent Belec from conducting the appeal, nor does he have so many assets that security is unnecessary.

27 The costs of the trial have yet to be assessed, but it appears that they will be substantial. I do not have before me the proposed bill of costs of Vulcan from the trial. I am not in a position on this motion to fix the percentage of security for costs which would be appropriate, and I decline to do so in a vacuum. The portion of the motion relating to security for costs is therefore dismissed without prejudice to Vulcan to bring a further motion once there is a concrete indication of the costs of the trial and of the appeal and of Belec's financial position.

VI Costs of This Motion

28 Counsel agreed that the costs of the motion would follow the event and that I should fix the costs at $1,250. Costs to the applicant on the motion fixed at $1,250.

Motion granted in part; stay lifted, and security for costs refused.

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TAB 16

Commercial Arbitration and the Courts

Remarks by: Chief Justice Warren K. Winkler Court of Appeal for Ontario

Toronto Commercial Arbitration Society ("TCAS")

Toronto, Ontario

September 7, 2010

It is a pleasure to be here at the inaugural event of the Toronto Commercial Arbitration Society to speak about the relationship between the courts and commercial arbitration.

Let me begin by congratulating you on the creation of this important organization and the work that you are taking on to promote Toronto as a global centre for commercial arbitration. More generally, I herald your efforts to promote the use of private arbitration to resolve commercial disputes where the parties are in agreement on such a model.

With my interest in alternative dispute resolution being well known, it should come as no surprise to this group that I support your goals and the vision that this Society reflects. In my experience, properly conducted private dispute resolution can only serve to enhance the effectiveness and efficiency of the justice system. In other words, it is not in competition with the courts but rather serves a complementary role to them.

There are many reasons why parties choose private arbitration for the resolution of a dispute, all of which I expect will readily come to mind for those of you here tonight. Nevertheless, I will list a few: the parties may wish to choose a specific arbitrator with a developed expertise in the subject matter in dispute; the parties may want to control the timetable as opposed to leaving this to the court administrators; they may require a level of confidentiality not available in a court proceeding; or, they may opt for finality over the delays that appeals from a lower court decision entail. Admittedly, private arbitration is not always simple or inexpensive but it is expeditious.

Looking at it from a broader perspective, however, I see the availability of private arbitration as an access to justice issue. When the parties select arbitration, they free up valuable court time and thus shorten waiting periods for other litigants. To this extent private arbitration is the only expandable resource available to the traditional court system. It can and does have a streamlining effect on the flow of litigation generally. In short, it enhances access to justice.

Finally, and importantly, those of us in the courts respect the freedom of choice of the parties to select private commercial arbitration to resolve their disputes.

I also commend you on choosing to promote Toronto as a location of choice for international and national commercial arbitrations. As all of us in this room know, it is a great place to live, work and do business. We live in a modern and dynamic city, of which we are justifiably proud. Here, in the heart of Toronto, we have corporate head offices, top-flight universities, splendid restaurants, outstanding hotels and a thriving arts community, which is right now in the midst of its annual and world-renowned film festival. Toronto has become, in every respect, a city of the world.

Of special interest to today's topic, Toronto is also a major commercial and financial driver of the Canadian economy. It is the third largest financial centre in North America and twelfth largest in the world.

If you are in business, you need a functioning transportation network, a reliable source of energy, and a healthy and educated workforce. You also need a functioning commercial dispute resolution capacity. There are more than 175 countries in the world. How many jurisdictions offer the advantages of Canada and, in particular, Toronto?

Those advantages depend, in part, on access to fair, timely and expert dispute resolution. Our justice system - including private arbitration - is a critical part of the social and political infrastructure that enables Toronto and Ontario to attract global investors.

Day in and day out lawyers in this city handle countless business deals: selling and developing real estate, financing film projects, restructuring businesses, drafting and entering into sales agreements, and sorting out intellectual property rights. Many of these have national and international components.

Very few of these transactions will ever wind up in a dispute. But, in a competitive and modern society, an effective dispute resolution system must be there for when it is needed. With respect to private arbitration, that means you need competent counsel, a group of skilled arbitrators to choose from and an understanding court system, all working together for a common purpose. Toronto is a place that meets all of these requirements.

Potential users of our commercial dispute resolution system need to be made aware of our well-established, neutral, user-friendly, and expert commercial arbitration capacity, as well as the stellar reputation of our justice system for dealing with commercial disputes. Our arbitration system is structured to respect the need of parties to determine the scope of arbitration and to accommodate the need of parties to craft the process that will work best for their unique commercial interests. Those already familiar with our system will attest to the high-quality of counsel and arbitrators and their well deserved reputation for excellence.

Equally important to the users of our commercial arbitrators, is the knowledge that the courts in Ontario are available to ensure the proper functioning of the arbitral process for all commercial disputes. In this sense the courts are a back-stop for the private arbitration system. That said, where the process

itself is fair to the parties, the courts are prepared to limit their intervention to the degree contemplated by the parties in the arbitral agreement.

We in the courts appreciate the synergy that must exist between an expert commercial arbitration system, and a knowledgeable and effective court system. Courts recognize the benefits that result from attracting fast-paced, global commercial transactions to our jurisdiction. And, we wholeheartedly support your efforts to make Toronto an attractive venue and leading centre for commercial arbitration.

While the parties can, of course, control the role that the courts play in their particular dispute resolution process, there have been a number of innovations introduced in the Superior Court of Justice that seek to enhance its accessibility and responsiveness, when court intervention is essential. In other words, the courts have tried to keep up with the times and to do their part to ensure that their limited role in international and domestic commercial arbitrations is perceived as "value added", as opposed to "interventionist", to the arbitral process.

The Commercial List in the Toronto Region of the Superior Court of Justice is a prime example of this innovation. Created in 1991, it has become a model in Canada for the provision of timely and effective adjudication of commercial disputes. Deploying special procedures, the Commercial List provides fast-paced, time-sensitive decision-making. It has a cadre of judges who know what is happening in the corporate and commercial world. They understand that money flows rapidly and that time is of the essence. There are many recent examples of our court's willingness to address disputes on a "real time" basis.

Another key to its success has been the assigning of judges to cases based on their areas of expertise. The world is becoming more complex and more specialized, and the justice system is no exception, or at least it should not be. Seasoned judges presiding over familiar topics are more efficient, more attuned to the nuances of a case, as well as being more receptive to the needs of litigants.

The courts do have a deep familiarity, knowledge and respect for the world of commercial arbitration. We understand the value to the parties of this form of dispute resolution while also recognizing the important, compatible and limited role that we must play when called upon. Other jurisdictions like England and the state of Delaware have been very successful in beefing up their commercial courts for this very reason. Ontario has what it takes to equal this success.

I am firmly convinced the presence of such a responsive, independent, impartial and effective court gives Ontario an inside track when corporations are making decisions about where to arbitrate their disputes. In promoting Toronto as a centre of excellence for commercial arbitrations, this positive and dynamic relationship between the world of ADR and the courts is a significant additional benefit to the parties.

It is, therefore, a worthwhile goal for all of us working in the justice system to actively support the work of TCAS to raise domestic and international awareness of the strengths of our commercial arbitration system, of our civil court system, and of the vibrant relationship between them. The two, the

world of private arbitration and our civil courts, go together hand in hand. Our courts and organizations like TCAS should find ways to work together to achieve that goal.

We have the expertise, the experienced counsel and arbitrators, as well as the judicial infrastructure, to attract commercial arbitration work to our jurisdiction. Let's make sure that the word gets out!

Thank you.

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TAB 17

The Honourable James M. Farley, Q.C.: International Advocate for the Canadian Insolvency Process and Cross-Border Cooperation

*Pamela L. J. Huff**

I. INTRODUCTION

When reflecting on the Farley era, 17 years from judicial appointment to retirement from the Superior Court of Justice (Ontario), it is important to note his unprecedented activism as a judge in the international forum. It is important to recognize the messages that he delivered to the international community, as a judicial ambassador for Canada.

The Honourable James M. Farley, Q.C. is a member of and participant in an impressive array of multinational associations: International Bar Association (IBA); International Law Institute; International Insolvency Institute; American Bankruptcy Institute; American College of Bankruptcy; American Law Institute (ALI); and the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL). He has been a participant in the Multinational Judicial Colloquia, co-sponsored by the United Nations Commission on International Trade Law (UNCITRAL) and INSOL, held for the first time in 1995 and every two years since then. He is currently Co-chair of the Judicial Working Group for Commercial Insolvency Proceedings for the World Bank and continues to be involved with the Working Group on Insolvency Law of UNCITRAL.

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* Pamela L. J. Huff is a partner at Blake, Cassels & Graydon LLP. She gratefully acknowledges the insight provided by the Honourable James M. Farley, Q.C. in the preparation of this article.

What led James Farley from his leadership role on the Commercial List in Toronto to the world stage? A combination of interest, timing, and opportunity.

1. Interest

James Farley always had an interest in the global community. Growing up in Guelph was not a parochial experience. Rather, as the only son of a graduate of the Ontario Agricultural College (which after World War II had a large international graduate student contingent), he witnessed his parents' home become the home for many a foreign student. Jim Farley learned about diversity and the global community in his own backyard. In 1962, he travelled to Oxford as one of the eleven Rhodes Scholars from Canada. He returned to the University of Toronto Law School in 1964, with strong and lasting friendships with fellow Rhodes Scholars from all over the world as well as a strong impression and first-hand appreciation of the global community.

2. Timing

Timing is everything, and James Farley was appointed to the bench in 1989 at a time when the global economy was no longer a topic of academic consideration, but a reality. In that global economy, international insolvencies are bound to occur, which drove academics, judges, lawyers, government officials, and other professionals throughout the 1990s to consider ways of effectively and efficiently dealing with the troubled multi-national enterprise in order to maximize value. While assets may be located in different jurisdictions, corporations in the global economy have no boundaries, creating new challenges when such corporations or corporate groups are insolvent.

During his era as a judge, there was an explosion of interest in the globalized economy and the need for coordinated insolvency processes. That interest resulted in the IBA's Cross-Border Insolvency Concordat, adopted by the IBA in September 1995. The ALI adopted its Guidelines Applicable to Court Communications in Cross-Border Cases in 2000, based upon examples of actual cross-border cases involving protocols. UNCITRAL adopted its Model Law on Cross-Border Insolvency in 1997. The UNCITRAL Model Law was being formulated at the time of Canada's 1997 amendments to the *Companies' Creditors Arrangement Act*[1] (CCAA) and the *Bankruptcy and Insolvency Act*[2] (BIA), which introduced the cross-border recognition provisions in s. 18.6 of

1 R.S.C. 1985, c. C-36.
2 R.S.C. 1985, c. B-3.

the *CCAA* and s. 268(3) of the BIA. The UNCITRAL Model Law has now been incorporated in Chapter 47, the recent amendments to the CCAA and BIA passed but not yet in effect. Farley was part of the consultative process in each of these initiatives of UNCITRAL, INSOL, the IBA, and the ALI, along with members of the judiciary, the bar, and government officials from many countries. In Farley's own words, "there seem to be many threads which have been developing over the past decade, all with a view to making a suit to fit the requirements of international insolvency".[3] Farley was part of the fabrication of that suit.

3. Opportunity

Becoming a judge was the opportunity for Farley for meaningful international participation. Farley had the opportunity to bring home to Canada, to his courtroom, the messages that he was receiving from and delivering to his international colleagues. In his judgments, he reflected on the comity and co-operation that are necessary in the bankruptcy and insolvency context, but also in the context of all cross-border litigation. He applied the principles of the IBA, Concordat, the ALI Guidelines, and the Model Law to the cases before him.

Farley had the opportunity to preside over the Everfresh restructuring, where the IBA Concordat was used to build the first ever international general protocol approved by both U.S. and Canadian courts. Previous protocols had been more limited in scope. *Everfresh*[4] catapulted Farley into the limelight as a spokesman for coordinated international insolvency proceedings.

In *Babcock & Wilcox Canada Ltd., Re*,[5] Farley fleshed out the relatively new s. 18.6 of the *CCAA*, a case involving the recognition and enforcement of a U.S. *Bankruptcy Code*, Chapter 11 stay of proceedings with respect to a solvent Canadian subsidiary of the main U.S. parent and applicant in the U.S. proceedings. In *Systech Retail Systems*, *Matlack Systems* and *PSI Net Ltd., Re*, cases over which Farley presided, the ALI Guidelines for Court to Court Communications were employed as an integral part of the cross-border insolvency protocols, approved by the Canadian and U.S. courts. Being a judge faced with such cross-border insolvencies was an opportunity.

Perhaps the opportunity most worthy of note has been his participation in the bi-annual UNCITRAL/INSOL Multinational Judicial Colloquia. UN-

3 Justice James Farley, "Litigating the Commercial Dispute in a Globalized Economy: Multi-Jurisdictional Disputes — A Judicial Perspective on Globalization" (November 15, 2003), http://www.globalinsolvency.com at 27.

4 See *Everfresh Beverages, Inc., Re* (1995), 1995 CarswellOnt 2336 (Ont. Gen. Div. [Commercial List]); and Case No. 95 B 45405 (Bankr. S.D.N.Y., December 20, 1995).

5 (2000), [2000] O.J. No. 786, 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]).

CITRAL has six working groups to prepare the substantive preparatory work on topics within the Commission's work. One such working group is Insolvency Law. UNCITRAL decided in 1995 to develop a legal instrument relating to cross-border insolvency cases. The project started in 1994 at an international insolvency colloquium in Vienna, sponsored by INSOL and UNCITRAL. Such an ambitious project moved quickly. More than 70 countries, including Canada, and international associations participated in the development process. UNCITRAL adopted the Model Law on May 30, 1997, and the United Nations General Assembly adopted the resolution on December 15, 1997.

As part of the consultative process, UNCITRAL and INSOL jointly sponsored the First Multinational Judicial Colloquium on Cross-Border Insolvency Law in March 1995, held in Toronto. It was chaired by the Right Honourable Lord Hoffmann, a Rhodes Scholar himself, Farley's tort tutor at Oxford, and a personal friend. The panel at the Evaluation Session at the end of the First Colloquium included the Honourable Mr. Justice Farley, as he then was, the Honourable Burton R. Lifland (U.S.A.), the Honourable Jean-Luc Vallens (France), and Justice D. P. Wadhwa (India). Lord Hoffmann made the following comments at the Evaluation Session:

> The object of this evaluation is for each of us here on the platform to try to distil from what emerged in yesterday's discussion something which will be of value to UNCITRAL in its efforts to promote an international bankruptcy convention.
>
> Gerold Herrmann said in his opening remarks that he wished to proceed on two tracks — judicial co-operation and a convention for access and recognition and a possible third track, a model code, was realistically postponed to a later date.
>
> I think that Gerold Herrmann was, therefore, right and it is curious how most of the most important and sensible things in this Colloquium seem to have been said in the first 10 minutes yesterday. *He was right in his opening remarks when he said it was time to stop congratulating ourselves on the individual cases in which we had achieved co-operation with foreigners and to concentrate instead not on the bespoke tailor-made end of the market but, on designing some ready-made suit which the judge could take off the legislative peg. In other words, we need some degree of certainty and predictability, which can only come from a basic convention on access and recognition.*[6]
> (Emphasis added).

Lord Hoffmann retired from the subsequent meetings as he was being quickly elevated through the ranks to the House of Lords, but he inspired his former student and friend to pursue the principles discussed at this First Colloquium and to pursue such a convention for access and recognition. Jim Farley

6 The Right Honourable Lord Hoffmann *et al.*, "Address" (Evaluation delivered at the Multinational Judicial Colloquium: UNCITRAL – INSOL International, Toronto, Canada, March 22-23, 1995), www.uncitral.org.

was a participant at each subsequent colloquium and a proponent of the adoption globally of the Model Law.

The objective in developing the Model Law, first discussed at UNCITRAL gatherings in Vienna in 1994 and then Toronto in 1995, was to establish a set of uniform principles that would deal with the requirements that a foreign insolvency representative would need to meet in order to have access to the courts of other countries in cross-border cases. The Model Law project, however, evolved into a much broader work and ultimately became an agreed-upon international model for domestic legislation dealing with cross-border insolvencies that could be adopted anywhere in the world with or without variations that would reflect the local domestic practices and procedures.

The primary goal of the Model Law is to facilitate domestic recognition of foreign insolvency proceedings and to increase international cooperation in multinational cases. Thus, the Model Law contemplates a high level of cooperation between courts in cross-border cases. Domestic courts are directed to cooperate "to the maximum extent possible" with foreign courts and foreign insolvency representatives.[7] The courts may communicate directly with each other and may request information or assistance directly from the foreign court or from the foreign insolvency representative.[8] Cooperation can, for example, consist of appointing someone to act on the direction of the court, communicating information by any means considered appropriate by the court, and coordinating the administration of the debtor's assets and affairs in both jurisdictions.[9] The courts may also approve or implement agreements concerning the coordination of concurrent proceedings involving the same debtor.[10]

By the Sixth Colloquium in March 2005, the UNCITRAL Model Law had been adopted by UNCITRAL and the General Assembly, the enactment of Chapter 15 of the U.S. *Bankruptcy Code* based on the Model Code was to be effective October 17, 2005, and the Senate Committee in Canada had recommended its adoption. Shortly thereafter, Bill C-55 was introduced on June 3, 2005 to amend the CCAA and BIA to, among other things, adopt the Model Law. Lord Hoffmann's goals enunciated at the First Colloquium had become a reality.

At the Evaluation Session following the Sixth Colloquium, Farley had the following comments:

> You may have seen a number of people wandering around this conference centre with orange bags. With some degree of investigation I determined they were not tourists from Ukraine but in fact they were with the Australian division of the International Academy of Pathology and so they do have a commonality

7 UNCITRAL Model Law, Article 26.
8 *Ibid.*, Article 25.
9 *Ibid.*, Article 27.
10 *Ibid.*, Article 30.

> with insolvency. Pathology, as I understand it, is not restricted to an examination of dead bodies, although that is sometimes the case in both of our professions. Rather it is to examine the cause of disease and to see whether or not it can be prevented or put into remission or in fact cured. That of course would be the successful rehabilitation of a diseased company. Let me deal with the cross-border court practice.
>
> Insolvency on a purely domestic basis is inherently chaotic enough with the need to maximize value and to ensure that a viable corporate enterprise can be restructured. This is with the objective of preserving the vital capital not only of plant and equipment but also a trained workforce (and incidentally minimizing social disruption) and established supply arrangements, a significant distribution chain and a loyal customer base. Dealing with insolvency in a domestic case requires that matters be dealt with on a timely basis: that's real time litigation requiring rather quick decisions on a timely basis versus autopsy litigation which can be dealt with tomorrow, or can be dealt with next month, or can be dealt with next year. Real time litigation compounds the difficulty when you get involved in a cross-border situation.
>
> Globalization has [ensured] and will continue to ensure that business enterprises will stretch across national borders. The value of the whole will always be greater than the sum of the constituent parts. That will need cooperation and communication between, or as my grammar school teacher would say when dealing with more than two, among the jurisdictions involved.
>
> . . .
>
> I never failed to learn something valuable when I go to another jurisdiction or to sessions like this. I have done so again with this Judicial Colloquium and I would like to express my thanks again to UNCITRAL and INSOL. You too can contribute not only by using the tools, by spreading the word, by planting and nurturing the seed, by helping with getting the communication guidelines translated, but also by going back to your jurisdiction and sharing your experiences and by making suggestions as to the improvement in the approaches and systems. We have not finished the job; we are part way there; we need your assistance and help.[11]

This passage reflects themes that appear regularly in Jim Farley's speeches, his papers and his judgments: the ability of the judge to learn from the laws and procedures in other jurisdictions and to seek improvements in his or her system; the importance of the judge in insolvency matters being available for "real time litigation", not "autopsy litigation"; the need for cooperation and communication among the jurisdictions involved in a cross-border insolvency in order to preserve value of the whole; and the fact that globalization demands

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11 The Honourable Justice James Farley *et al.*, "Address" (Evaluation delivered at the Sixth Multinational Judicial Colloquium: UNCITRAL – INSOL International, Sydney, Australia, March 12-13, 2005), http://www.uncitral.org.

a dynamic and responsive bench and bar to respond to the urgency of a global enterprise in distress.[12]

The best way to appreciate Farley's vision of the global economy and the need for an effective and efficient convention amongst countries to deal with international insolvencies is through his own words. The following is a retrospective of the messages delivered by Jim Farley to the international community.

II. FARLEY ON GLOBALIZATION

In many of his writings, Farley reflected on the global economy. He viewed globalization as a tool. One of sharing a maximized wealth, if used properly, to assist poorer countries to catch up with wealthier countries for their mutual advantage. Farley saw business on a worldwide basis increasingly becoming more and more competitive, while at the same time the world economy becomes increasingly more interdependent. To enjoy the higher standard of living that goes with that, countries have to be flexible and adaptable to keep up with that competition. "We really do not have a choice of standing still; for if we did, we would be opting out and so becoming poorer."[13] Farley frequently reflected on his role as a judge and the role of the judiciary in the global economy. "Businesspersons and investors crave certainty; they also require that they be dealt with fairly and reasonably, and further that they have access to courts that dispense non-discriminatory predictable justice on a timely basis."[14]

Not only predictability but agility is required to deal with cross-border insolvency matters. Agility can only be achieved through discussion, communication, and guidelines fostered, adopted and jointly advocated by the international community. In Farley's words:

> This Judicial Colloquium is a learning experience for us all. It is a sharing of views and a discussion of various approaches to provide our respective public, that's both domestic and international interested parties, with more effective and efficient insolvency regime; which would lead to a greater predictability of result on a more timely basis. This will not only assist in negotiating self-resolution but also preserve and maximize value for the benefit of all concerned. Our legal systems have developed in relative isolation; they have been built up on a jurisdictional basis in a time when there was not so much international

12 See also Mr. Justice J. M. Farley, Bruce Leonard & John N. Birch, "Co-operation and Co-ordination on Cross-Border Insolvency Cases" (Paper presented at the First Annual Insolvency Review Conference, Faculty of Law, University of British Columbia, February 6, 2004), American College of Bankruptcy, www.amercol.org/images/Coordination%20of%20Cross-Border%20Insolvencies3.doc.

13 *Supra*, note 3 at 16.

14 *Ibid.*, at 5.

the innovative functional ways that have been developed over the past decade to deal with these matters, such as the Concordat of the International Bar Association and also by using the Model Law as a "prototype" to develop tailored protocols. We need to take the message back to our colleagues because they did not have the good fortune of coming to Munich. They need to share our experience, even if remotely and indirectly.

> *So I believe that we have learned from this colloquium. Take back this knowledge to your colleagues. Build upon it, because the world is becoming smaller and more integrated. What you do in your country will affect what happens in my country and vice versa.*[17] (Emphasis added.)

Farley took on the task of spreading the word with a greater understanding and appreciation of the difficulties involved in insolvency matters, particularly of those that have international implications. He believed that progressive methods to efficiently and effectively handle cross-border insolvencies would result in greater public confidence in the insolvency regime and in the judiciary, with the goal of minimizing loss, maximizing value, recycling scarce resources, saving jobs, and avoiding social disruption.[18]

IV. FARLEY ON "REAL TIME LITIGATION"

Anyone who has read a Farley paper, heard a Farley speech or attended a panel discussion with Farley participating has heard his views on "real time litigation". This concept resonated for Farley in the insolvency context. It is sprinkled through his many judgments and a repeated theme of his messages to the international community. The following passage is a fulsome expression of his perspective on real time litigation and the role of the judge in making it happen in the insolvency context:

> Minimizing dead time is important to avoid unnecessary erosion of value. The court must be capable of being accessed on a timely basis as required. Insolvency is what I term "real time" litigation which must take precedence over what I call "autopsy" litigation, which is not adversely affected if it is dealt with tomorrow, next month or the next year. Necessity dictates that the queue must be jumped but with a reasonable and realistic timetable which has to be dictated by the controller or the judge. The insolvency case must be entrusted to a judge who has a commercial mentality, awareness and approach. He should not only rely upon his own skills and experience, but know how and when to rely upon the business expertise and experience of others in the case. He should be one who

17 *Supra*, note 15.

18 The Honourable Justice James Farley *et al.*, "Address" (Evaluation delivered at the Fifth Multinational Judicial Colloquium: UNCITRAL – INSOL International, Sydney, Australia, September 21-23, 2003), www.uncitral.org.

> The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:
>
> > Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (Emphasis added)
>
> *Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule — there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process.

Farley viewed such principles of comity and cooperation as necessary in the bankruptcy and insolvency context — and also in the context of all cross-border litigation. In *Babcock & Wilcox Canada Ltd., Re*,[21] Farley granted the relief requested under the relatively new s. 18.6 of the CCAA. Farley took the op-

21 (2000), [2000] O.J. No. 786, 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]).

portunity in this judgment to express his views on comity and cooperation, the role of local courts in multi-jurisdictional insolvencies, and court-to-court communications:[22]

> ... Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:
>
> (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
>
> (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
>
> (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside
>
> (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.
>
> (e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:
>
> (i) the location of the debtor's principal operations, undertaking and assets;
>
> (ii) the location of the debtor's stakeholders;
>
> (iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

22 *Ibid.*, at para. 21.

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

Babcock was the first of a number of cross-border insolvencies that engaged s. 18.6 and the principles enunciated by Farley.

VI. FARLEY ON COURT-TO-COURT COMMUNICATIONS

Farley is an advocate of court-to-court communications, also recognizing that procedural fairness must be addressed. From his participation in the First Judicial Colloquium in Toronto in 1995 to date, he has noted a significant shift in acceptance for court-to-court communication. In 1995, communication among the courts was somewhat of a controversial matter. Upon reflection and with the experience of court-to-court communications in insolvency cases, the desirability of facilitating communication was recognized.

> Communication between courts — is that not a radical step? Are there no fundamental issues of procedural fairness involved? The answer is no to the first question and yes to the second, but that procedural fairness questions have been well addressed over the past decade. There has always been communication between courts — in the past this has usually been through one court issuing an order accompanied by reasons and the other court responding in kind with communications being through counsel in either jurisdiction. However, this is rather time consuming and it does not lend itself to brainstorming problems/solutions in real time.
>
> The need for better, that is more efficient, communications was well illustrated

> by the *Maxwell Communications* case of the early 90s. The U.S. and English judges, Brozman and Hoffmann respectively, sensed that the information they were receiving in their respective courts was askew. They independently raised with their respective counsel that a protocol between the two courts would be helpful, not only to resolve an impasse, but also to facilitate better and more timely exchange of information. Interestingly enough with the protocol in place which provided for an intermediary, these two distinguished judges never spoke directly to each other until they met for the first time at an international insolvency conference shortly after the successful conclusion of the Maxwell case. Needless to say that they have become fast personal friends.[23]

Farley was given the opportunity to put court-to-court communication in practice two months after the adoption of the Concordat. Farley was seized with the Everfresh restructuring. The operations of Everfresh were legally and functionally intertwined in both Canada and the U.S. By coincidence, the case came before Judge Lifland and Justice Farley, both of whom had been involved in developing the Concordat. The judges on either side of the border enthusiastically supported the concept of developing a more general protocol based on the Concordat principles. A protocol was developed in a few weeks by the practitioners and approved by both courts.

Matters were proceeding more quickly in Canada than in the U.S. The protocol was then utilized to hold what was the first cross-border joint hearing so that the pace of proceedings on each side of the border could be coordinated. The hearing was by way of telephone conference with counsel participating. Although innovative at the time, subsequent court-to-court communications have used video conferencing, or satellite hook-ups, with counsel in different jurisdictions making submissions at joint hearings in order to effectively manage a cross-border case.

VII. FARLEY ON JUDICIAL EDUCATION

Farley has always praised the valuable assistance and education he received from the counsel who appeared before him. He has praised, in the international community, the quality and integrity of the insolvency bar in his home country. He believes in the importance of an educated judiciary and the need for continuing education. Farley had the interest and opportunity to learn from the international community as well as the local insolvency bar. In his words:

> I would make the general proposition that no one and particularly a judge is immune from the need for education and particularly education on a continuing basis. This proposition has been supported in comments made at this Colloquium

23 *Supra*, note 3 at 23.

> whether the judges be from common law, civil law or mixed jurisdictions. I was appointed as a common law judge a dozen years ago from a corporate background. I can confirm that I needed education then and I have continued to pursue education from every available source. In particular Canadian judges have access to educational programmes put on by practitioners (both legal counsel and insolvency practitioners who have a very good grounding in Canada in insolvency matters).
>
> Lastly I would indicate that there must be a co-ordinated training programme. Ideally this would be co-ordinated between the judiciary and those of the insolvency practitioners/counsel who appear in your courts and this needs to be co-ordinated in such a way that each is supportive of the other. There should not be any restriction with respect to judges training judges; there should be the facility for judges to assist in training the practitioners and for the practitioners to assist in training the judges. I would observe that in many of our countries there are professional associations in which judges can join as liaison members. Those judges can participate in their programmes, both as resource people and as people who enjoy the benefits of the programmes that are being put on.[24]

VIII. CONCLUSION

What is apparent from these passages; from Farley's articles; from his speeches and judgments; from his involvement with UNCITRAL, INSOL, IBA and other international associations? Jim Farley had an interest in, and ample opportunity as a judge for, international activism in the globalized economy. He took that opportunity. He was our representative in the pursuit of the UNCITRAL Model Law, now the subject of a second round of considerations at the next UNCITRAL session. He will continue to be involved. He is the Canadian player on the international team and proud of the respect he encounters for Canada and the Canadian insolvency process. He put Canada in the forefront, not in the back seat, and was an ardent student travelling abroad, seeking ways to improve our systems and our participation in the global economy.

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24 The Honourable Justice James Farley *et al.*, "Address" (Evaluation delivered at the Fourth Multinational Judicial Colloquium: UNCITRAL–INSOL International, London, England, July 16-17, 2001), www.uncitral.org.

TAB 18

SLMsoft.com Inc. v. Ernst & Young Inc. in its Capacity as Trustee in the Estate of Rampart Securities Inc.

Ernst & Young Inc. in its Capacity as Trustee in the Estate of Rampart Securities Inc. v. SLMsoft.com Inc. et al.

[Indexed as: SLMsoft.com Inc. v. Rampart Securities (Trustee of)]

78 O.R. (3d) 521
[2005] O.J. No. 4847
Court File No. 231/05

Ontario Superior Court of Justice
Divisional Court,
Epstein J.
November 10, 2005

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Appeals -- Fresh evidence -- Due diligence -- Due diligence requirement applying to period between release of reasons and time when presiding judge becomes functus officio -- Appellant having fresh evidence in hand after presiding judge's reasons were released and before order was issued and entered -- Due diligence aspect of test for admission of fresh evidence on appeal not met -- Evidence should generally not be admitted if by due diligence it could have been adduced before presiding judge was functus officio.

Appeals -- Fresh evidence -- Leave to appeal -- Section 134(4)(b) of Courts of Justice Act not permitting party seeking leave to appeal to adduce fresh evidence on application for leave to appeal -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(4)(b).

Appeals -- Leave to appeal -- Applicant applying for leave to appeal order granting Mareva injunction -- Leave denied -- No

conflicting decisions existing -- Exercise of discretion that leads to different result because of different circumstances not constituting "conflicting decision" for purposes of test for leave to appeal -- Case not raising issue of general importance or significant jurisprudential value.

An action was commenced against the defendant trustee in bankruptcy alleging, amongst other things, that certain guarantees the trustee held of related accounts of the bankrupt were altered after their execution. The trustee counterclaimed against various parties, including S Inc., alleging that they engaged in a conspiracy to strip value and capital from the bankrupt. The trustee obtained a Mareva injunction restraining S Inc. from dealing with any of its assets. The motion judge found that the trustee was almost certain to succeed at trial in establishing the elements of the conspiracy and that there was a real risk of S Inc. [page522] dissipating or disposing of its assets so as to defeat any attempt by the trustee to realize on any judgment it might obtain against S Inc. in the counterclaim. S Inc. brought an application for leave to appeal that order, and also brought a preliminary motion for leave to adduce new evidence on the leave application.

Held, the motion and application should be dismissed.

The court did not have jurisdiction to consider the motion for leave to adduce fresh evidence. Section 134(4)(b) of the Courts of Justice Act, as it is currently worded, does not allow a party to seek to adduce fresh evidence on an application for leave to appeal. Even if the court had jurisdiction to consider the motion, the test for the admission of fresh evidence was not met. Counsel for S Inc. had the fresh evidence in hand after the hearing of the Mareva injunction motion but several weeks before the motion judge released his reasons. Counsel did not immediately bring the fresh evidence to the motion judge's attention because he did not appreciate its importance, as he did not then know how the motion judge was going to rule or the basis for the ruling. However, five months elapsed between the release of the motion judge's reasons and the issuing and entering of the order. No explanation was given as to why the evidence was not brought to

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the motion judge's attention durin g that period, when counsel was fully aware of the reasoning behind the decision and the motion judge was not yet functus officio. Fresh evidence should generally not be admitted if, by due diligence, it could have been adduced before the presiding judge was functus officio.

The test for leave to appeal was not met. There were no decisions in conflict with the motion judge's decision. An exercise of discretion that leads to a different result because of different circumstances is not a "conflicting decision". Moreover, there is no confusion regarding the test for a Mareva injunction. There was no issue of general importance or significant jurisprudential value raised by this matter that would warrant appellate review. While the matter was clearly of considerable importance to the parties, it did not involve matters of public importance and matters relevant to the development of the law and the administration of justice.

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90207 Canada Ltd. v. Maple Leaf Village Ltd., [1981] O.J. No. 2200, 24 C.P.C. 152 (H.C.J.); Dion v. CIBC World Markets Inc., [2002] O.J. No. 5512 (S.C.J.); Gudaitis v. Abacus Systems Inc., [1992] B.C.J. No. 251, 65 B.C.L.R. (2d) 1, 41 C.P.R. (3d) 37, 3 C.P.C. (3d) 1 (C.A.); I.F. Propco Holdings (Ontario) 36 Ltd. v. 1228851 Ontario Ltd., [2002] O.J. No. 1667 (Div. Ct.); Lafleur v. Fraser, [2000] O.J. No. 3647 (S.C.J.); Malvern Garden Centre and Landscaping Ltd. v. Gullo, [1996] O.J. No. 2958 (C.A.); Robinson v. Ontario (Securities Commission), [1994] O.J. No. 4185, 3 C.C.L.S. 192 (C.A.), consd

R. v. Palmer, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22 (sub nom. Palmer and Palmer v. R.), apld

Other cases referred to

663309 Ontario Inc. v. Bauman, [2000] O.J. No. 2674, 190 D.L.R. (4th) 491 (S.C.J.); 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, [2001] S.C.J. No. 61, 55 O.R. (3d) 782n, 204 D.L.R. (4th) 542, 274 N.R. 366, 2002 C.L.L.C. 210-013, 2001 SCC 59, 17 B.L.R. (3d) 1, 11 C.C.E.L.

(3d) 1, 8 C.C.L.T. (3d) 60, 12 C.P.C. (5th) 1, supp. reasons [2000] S.C.C.A. No. 141, 10 C.C.L.T. (3d) 292; Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1, 32 Man. R. (2d) 241, 15 D.L.R. (4th) 161, 56 N.R. 241, [1985] 2 W.W.R. 97, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145; [page523] Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc. (2003), 62 O.R. (3d) 647, [2003] O.J. No. 6, 28 C.P.C. (5th) 258 (C.A.), supp. reasons [2003] O.J. No. 2588 (C.A.); Children's Aid Society of the Niagara Region v. DeGuire, [2005] O.J. No. 1373, 15 R.F.L. (6th) 117 (Div. Ct.); Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, 69 C.P.R. (2d) 62, 30 C.P.C. 205 (C.A.); Comtrade Petroleum Inc. v. 490300 Ontario Ltd. (1992), 7 O.R. (3d) 542, [1992] O.J. No. 652, 6 C.P.C. (3d) 271 (Div. Ct.); Culbert v. Agosti, [1993] B.C.J. No. 2238, 20 C.P.C. (3d) 349 (S.C.); Duracell v. Konjevic, [1998] O.J. No. 4265 (Gen. Div.); Greslik v. Ontario Legal Aid Plan (1988), 65 O.R. (2d) 110, [1988] O.J. No. 525, 30 O.A.C. 53, 28 C.P.C. (2d) 294 (H.C.J.); MacMillan Bloedel Ltd. v. Mullin, [1985] B.C.J. No. 2077, 66 B.C.L.R. 258 (C.A.); Minnema v. Archer Daniels Midland Co., [2000] O.J. No. 1685, 47 C.P.C. (4th) 344 (S.C.J.); SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of), [2004] O.J. No. 3290, 4 C.B.R. (5th) 105 (S.C.J.); United States of America v. Yemec (2003), 67 O.R. (3d) 394, [2003] O.J. No. 3863, 233 D.L.R. (4th) 169 (S.C.J.); Way v. Deslauriers, [2005] O.J. No. 3245 (S.C.J.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134

Rules and regulations referred to

Court of Appeal Rules, B.C. Reg. 297/2001, Rule 31

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 62.02(4), 63.02 [as am.]

Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rule 499

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Authorities referred to

Sharpe, R.J., Injunctions and Specific Performance, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2004)

APPLICATION for leave to appeal the judgment of Ground J., [2004] O.J. No. 3290 (S.C.J.); MOTION for leave to adduce fresh evidence.

Kenneth Prehogan and Paul D. Guy, for defendants by counterclaim (moving party).

M.J. Dermer and Craig Hill, for plaintiff by counterclaim (respondent).

[1] EPSTEIN J.:-- On August 9, 2004, Justice Ground granted a Mareva injunction that restrained a securities brokerage firm, St. James Securities Ltd., from dealing with any of its assets. St. James is seeking leave to appeal that order to the Divisional Court. The motion is accompanied by St. James' preliminary motion for leave to adduce new evidence on the leave application. Therefore, the issues before me involve not only the application of the tests for leave to appeal to the Divisional Court set out in rule 62.02(4) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 but also whether I have jurisdiction pursuant to s. 134(4)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA") to entertain a motion to adduce fresh evidence and, if so, whether the [page524] proposed new evidence should be admitted for the purpose of determining the leave application.

I Background

[2] On October 24, 2001, Ernst & Young Inc. was appointed Trustee in Bankruptcy of the estate of Rampart Securities Inc. Following Rampart's bankruptcy, SLMsoft.com commenced proceedings against the Trustee alleging, amongst other things, that certain guarantees the Trustee held of related accounts at

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Rampart were altered after their execution. The Trustee defended the action and counterclaimed against various parties including SLM, John Illidge, David Cathcart and Patricia McLean.

[3] In January 2004, the Trustee sought leave to add St. James as a defendant to the counterclaim. St. James is a wholly-owned subsidiary of St. James Holdings Inc. ("St. James Holdings"), an Ontario corporation that was incorporated for the sole purpose of acting as the only shareholder of St. James.

[4] At all material times the directors of St. James Holdings and St. James were Illidge, Roderick DeCourcy-Ireland and Edward Ing. McLean was a consultant with St. James between September and November 1999.

[5] In October 1999, the shareholders of St. James Holdings voted in favour of winding down St. James. In November 1999, St. James and Northern Securities Inc. reached an agreement under which Northern would, amongst other things, accept the transfer from St. James of its customer accounts. By letter dated November 9, 1999, Northern and St. James authorized CT Securities, the carrying broker for all accounts at St. James, to transfer all of the accounts residing under St. James to Northern, effective November 15, 1999.

[6] Approximately five weeks after the transfer took place, Northern attempted to disavow its responsibility for some of the accounts it had accepted. St. James denied responsibility for any of its former customer accounts. On January 6, 2000, the Investment Dealers Association of Canada (the "IDA") confirmed that effective November 16, 1999, all of St. James' customer accounts became accounts of Northern.

[7] In November 1999, Illidge joined Rampart's parent corporation, Rampart Mercantile Inc.

[8] In December 1999, Cathcart and McLean joined Rampart. The Trustee's amended counterclaim alleges that St. James, Illidge, Cathcart and McLean, amongst others, engaged in a

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conspiracy to strip value and capital from Rampart. [page525]

[9] In August 2002, McLean became the sole officer and director of St. James and St. James Holdings.

[10] Both St. James and McLean have defended the Trustee's counterclaim. They deny, amongst other things, that they conspired with anyone to cause damage to Rampart. McLean has also counterclaimed against Rampart for various relief.

[11] St. James' only assets are TSX shares, which as of January 2004, had an estimated value of $6.5 million. Pursuant to a Memorandum of Agreement, dated July 26, 2002, St. James intends to dispose of these assets and allocate the proceeds amongst its creditors and shareholders.

[12] It was against this background that the Trustee brought a motion for a Mareva injunction restraining St. James from dealing with its assets. In his reasons granting the Order from which St. James now seeks leave to appeal, Justice Ground held:

> ... I find that the Trustee has met the two prongs of the test for the issuance of a Mareva injunction in that I have found that the Trustee is almost certain to succeed at trial in establishing the elements of the conspiracy by the Co-Conspirators as pleaded and that there is a real risk of St. James Securities dissipating or disposing of its assets so as to defeat any attempt by the Trustee to realize on any judgment it may obtain against St. James Securities in the Counterclaim in the within action.

(SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of), [2004] O.J. No. 3290, 4 C.B.R. (5th) 105 (S.C.J.), at para. 24)

II Issues

[13] There are two issues before me:

(a) Should St. James be granted leave to rely upon fresh evidence?

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(b) Should St. James be granted leave to appeal the Order?

(a) Should St. James Securities be granted leave to rely upon fresh evidence?

[14] St. James seeks leave to rely upon a letter to McLean from the IDA (the "IDA letter") in support of this motion, and, if leave is granted, on the appeal. The letter advises McLean that the IDA has completed its investigation into the operations and adequacy of the books and records of St. James, as well as the supervisory and procedural controls at Rampart, and that: "[h]aving reviewed the findings of the investigation, Enforcement staff determined that disciplinary proceedings would not be initiated against [McLean] in this case. As a result, we are closing our file in this matter." [page526]

[15] I must first consider the court's jurisdiction to grant leave to adduce fresh evidence on a leave application.

(i) Interpretation of s. 134(4)(b) of the CJA

[16] Section 134(4)(b) of the CJA states: "Unless otherwise provided, a court to which an appeal is taken may, in a proper case, ... receive further evidence by affidavit ... to enable the court to determine the appeal."

[17] The Trustee argues that I have no jurisdiction to consider the motion. St. James' motion is not an appeal; it is a motion seeking leave to appeal. Counsel for the Trustee submits that the wording of s. 134(4)(b) of the CJA makes it clear that the provision has no application to a motion for leave to appeal. The Trustee also relies on authorities such as 90207 Canada Ltd. v. Maple Leaf Village Ltd., [1981] O.J. No. 2200, 24 C.P.C. 152 (H.C.J.), at para. 5 ("Maple Leaf"); Minnema v. Archer Daniels Midland Co., [2000] O.J. No. 1685, 47 C.P.C. (4th) 344 (S.C.J.) ("Minnema"); and Lafleur v. Fraser, [2000] O.J. No. 3647 (S.C.J.) ("Lafleur") in support of the proposition that on a leave application, the court has no jurisdiction to grant leave to adduce fresh evidence.

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[18] The applicant's position is that a purposive reading of s. 134(4)(b) of the CJA leads to the conclusion that the provision should be interpreted with sufficient flexibility so as to permit motions for leave to adduce fresh evidence not only on appeals but on applications for leave to appeal, as well. Counsel for St. James further argues that Maple Leaf is distinguishable and has been misinterpreted in subsequent decisions dealing with this issue.

[19] For the following reasons, I am of the view that s. 134(4)(b) of the CJA, as it is currently worded, does not allow a party to seek leave to adduce fresh evidence on an application for leave to appeal. I come to this conclusion reluctantly as there are compelling policy reasons why the court should, in appropriate circumstances, be entitled to consider fresh evidence for the purpose of deciding whether leave to appeal ought to be granted.

[20] I start with a review of the jurisprudence on this issue.

[21] The first case to comment on the application of the provision that preceded s. 134(4)(b) of the CJA on applications for leave to appeal is Maple Leaf. This case involved an application for leave to appeal from a decision of Justice Catzman (as he then was) under Rule 499 [Rules of Practice and Procedure, R.R.O. 1980, Reg. 540] (the predecessor of the current rule 62.02). Justice Catzman had exercised his discretion by refusing to continue [page527] until trial an ex parte injunction restraining the defendant from interfering with the plaintiff in the operation of its restaurant [See Note 1 at the end of the document]. Justice Catzman felt that the plaintiff's financial condition was less than adequate to ensure that damages could be paid.

[22] The plaintiff moved before Justice Steele for leave to adduce fresh evidence for the purposes of the leave application. The proposed fresh evidence apparently demonstrated that since the decision, the plaintiff had taken actions that improved its financial position.

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[23] At para. 5 in Maple Leaf, Justice Steele said that on the application for leave to appeal "[n]o new evidence that was or could have been brought before Justice Catzman should be considered because to do otherwise would be to re-hear the application before him. Also, to consider evidence of facts that occurred after the decision would not be to review the decision but would be to hear an entirely different application."

[24] Judges of this court have interpreted Maple Leaf in the manner urged upon me by counsel for the Trustee, that on a motion for leave to appeal, the court has no jurisdiction to entertain a motion for leave to adduce fresh evidence.

[25] For example, in Minnema, supra, Justice A. Campbell refused a request to introduce fresh evidence on a motion for leave to appeal to the Divisional Court. The appeal in that case was against an order that Newmarket was the appropriate venue for motions in the action. Citing Maple Leaf, Justice A. Campbell stated [at p. 355 C.P.C.]: "There is no basis to permit them to introduce fresh evidence on this motion for leave to appeal."

[26] Similarly, in Lafleur, supra, Justice Valin applied Justice Steele's reasoning in an application for leave to appeal from a judge's refusal to direct the plaintiff to attend a medical examination, and to grant leave to amend the statement of claim. The applicant sought to deliver additional psychological documents that were not available when the motions appealed from had been heard. Justice Valin refused to consider any application for new evidence on the motion for leave to appeal, stating that he should only review the evidence that was before the judge who refused to grant the motions appealed from. Justice Valin appears to have simply cited Maple Leaf directly at para. 2: "No new evidence should be considered because to do otherwise [page528] would result in re-hearing the original motion. That was the conclusion reached by Steele J."

[27] Without analyzing the reasoning in Maple Leaf, both Justice A. Campbell and Justice Valin relied upon Justice

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Steele's decision as authority that s. 134(4)(b) of the CJA does not apply to leave applications. However, a close reading of the reasons demonstrates that Justice Steele's decision was clearly influenced by nature of the evidence that was being proposed, namely, the fact that the proposed evidence related to what the plaintiff had done in response to Justice Catzman's concerns. To admit such evidence for the purpose of determining whether leave to appeal should be granted would clearly have distorted the process: in the circumstances, it would have given rise to an entirely new hearing. Furthermore, Justice Steele specifically provided that his ruling was without prejudice to any new application that the plaintiff might bring for an interim injunction upon such new evidence as it deemed appropriate.

[28] Given the particular circumstances under which Maple Leaf was decided, I am not satisfied that Justice Steele necessarily intended to say that courts have no jurisdiction to consider motions for leave to adduce fresh evidence on an application for leave to appeal. In fact, other cases have implicity suggested that s. 134(4)(b) of the CJA should not be so interpreted.

[29] In Malvern Garden Centre and Landscaping Ltd. v. Gullo, [1996] O.J. No. 2958 (C.A.) ("Malvern"), Justice Catzman heard a motion for leave to appeal to the Court of Appeal. In denying the motion, Catzman J.A. stated at para. 2 that "the existing evidence does not warrant the granting of leave and the suggested fresh evidence does not meet the requirement of due diligence in order to justify its admission". It is true that Catzman J.A. did not explore the question of jurisdiction, but his words perhaps suggest that if the proposed fresh evidence had met the due diligence requirement, it may have been admitted on the application for leave to appeal.

[30] In I.F. Propco Holdings (Ontario) 36 Ltd. v. 1228851 Ontario Ltd., [2002] O.J. No. 1667 (Div. Ct.) ("Propco"), Justice Dunnet considered an application for leave to appeal from an order of a judge appointing a receiver. The lower court refused to grant a request for adjournment. Justice Dunnet described Steele J.'s ruling in Maple Leaf as "well-settled"

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yet went on to consider the fresh evidence that had been proffered. See also Children's Aid Society of the Niagara Region v. DeGuire, [2005] O.J. No. 1373, 15 R.F.L. (6th) 117 (Div. Ct.) where Lofchik J., on the consent of the parties, considered fresh evidence on the application for leave to appeal. [page529]

[31] How this issue is treated in other provinces and specifically how the decision in Maple Leaf is interpreted is of some interest. The British Columbia Court of Appeal has applied Maple Leaf to arrive at the conclusion that more flexibility should be granted in the case of a motion to adduce fresh evidence in an application for leave to appeal from an interlocutory order than from a final order [See Note 2 at the end of the document].

[32] In Gudaitis v. Abacus Systems Inc., [1992] B.C.J. No. 251, 65 B.C.L.R. (2d) 1 (C.A.), the court considered Maple Leaf in concluding that a judge hearing an application for leave to appeal may consider evidence not adduced in the court below. The court went further and held [at p. 6 B.C.L.R.] that the "usual prerequisites for the introduction of fresh evidence should not be applied as strictly as generally applied in respect of an appeal from a final judgment". See also MacMillan Bloedel Ltd. v. Mullin, [1985] B.C.J. No. 2077, 66 B.C.L.R. 258 (C.A.) ("MacMillan").

[33] This interpretation of Maple Leaf has returned to influence the Ontario courts. In Dion v. CIBC World Markets Inc., [2002] O.J. No. 5512 (S.C.J.) ("Dion"), Somers J., on a motion appealing from the decision of a master ordering a payment into court, applied the British Columbia courts' interpretation of Maple Leaf as allowing for a flexible and contextual approach to applications to adduce fresh evidence. Justice Somers was faced with the question of "whether or not on this appeal fresh evidence should be introduced when it is clear that it could have been before the Master in the original hearing" (at para. 6). Justice Somers cited MacMillan, supra, and the case of Culbert v. Agosti, [1993] B.C.J. No. 2238, 20 C.P.C. (3d) 349 (S.C.) where the court stated that "[a]fter a consideration of all of the circumstances of this case, I must

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conclude that it is in the interests of justice to admit the fresh evidence" (at p. 352 C.P.C.). Just ice Somers noted that the plaintiff had sought an adjournment, which the master had refused and which otherwise might have allowed for the evidence to be admitted during the [page530] motion, similar to Justice Dunnet's considerations in Propco, supra. Justice Somers' conclusion was that more leniency should be granted where an interlocutory order is at issue on the appeal: "I am of the view that it is in the interests of justice to admit the fresh evidence" (at para. 10).

[34] While some of these cases deal with fresh evidence on appeals, as opposed to applications for leave to appeal, the same objective appeared to inform both types of hearings, namely, the interests of justice.

[35] This takes me to the decision of Carthy J.A., in chambers, in Robinson v. Ontario (Securities Commission), [1994] O.J. No. 4185, 3 C.C.L.S. 192 (C.A.) ("Robinson"). Justice Carthy was considering a motion for a stay of an order that dismissed an application to stay a hearing of the Ontario Securities Commission. The motion was brought pursuant to rule 63.02 and s. 134(2) of the CJA [See Note 3 at the end of the document]. Carthy J.A. held that the court had no jurisdiction to provide the relief sought. What is relevant for the purposes of the instant analysis is that Carthy J.A. considered the phrase "a court to which an appeal is taken" in s. 134 and compared it to the wording in rule 63.02(2), which was "by ... a judge of the court to which a motion for leave to appeal may be or has been made". After a lengthy analysis, Carthy J.A. interpreted "a court to which an appeal is taken" under s. 134(2) as limiting the power to grant a stay to appeals where leave has been granted. Furthermore, Justice C arthy considered policy reasons for broadening this meaning but concluded that "jurisdiction is jurisdiction" and refused to interpret the phrase differently (at para. 10). He also stated that "in other subsections of s. 134 the words 'an appeal is taken' are used in a context contemplating a fully formulated appeal" (at para. 6) (emphasis added).

[36] This decision clearly holds that s. 134(4) must be

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interpreted as having no application to motions for leave to appeal. Such an interpretation closes the door to St. James' application for leave to adduce the IDA letter into evidence for the purpose of arguing the leave application. [page531]

[37] I mentioned earlier that, in my opinion, there are policy reasons why a party ought to be entitled to seek leave to adduce fresh evidence on an application for leave to appeal. Allowing a court, in appropriate circumstances, to consider potentially relevant and important evidence in the course of an appeal but not in order to determine if the matter should go to appeal defies common sense and cannot be in keeping with the objective of securing the ends of justice.

[38] While courts must strive to protect the integrity of the process and finality is an important part of that integrity, the overarching objective must always be to secure a just result on the merits. It is for this reason that the Rules and the provisions of the CJA provide for considerable flexibility within the litigation process. Examples of this flexibility include allowing amendments to be made at any stage, allowing the court to reconsider decisions up to the time the judgment is signed, allowing mistakes in orders and judgments to be corrected and allowing new evidence to be considered on a review of a decision. However, in the face of the clear wording of s. 134(4) of the CJA and the decision in Robinson, any addition to this list and specifically any change to allow for motions for leave to adduce fresh evidence for the purpose of seeking leave to appeal, is for the Rules Committee and/or the legislature.

[39] Accordingly, I dismiss the motion for leave to adduce fresh evidence on the application for leave to appeal on the basis of lack of jurisdiction.

[40] Notwithstanding my conclusion that St. James is not entitled to seek leave to adduce the IDA letter into evidence for the purposes of the leave application, I will proceed to examine the merits of the motion. In the circumstances here, St. James is, in any event, unable to satisfy the tests set out in R. v. Palmer, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, at

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p. 775 S.C.R. ("Palmer").

(ii) The Palmer test

[41] The parties agree that the test I should use to determine whether to admit fresh evidence is found in Palmer. The test is as follows:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at the trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases ...;
>
> (2) The evidence must be relevant in the sense that it bears upon a decision or potentially decisive issue in the trial [or motion]; [page532]
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at [the trial or motion], be expected to have affected the result.

[42] St. James submits that all of these requirements are met in this case.

[43] First, St. James argues that the evidence could not have been adduced prior to or on the return of the motion because the IDA letter was not written until after the motion was argued. The motion was heard between April and June 2004; the letter is dated July 8, 2004. I will return to this question below.

[44] Second, St. James states that the evidence is relevant in that it bears upon a decisive issue raised on the motion -- namely, the merits of the fraud allegations against McLean.

[45] Third, St. James argues that the evidence is credible

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and reasonably capable of belief. The IDA's conclusion that it would not take any disciplinary action against McLean was the product of a four-year investigation into St. James and Rampart. The results of a four-year investigation by an independent expert body meet the credibility threshold for admissible evidence.

[46] Fourth, if believed, the evidence could reasonably be expected to have affected the result. St. James notes that the "risk of dissipation of assets" requirement is a prerequisite for the issuance of a Mareva injunction. Justice Ground's conclusion that this requirement had been met was made largely because of the fact that McLean, a person who could not be trusted, controlled St. James.

[47] The hearing before me gave rise to considerable debate about a critical part of the first step in the Palmer test, namely, the meaning of "could have been adduced at trial" or the "due diligence" requirement.

[48] St. James argues that I must determine whether the proposed new evidence could have been brought to the motion judge's attention prior to the end of the hearing of the motion. The Trustee submits that to meet the first part of the Palmer test, the party seeking leave to adduce fresh evidence must demonstrate that the proposed evidence could not have been brought to the attention of the presiding judge before he was functus officio.

[49] In this case, the resolution of how the first step in the Palmer test should be interpreted is of considerable importance. The record is clear that counsel for St. James had the IDA letter in hand several weeks before Justice Ground [page533] released his reasons. When asked why the letter was not immediately brought to the learned motion judge's attention, counsel for St. James responded that at that stage the lawyer for St. James, who received the communication, did not appreciate its importance as he did not then know how Justice Ground was going to rule or the basis of the ruling. Specifically, the lawyer for St. James who received the IDA letter did not appreciate, before receiving and reviewing the

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decision granting the Mareva, the importance Justice Ground would attach to McLean's conduct and therefore to the content of the IDA letter.

[50] However, the factual background to the timing issue in terms of due diligence does not end with the release of the reasons in August. For reasons not known to me, Justice Ground's order was not issued and entered for another five months. No explanation was provided in response to my question as to why the IDA letter was not brought to Justice Ground's attention in the intervening period between the time when counsel was fully aware of the decision and the reasoning behind it and the time when Justice Ground became functus officio when the order was taken out.

[51] What is the significance of the time period after the end of the hearing in terms of the first part of the Palmer test? St. James says, none. Counsel for St. James relies on the wording contained in the Palmer decision itself as well as the myriad of decisions in which the Palmer test has been applied, wording that suggests that the examination of the due diligence requirement focuses on whether the proposed new evidence could have been discovered before the end of the hearing of the trial or motion.

[52] Moreover, St. James submits that to accept the Trustee's argument would put an unworkable burden on counsel during the interval between the close of argument and the taking out of the order or judgment. During this period counsel would remain constantly obligated to monitor the situation and bring any new development to the attention of the presiding judge in the event that it may be relevant to his or her ultimate decision and reasoning.

[53] I disagree with St. James' position with respect to the cut off point for the due diligence test. In my view, the only sensible way to interpret the first part of the Palmer test is that it requires that the evidence should generally not be admitted if, by due diligence, it could have been adduced before the presiding judge was functus officio. [page534]

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[54] It is well established that the trial judge's jurisdiction over a matter ends only upon the entry of judgment. In Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc. (2003), 62 O.R. (3d) 647, [2003] O.J. No. 6 (C.A.) ("Byers"), Borins J.A., writing for the court, reiterated the principle that a court is not functus officio until an order is issued and entered. He then observed that the court possesses the power to alter, modify or amend its judgment, or to rectify its own mistake, following the release of its decision and before it has been signed as the formal judgment of court and entered. In other words, before the decision is entered, the court may reconsider matters properly encompassed in its decision on the merits.

[55] Policy reasons support interpreting the due diligence aspect of the Palmer test so as to require parties who come into possession of evidence, which they believe to be potentially relevant to the determination of a matter before the court, to bring it to the court's attention at the earliest possible time. First, the hearing judge is in the best position to weigh the factors set out in Palmer in order to exercise the discretion as to whether to allow the evidence to be presented. (See: 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, [2001] S.C.J. No. 61.) Secondly, to endorse the argument counsel for St. James advances would be to endorse a practice that would allow counsel to 'sit on' evidence potentially valuable to the determination of the issues while the hearing judge has the matter under reserve. Such a practice would allow counsel to then bring the evidence forward only if necessary, having regard to the result and the reasoning behind the result. This, at the very least, runs contrary to the objective of efficient use of judicial resources. Third, such an interpretation is consistent with the "diligence" requirement that is integral to the Palmer test.

[56] In my view, the only reasonable way to interpret the first part of the Palmer test is that it requires an examination of whether the proposed evidence could have, with due diligence, been adduced prior to the time at which the presiding judge was functus officio -- in this case prior to

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January 18, 2005, when the order was issued and entered.

[57] The IDA letter was in the hands of St. James' lawyer in mid-July 2004. The reason advanced as to why it was not immediately brought to the attention of the motions judge is not acceptable for the reasons I have already expressed. In any event, there is no reason advanced as to why the letter was not brought to Justice Ground's attention while he still had jurisdiction over the case. [page535]

[58] St. James is therefore unable to meet the requirements of the first part of the Palmer test.

[59] While this finding alone is determinative of my decision not to allow the IDA letter into evidence for the purposes of the leave application, I would add that I do not believe that the proposed evidence would meet the requirements of the second or fourth parts of the test.

[60] This proposed evidence raises no new issues from those that were before Justice Ground on the motion. In the material filed in response to the motion for the Mareva injunction, St. James attempted to argue that Rampart, along with individuals who had been involved at Rampart (Illidge, Cathcart, Ing, Kasman, Monardo and Cole), were the subject of IDA disciplinary proceedings while the IDA made no charges against McLean.

[61] Regardless of the IDA's decision not to initiate disciplinary proceedings against McLean, Justice Ground made the following finding based on the extensive evidence that was before him (at para. 22):

> More significantly, the fact that McLean is the sole director and officer of St. James Securities as of today gives the court little comfort. The evidence before this court clearly implicates McLean as an active participant in a number of peculiar and allegedly fraudulent transactions entered into as a part of the alleged conspiracy and which involved documents which were manifestly false, in several cases overstating the net worth of customers or the value of securities by hundreds of thousands of dollars. These

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transactions and documents have not been denied or convincingly explained by McLean in her affidavits filed with this court. It is also significant that the affidavits filed by McLean and statements made by McLean in the course of the IDA investigations, the Oppression Action and this action are, in many instances, not only unconvincing but inconsistent and appear to have been tailored to meet the particular occasion.

[62] Accordingly, I am not satisfied that the "fresh evidence" sought to be introduced would have affected the result of the Mareva motion. St. James had already made those very arguments. Moreover, there was evidence other than the IDA investigation that supported Justice Ground's finding that "[t]he evidence before this court clearly implicates McLean as an active participant in a number of peculiar and allegedly fraudulent transactions entered into as a part of the alleged conspiracy ...".

[63] As I have said, the court must balance the need to ascertain the truth upon full disclosure of all material facts with the need to preserve the integrity of the litigation and the need to prevent an abuse of its process. All three needs are directed at [page536] ensuring that justice is achieved. What has happened here is that, with the benefit of the judgment, St. James now wants the opportunity to improve upon the record.

[64] I have concluded that I have no jurisdiction to consider a motion for leave to adduce fresh evidence on an application for leave to appeal. In any event St. James is not able to meet the tests set out in Palmer.

(b) Should St. James be granted leave to appeal the order?

[65] The test for granting leave to appeal to the Divisional Court from an interlocutory order of a single judge of the Superior Court of Justice is set out in rule 62.02(4):

(a) Is there a conflicting decision by another judge or Court in Ontario or elsewhere on the matter involved in the

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proposed appeal and is it desirable that leave to appeal be granted; or

(b) Is there good reason to doubt the correctness of the Decision and does the proposed appeal involve matters of such importance that leave to appeal should be granted?

[66] In order to determine whether there are conflicting decisions, I must look to the principles that guided the exercise of Justice Ground's discretion. An exercise of discretion that leads to a different result because of different circumstances is not a "conflicting decision". See: Comtrade Petroleum Inc. v. 490300 Ontario Ltd. (1992), 7 O.R. (3d) 542, [1992] O.J. No. 652 (Div. Ct.), at p. 544 O.R., p. 3 (QL).

[67] Both the Supreme Court of Canada in Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1 ("Aetna"), and the Ontario Court of Appeal in Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268 (C.A.) ("Chitel"), have established that a plaintiff seeking a Mareva injunction must demonstrate "a strong prima facie case" on the merits, and "that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law" (Aetna, supra, at pp. 26-27 S.C.R.).

[68] St. James argues that the "conflicting decision" requirement is met as the test Justice Ground utilized differs from the test set out in Aetna and Chitel. [page537]

[69] St. James has not shown that there are grounds to grant leave under the first branch of the rule.

[70] At para. 14 of his reasons, Justice Ground expressly accepted the well-established test for a Mareva injunction.

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[71] There are no decisions that conflict with Justice Ground's decision. It is irrelevant that a different judge may have exercised his or her discretion differently on those same facts to reach a different result.

[72] Moreover, there is no confusion regarding the test for a Mareva injunction. There is no issue of general importance or significant jurisprudential value raised by this matter that would warrant review by the Divisional Court. As in the case of Way v. Deslauriers, [2005] O.J. No. 3245 (S.C.J.), at para. 42, this case "involves the application of principles, not the establishment or clarification of principles".

[73] I now turn to the second aspect of the test for leave to appeal. This is the test upon which St. James relies most heavily.

[74] The test under rule 62.02(4)(b) is also conjunctive; it is insufficient to establish either that there is good reason to doubt the correctness of the decision or that the appeal raises matters of importance. Both of these requirements must be established in order for the court to grant leave to appeal. See: Greslik v. Ontario Legal Aid Plan (1988), 65 O.R. (2d) 110, [1988] O.J. No. 525 (H.C.J.) ("Greslik") at pp. 112-13 O.R.

[75] Counsel for St. James submits that the law is clear. As set out by Justice Sharpe in his book, Injunctions and Specific Performance, the plaintiff is not relieved of the obligation to demonstrate a real risk of dissipation when the underlying claim is based on fraud: "Proof of a serious risk of removal or deposition of assets is required even where the action is based on fraud and it is shown that the defendant has committed a fraudulent act." [See Note 4 at the end of the document] See: 663309 Ontario Inc. v. Bauman, [2000] O.J. No. 2674, 190 D.L.R. (4th) 491 (S.C.J.) and United States of America v. Yemec (2003), 67 O.R. (3d) 394, [2003] O.J. No. 3863 (S.C.J.).

[76] St. James' position is that Justice Ground's decision is open to serious debate. While the motions judge did conclude that there was a risk that St. James would dispose of its

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assets so as to defeat the Trustee's claim, this finding was not based upon his acceptance of any cogent evidence. Instead, Justice Ground based his finding solely on the fact that St. James "is indirectly owned [page538] and controlled by persons who were active participants in the allegedly fraudulent transactions comprising the alleged conspiracy and ... directly controlled as of today by McLean" (at para. 23) and that the assets of St. James are liquid and are expected to be paid out to creditors and shareholders pursuant to the Memorandum of Agreement. St. James submits that this falls far short of demonstrating that St. James is about to remove its assets from the jurisdiction or dispose of its assets so as to render the possibility of future tracing remote.

[77] St. James' argument is really that the evidence supporting Justice Ground's finding was insufficient to demonstrate a real risk that St. James would dissipate or dispose of its assets so as to defeat any attempt by the Trustee to realize on any judgment it might obtain against St. James.

[78] The Trustee argues that the learned motions judge made extensive findings of fact that were supported by the substantial body of evidence placed before him and properly concluded that the tests for a Mareva injunction had been met.

[79] I do not consider it necessary to delve into this "substantial body of evidence" to analyze whether Justice Ground's finding that St. James intended to dispose of its assets to defeat the Trustee's claim is "open to serious debate", since St. James cannot satisfy the second prong of the test set out in rule 62.02(4)(b).

[80] This aspect of the test requires that the questions raised in the appeal involve matters of such importance that leave should be granted. Greslik, supra, has often been quoted as standing for the proposition that for the matter to be of importance, it must transcend the immediate interest of the parties and involve matters of public importance and matters relevant to the development of the law and the administration of justice. Where the issues are fact-driven, they do not raise

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issues of general public interest. See: Duracell v. Konjevic, [1998] O.J. No. 4265 (Gen. Div.), at para. 3.

[81] St. James argues that this case raises an issue of general importance as the Divisional Court should provide guidance as to the test to be applied in applications for a Mareva injunction when a prima facie case of fraud has been made out.

[82] I disagree. The law in this area is well-settled. The proposed appeal does not raise issues that constitute matters of public importance. The issues, as in most motions of this nature, are heavily fact-driven and are thus of importance only to the parties to this litigation. They are not questions of general application. [page539]

III Conclusion

[83] After a lengthy hearing, Justice Ground carefully considered the Trustee's motion for injunctive relief and rendered detailed reasons that involved an extensive examination of the substantial volume of evidence before him. Based on that evidence he found a strong prima facie case of fraud to which St. James takes no exception and a risk of dissipation of assets to defeat the Trustee's claim. What St. James is really saying is that the evidence was not capable of supporting this second finding. While this matter is clearly of considerable importance to the parties, it does not involve matters of public importance and matters relevant to the development of the law and the administration of justice.

[84] St. James has not persuaded me that the test set out in either branch of rule 62.02(4) has been met. The application for leave to appeal is therefore dismissed.

[85] If the parties are unable to resolve the issue of costs, they may make submissions to me in writing within 20 days of today's date.

Motion and application dismissed.

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Notes

Note 1: Except for some minor differences, the wording of Rule 499 was essentially the same as the wording of the current rule 62.02.

Note 2: The relevant rule in British Columbia is admittedly different. In B.C.'s current Court of Appeal Rules, B.C. Reg. 297/2001, Rule 31(1) states: "With leave of the court or a justice, a party may adduce fresh evidence that was not before the court appealed from." Interestingly, Rule 31(2) states that a party applying for leave under this rule must ensure that "the notice of motion is made returnable on the date set for the hearing of the appeal, unless a justice otherwise orders". The predecessor to this rule [B.C. Reg. 303/82, Rule 24], which was the rule relied upon in the B.C. cases referred to, simply stated: "By leave of the court or a justice, evidence may be adduced, in the manner directed by the court or justice, that was not before the court appealed from."

Note 3: The wording of both of these provisions is now different. Rule 63.02(1)(b) now specifies that an order may be stayed "by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken". Similarly, s. 134(2) of the CJA now specifies its application to both "a court to which a motion for leave to appeal is made or to which an appeal is taken". It appears that no such wording changes have altered the scope of s. 134(4)(b).

Note 4: Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2004).

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TAB 19

1979 CarswellBC 533, 14 C.R. (3d) 22, [1980] 1 S.C.R. 759, 17 C.R. (3d) 34, 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, (sub nom. R. v. Palmer) 30 N.R. 181

Palmer v. R.

Douglas Garnet Palmer and Donald Palmer, Appellants and Her Majesty The Queen Respondent

Supreme Court of Canada

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

Heard: June 26 and 27, 1979
Judgment: December 21, 1979

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Counsel: Harry Walsh, Q.C., for the appellants

Mark M. de Weerdt, Q.C., for the respondent

Subject: Criminal; Evidence

Criminal Law --- Evidence — Evidence on appeal — Fresh evidence

Criminal Law --- Evidence — Evidence on appeal — Fresh evidence — Factors to be considered

Cases considered:

Browne v. Dunn (1893), 6 R. 67 (H.L.) — *considered*

Horsburgh v. R., [1967] S.C.R. 746, 2 C.R.N.S. 228, [1968] 2 C.C.C. 288, 63 D.L.R. (2d) 699 — *considered*

McMartin v. R., [1964] S.C.R. 484, 43 C.R. 403, 47 W.W.R. 603, 46 D.L.R. (2d) 372 — *considered*

R. v. Demeter (1975), 10 O.R. (2d) 321, 25 C.C.C. (2d) 417, affirmed [1978] 1 S.C.R. 538, 38 C.R.N.S. 317, 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, 16 N.R. 46 — *considered*

R. v. Foster (1978), 8 A.R. 1 (Alta. C.A.) — *referred to*

R. v. Hart (1932), 23 Cr. App. R. 202 — *considered*

R. v. McDonald, [1970] 2 O.R. 114, 9 C.R.N.S. 202, [1970] 3 C.C.C. 426 (C.A) — *considered*

R. v. Stewart (1972), 8 C.C.C. (2d) 137, leave to appeal to Supreme Court of Canada refused 8 C.C.C. (2d) 280n — *referred to*

Sam v. C.P. Ltd. (1975), 63 D.L.R. (3d) 294 (B.C.C.A.) — *applied*

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34, s. 610(1)(d).

McIntyre J.:

1 This is an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J, sitting without a jury upon an indictment charging a conspiracy to traffic in heroin, A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. Although the appeals were heard together, these reasons will deal with the Palmers only.

2 The indictment dated November 24th, 1975, charged in count 1 a conspiracy to traffic in heroin between the 1st day of February 1969 and the 30th day of April 1975. This count is the only one in issue on this appeal. A preliminary hearing commenced in February of 1975, after a postponement from September 1974, because the witness Ford, of whom much more will be said, had then absented himself. The trial, which lasted several weeks, commenced on January 12, 1976. The appellants were found guilty on March 23, 1976.

3 One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was Frederick Ford, referred to above, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. This appeal is taken by leave of this Court upon two points which are set out hereunder:

> 1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000.00 from the police "in payment for services" about a week after the trial judgment herein?
>
> 2. Did the trial Judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973 when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

4 The principal point argued in this Court was point 1. It will, of course, be seen at once that this point

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raises no question as to the conduct of the trial and attacks no determination made by the trial judge. The sole issue raised relates to the disposition made by the Court of Appeal.

5 Ford gave evidence both at the preliminary hearing and at the trial that in June of 1971 he had approached Douglas Palmer, whom he had known for some fifteen years, and asked for a job in the drug business. After some delay, he was introduced into the business and he worked with the Palmers in the trafficking of heroin during the period covered by the indictment. He said that on numerous occasions he had received bulk heroin from Douglas Palmer. It was then his task, with the assistance of others, to put the heroin into gelatin capsules and bundles of the capsules into glass containers and to bury the containers at locations, particulars of which he would give to Palmer. As the heroin was sold, Palmer, or others under his direction, were thus enabled to direct purchasers to the hidden heroin to complete the sales. During this period, Ford was paid for his services by Douglas Palmer.

6 Ford said that during the summer of 1972 he had employed his nephew to plant out caches of heroin for him. The nephew was caught by the police and Ford was able, by giving the police information which led to the arrest of one of his associates named DeRuiter, to procure the release of his nephew and have the prosecution dropped. It seems that it was this contact with the police which led Ford at or about that time to furnish information concerning the activities of the Palmers to the police.

7 Ford said that he received a call from Douglas Palmer on January 20, 1973, in which he was instructed to get together all the heroin in his possession and to meet another member of the organization for the purpose of getting rid of the heroin all at once so a purchase of newer stock could be made. In compliance with these instructions, the heroin was disposed of at night by throwing it from a moving car in a garbage bag. When this was completed. Ford reported to Palmer who told him that he was fired. He gave evidence at trial of the conversation which passed between them on this occasion in these words:

> A. Well, I said "What do you mean?" He said, "Well, I found out that you are the one that set up De Ruiter for the bust" he said, "So you are fired." And I just said, you know, "I don't know what you are talking about." And then I said, "Well, what about my money you owe me?" and he said, "You are not getting any money." And I said, "Well, you know, you owe me the money" and he said, "Tough", you know.
>
> Q. How much money did he owe you at that time?
>
> A. Oh, 12,500 or something.
>
> Q. Did you ever receive that from him?
>
> A. No.
>
> Q. Was there any further conversation on that occasion when he terminated your services?
>
> A. Well, other than "If I ever find out for sure it was you ...", you know, that's all. Other than that. I am lucky to be alive, that's all.
>
> Q. I am sorry, would you speak up?
>
> A. He said that I am lucky to be alive. If he finds out for sure that it's me that set up DeRuiter, I am in big

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trouble.

8 Ford continued trafficking independently until on January 6, 1975, he was shot in the street near his home. A police officer, one Steer, a member of the Vancouver City Police and not connected with the investigation of this case, attended at the scene of the shooting and had a conversation with Ford just before he was taken to hospital. Steer asked "Who shot you?". Ford replied "Pick up Doug Palmer". The officer then said "Did Palmer shoot you?". Ford said "Just pick up Doug Palmer". Ford was taken to hospital and while still in the emergency section had another conversation with a Vancouver police officer named Caros. The version given by the police officer follows:

Caros: "Who shot you?"

Ford: "I don't know."

Caros: "You mentioned a man at the scene of the shooting."

Ford: "Yes, Doug Palmer. He didn't do it, he's too chicken. He hired someone."

Caros: "Why did he do it?"

Ford: "Guess he didn't like me."

Caros: "How many men involved?"

Ford: "One."

Caros: "Did he have two guns?"

Ford: "Yes."

Caros: "Did you see a car?"

Ford: "No."

Caros: "What did he look like?"

Ford: "He had a dark mask, a toque and a dark coat on."

Caros: "Did you know him?"

Ford: "No."

9 I consider it significant that moments after the shooting Ford identified Palmer as either his assailant or the instigator of the attack. The circumstances of the shooting, the earlier dismissal from the organization coupled with the disagreement about money, furnish a motive for Ford's later conduct.

10 After Ford's dismissal by Palmer, he agreed to testify for the Crown. The precise date of such agreement is unclear. He gave evidence at the preliminary hearing and at the trial, and on each occasion his evidence was essentially the same. He was cross-examined closely on both occasions. He admitted that in return for his

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agreement to give evidence against Douglas Palmer, and for the actual giving of the evidence, he had been promised immunity from prosecution on certain charges which were outstanding against him and protection for himself and his family. To that end he said he had been paid an allowance of $1,200 per month up to the time of the trial. He said the police had agreed as well to provide for relocation and maintenance expenses after the trial for himself and his family until they were re-established in life and secure from danger.

11 The defence was a flat denial by Palmer of any involvement with drugs and with Ford. It was asserted that Ford's evidence was completely fabricated.

12 At the outset of the appeal, in which various other grounds were raised, the appellants moved under s. 610(1)(d) of the *Criminal Code* to have the Court receive evidence in the form of declarations from Douglas Palmer, Donald Palmer, Edith Twaddell and Thomas Ford. Section 610(1)(d) of the *Criminal Code* is set out hereunder:

> 610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
>
> .....
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

13 On this motion, the Court of Appeal had before it the various declarations referred to above and in addition affidavits in reply from Crown counsel and several police officers including affidavits from officers of the Vancouver Police Force concerning the words spoken by Ford after the shooting incident. Upon a consideration of this material, the Court refused the motion and disposed of the other grounds raised and dismissed the appeal.

14 The argument in this Court centered on the declarations made by Ford and the Crown affidavits in reply. The declaration of Edith Twaddell is of no significance and requires no further mention. The other declarations produced in support of the motion are largely explanatory of the events leading to the production of Ford's documents. Ford made four declarations dated, respectively, April 20, 1976, May 21, 1976, October 7, 1976, and October 13, 1976. In his first declaration, he said that he received $25,000 in cash from the R.C.M.P. in April 1976 for services rendered which he described as testifying in the Palmer drug conspiracy trial. He exhibited a receipt to the declaration prepared by the R.C.M.P. which he had signed. It was on a printed form acknowledging the receipt of $25,000 from R.C.M.P. Inspector Eyman. The printed words "Payment in full for services rendered" had been struck out and the words "Payment for services" had been written in.

15 In his second declaration, he referred to and verified a hand written statement which he had signed dated May 21, 1976, in these terms;

> May 21, 1976.
>
> To whom it may concern

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Any evidence I gave at the Douglas Palmer trial in 1976 was not of my own free will. I was pressured into saying what I said and also promised payment of $60,000 dollars. I never had any drug dealings with Doug Palmer, Don Palmer, Tom Duncan or Jake Smith. Any drug dealings I had were on my own and had nothing whatsoever to do with the above mentioned names. In April 1976 I rec. $25,000 Cash from the R.C.M.P.

Fred Ford

Also I had dealings with Roy Twaddell and he asked me to introduce him to Doug Palmer and I said I knew nothing about him and as far as I know he only dealt with me in drugs until he went to jail. Fred Ford.

Witnessed: J. Wood

J. B. Clarke

16 In his third declaration dated October 7, 1976, he swore to the truth of another statement he had prepared and which bears date October 7, 1976, and which is in these terms:

Oct. 7/1976

To whom it may concern.

My name is Frederick Thomas Ford of Vane. B.C. Everything I am about to write in this statement is the truth and I am writing it of my own free will without any threats or inducements from anyone! I started dealing in Heroin (drugs) in 1972. My nephew worked for me burying drugs and got caught, I went to the police and made a deal to turn someone in if they gave him a stay of proceedings (which they did). I talked with R.C.M.P. Staff Sgt. Jim Locker. He asked me if I knew a person named Doug Palmer, I said Yes and he said we want him for dealing in drugs and we will let you deal in drugs without getting caught if you can help us nail Doug Palmer. I didn't really know a thing about Doug Palmer but I saw an easy way for me to stay on the street and make money. I kept telling them different stories about Palmer none of them true! In Jan. 1975 I was shot in front of my home 3475 Triumph St. The R.C.M.P. (Neil McKay) came and saw me at the hospital he said it was a hired killer paid for by Doug Palmer. I knew this was not so but in order for me to get their protection I played along with what they said. In Feb. or Mar. 1975 I went to a Preliminary hearing concerning a drug case against Doug Palmer and some assoc. I got up on the stand and made up a bunch of lies only because I didn't want to go to jail also I was promised a large cash settlement new I.D. and transportation to anywhere I wanted to go. Naturally I would not turn this down.

The R.C.M.P. kept me and provided myself and family with $1200.00 per month to live on. In Jan. 1976. They took me to the Plaza 500 Hotel on 12th Ave Vane. There Staff Sgt. Almrud, Neil McKay and other R.C.M.P. officers kept harrassing me and threatening me to get on the stand and say some things about Doug Palmer. By then I was in so deep I had to go along. Niel McKay said he could not tell me personally how much I would get but he told Corp. Hoivik to tell me I would get $60,000 some I.D. and relokate me. The Prosecutor Art McLennan and Neil McKay came to see me and threatened me with all kinds of charges if I did not give evidence at the trial of Doug Palmer. They said make sure I brought up Doug Palmer's name any chance I got. So I gave the same evidence was before (All Lies) After the trial they took me and my family to Victoria B.C. At the end of April 1976 they took me to there office on Heather St. and offered me

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$25,000 so I said no. Finally I went to the Bank of Commerce (Main Branch) Hastings St. with Inspector Elman and got $25,000. He said I would have to wait for the other $35,000 and take it up with Neil McKay when he got back from holidays. I'm still waiting! In regards to "Roy Twaddell" I sold him drugs for months and months. He owed me $2,000 I had him beat up to make him pay me. It was the day after that I was shot. I believe he had it done! There is no proof, but I heard through the grape vine it was him! He couldn't possibly have been getting drugs from anyone else as he had no money. I had to give him credit every time he got heroin off of me. I believe like me he was scared and promised lots of things to induce him to take the stand against Doug Palmer. The Police (R.CM.P.) told me time and again they would do anything to nail Doug Palmer.

This Statement is all true —

17 His final declaration dated October 13, 1976, contains serious charges against the police and Crown counsel. It takes the form of answers to a series of questions put to him in writing by solicitors acting for the appellants in the matter. The questions were not leading in nature, they merely directed Ford's attention to matters and incidents that he had apparently raised. Since the answers are contained in the declaration, and provide such evidence as the declaration is capable of giving, I have omitted the questions. I reproduce the declaration hereunder:

CANADA PROVINCE OF BRITISH COLUMBIA

IN THE MATTER OF FREDERICK THOMAS FORD AND DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER AND CLIFFORD LUTHALA

TO WIT:

I, FREDERICK thomas ford, of the City of Vancouver, in the Province of British Columbia, do solemnly declare:

1) I think I met Twaddell late 1973 or early 1974. Sold him drugs of and on for 1 yr. Was introduced to him through Oscar Hansen on the 1900 Turner St. I sold him drugs on credit!

2) Neil McKay and Art Mclennan [Crown counsel] came to the Plaza 500 Hotel in January 1976 and told me I had better testify at Doug Palmer's trial or I would have so many charges against me I would never see day light. Also they said you'll be killed as soon as you get in the Pen (jail). Also they said to use Doug P. name every chance I got!

3) They said not to mention money promised only to answer that I would be relocated elsewhere not to elaborate any further. This was said to me many times.

4) They came to me in Jan. 1976, at Plaza 500 and showed me pictures of Doug P., his brother, Roy Dorn, Tom Duncan, and many others and the same thing as before. Kept insisting I take stand and give evidence against Doug P. They said they really wanted him.

5) It was in 1975 Jan. I was shot! They put me into protective custody. I was really scared! I would have done or said almost anything at that point. They said they would pay me $25,000 and relocate me. I agreed! They arc-Neil McKay and Art Mclennan.

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6) Stayed at Plaza 500 1 wk. before and 1 wk. after. Corporal Art Hoivik was instructed to make sure I read transcripts and to memorize. He read me questions and I answered them.

7) Neil McKay came to see me after and kept on insisting I testify or I would be charged with many charges. He kept saying Doug P. had me shot and it was my only way to get even.

8) My nerves were shot. So the R.C.M.P. on Neil McKay's orders went to a doctor and get me sleeping pills (I was taking 3 at once) also I had codine pills 1 wk. before and 1 wk. after trial.

9) Same as question (2).

10) I had 2 robbery and poss. jewellery against me they said these would be dropped. But if I did not testify I would be charged with alot more than that!

11) Art Mclennan came to see me 2 or three times at Plaza 500. He also said I had no choice but to testify at Doug P. trial. He said you will make money and be clear of all charges. If you don't testify you will have many charges against you.

12) Neil McKay and Art Mclennan both told me I would be paid the date after I gave my evidence!

13) After I gave my evidence Neil McKay Art Hoivik and other R.C.M.P. officers were in room with me. They all said we have got Palmer for sure now.

14) While at Plaza 500 I told Staff Sgt. Almrud I would not testify for $25,000. He said how much do you want? I said $60,000. He said I do not have the authority to authorize it, I'll be back later with answer. He came back a couple of hours later and said okay you can have $60,000 if you give evidence. Art Hoivik was there at the time. He also told me Neil McKay said $60,000 but for me not to mention money on stand.

15) Neil McKay told Corp. Hoivik to tell me about money as if he told me himself and was asked directly on stand about money and me he would have to answer truthfully, but if someone else told me he could say I never talked with Mr. Ford regarding any monies.

16) Same as No. (14).

17) Art Mclennan gave the transcripts to Neil McKay and he gave them to me. They both said to read trans. and to be more specific!

18) Neil McKay Art Mclennan and every R.C.M.P. officer I came in contact with kept saying I should testify against D. Palmer.

19) As I've said before — I was in 24 hr. contact with R.C.M.P. they all kept at me to testify and nail D. Palmer.

20) Went to Heather St. as it is main office. Inspector Ehman was there. He took me to Main Branch of C. Imperial Commerce on Hastings. Signed money draft and I was paid right in Bank. Cash and travellers cheques. I told him I was to get $60,000 not $25,000. He said he was not aware of this but to take it up with Neil McKay and Inspector White when they returned from holidays in 2 wks. Which I

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did. They said they were sorry but Ottawa would not pay anymore than $25,000. I'm still waiting for my other $35,000.00.

21) Met White after I was shot. He said in his office that any deals I was to make would be through Neil McKay.

22) Have telephoned Art Mclellan and he said he told R.C.M.P. to pay me the other $35,000. He can't understand why they haven't kept up there part of bargain!

23) Whenever I refer to D. Palmer or Doug P. in this statutory declaration I am in fact referring to Douglas Palmer.

and I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act".

declared before me at the City of Vancouver, in the Province of British Columbia, this 13th day of October, A.D.1976.

"Fred Ford"

Frederick Thomas Ford

A commissioner for taking

Affidavits for British Columbia

18 In reply to this motion, the Crown filed extensive material. Arthur MacLennan, Crown counsel, denied, in his affidavit, all improprieties alleged by Ford. He swore that he saw Ford in the Plaza Hotel only once. They had an interview lasting three or four minutes during which he showed Ford some photographs and left a transcript of Ford's evidence taken at the preliminary hearing so any mistakes could be corrected. He explained his actions regarding money in paras. 6, 7 and 8 in these words:

6. THAT I at no time, nor did Sgt. McKay at any time in my presence, say to Ford that he would receive $25,000.00 or any sum whatsoever, nor that Ford would be paid the day after he gave his evidence, or at any time;

7. THAT in or about the month of May 1976, Ford telephoned me to request that I assist him in obtaining a further $35,000.00 from the RCM Police. At that time I had become aware that Ford had already received $25,000.00 in lieu of the re-location arrangements to which he had testified at the trial. I told Ford that notwithstanding he had himself elected after the trial to receive $25,000.00 instead of the re-location he had been promised, I had already tried to get for him some additional money because ! felt he might come to harm if he remained in the Vancouver vicinity; that a lump sum payment totalling $60,000.00 was perhaps not excessive to keep him out of danger until he could establish himself elsewhere. I also informed Ford on that occasion that a superintendent of the RCM Police had refused to recommend payment of any further money as considered Ford's insistence on a further payment to be close to blackmail. Ford replied that he would never try to blackmail the RCMP; that he

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had already given his evidence and was not about to change that;

8. THAT I never at any time told Ford I could not understand why the RCMP had not "kept up their part of the bargain;"

19 The various police officers mentioned by Ford in his declarations denied any impropriety in their affidavits. They denied any harassing of Ford or the putting of any pressures upon him. From their affidavits the Crown position is made clear. There was an arrangement with Ford that he would give evidence against the Palmers. At the preliminary hearing as at the trial Ford admitted the particulars of this arrangement. A condition of the arrangement was that the police would provide protection, and maintenance payments in the amount of $ 1,200 a month, until the trial was over. Thereafter provision would be made for the maintenance and relocation of Ford and his family, as well as for their protection until he could re-establish himself elsewhere. The payments made for relocation would have included travelling and moving expenses and, if necessary, a down payment on a new house. Pursuant to this arrangement, Ford gave evidence at the preliminary and no difficulties arose until just before the trial.

20 According to the police affidavits, at that time Ford seemed to have changed his mind. He decided that he wanted a cash payment rather than relocation expenses as agreed. He requested a sum in the neighbourhood of $50,000 and indicated that he would go to England to live after the trial and from this cash payment he would cover his own expenses. The police officers who were responsible for the immediate custody and protection of Ford agreed to take the matter up with superior officers and, in discussions between themselves, considered that a $60,000 payment would not be unreasonable in the circumstances. This figure would presumably have replaced all payments for maintenance, moving and relocation expenses until Ford was re-established after trial and what could be required for a down payment on a house. It is not clear from the evidence what recommendations were made to superior officers on this subject but the Crown, after the trial, was prepared to pay only $25,000. This payment was arranged by R.C.M.P. Inspector Eyman who met Ford, took him to the bank, procured $25,000 by cashing a cheque, and gave it to Ford in cash and travellers cheques. At the time of payment, he procured the receipt from Ford exhibited to Ford's first declaration. The Crown submits that Ford, dissatisfied by the payment of $25,000, and no doubt influenced by fear as well, has changed his story.

21 The Court of Appeal, when dealing with the motion, had before it in addition to the materials already referred to some fifty-four volumes of evidence from the preliminary hearing and the trial and therefore had a much greater knowledge of the evidence than could be drawn from the brief summary I have set out above. In dealing with the motion, McFarlane J. A., speaking for the Court, said:

> Section 610(1) provides that for the purposes of an appeal under Part XVIII of the Code the Court of Appeal may, if it considers it in the interests of justice, receive the evidence of any witness. Parliament has here given the Court a broad discretion to be exercised having regard to its view of the interests of justice. In my opinion it would not serve the interests of justice to receive the tendered evidence of Ford and Twaddell because it is simply not capable of belief. I am satisfied that it is untrue and that any intelligent adult would reject it as wholly untrustworthy. Moreover, the trial Judge was well aware of the weaknesses in the testimony of Ford and Twaddell. He had not found them to be honourable, upright witnesses but he accepted testimony which they gave because it was consistent with, and in harmony with, other testimony placed before him. He found the testimony, not the witnesses, to be credible. In my opinion the tendered evidence if adduced before the trial Judge or other tribunal of fact could not possibly affect the verdict. This

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view is in accord with the decision of this Court in *R. v. Stewart* (1972), 8 C.C.C. (2d) 137, leave to appeal to Supreme Court of Canada refused 8 C.C.C. (2d) 280n

I have considered the judgments of the Supreme Court of Canada in *McMartin v. R.*, [1964] S.C.R. 484, 43 C.R. 403, 47 W.W.R. 603, 46 D.L.R. (2d) 372 and *Horsburgh v. R.*, [1967] S.C.R. 746, 2 C.R.N.S. 228, [1968] 2 C.C.C. 288, 63 D.L.R. (2d) 699. I find nothing in those judgments which requires me to accept this evidence. With particular reference to the latter judgment, I should add that I do not reject the evidence of Ford on the ground that he testified and was cross-examined at the trial.

22 Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them — see for example *R. v. Stewart*, supra; *R. v. Foster* (1978), 8 A.R. 1 (Alta. C.A.); *R. v. McDonald*, [1970] 2 O.R. 114, 9 C.R.N.S. 202, [1970] 3 C.C.C. 426 (C.A.); and *R. v. Demeter* (1975), 10 O.R. (2d) 321, 25 C.C.C. (2d) 417, affirmed [1978] 1 S.C.R. 538, 38 C.R.N.S. 317, 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, 16 N.R. 46. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. R.*[FN1].

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

23 The leading case on the application of s. 610(1) of the *Criminal Code* is *McMartin v. R.*, supra. Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial. The test he applied on this question was expressed in these terms at p. 493:

With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a

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jury.

24 The evidence was admitted and a new trial ordered.

25 In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin*. The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be introduced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

26 Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

27 It is evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. While it may not be necessary to do so in view of this conclusion, I express the view that the Court of Appeal was fully justified in reaching the conclusion it did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

28 It was argued for the appellants that Ford's trial evidence was totally fabricated as a result of police pressures and inducements. In his declarations, Ford says that he was frightened and under pressure and accordingly when the time for the preliminary hearing came he merely got in the witness box and made up a bunch of lies. It should be noted, however, that at the trial, almost a year later, he gave the same evidence and, despite strenuous cross-examination on both occasions, no assertion is made that there was any significant difference in the evidence. The accurate repetition of extemporaneous inventions after such a long interval would be a remarkable performance on Ford's part under any circumstances but, when one adds the fact that the trial judge considered that his evidence was in harmony with the general picture of events which emerged from the evidence of many other witnesses, it becomes impossible to believe that the evidence was fabricated on the spur of the moment. Furthermore, it should be observed that the modification of the financial arrangements with Ford occurred, according to Ford's own declaration, after the preliminary hearing where he had given evidence and before the trial when, it is conceded, he repeated it. It is impossible to believe that the nature of his evidence given at trial was affected by the payment or promise of money. Considering the suggestion that this arrangement was undisclosed and that the trial judge could therefore have been misled in his assessment of Ford's credibility, reference may be made to a passage in his reasons for judgment where he said:

> Ford testifies that the police promised to protect him and his family if he gave evidence on behalf of the Crown, and that they have fulfilled this promise by paying for the cost of relocating him and his family, and of maintaining them since February 1975. The cost of such maintenance said to have been $1,200 a month.

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29 A careful review of the police evidence drawn from the affidavits filed confirms the version of the agreement made with Ford which he himself described in evidence at the trial. The police contention that Ford changed his mind shortly before the trial and wanted cash in lieu of unspecified relocation expenses is confirmed, at least in part, by Ford's later acceptance of the sum of $25,000 and his insistence upon more. It seems clear that he abandoned the original arrangement in favour of a sum of money as contended by the police. It was argued that the police had offered $60,000 when all that Ford had sought was $50,000. The police affidavits confirm that Ford requested a sum in the neighbourhood of $50,000. It also appears from the affidavits that the police officers themselves said, after some discussion between themselves, that they would recommend $60,000 to their superior officers. When it is considered that this payment was to be in lieu of all other provision for Ford after the trial and that it would serve to cover all the expenses involved in maintenance for Ford and his family including travel and relocation expenses and even a possible down payment on a new house, it does not seem an unreasonable amount.

30 The manner of payment of the $25,000 to Ford, which involved no secrecy and was done openly by cheque, negates improper motives on the part of the police. The use of the words "services rendered" and "services" on the receipt has, in my opinion, no sinister significance. It is evident that these words were employed to describe the arrangement here discussed. In my opinion, the rejection of Ford's evidence by the Court of Appeal was amply justified.

31 I cannot leave this part of the case without making some general remarks upon the situation it reveals. There can be no doubt that from time to time the interests of justice will require that Crown witnesses in criminal cases be protected. Their lives and the lives of their families and the safety of their property may be endangered. In such cases the use of public funds to provide the necessary protection will not be improper. When the need arises, the form of protection and the amount and method of the disbursement of moneys will vary widely and it is impossible to predict the precise form the required protection will take.

32 The dangers inherent in this situation are obvious. On the one hand, interference with witnesses cannot be tolerated because the integrity of the entire judicial process depends upon the ability of parties to causes in the courts to call witnesses who can give their evidence free from fears and external pressures, secure in the knowledge that neither they nor the members of their families will suffer in retaliation. On the other hand, the courts must be astute to see that no steps are taken, in affording protection to witnesses, which would influence evidence against the accused or in any way prejudice the trial or lead to a miscarriage of justice. However, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

33 It must be recognized that when cases of this nature arise, charges of bribery of witnesses will, from time to time, be made. It is for this reason that the courts must be on guard to detect and to deal severely with any attempt to influence or corrupt witnesses. The courts must discharge this duty with the greatest care to ensure that while no impropriety upon the part of the Crown will be permitted, the provision of reasonable and necessary protection for witnesses is not a prohibited practice. In the United States, there are statutory provisions expressly contemplating such expenditure under the authority of the Attorney General.

34 I now turn to the second point raised in this appeal. There was evidence at trial, resulting from police surveillance, that Ford and Douglas Palmer met on three separate occasions. It was presumably led to afford some evidence of association between them. On July 18, 1972, Ford was seen to leave a car and walk up

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Palmer's driveway then return to the car in three or four minutes and depart. Ford, in giving evidence in chief, was not asked about this incident and he was not cross-examined about it. Palmer disclaimed any knowledge of Ford's visit. On November 8, 1972, Palmer was seen travelling in Ford's automobile as a passenger with Ford driving. Ford was not examined or cross-examined on this incident. Palmer said that he had been waiting at a bus stop near his home because he was going to pick up a truck which was under repair and Ford happened by in his car and gave him a lift. The event he said was not prearranged. On January 23, 1973, at 11:30 p.m.. Ford was observed leaving his automobile from which he went down a driveway to Palmer's house and spoke to Douglas Palmer for a few minutes then returned to his car and left. Ford, as before, gave no evidence relating to this event and was not cross-examined upon it. Palmer said that Ford had come to his house and offered to sell some tires at a reasonable price and Palmer had merely sent him away. Palmer was net cross-examined on his evidence relating to the three meetings.

35 The trial judge found that Palmer was not a credible witness and indicated that he was not willing to accept his testimony on important matters. In dealing with this question, he made reference to these incidents as well as much other evidence. Counsel for Palmer objects to this on the basis that Palmer's version of what occurred on these occasions stands uncontroverted and, particularly in view of the Crown's failure to examine Ford upon these matters, it is argued that the trial judge should have accepted Palmer's version of events and not drawn inferences adverse to him. The point was summarized in the appellants' factum in these words:

> It is submitted that the Court of Appeal for British Columbia erred in concluding that it was not necessary for the prosecution to have examined Ford in-chief with respect to the three incidents and that it was not necessary to cross-examine the Appellant Douglas Garnet Palmer when he testified with respect to the said three incidents. Had the Court of Appeal for British Columbia found that the learned trial Judge had erred in rejecting the testimony of Douglas Garnet Palmer with respect to the said three incidents then the basis for the learned trial Judge's acceptance of Ford's testimony would have disappeared and the Court of Appeal would then have quashed the convictions against the Appellants.

36 In dealing with this argument in the Court of Appeal, McFarlane J.A. said for the Court:

> The second ground of appeal argued was that the trial Judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn*, (1894) The Reports 67 and to *R. v. Hart* (1932), 23 Cr. App. R. 202. I respectfully agree with the observation of Lord Morris in the former case at page 79:
>
>> I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.
>
> In my opinion the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, vide: *Sam v. C.P. Ltd.* (1975), 63 D.L.R. (3d) 294 (B.C.C.A.) and cases cited there by Robertson, J.A. at 315-7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross-examined. The trial Judge gave a

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careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.

37 I am in full agreement with these words and I do not consider it necessary to add to them save to emphasize that the finding against the credibility of Palmer was made upon much more than the evidence of these three events. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer, I would dismiss the appeal.

Appeal dismissed,

FN1 [1964] S.C.R. 484.

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HOME TRUST COMPANY
Applicant

-and-

2122775 ONTARIO INC.
Respondent

Court File No. CV-13-10313-00CL
Court of Appeal No. C58425

COURT OF APPEAL FOR ONTARIO

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