Court File No. CV-18-604993-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

In the matter of **Sections 97 and 100 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as am.**

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED

Borrowers

BOOK OF AUTHORITIES OF THE APPLICANT, FIRM CAPITAL MORTGAGE FUND INC.

Dated: October 17, 2018

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CYNTHIA LYNCH (Respondent / Applicant) and MOSES SEGAL, IDYLLIC ACRES HOLDINGS INC., and ASHOE HIGH SPEED SOLUTIONS INC. (Appellants / Respondents)

D. Doherty, R.A. Blair, H.S. LaForme JJ.A.

Heard: June 6-7, 2006
Judgment: December 19, 2006
Docket: CA C43572

Proceedings: affirming *Lynch v. Segal* (2005), 2005 CarswellOnt 8731 (Ont. S.C.J.)

Counsel: D. Smith for Appellants
Thomas G. Bastedo Q.C., Samantha Chousky for Respondent

Subject: Family; Property
Related Abridgment Classifications
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III.4 Determination of ownership of property
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Headnote

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Enforcement of award — General principles

Vesting order — Parties met in 1992, began living as spouses in 1994, had two children, and separated in 2001 — Husband was man of great means who structured his business affairs so as to disguise his ownership of assets comprising his wealth — Wife gave up career as solicitor to start life with husband — Certain properties ("land") were held in names of I Inc. and A Inc., which were incorporated by solicitor on husband's instructions — Husband claimed that he was representing unnamed investors who could not be identified — Since separation, husband paid little in way of support for wife or children, and paid no support since December 2002 — Wife was successful on action for spousal support; however, husband fled jurisdiction shortly after separation — Default proceedings were brought against husband and lump sum award of $8,350,747 for child and spousal support was made — No appeal was made from order — Trial judge did find that A Inc., I Inc. and husband were one and same, that husband was beneficial owner of land, and that land was to be vested in wife in satisfaction of trial award and costs — Husband, A Inc. and I Inc. appealed — Appeal dismissed — Trial judge had jurisdiction to make vesting order under Courts of Justice Act and Family Law Act, and nothing in relevant language of either statute operated to constrain flexible discretionary nature of such power — Trial judge found that husband was beneficial owner of underlying assets, and it could be inferred that trial judge concluded that husband, A Inc. and I Inc. could defray tax obligations arising from transfer in other ways — Husband's first wife was not execution creditor of husband in Ontario at any relevant time in proceedings and although she was aware of wife's lawsuit against husband, first wife had no enforceable encumbrance against any of his assets in Ontario — Trial judge made no error in declining to vest shares of A Inc. and I Inc., rather than land, in wife, or in refusing to grant some other remedy in lieu of vesting order.

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Vesting order — Parties met in 1992, began living as spouses in 1994, had two children, and separated in 2001 — Husband was man of great means who structured his business affairs so as to disguise his ownership of assets comprising his wealth — Wife gave up career as solicitor to start life with husband — Certain properties ("land") were held in names of I Inc. and A Inc., which were incorporated by solicitor on husband's instructions — Husband claimed that he was representing unnamed investors who could not be identified — Since separation, husband paid little in way of support for wife or children, and paid no support since December 2002 — Wife was successful on action for spousal support; however, husband fled jurisdiction shortly after separation — Default proceedings were brought against husband and lump sum award of $8,350,747 for child and spousal support was made — No appeal was made from order — Trial judge did find that A Inc., I Inc. and husband were one and same, that husband was beneficial owner of land, and that land was to be vested in wife in satisfaction of trial award and costs — Husband, A Inc. and I Inc. appealed — Appeal dismissed — Trial judge had jurisdiction to make vesting order under Courts of Justice Act and Family Law Act, and nothing in relevant language of either statute operated to constrain flexible discretionary nature of such power — Trial judge found that husband was beneficial owner of underlying assets, and it could be inferred that trial judge concluded that husband, A Inc. and I Inc. could defray tax obligations arising from transfer in other ways — Husband's first wife was not execution creditor of husband in Ontario at any relevant time in proceedings and although she was aware of wife's lawsuit against husband, first wife had no enforceable encumbrance against any of his assets in Ontario — Trial judge made no error in declining to vest shares of A Inc. and I Inc., rather than land, in wife, or in refusing to grant some other remedy in lieu of vesting order.

Family law --- Family property on marriage breakdown — Determination of ownership of property — Miscellaneous issues

Parties met in 1992, began living as spouses in 1994, had two children, and separated in 2001 — Husband was man of great means who structured his business affairs so as to disguise his ownership of assets comprising his wealth — Wife gave up career as solicitor to start life with husband — Certain properties ("land")were held in names of I Inc. and A Inc., which were incorporated by solicitor on husband's instructions — Husband claimed that he was representing unnamed investors who could not be identified — Since separation, husband paid little in way of support for wife or children, and paid no support since December 2002 — Wife was successful on action for spousal support; however, husband fled jurisdiction shortly after separation — Default proceedings were brought against husband and lump sum award of $8,350,747 for child and spousal support was made — No appeal was made from order — Trial judge found in part that A Inc., I Inc. and husband were one and same — Husband, A Inc. and I Inc. appealed — Appeal dismissed — Evidence amply supported trial judge's findings that husband alone was beneficial owner of shares and land — A Inc. and I Inc. were completely controlled by husband for his benefit, and no third parties were involved — In circumstances, trial judge was correct to pierce corporate veil and find that corporate shares and land were beneficially owned by husband, as such finding was essential for ensuring that wife and children receive support to which they were legally entitled.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Lump sum award — Factors to be considered — Respondent unlikely to make periodic payments

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APPEAL by husband and two companies from judgment reported at *Lynch v. Segal* (2005), 2005 CarswellOnt 8731 (Ont. S.C.J.), finding that husband was beneficial owner of company shares and making vesting order for land in wife's favour.

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

Overview

1 Moses Segal is an extraordinarily wealthy man. By his own admission he has a net worth exceeding $100,000,000. Equally extraordinary, however, is his ability to organize his business affairs in a way that disguises his ownership (direct or beneficial) in the assets underlying this wealth. As far as his former spouses and his infant children are concerned, he would have it appear that he has no assets whatsoever.

2 Cynthia Lynch — his second wife and the mother of his two pre-teenage children — sued Mr. Segal for spousal and child support, and other monetary relief. She also discovered two properties in Ontario held in the name of the appellant corporations, added the appellants as defendants in the action, and sought declarations that Mr. Segal is the beneficial owner of their shares and/or their property as well as a vesting order with respect to the shares and/or property.

3 The assets Ms. Lynch discovered consist of development and farm lands in the Oakville area ("the Lands"). Justice Paisley found that there is no distinction in law between the appellant corporations and Mr. Segal and that Mr. Segal is the beneficial owner of the Lands. As a remedy to ensure that the sizeable lump sum awards for spousal and child support that he had made — and which were not challenged on appeal — were paid, Paisley J. directed that the Lands be transferred to, and vested in, Ms. Lynch.

4 The issue on this appeal is whether the trial judge was justified in making that vesting order. In my view, for the reasons that follow, he was.

Background and Facts

The Parties' Relationship and Lifestyle

5 Cynthia Lynch and Moses Segal met in 1992. He is a moneyed self-employed businessman. She is a U.S. citizen, and when their relationship began, was a qualified lawyer practising at the Bar of New York. They started living together as spouses in 1994 and have two children, Emily and William, now aged twelve and eight. They separated in 2001.

6 Mr. Segal had previously been married to Leonor Segal for twenty-six years. They are divorced. The children of that marriage are now adults.

7 Ms. Lynch was reluctant to give up her career, but agreed to do so when Mr. Segal persuaded her in 1994 to move with him to London, England, to live together and have a family. In exchange for her loss of income, he agreed to pay her the sum of $100,000 (U.S.) plus $7,300 (U.S.) per month to enable her to purchase whatever luxury items she wanted. Shortly after the move to London, the parties relocated to Lyford Cay, Bahamas, because Mr. Segal decided he wanted to live in a tax-free jurisdiction. In 1997, they moved to Toronto, where they lived in an elegant mansion on Warren Road. The couple led a lavish lifestyle, as one would expect of a person of Mr. Segal's wealth — expensive homes in the Bahamas and Canada, a private plane, farm property in Ontario where ponies and farm animals were available for the pleasure of the children.

Mr. Segal's Modus Operandi With Respect To His Assets

8 Central to this action, and appeal, are what Mr. Bastedo referred to as the "extraordinary lengths [to which Mr. Segal went] to set up legal formulations which would have the effect of distancing himself in every possible way from any assets, corporations or trusts which could be connected to him". [1] Mr. Segal's carefully honed practice is to set up intermediary vehicles in order to screen himself from creditors, including his spouses, and to use various aliases and pseudonyms to that end. Substantial assets were held outside of Canada and those located in Canada were held by nominees or nominee corporations that made it very difficult to trace them directly back to Canada and to Mr. Segal. The trial judge noted that the documents created by Mr. Segal were just pieces of paper and did not prove what they appeared to create.

1 Respondent's factum at para 14.

9 Ms. Lynch was not unaware of these practices on the part of Mr. Segal during their relationship. In fact, he boasted about them. At one point he informed Ms. Lynch that he wished to change a trustee in Switzerland for another trustee who would obtain a witness for him to claim ownership in his assets, in court, if needed. In 1994, he took her to the Channel Islands and introduced her to an English solicitor, Roger Dadd, who, he said, was involved in asset protection for him at the time. Mr. Dadd is the person to whom the Ontario solicitor who incorporated the appellant corporations reported. Mr. Segal also explained his *modus operandi* to Ms. Lynch. It involved incorporating companies with only the bare necessities and formalities in place in order to make the incorporation valid. Directors would be named, but shares would not be issued and blank shares would be held by the incorporator and trustee. If a structure were ever challenged, the shares could be issued to create the impression that someone else owned the corporation and, thus, the asset in question.

10 The trial judge found this was precisely the scheme utilised with respect to the appellant corporations, as well as with respect to certain other transactions in which Mr. Segal engaged to "whisk away" assets from Ms. Lynch.

11 The appellants were incorporated by an Ontario solicitor, Mr. Dolson, shortly before the acquisition of the respective tracts of land they hold, on instructions from Mr. Segal, who said he was representing a group of investors. They were incorporated on behalf of unnamed beneficial owners, with no reporting letter, little correspondence and no notes in the file. Mr. Dolson was instructed to appoint himself to be the sole shareholder, president and director of the corporations; to prepare and execute blank Nominee Agreements providing that the corporations held the Lands in trust for an undisclosed beneficial owner; to endorse the Share Certificates and Share Transfers in blank; and to execute resignations in respect of his positions as officer and director. He was then instructed to send the incorporating documents, the Share Certificates, Share Transfers and Nominee Agreements, completed in blank form, together with the signed resignations, to the same Mr. Dadd, of the Isle of Guernsey, to whom Ms. Lynch had been introduced in 1994, as the man in charge of Mr. Segal's protection scheme. Shares of the appellants were issued in blank and held by unnamed nominees supposedly fronting for mysterious high-end foreign investors operating through the medium of international trusts.

12 This was the same ploy utilised by Mr. Segal in respect of the corporation holding title to the parties' matrimonial mansion on Warren Road, and in respect of a further corporation (Sondol Wireless Connectivity Inc.) holding title to a third development tract of land in the Milton area. In both of these cases, he was able to have the corporate structure of the companies altered quickly to make himself the president and controlling officer; he then effected the sale of the assets and transferred the sale proceeds into untouchable overseas accounts. The sale of the matrimonial home ($2,700,000) took place shortly after the separation of the parties. The Sondor sale ($2,500,000) took place later, in October 2003, and was in direct defiance of an order of Mesbur J. dated July 31, 2003 restraining Mr. Segal from depleting his assets. That order had been served on Mr. Dolson prior to the Sondor sale.

13 At trial and on discovery, the appellants produced Mr. Fergus Anstock, an English solicitor, who testified that he was now the sole nominee shareholder of the appellant corporations and that he represented the beneficial owners. He said he knew who the beneficial owners were, and that Mr. Segal was not one of them, but that he could not reveal their identity without breaching his duty of confidentiality to his clients. On discovery, he refused to provide answers to the following inquiries and requests:

> a) who was involved with Mr. Dadd in respect of the acquisition of the properties in Canada;
>
> b) where the money for the acquisition of the properties came from;
>
> c) whether there was one individual or more than one individual who put money into the acquisition;
>
> d) what was the name of the family of investors involved;
>
> e) what was the name of the investor, the name of the person who provided the money, the record of the way in which the money was paid, his recollection of the entire transaction together with copies of correspondence, e-mails, telegraphic transfers, money transfers, or any other information from the family that would trace the properties into Ontario;
>
> f) to provide the contents of a discussion with Mr. Segal in the Fall of 2003; and,
>
> g) to provide the files in his office containing correspondence, e-mails, wire transfers, or any other documents relating to this particular matter.

14 At trial, Mr. Anstock advised that he would not answer any of the questions he refused to answer during his examination for discovery.

15 The trial judge quite properly declined to allow Mr. Anstock to testify as to other matters purportedly relating to the beneficial ownership of the shares of the appellants, when he refused to testify regarding the issues outlined above. Although he found Mr. Anstock to be a person of integrity, he concluded that Mr. Anstock had been deceived by Mr. Segal, and gave no weight to his evidence. At the conclusion of the appellants' oral argument we saw no reason to interfere with the trial judge's ruling and conclusion in this regard, and did not call upon the respondent to address this issue. We agree with the trial judge's observation that "to fail to indicate who the owner is when you give your opinion as to who the owner isn't, is neither logical or fair". To permit such testimony would result in a situation where a witness could testify about half the story without telling the whole story. This would potentially sanction a witness limiting his or her evidence to what is helpful to the case of the party calling the witness without exposing him or her to providing relevant evidence to the contrary that may be within the witness' knowledge. See *Weslock v. Weslock*, 2003 CarswellOnt 4206 (Ont. S.C.J.) at para. 11.

The Claims in the Action

16 Mr. Segal has paid little in the way of support for Ms. Lynch or the children since the separation, and nothing since December 2002. He made it clear that he was prepared to bankrupt the respondent, if necessary, to enforce his idea of what a reasonable financial settlement was. This action was commenced in July 2003.

17 In the action, Ms. Lynch claimed custody of the children, spousal and child support, amounts representing the unpaid monthly sums of $7,300, and monies promised but not paid on the sale of the spouse's home in Lyford Cay. This relief was not contested, as Mr. Segal fled the jurisdiction shortly after the separation and did not defend the action. Default proceedings were taken against him. Justice Paisley awarded the following relief in relation to the above claims:

a) $8,350,747 as lump sum child and spousal support;

b) $378,135.77 for arrears of child and spousal support;

c) $1,445,664.99 in respect of a debt owing to Ms. Lynch; and,

d) $963,084 in respect of monies promised Ms. Lynch on the sale of the parties' home in the Bahamas.

18 No appeal is taken from these orders.

19 At trial, the main issues centred around the relief claimed by Ms. Lynch against the appellant corporations, Idyllic Acres Holdings Inc. and Ashoe High Speed Solutions Inc. Idyllic owns a tract of raw development property in the Oakville area, acquired in 1998 for $2.6 million. Ashoe owns the farm property in the same area that was used as a recreation retreat by Mr. Segal, Ms. Lynch and their children, and on which the ponies and farm animals were kept. This property was purchased in July 2000, at a cost of $1.636 million. Amongst other things, Ms. Lynch claimed a declaration that:

a) Mr. Segal is the beneficial owner of the shares of Idyllic and Ashoe, and that he holds this beneficial ownership in trust for her to the extent of 50%, or alternatively, that he is the beneficial owner of the shares himself;

b) In the further alternative, that Mr. Segal has a beneficial ownership in the lands owned by the appellant corporations, and that he holds this ownership either in trust for her or wholly for himself; and,

c) An order pursuant to s. 34(1)(c) of the *Family Law Act*, R.S.O. 1990, c. F.3 requiring the shares of Idyllic and Ashoe and the Lands, or the Lands only, to be transferred to her and vested in her absolutely.

20 She succeeded. The trial judge found that "the limited companies and Mr. Segal are one and the same" and that "[Mr. Segal] is the beneficial owner of the property". He ordered that the Lands be vested in Ms. Lynch in satisfaction of the monetary claims outlined above, and costs.

21 On appeal, Idyllic and Ashoe attacked the finding that Mr. Segal is the beneficial owner of their shares and the Lands, together with the order vesting the Lands in Ms. Lynch. They argued that Mr. Segal was simply the finder and manager of the Lands on their behalves, and that he is completely divorced from any ownership interest in the appellant corporations. Rather, the appellants submitted, they are owned by mysterious but not-to-be-named high net worth individuals and families operating through international trust vehicles out of the Isle of Guernsey. At most, they contended, the vesting order should have been made in respect of the shares of the corporations. Alternatively, the trial judge should have imposed some other more suitable remedy such as a charging order against the Lands or the shares.

22 There was ample evidence, however, to support the trial judge's findings that Moses Segal and the appellant corporations "are one and the same", that he is the beneficial owner of the shares of Idyllic and Ashoe and that he is also the beneficial owner of the Lands. We did not call upon the respondent to address those issues, and the appeal with respect to them is dismissed.

23 We reserved our decision with respect to the issues relating to the vesting order, however, and the balance of these reasons relate to those issues. I will deal with the matters we did not ask the respondent to address only to the extent necessary to understand the vesting order concerns.

24 Prior to turning to that analysis, though, I need to refer to a development that occurred following oral argument and the reservation of our decision respecting the vesting order.

25 One of the appellants' submissions on appeal was that the trial judge should not have made a vesting order respecting Mr. Segal's property without Leonor Segal — Mr. Segal's first wife — having been made a party to the proceeding. Ms. Segal has two judgments against Mr. Segal in Nevada for amounts totalling close to six million dollars (U.S.), primarily for spousal and child support in relation to the first marriage. The argument is that she has an interest as a spousal judgment creditor in Mr. Segal's property, an interest that is equal in priority to that of Ms. Lynch.

26 Leonor Segal has been aware of the Lynch action since shortly after it was commenced in 2003, and took no steps to intervene in it. Almost immediately following the completion of oral argument and the reservation of our decision, however — after it had become apparent that the appeal with respect to the beneficial ownership interests had been lost — she unexpectedly appeared and sought leave to intervene in the appeal. We dismissed that motion in a separate decision (Ont. C.A.), released on December 5, 2006, for reasons set out therein. Suffice it to say here that, although we recognize the question of Ms. Segal's position as judgment creditor is something to be considered in relation to the vesting order issues, we were satisfied that any advantage of having Ms. Segal's submissions on those issues would be far outweighed by the prejudicial effect on Ms. Lynch of further delays that would inevitably result from permitting her to intervene.

Analysis

The Jurisdiction to Make a Vesting Order

27 In Ontario, the court's broad general power to grant a vesting order is found in section 100 of the *Courts of Justice Act*. In the specific context of family law claims, sections 9(1)(d)(i) and 34(1)(c) of the *Family Law Act* confer an equally broad power to grant a vesting order on an application for equalization of net family property or support, respectively. [2] Vesting orders are discretionary and have their origins in the court's equitable jurisdiction.

2 This case deals with support.

28 Section 34(1)(c) of the *Family Law Act* states:

> 34(1) In an application under section 33, the court may make an interim or final order,
>
> (c) requiring that property be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years.

29 Section 100 of the *Courts of Justice Act* states:

> 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.

30 As this court noted in *Regal Constellation Hotel Ltd., Re* (2004), 242 D.L.R. (4th) 689 (Ont. C.A.) at paras. 32-33:

> 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* (2000), 195 D.L.R. (4th) 135 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.]

> 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)....

31 The rationale for the vesting power, therefore, is to permit the court to direct the parties to deal with property in accordance with the judgment of the court. The jurisdiction is quite elastic. Nothing in the language of either section 100 of the *Courts of Justice Act* or section 34(1)(c) of the *Family Law Act* operates to constrain the flexible discretionary nature of the power.

32 I do not think any useful purpose is served by attempting to categorize the types of circumstances in which a vesting order may issue in family law proceedings. The court has a broad discretion, and whether such an order will or will not be granted will depend upon the circumstances of the particular case. I agree with the appellants that the onus is on the person seeking such an order to establish that it is appropriate. As a vesting order — in the family law context, at least — is in the nature of an enforcement order, the court will need to be satisfied (as the trial judge was here) that the previous conduct of the person obliged to pay, and his or her reasonably anticipated future behaviour, indicate that the payment order will not likely be complied with in the absence of more intrusive provisions: see *Kennedy v. Sinclair* (2001), 18 R.F.L. (5th) 91 (Ont. S.C.J.), affirmed (2003), 42 R.F.L. (5th) 46 (Ont. C.A.). Thus, the spouse seeking the vesting order will have already established a payment liability on the part of the other spouse and the amount of that liability, and will need to persuade the court that the vesting order is necessary to ensure compliance with the obligation.

33 In addition, the court should be satisfied that there is some reasonable relationship between the value of the asset to be transferred and the amount of the targeted spouse's liability and, of course, that the interests of any competing execution creditors or encumbrancers with exigible claims against the specific property in question are not an impediment to the granting of a vesting order. However, I would not go so far as to say — as argued by the appellants — that the onus to satisfy the court on these matters is at all times on the person seeking the order. I shall return to these issues later in these reasons.

The Beneficial Ownership Issue

34 As noted above, we did not call on Mr. Bastedo to respond to the appellants' submissions that the trial judge erred in finding Mr. Segal alone is the beneficial owner of their shares and of the Lands. The evidence amply supports these findings, which are pivotal to the proceedings as they underpin the making of the vesting order in question.

35 The well-known corporate law principle, first enunciated in *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.), that the shareholders of a corporation are separate and distinct from the corporate legal entity is — as MacPherson J.A. recently noted in *Wildman v. Wildman*, [2006] O.J. No. 3966 (Ont. C.A.) at para. 23 — "an important one" but not, however, "an absolute principle". There is a line of jurisprudence establishing in very general terms that the courts will not enforce the "separate entities" notion where "it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue'": *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 (S.C.C.), at 10, citing L.C.B. Gower, *Principles of Modern Company Law*, 4th ed. (London: Stevens & Sons, 1979) at 112. See also *Debora v. Debora*, [2006] O.J. No. 4826 (Ont. C.A.) at para. 24; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), at 432-434, affirmed (Ont. C.A.); and *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (Ont. C.A.) at paras. 67-69.

36 A more flexible approach is appropriate in the family law context, particularly where — as here — the corporations in question are completely controlled by one spouse, for that spouse's benefit, and no third parties are involved. The same situation arose in *Wildman, supra*. In that case, Mr. Wildman operated a successful high-end landscaping business through a corporation and several sole proprietorships. There were no third-party investors in the companies and Mr. Wildman controlled them completely. In order to enforce the other parts of his order requiring Mr. Wildman to pay large sums of money for spousal and child support, the trial judge in that case directed that the amounts owing were to be secured by way of a charge not only against the appellant personally, but also against his companies.

37 In rejecting Mr. Wildman's appeal from the latter disposition, MacPherson J.A. said, at paras. 48-49:

> This is matrimonial litigation, not commercial litigation. Importantly, the record establishes that *the appellant and his companies are one and the same.* No third party has any interest in any of the companies....
>
> In the end, although a business person is entitled to create corporate structures and relationships for valid business, tax and other reasons, *the law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law. In appropriate cases, piercing the corporate veil of one spouse's business enterprises may be an essential mechanism for ensuring that the other spouse and children of the marriage receive the financial support to which, by law, they are entitled.* The trial judge was correct to recognize that this was such a case. [Emphasis added.]

38 In my view, Justice Paisley, like the trial judge in *Wildman*, was correct in recognizing that this case is one in which it is appropriate to pierce the corporate veil. During argument he observed that Mr. Segal was not using the appellant corporations for permissible corporate arrangements, but rather "was using the corporate structure for one sole purpose, to disguise his property so that his spouse and children would have no claim against him should he ever have to defend against a claim." In his reasons for judgment he referred to Mr. Segal's scheme "to conceal his assets", "to disguise [them] through every means possible", and to create the impression that "someone other than he owned his property." The record supported these observations and findings. In the circumstances, piercing the corporate veil, and finding that both the corporate shares and the Lands are beneficially owned by Mr. Segal, was — to adopt the language of MacPherson J.A. above — "an essential mechanism for ensuring that [Ms. Lynch] and [the] children of the marriage receive the financial support to which, by law, they are entitled."

39 The "beneficial ownership" findings are central, because they provide the foundation upon which the trial judge was able to make the vesting order that is challenged on appeal. It is not because Mr. Segal was found to be the beneficial owner of the shares of Idyllic and Ashoe that the order may stand; it is because the trial judge found Mr. Segal to be the beneficial owner *of the Lands*. Once it is accepted that *the Lands* belong to Mr. Segal, they become a fair target for a vesting order under section 34(1)(c) of the *Family Law Act* or section 100 of the *Courts of Justice Act*, if such an order is otherwise appropriate in the circumstances.

The Appellants' Arguments

40 The appellants raise four specific arguments in opposition to the vesting order made. I have touched on some of them earlier. First, they attack the premise that the trial judge in fact made a finding that Mr. Segal is the owner of the Lands. It follows from this, in their view, that the judgment should have provided for the vesting of *the shares* of the corporations in Ms. Lynch, if any vesting order were made, rather than stripping the underlying assets out of the corporations and transferring them directly to Ms. Lynch (without the liabilities — e.g., capital gains tax — attending them within the corporations). Secondly, they submit that the vesting order ought not to have been made without any valuation of the Lands in order to ensure that their value was sufficient to satisfy and protect the interests of the children in terms of their lump sum support awards. [3] Thirdly, they contend that no vesting order should have issued without Mr. Segal's first wife, Leonor Segal, being made a party in order to protect her Nevada judgments for spousal and child support. Finally, the appellants submit that the trial judge erred in failing to consider and impose alternative measures

to the vesting order, either in the form of vesting the corporate shares rather than the Lands or in the form of a charging order against the shares or the Lands in lieu of the vesting order.

3 A combined lump sum child and spousal support award of $8,350,747 plus an amount of $378,135.77 for arrears of child and spousal support.

41 I would not give effect to any of these grounds.

The Trial Judge Found Mr. Segal to be the Owner of the Underlying Assets

42 I agree, respectfully, that the trial judge was not as clear as he might have been in articulating his finding that Mr. Segal is the beneficial owner of the Lands. On reviewing his reasons as a whole, however, I have no doubt that he made such a finding — particularly when the reasons are read in conjunction with the oral argument of counsel that immediately preceded the rendering of oral judgment.

43 In at least two places during the submissions of counsel for the appellants at trial the trial judge commented that "Mr. Segal is the beneficial owner of the lands and any intermediaries that he is using are puppets" and that " the owner of the land — the owner of the company, is Moses, a.k.a. Moey Segal". Although he noted at one point in his reasons that the only significant issue to be tried in the action was whether the companies are owned by Mr. Segal or by some other unknown parties, the trial judge did not limit his findings to the determination that the appellants are beneficially and entirely owned by Mr. Segal. He was alive to the central issue underlying the question of ownership of the corporations, namely, the use of the hidden ownership scheme to camouflage *Mr. Segal's* ownership of the assets. In the context of making the vesting order, the trial judge noted that "[t]he only evidence that somebody other than Mr. Segal *owns the land* is the self-serving statement made to Mr. Dolson" (which he did not accept).

44 In the end, the trial judge made the following findings, which were amply supported on the evidence:

> In my view the limited companies and Mr. Segal are one and the same. He is the beneficial owner *of the property*. [Emphasis added.]

45 I reject the submission that the trial judge made no finding that Mr. Segal was the beneficial owner of the underlying assets.

46 The appellants also submit that it was inappropriate for the trial judge "to strip" the Lands out of the corporations and vest them directly in Ms. Lynch without regard for any capital gains tax obligations that may be attributable to appreciation in the value of the properties. No doubt, a person taking title by way of a vesting order must take the property subject to any existing executions against it: *Maroukis v. Maroukis* (1984), 12 D.L.R. (4th) 321 (S.C.C.), at 323. Capital gains tax, however, is not an execution or encumbrance against the Lands. The obligation to pay capital gains tax falls on the taxpayer owner of the property in question [4] — in this case, technically, the appellant corporations. Vesting the Lands — which the trial judge held to be beneficially owned by Mr. Segal — is no different than vesting any other asset belonging to him. If the property vested is subject to pre-existing registered executions or encumbrances, the person taking title through the vesting order takes subject to those executions or encumbrances. The person in whom the title vests, however, does not take subject to other personal obligations to which the previous owner may be subject. Capital gains tax obligations fall into this latter category.

4 Section 3(b)(i) and (ii) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), require the taxpayer to determine the amount, if any, by which *the total of all of the taxpayer's taxable capital gains for the year* from dispositions of property other than listed personal property, and the taxpayer's taxable net gain from the year from dispositions of listed personal property, exceeds the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year. A taxpayer includes a corporation: s. 248(1). Section 38(a) defines a taxpayer's taxable capital gain for a taxation year from the disposition of any property as one-

> half of the taxpayer's capital gain from the year from the disposition of property. As these provisions illustrate, the obligation to pay capital gains tax is taxpayer-focused, rather than property-focused.

47 Here, the trial judge was made aware of the appellants' "capital gains" submission. Appellants' counsel at trial specifically brought it to the trial judge's attention during argument, which was completed immediately prior to the judge's delivery of his oral reasons. Although he did not say so specifically, it is a fair inference from the trial judge's reasons, and from his comments during argument that he concluded Mr. Segal (or the appellant corporations, which he equated with Mr. Segal) is in a position to defray whatever personal tax obligations might arise from the transfer in other ways. I see no error in that approach.

No Evidence of Value

48 The appellants next argued that no order should have been made vesting the Lands in Ms. Lynch because she led no evidence to establish the value of the Lands nor any evidence indicating some relative equivalence between the money judgments the Lands were to satisfy and the value of the Lands. If the Lands are worth significantly more than the money judgments, Ms. Lynch will receive an undeserved windfall as a consequence of the vesting order. If they are worth significantly less, then the court must, given its jurisdiction to protect children, ensure that it does not exchange a significant award for an empty recovery.

49 It is the appellants, however, who were advancing the contention that the value of the Lands did not justify their exchange in satisfaction of the money judgment imposed by the trial judge. They were in as good a position as Ms. Lynch — and arguably, a better position — to present evidence of the value of the Lands. I do not think it is open to them to complain that there was no evidence of value in the circumstances of this case.

50 In any event, the trial judge had some evidence of value. Working from the purchase prices of the two properties — $2.6 million, in the case of the Idyllic tract, and $1.636 million in the case of the Ashoe farm property — he concluded that there was "no rational risk ... that the lump sum payment claimed would be exceeded by the value of the lands which are sought to be vested in satisfaction of that sum." Based on the record, he was entitled to draw that conclusion, and I would not interfere with it. That disposes of the "windfall" concern. It was also clearly open to the trial judge to conclude, as he did, that the only realistic way of ensuring the children would receive *any* recovery on the support order made in their favour — given Mr. Segal's determination to avoid his obligations and, indeed, his outright defiance of earlier court orders — was to satisfy the money portion of the judgment out of the Lands. In my view he was correct in doing so.

51 I cannot help but make one further observation at this point. While it is commendable of the appellants to address the concern that the best interests of the children be protected, the submission is somewhat disingenuous in the circumstances. Given the trial judge's finding that the appellants and Mr. Segal are "one and the same", and given Mr. Segal's complete abandonment of his children and his evident determination to avoid meeting any of his support obligations, the argument seems more directed towards saving the assets in his corporation than to providing for the best interests of the children.

Leonor Segal as Judgment Creditor

52 Nor would I interfere with the vesting order on the basis that the interests of Mr. Segal's first wife, Leonor Segal, have not been adequately protected.

53 At the time of trial, Ms. Segal was not an execution creditor of Mr. Segal in Ontario. She had taken no steps to register or enforce her Nevada judgments here pursuant to Part III of the *Interjurisdictional Support Orders Act, 2002*, S.O. 2002, c. 13. This state of affairs continued until a few days after oral argument on the appeal, when Ms. Segal suddenly entered the fray, registered her foreign judgments pursuant to the Act, and sought leave to intervene in the appeal.

54 As indicated earlier, we dismissed her motion for leave to intervene for separate reasons, *supra*, released on December 5, 2006. In those reasons we canvassed the circumstances underlying the motion to intervene and concluded that it would not be fair or just to permit Ms. Segal to inject herself into the proceedings — of which she has been aware since 2003 — at this stage because any advantage that might be gained from her participation would be outweighed by the prejudice to Ms. Lynch in causing further delay. Suffice it to say that we had no doubt it was Moses Segal who had instigated Ms. Segal's initiative to become involved, notwithstanding his apparent absence from the proceedings and his professed lack of any connection to or control over the appellant corporations. Nor did we have any doubt that Mr. Segal was animated by his avowed intention to practice a "scorched earth policy" and to ensure that anybody but Ms. Lynch take value from his properties. This attitude was confirmed in an e-mail to Ms. Lynch, dated December 19, 2005, in which Mr. Segal said: "I think it is now time to invite U-NO-WHO from Montreal to the picnic. She is not needy, but is very hungry, will eat a lot, and will never go away." On July 18, 2006 — one day after Leonor Segal's motion for leave to intervene was filed — Mr. Segal sent another e-mail to Ms. Lynch. This one said:

> While at the shore in my house with my kids give serious consideration to the following: **NEMO ME IMPUNE LACESSIT**. [Emphasis in e-mail].

55 Roughly translated, "Nemo me impune lacessit" means "No one messes with me and gets away with it."

56 A vesting order is essentially an equitable remedy designed to work as an enforcement mechanism. The equities in this case do not favour Leonor Segal; they favour Ms. Lynch.

57 It is true that Ms. Lynch was aware of Ms. Segal's outstanding Nevada judgments. However, as noted in our earlier decision, she had reason to believe, following a lengthy conversation with Ms. Segal's Nevada counsel (at Ms. Segal's suggestion), that Ms. Segal was not going to pursue enforcement procedures at that time. Moreover, Ms. Segal is not in need. She has remarried a distant cousin of Moses Segal, a man who is even wealthier than Mr. Segal. She and her new husband are highly regarded members of the Jewish community in Montreal, where they are known for their generous charitable donations. The children of Leonor and Moses Segal are now adults. Ms. Lynch and her minor children, on the other hand, are in need of the support ordered by the trial judge.

58 The appellants argue that Ms. Segal is a known judgment creditor of Mr. Segal and that she is a necessary party to the determination of the vesting issue. This is particularly so, they say, because both Ms. Lynch and Ms. Segal are judgment creditors with claims for spousal and child support. They are therefore claimants entitled to equal priority over other judgment creditors — a right now entrenched in statute law in order to protect spouses and children and to ensure that their claims are satisfied in priority to those of other non-secured claimants: see the *Creditors' Relief Act*, R.S.O. 1990, c. C.45, s. 4. Not to take into account Ms. Segal's interests as a spousal judgment creditor when vesting the Lands in Ms. Lynch, the appellants submit, is to ignore the broad interjurisdictional statutory scheme that has been put in place by legislators across the continent to protect spouses and children.

59 I do not accept these submissions in the context of this case.

60 Ms. Segal was not an execution creditor of Mr. Segal in Ontario at any relevant time in these proceedings. Although she was well aware of Ms. Lynch's lawsuit against her former husband, she had no enforceable encumbrance against any of his assets in this province. Had she registered her Nevada judgments in Ontario prior to the trial and applied for intervention status at that stage, it may well be she would have succeeded, at least with respect to the issues concerning the ownership of the appellant corporations and their properties, and the matter of the vesting order. As a registered spousal judgment creditor entitled to equal priority with Ms. Lynch over Mr. Segal's property, she could be said to have an interest in those subject matters and to be a person who may be adversely affected by a judgment in relation to them. However, she chose not to take any of these steps.

61 There is no requirement under the *Family Law Act* or the *Courts of Justice Act* for notice to be given to anyone in particular when a vesting order is sought. Whether such notice should be given in a particular case is a matter for a

judge to determine. However, I am not aware of any other statutory or legal prerequisite requiring Ms. Lynch to give notice of the details of her claim to Ms. Segal, an unregistered foreign judgment creditor; nor were we referred to any such authority by counsel. Clearly, Ms. Segal's interests would have been protected had she been a registered execution creditor. Either she would have been entitled to receive notice and to participate in the proceedings or, at worst, Ms. Lynch would have taken the vested title in the Lands subject to her interest as an execution creditor. Unfortunately for Ms. Segal, she chose not to register her Nevada judgments until it was too late.

62 The argument concerning Ms. Segal's claim on the Nevada judgments was advanced thoroughly at trial (and on appeal) by the appellant corporations. The trial judge obviously concluded that notice to Ms. Segal was not necessary and that whatever inchoate claim she might have in relation to Mr. Segal's assets did not preclude him from vesting these particular Lands in Ms. Lynch in order to ensure payment of the particular orders for spousal and child support that he had made in the circumstances of this particular case. For the reasons outlined above, I do not think he erred in that assessment.

The Failure to Vest the Shares or to Make a Charging Order in Lieu of a Vesting Order

63 Finally, the trial judge committed no reversible error in declining to vest the shares of the appellant corporations, rather than the Lands, in Ms. Lynch, or in refusing to make a charging order or grant some other remedy in lieu of a vesting order. Once the finding was made that Mr. Segal is the beneficial owner of the shares *and* of the Lands, the decision whether to grant a vesting order pursuant to the *Family Law Act* or the *Courts of Justice Act* became a matter within the broad discretion of the trial judge. Absent an error in principle or an error in law in the exercise of that discretion, this court will not interfere.

64 There was no such error here.

65 On the findings of the trial judge there are no third party investors or shareholders — "no secret offshore investor whose identity needs to be protected" — whose interests in the appellant corporations might be affected by treating Mr. Segal and the corporations as "one and the same", and by the finding Mr. Segal to be the beneficial owner of the Lands. Any valid encumbrancers or registered execution creditors with an interest in the Lands at the time the vesting order was made are protected because Ms. Lynch takes title subject to such interests. The trial judge was very alert to the reality that "[t]here is simply no possibility that Mr. Segal would ever pay child or spousal support willingly." He concluded Mr. Segal's failure to comply with the interim support order of Justice Kitely in the proceedings and his deliberate evasion of Justice Mesbur's order prohibiting him from dissipating his assets (the Sondor sale) were sufficient proof of that actuality. He was also aware of the need to provide finality to the litigation, to the extent possible.

66 In these circumstances, it was clearly open to the trial judge to reject alternative solutions and to opt, as he did, for a remedy that would in effect swap the monetary spousal and child support parts of the claim against Mr. Segal for the Lands. This would ensure that at least a significant portion of Mr. Segal's support obligations would be satisfied (on the evidence the trial judge was satisfied the value of the Lands would not be sufficient to meet those obligations fully). He was convinced that without the vesting order Ms. Lynch and the children would likely receive nothing. He concluded:

> In my view the claim for vesting of those lands, in lieu of any excess claim for spousal support, and in satisfaction of the claim for lump sum support is fair in the circumstances.

67 The trial judge was justified in the circumstances in arriving at that conclusion. While he could have awarded a different remedy, the vesting order was well within the range of reasonable options at his disposal.

68 Providing for a charging order against either the shares or the Lands, instead of a vesting order, would have left control of the appellant corporations in the hands of Mr. Segal, who is a self-confessed master at manoeuvring and manipulating his corporate vehicles in order to frustrate and defeat the interests of his former spouses, his children, and his creditors generally. At worst, he could devise a means of stripping the assets out of the corporations and spiriting them away for his personal benefit, as he did in the Sondor transaction. At best, he could take steps to delay Ms. Lynch's

ability to recover on the charging order and put her to further expense in pursuance of his "scorched earth policy". The trial judge was right in rejecting such a proposal.

69 Similarly, while an order vesting the shares of the appellant corporations in Ms. Lynch would ultimately put control of the corporations in her hands, a series of corporate steps would have to be taken before that control would become a reality and, in any event, such a remedy might not be as effective in satisfying Mr. Segal's support obligations because of the capital gains tax implications referred to above. As long as there are corporate steps that have to be taken, there are opportunities for Mr. Segal and the appellant corporations to be mischievous and to attempt to put obstacles in the way of Ms. Lynch's attempts to enforce her spousal and child support orders. As to the tax considerations, Mr. Segal is obviously in a position to cope with any personal or corporate tax liabilities that he may be compelled to pay, whereas he will not willingly satisfy his support obligations. The choice of an order vesting the Lands, which he beneficially owns, instead of the shares, is justifiable on that ground alone.

Disposition

70 For the foregoing reasons, and given the circumstances of this case, I would not interfere with the trial judge's discretionary choice to transfer the Lands to Ms. Lynch and to vest them in her in satisfaction of her spousal and child support claims, in the circumstances of this case.

71 Accordingly, the appeal is dismissed.

72 Ms. Lynch is entitled to her costs of the appeal, payable by the appellant corporations, and fixed in the amount of $60,000.00 all inclusive, as agreed by counsel.

***D. Doherty J.A.*:**

I agree.

***H.S. LaForme J.A.*:**

I agree.

Appeal dismissed.

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Kershaw v. Kershaw | 2012 ONSC 134, 2012 CarswellOnt 1403, [2012] W.D.F.L. 2758, 211 A.C.W.S. (3d) 383, 19 R.F.L. (7th) 68 | (Ont. S.C.J., Jan 6, 2012)

2006 CarswellOnt 4139
Ontario Court of Appeal

Trick v. Trick

2006 CarswellOnt 4139, [2006] W.D.F.L. 3546, [2006] W.D.F.L. 3574, [2006] W.D.F.L. 3578, [2006] W.D.F.L. 3579, [2006] O.J. No. 2737, 213 O.A.C. 105, 271 D.L.R. (4th) 700, 31 R.F.L. (6th) 237, 54 C.C.P.B. 242, 81 O.R. (3d) 241, 83 O.R. (3d) 55

EDWINA RUTH TRICK (Applicant / Respondent on Appeal) and JOHN ANTHONY TRICK (Respondent / Appellant)

Laskin, Cronk, Lang JJ.A.

Heard: March 31, 2006
Judgment: July 7, 2006
Docket: CA C44322

Proceedings: reversing in part *Trick v. Trick* (2005), 2005 CarswellOnt 7772 (Ont. S.C.J.)**Proceedings: and affirming *Trick v. Trick* (2005), 2005 CarswellOnt 7740 (Ont. S.C.J.)**

Counsel: D. Smith, Brinley Evans for Appellant
Jacqueline M. Mills for Respondent

Subject: Family; Property; Corporate and Commercial; Public; Civil Practice and Procedure
Related Abridgment Classifications
Family law
IV Support
IV.1 Spousal support under Divorce Act and provincial statutes
IV.1.l Enforcement of award
IV.1.l.iii Garnishment
Family law
IV Support
IV.1 Spousal support under Divorce Act and provincial statutes
IV.1.l Enforcement of award
IV.1.l.vi Practice and procedure
Family law
IV Support
IV.3 Child support under federal and provincial guidelines
IV.3.i Enforcement of award
IV.3.i.i General principles
Family law
XX Costs
XX.1 In family law proceedings generally
XX.1.g Factors considered
XX.1.g.v Success

XX.1.g.v.C Miscellaneous

Headnote

Family law --- Support — Child support under federal and provincial guidelines — Enforcement of award — General principles

Husband and wife were divorced in 1992 — Wife brought successful application to vary child and spousal support in 1998 — Husband was ordered to pay retroactive and ongoing child and spousal support — Judgment provided for enforcement of support order by Director of Family Responsibility Office — By March 2005, husband owed wife $422,192.17 including arrears of support, interest and costs — In May 2005, wife brought successful motion for, inter alia, order vesting husband's entire pension from former employer (employment pension) in her name and order directing garnishment of 100 per cent of husband's Canada Pension Plan (CPP) and Old Age Security (OAS) benefits — Husband appealed on basis that motion judge did not have jurisdiction to vest husband's employment pension in wife, or to order garnishment of 100 per cent of husband's employment pension or CPP and OAS benefits — Appeal allowed — Order of motion judge set aside to extent that it provided for 100 per cent garnishment of husband's CPP and OAS benefits — Vesting order with respect to employment pension was set aside, and wife was entitled to garnishment of only 50 per cent of husband's employment pension — Section 23(1) of Family Responsibility Support Arrears Enforcement Act, 1996 caps garnishment at 50 per cent of payor's "income source", which is defined in s. 1 as including "disability, retirement or other pension" — Court should exercise its discretion under R. 29(19) of Family Law Rules to limit garnishment to 50 per cent of CPP and OAS benefits, same restriction as is placed on garnishment by Director of Family Responsibility Office — Section 100 of Courts of Justice Act does not provide stand-alone jurisdiction to grant relief; it provides only mechanism to vest title to property in respect of which there is separate, valid claim to ownership — Motion judge relied upon Family Law Act as conferring such valid claim, but support order was made under Divorce Act — Section 66(4) of Pension Benefits Act clearly restricts execution to enforce support orders to 50 per cent of payor's pension.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Enforcement of award — Practice and procedure

Husband and wife were divorced in 1992 — Wife brought successful application to vary child and spousal support in 1998 — Husband was ordered to pay retroactive and ongoing child and spousal support — Judgment provided for enforcement of support order by Director of Family Responsibility Office — By March 2005, husband owed wife $422,192.17 including arrears of support, interest and costs — In May 2005, wife brought successful motion for, inter alia, order vesting husband's pension from former employer (employment pension) in her name and order directing garnishment of 100 per cent of husband's Canada Pension Plan (CPP) and Old Age Security (OAS) benefits — Husband appealed on basis that motion judge lacked jurisdiction to vest husband's employment pension in wife, or to order garnishment of 100 per cent of husband's CPP and OAS benefits — Appeal allowed — Order of motion judge set aside to extent that it provided for 100 per cent garnishment of CPP and OAS benefits — Vesting order with respect to employment pension was set aside, and wife was entitled to garnishment of only 50 per cent of husband's employment pension — Section 23(1) of Family Responsibility Support Arrears Enforcement Act, 1996 caps garnishment at 50 per cent of payor's "income source", which is defined in s. 1 as including "disability, retirement or other pension" — Court should exercise its discretion under R. 29(19) of Family Law Rules to limit garnishment to 50 per cent of CPP and OAS benefits, same restriction as is placed on garnishment by Director of Family Responsibility Office — This was not case where equitable remedies should be employed — Section 100 of Courts of Justice Act did not provide stand-alone jurisdiction to grant relief; it provided only mechanism to vest title to property in respect of which there is separate, valid claim to ownership — Motion judge relied upon Family Law Act as conferring such valid claim, but support order was made under Divorce Act — Section 66(4) of Pension Benefits Act clearly restricts execution to enforce support orders to 50 per cent of payor's pension.

Family law --- Costs — In family law proceedings generally — General principles

Husband and wife entered into separation agreement in 1991, which provided for both child and spousal support — Parties' 1992 divorce judgment also provided for child support — In 1998, wife brought application to vary child and spousal support, and to set aside separation agreement — Husband was ordered to pay retroactive child support of $152,740, ongoing child support of $1,448 per month, and 75 per cent of children's extraordinary educational expenses — Husband was also ordered to pay retroactive spousal support of $79,000, and ongoing spousal support of $800 per

month — By March 1995, husband was in arrears $422,192, had contributed nothing to children's educational costs, and had unilaterally reduced monthly payment from ordered amount to $1,570 — Husband had taken new, more lucrative job in Texas, and his only asset in Canada was pension entitlement from former employer of approximately $31,000 per year — Husband also received Canada Pension Plan and Old Age Security pensions — Wife brought sucessful motion for order vesting husband's interest in pension entitlement in her, and for order diverting all amounts due and payable to husband by government to her — Husband brought unsuccessful cross-motion to vary support and rescind arrears — Wife was awarded costs of $10,000 against husband — Husband appealed from judgment and costs order — Appeal dismissed with respect to costs issue — Motion judge did not err in exercise of his discretion regarding costs for two reasons — First, wife was entirely successful in defending against husband's application to vary support and to rescind all arrears — Second, wife remained entitled to orders for garnishment of 50 per cent of employment pension and CPP and OAS benefits — In this sense, wife was successful below and was entitled to her costs.

Annotation

This important case resolves, for now, an important question in Ontario, that of the court's jurisdiction to vest a payor spouse's private pension in favour of a recipient spouse in order to enforce a support order. This case also answers the secondary question of the court's jurisdiction to order the diversion, by garnishment, of 100 per cent of a payor's Canada Pension Plan ("CPP") and Old Age Security benefits ("OAS").

The division of pension benefits in Ontario continues to vex practitioners and the Bench. In 1986, the Ontario legislature made pensions part of the net family property for equalization purposes, but did not provide a plan for the division of the pension. Notwithstanding constant cries by the Ontario Bar Association and judges in various trial judgments for pension law reform, the government has not seen fit to pass legislation. Legislation is desperately needed. *Trick* is but one case in a host of cases that make it clear that the Ontario *Pension Benefits Act* is being used to defeat both equalization entitlements under the *Family Law Act* and support orders. Most other provinces have a form of pension splitting. Ontario lags seriously behind and this case is another judicial reminder that Ontario needs to reform this area urgently.

The wife in this case was owed significant retroactive spousal and child support totalling in excess of $225,000, coupled with a significant order for costs of over $100,000. The husband was also ordered to pay continuing monthly spousal and child support. The husband did not pay the arrears and took the view that he was not in a position to pay the ongoing support. Instead of applying to the courts, he unilaterally reduced his support payments and judgment proofed his assets by moving to Texas to take a job that paid him about $200,000 a year. His only remaining assets in Canada were his Nortel pension and his CCP and OAS benefits. By the time the matter came before the motion court judge below, the husband owed his wife over $422,000 and, accordingly, the wife, out of desperation, sought two orders. One vesting the husband's Nortel pension in her name and the other directing the garnishment of 100 per cent of the husband's CCP and OAS benefits. The motion court judge granted both requests in order to enforce the support order. She relied on s. 100 of the *Courts of Justice Act*, s. 34.1(c) of the *Family Law Act*, and the provisions of the *Divorce Act* that permit a court ordering support to impose terms, conditions or restrictions in connection with a child and spousal support order. The motion court judge quickly realized that absent this enforcement mechanism, the wife would be without a remedy.

The Court of Appeal unanimously overturned the motion court judge's order because the order, in their view, contravened s. 66(4) of the *Pension Benefits Act* which permits execution against a pension to enforce a support order to a maximum of only 50 per cent of the benefit. Secondly, the vesting order contravened s. 65(1) of the *Pension Benefits Act* which voids every transaction purporting to assign a pension. The motion court judge was also found to have erred in ordering the diversion or garnishment of more than 50 per cent of the husband's CCP and OAS benefits.

Regrettably, the *Pension Benefits Act* has not kept pace with modern family law and the problem created by persons who have a pension but who ignore their child and spousal support obligations. As creative as the wife's counsel may have been, the Court of Appeal found that s. 100 of the *Courts of Justice Act* does not provide stand-alone jurisdiction to grant the relief claimed but only provides a mechanism to vest title to property in respect to which there is a separate, valid claim to ownership. The motion court judge was also not entitled to rely on the *Family Law Act* since the parties

were divorced and the original support order was made under the *Divorce Act*. Unfortunately for the wife, the *Pension Benefits Act* prohibits the granting of such a vesting order. The Act is clear.

At first blush, s. 65(1) of the *Pension Benefits Act* appears to not hurt the wife's claim since the prohibition in s. 66 (exempting money payable under a pension plan from execution) appears to fall within the exception provided in s. 65(3) (allowing for execution against a pension for amounts owing by an order under the *Family Law Act* or by a domestic contract). However, for the reasons stated above, the *Family Law Act* was not applicable in this case, as support was owing under the *Divorce Act*, not the *Family Law Act*. At the very least, a simple amendment to the *Pension Benefits Act* expanding the powers exclusion under s. 65(3) to orders under the *Divorce Act* would solve the problem.

The Court of Appeal, in reviewing the *Divorce Act* and, in particular s. 15.1, did not find jurisdiction in that section to vest the pension. This was, in the Court of Appeal's view, precluded by the *Pension Benefits Act*.

The main purpose behind the *Pension Benefits Act* is to encourage the establishment of pensions and to ensure that they are available to workers for their retirement years. As a result, there are significant limits on what can be done with a pension. It is somewhat surprising that predecessor legislation, the *Pension Benefits Act*, R.S.O. 1980, c. 373, permitted execution against 100 per cent of a pension in pay to enforce a support order. However, in 1988, the Ontario legislature amended the legislation to cap execution to enforce a support order at 50 per cent of the payor's pension and to permit the assignment of a maximum of 50 per cent of pension to satisfy an equalization order. In this way, the Ontario legislature tried to balance the competing interest of support enforcement and pension preservation. With respect, the Ontario legislature seems to have its priorities wrong. While there is great merit in creating pension legislation which encourage pensions, it seems to us that a higher priority ought to be to ensure that court orders for child and spousal support and equalization are complied with before a pensioner gets to enjoy the pension benefits. We do not understand the need to balance these interests and, certainly, there is no need to treat such interests equally. With respect, the amendments in 1988 that interfered with the inability to execute fully on a pension were in error.

However, the legislation, at present, is clear and in a careful analysis of the sections, the Court of Appeal unanimously concluded that to allow s. 65(3) to provide an exception, would be clearly inconsistent with the legislative intention of s. 66(4) and inconsistent with the legislative history of the provisions. This is an unfortunate but predicable result in light of the wording of the section and is a clear warning to the Bench and Bar about the limits of enforcement against a pension for orders made under the *Divorce Act*.

In another creative argument, counsel for the wife tried to argue equitable execution. This argument failed because a court cannot grant equitable relief that directly conflicts with a prescribed legislative scheme. Justice Lang does a careful analysis of equitable execution in this judgment and for those that seek that kind of remedy for other assets, the case is worth careful examination.

What is clearly needed here is reform of the *Pension Benefits Act* to not only deal with issues of enforcement but to deal with issues of pension splitting at first instance.

The second issue in this appeal was the garnishment of 100 per cent of the husband's CCP and OAS benefits. This, too, raised the question of statutory interpretation because both CPP and OAS benefits are creatures of statutes, being the *Canada Pension Plan*, R.S.C. 1985, c. C-8 and the *Old Age Security Act*, R.S.C. 1985, c. O-9. These provisions explicitly prohibit execution in law and equity but are subject to garnishment for support enforcement in the terms set out in Pt. II of the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.); see ss. 24, 25 and 26. The Court of Appeal again analysed the legislation and reached the conclusion that garnishment of CCP and OAS benefits ought to be restricted to 50 per cent and that the motion court judge erred in garnishing 100 per cent of those benefits. Essentially, the Court of Appeal found that the Ontario law caps garnishment at 50 per cent and does not permit a higher level of garnishment. The 50 per cent cap is subject to two proposed but unproclaimed amendments to the *Family Orders and Agreements Enforcement Assistance Act*. These proposed amendments would allow for a garnishment to exceed 50 per cent but the amendments have not yet been proclaimed in force.

At the end of the day, the wife has a significant order for spousal and child support. The husband is judgment proof except for his private pension, CPP and OAS benefits. While the husband continues to accumulate wealth, capped at 50 per cent recovery, the wife will have to live to at least 164 years of age before she will recover that which is owed to her. It is hoped that by the time she reaches that age, the government will have seen fit to enact pension reform legislation.

Philip Epstein, Q.C., L.S.M.

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APPEAL by husband from judgments reported at *Trick v. Trick* (2005), 2005 CarswellOnt 7772 (Ont. S.C.J.) and *Trick v. Trick* (2005), 2005 CarswellOnt 7740 (Ont. S.C.J.), making garnishment and vesting orders with respect to support obligations and awarding costs to wife.

***Lang J.A.*:**

1 This appeal raises the primary question of the court's jurisdiction to vest a payor spouse's private pension in a recipient spouse to enforce a support order made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (DA). This appeal also raises the question of the court's jurisdiction to order the diversion by garnishment of 100 per cent of a payor's Canada Pension Plan (CPP) and Old Age Security (OAS) benefits.

2 In this case, the motion judge, Fragomeni J., vested 100 per cent of the appellant's pension in the respondent wife, Edwina Trick, and ordered the garnishment of 100 per cent of the appellant's CPP and OAS benefits. These orders, and other relief, were granted because the appellant husband, John Trick, was in substantial arrears of child and spousal support. The appellant seeks to set aside both orders as well as the order made against him to pay $10,000 in costs. The appellant, however, does not pursue his appeal of the dismissal of his motion to vary, in which he sought to reduce his child support obligations and rescind all support arrears.

3 For the reasons that follow, in my view, the motion judge erred in granting a vesting order of the appellant's private pension plan because such an order would contravene s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (PBA). Section 66(4) permits execution against a pension benefit to enforce a support order but to a maximum of 50 per cent of the benefit. Further, the vesting order contravened s. 65(1) of the PBA, which voids every transaction purporting, among other things, to assign a pension. The order in issue does not fall within the exception provided by s. 65(3). The motion judge also erred in ordering the diversion or garnishment of more than 50 per cent of the appellant's CPP and OAS benefits. Finally, in the circumstances of this case, I would not interfere with the costs order below or award any costs for this appeal.

Facts

4 In 1991, the parties entered into a separation agreement that provided for both child and spousal support. The parties' 1992 divorce judgment, although silent on the issue of spousal support, provided for child support for the parties' two children.

5 At the time of separation, the appellant was employed by Nortel, earning approximately $120,000 annually. Months later, Nortel terminated his employment, thereby triggering payment of the appellant's $31,000 annual Nortel pension. Within four months, the appellant accepted employment in Texas at an income much greater than he earned at Nortel. From 1995 to 2001, the appellant earned an average annual income of $194,258 CAD, including his Nortel pension. He did not disclose his increased income to the respondent.

6 In the meantime, the respondent's health deteriorated to the point that she was unable to earn any significant income. When the respondent eventually learned of the appellant's actual financial circumstances, she sought a retroactive and ongoing variation of support.

7 After an eight-day trial of the variation application in 2003, the trial judge, Seppi J., awarded the respondent retroactive spousal and child support totaling $225,675 and $117,936.41 in costs. She also ordered ongoing monthly spousal support as well as child support under the *Federal Child Support Guidelines*, S.O.R./97-175.

8 Following the variation judgment, the appellant appealed to this court. However, his appeal was late and the appellant decided not to review the order refusing him an extension of time. Instead, he simply reduced his support payments and, according to the respondent, "judgment-proofed his U.S. assets." In Canada, the appellant's only assets are his Nortel pension and his CPP and OAS benefits.

9 The variation judgment concluded with the usual paragraph providing for the enforcement of the support order by the Director of the Family Responsibility Office pursuant to the provisions of the *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31 (FRSAEA). On the record before this court, it appears that the Director has not withdrawn from enforcement the 2003 support variation judgment and the related Support Deduction Order, which was made under FRSAEA.

The Motion Below

10 By March 2005, the appellant owed the respondent $422,192.17, including arrears of support, interest and costs. In May 2005, the respondent brought a motion for, among other relief, the two orders at issue on this appeal: one vesting the appellant's Nortel pension in her name and the other directing the garnishment of 100 per cent of the appellant's CPP and OAS benefits. In response, the appellant brought a cross-motion to vary Seppi J.'s judgment to reduce his support obligations.

11 After reviewing the parties' circumstances and the reasons for the 2003 variation, the motion judge dismissed the appellant's motion to vary. He concluded that, in essence, the appellant was asking the motion judge to sit on appeal from the earlier variation judgment. I agree. In any event, as I have mentioned, the appellant does not appeal this part

of the motion judge's order. In argument, the appellant advises that he pursues only his challenge of the motion judge's jurisdiction to make the diversion orders.

12 It is clear from paragraph 35 of the motion judge's reasons that both the vesting order and the garnishment relief were granted "to enforce" the support order. [1] In support of his jurisdiction to grant the enforcement relief, the motion judge relied on s. 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA), s. 34(1)(c) of the *Family Law Act*, R.S.O. 1990, c. F.3 (FLA), and those provisions of the DA that permit a court ordering support to "impose terms, conditions or restrictions in connection with" a child or spousal support order. The motion judge, after commenting on the appellant's extensive history of non-payment and on the appellant's argument that diversion would be inequitable in light of the appellant's age and financial circumstances, concluded that the relief should be granted.

1 He stated: "In all of the circumstances of this case I am satisfied that a vesting order of the Nortel Pension is appropriate in order to enforce the terms of the judgment of Seppi J. I am also satisfied that the full amount payable from CPP and OAS pensions ought to be garnished."

13 With respect to the 100 per cent garnishment of the appellant's CPP and OAS benefits, the motion judge's reasons were brief: "I am also satisfied that the full amount payable from CPP and OAS pensions ought to be garnished."

Issues

14 The appellant raises three issues on this appeal:

1. Did the motion judge err in vesting 100 per cent of the appellant's Nortel pension in the respondent?
2. Did the motion judge err in ordering the garnishment of 100 per cent of the appellant's CPP and OAS benefits?
3. Did the motion judge err in awarding costs of $10,000 against the appellant?

Analysis

1. Did the motion judge err in vesting 100 per cent of the appellant's Nortel pension in the respondent?

Summary

15 The appellant argues that the PBA restricts execution against a pension to 50 per cent for spousal support. The respondent argues that any such statutory restrictions are not relevant to the court's exercise of its equitable jurisdiction under s. 100 of the CJA, a jurisdiction that is akin to the appointment of an equitable receiver under s. 101 of the CJA.

16 In my view, s. 100 of the CJA does not provide stand-alone jurisdiction to grant the relief claimed. Section 100 only provides a mechanism to vest title to a property in respect of which there is a separate, valid claim to ownership. Although the motion judge relied on the FLA as conferring such a valid claim, the support order was made under the DA and not under the FLA. Further, the *Family Law Rules*, O. Reg. 114/99 (FLR), which provide the procedure for the enforcement of DA support orders, do not list vesting orders as an available enforcement mechanism. The DA, however, does give a court jurisdiction to secure a spousal support order. In that sense, it may be construed as providing the CJA s. 100 authority to "encumber" an asset. However, even if that is so at law, the PBA prohibits the granting of such a vesting order. Consequently, in my opinion, even if a vesting order is available in equity, that relief should be refused where it would conflict with specific provisions of the PBA. This is particularly so because the exigibility of pensions is fraught with social and political policy issues, issues that are better-suited for the legislature than the courts. Accordingly, I would allow the appeal and set aside the vesting order.

17 These conclusions follow from a consideration of the legislation, although the wording of the legislation and the interaction between the applicable statutes are by no means straightforward.

Legislative Provisions

18 The following provisions are relevant to the question of the court's jurisdiction to make a vesting order with respect to a pension:

Courts of Justice Act

s. 100 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.

s. 101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Family Law Act

s. 34(1) In an application under section 33 [for support], the court may make an interim or final order,

. . . . .

(c) requiring that property be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years;

Divorce Act

s. 2(1) "support order" means a child support order or a spousal support order.

s. 15.1(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

s. 15.2(1) A court of competent jurisdiction may ... make an order requiring a spouse to secure or pay, or to secure and pay ... such...sums, as the court thinks reasonable for the support of the other spouse.

s. 15.1 (4) and s. 15.2(3) The court may make an order ... and may impose terms, conditions or restrictions in connection with the order ... as it thinks fit and just.

s. 17(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

s. 20(3) An order that has legal effect throughout Canada pursuant to subsection (2) may be

(a) registered in any court in a province and enforced in like manner as an order of that court; or

(b) enforced in a province in any other manner provided for by the laws of that province, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada.

Federal Child Support Guidelines

s. 12 The court may require in the child support order that the amount payable under the order be paid or secured, or paid and secured, in the manner specified in the order.

Family Law Rules

r. 2(1) In these rules, "payment order" means a temporary or final order, but not a provisional order, requiring a person to pay money to another person, including,

(a) an order to pay an amount under Part I or II of the *Family Law Act* or the corresponding provisions of a predecessor Act,

(b) a support order,

(c) a support deduction order,

(e) a payment order made under rules 26 to 32 (enforcement measures) or under section 41 of the *Family Responsibility and Support Arrears Enforcement Act, 1996*,

(j) the costs and disbursements in a case;

"Support order" means an order described in subsection 34(1) of the *Family Law Act* or a support order as defined in subsection 2(1) of the *Divorce Act* (Canada) or in section 1 of the *Family Responsibility and Support Arrears Enforcement Act, 1996*.

r. 26(2) An order that has not been obeyed may, in addition to any other method of enforcement provided by law, be enforced as provided by subrules (3) and (4).

r. 26(3) A payment order may be enforced by,

(a) a request for a financial statement (subrule 27(1));

(b) a request for disclosure from an income source (subrule 27(7));

(c) a financial examination (subrule 27(11));

(d) seizure and sale (rule 28);

(e) garnishment (rule 29);

(f) a default hearing (rule 30), if the order is a support order;

(g) the appointment of a receiver under section 101 of the *Courts of Justice Act*; and

(h) registration under section 42 of the *Family Responsibility and Support Arrears Enforcement Act, 1996*.

Pension Benefits Act - Benefits

s. 51 (1) A domestic contract as defined in Part IV of the *Family Law Act*, or an order under Part I of that Act is not effective to require payment of a pension benefit before the earlier of,

(a) the date on which payment of the pension benefit commences; or

(b) the normal retirement date of the relevant member or former member.

(2) A domestic contract or an order mentioned in subsection (1) is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or a former member during the period when the party and the member or former member were spouses.

Pension Benefits Act — Locking In

s. 65(1) Every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void.

(3) Subsections (1) and (2) do not apply to prevent the assignment of an interest in money payable under a pension plan or money payable as a result of a purchase or transfer under section 42, 43, clause 48(1)(b) or subsection 73(2) (transfer rights on wind up) by an order under the *Family Law Act* or by a domestic contract as defined in Part IV of that Act.

s. 66(1) Money payable under a pension plan is exempt from execution, seizure or attachment.

(4) Despite subsection (1), payments under a pension or that result from a purchase or transfer under section 42 or 43, clause 48(1)(b) or subsection 73(2) are subject to execution, seizure or attachment in satisfaction of an order for support enforceable in Ontario to a maximum of one-half the money payable.

Review of the Legislation

(a) Courts of Justice Act

19 The starting point referenced by the motion judge is s. 100 of the CJA, which provides a court with jurisdiction to vest property in a person but only if the court also possesses the "authority to order [that the property] be disposed of, encumbered or conveyed." Thus, s. 100 [2] only provides a mechanism to give the applicant the ownership or possession of property to which he or she is otherwise entitled; it does not provide a free standing right to property simply because the court considers that result equitable.

2 This description of a vesting order also follows from a reading of the predecessor to s. 100, s. 79 of the *Judicature Act*, R.S.O. 1980, c. 223:

Where the court has authority to direct the sale of any real or personal property or to order the execution of a deed, conveyance, transfer or assignment of any real or personal property, the court may by order vest the property in such person and in such manner and for such estates as would be done by any such deed, conveyance, assignment or transfer if executed; and the order has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise, for the same estate or interest, to the person in whom the property is so ordered to be vested or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person [emphasis added].

20 Accordingly, the question is whether, at law or in equity, the motion judge had that necessary authority to *dispose of, encumber or convey* the appellant's interest in his pension.

(b) Family Law Act

21 The FLA, which the motion judge relied upon, permits the diversion of pensions for two purposes. First, Part I, specifically s. 9(1)(d)(i), gives a court the jurisdiction to make a vesting order as a means to effect the equalization of net family property, including pensions. This section, however, does not apply because equalization was not the issue in this case.

22 Second, Part III of the FLA, specifically s. 34(1)(c), gives a court jurisdiction, when dealing with support, to transfer or vest property "in the dependant, whether absolutely, for life or for a term of years". [3] In this case, however, the judgment sought to be varied was not granted under the FLA, but under the DA.

3 For examples of cases involving the vesting of realty, see *Crump v. Crump* (1984), 38 R.F.L. (2d) 92 (Ont. H.C.); *Perrier v. Perrier* (1987), 12 R.F.L. (3d) 266 (Ont. H.C.); and *Hohn v. Hohn*, [1995] O.J. No. 2754 (Ont. Gen. Div.).

23 Consequently, it was an error to rely on the FLA as the authority necessary to vest the appellant's Nortel pension in the respondent.

(c) Family Law Rules

24 The FLR, which set out the procedures available for the enforcement of a support order, apply whether the order is made under the FLA or under the DA. Rule 26 sets out the enforcement mechanisms available, including garnishment, seizure and sale, equitable receivership under s. 101 of the CJA, and, finally, by registration against land under the FRSAEA. A vesting order under s. 100 of the CJA, however, is not included among Rule 26 enforcement methods. Accordingly, the FLR, which in any event are only procedural in nature, do not provide the additional authority to dispose of, encumber or convey the appellant's pension as required by the CJA.

(d) Divorce Act

25 The motion judge also referred to the DA s. 15 jurisdiction to "impose 'terms, conditions, or restrictions in connection with' a child or spousal support order." In addition, s. 17(3) provides, on a variation application, that a court may make an order that "could have been included in the order in respect of which the variation order is sought."

26 In my view, these provisions do not assist the respondent. The phrase, "in connection with," only modifies the terms of the support being ordered so that a judge may impose various terms and conditions on the payments being ordered. The provision does not go so far, however, as to provide jurisdiction for the judge to order enforcement of the order or to order security for the payments. I say this because both enforcement and security are specifically addressed elsewhere in the DA.

27 The DA gives a court jurisdiction to require a spouse "to secure and pay" spousal support pursuant to s. 15.2(1) and s. 17(3) of the DA. Jurisdiction to secure an order for child support is provided by s. 12 of the *Federal Child Support Guidelines*. The securing of support, which has been available since the 1985 DA amendments, was addressed in *Long v. Long* (1993), 1 R.F.L. (4th) 110 (Alta. Q.B.). In that case, Veit J., held that because "there is specific authority in the *Divorce Act* allowing the courts to secure the payment of support," she had the jurisdiction to order support payments deducted from the payor's wages. She explained at para. 18 that such an order "is like a receivership order and is therefore within the category of securing orders that also contains mortgages, bonds, and pledges." [4]

4 See also *Alexander v. Alexander* (1997), 31 R.F.L. (4th) 131 (Ont. Gen. Div.); *Koyama v. Leigh* (1998), 36 R.F.L. (4th) 64 (B.C. C.A.); and *Nicklason v. Nicklason* (1989), 22 R.F.L. (3d) 185 (B.C. S.C.).

28 Such an order for security arguably could provide the necessary additional authority upon which to found a subsequent CJA s. 100 vesting order because such an order could be interpreted as providing the "authority" to "encumber" property. In any event, apart from the fact that this analysis was not argued by the respondent, in my view, the provisions of the PBA, which I will now discuss, preclude such an order, at least at law.

(e) Pension Benefits Act

29 To encourage the establishment of pensions, and to ensure that they are available to workers for their retirement years, the pension legislation provides that pensions are non-assignable and non-exigible [5], subject to certain exceptions.

5 The Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Pt. II (Toronto: Ministry of the Attorney General, 1981) at 104.

30 Accordingly, certain provisions are included in the PBA to preserve pensions. The legislation distinguishes between the protection given to pension benefits which a member will receive in the future and protection for pension moneys actually being received, i.e. a pension in pay. The Act also distinguishes between what a pensioner or court can do by way of assigning a pension and the extent to which a creditor can execute against a pension.

31 However, preserving a member's interest in his or her pension can conflict with other important objectives reflected in family law legislation. From a property perspective, the value of the pension accumulated during marriage is part

of the spouses' net family property subject to equalization. From a support perspective, a pension in pay is an income source relevant to the ongoing needs of the family members. Thus, pension income may be a source of revenue to enforce support and equalization obligations.

32 Predecessor legislation, the *Pension Benefits Act*, R.S.O. 1980, c. 373, generally prohibited both assignment of and execution against a pension. However, that Act made an exception and permitted execution against 100 per cent of a pension in pay to enforce a support order:

> 27(1) Moneys payable under a pension plan shall not be assigned, charged, anticipated or given as security and are exempt from execution, seizure or attachment, and any transaction purporting to assign, charge, anticipate or give as security such moneys is void.
>
> (2) Subsection (1) does not apply to the execution, seizure or attachment of moneys payable under a pension plan in satisfaction of an order for support under the *Family Law Reform Act.*

33 In 1988, the legislature amended the legislation to cap execution to enforce a support order at 50 per cent of the payor's pension and to permit the assignment of a maximum of 50 per cent of a pension to satisfy an equalization order. In this way, the current PBA balances the competing interests of support enforcement and pension preservation.

34 I begin with the current legislative provisions restricting execution against pensions for support enforcement because they benefit from greater clarity of language than those restricting the assignment of pensions. Apparently none of these provisions was brought to the attention of or argued before the motion judge.

(1) PBA - Execution Against Pensions

35 Section 66(1) of the PBA exempts money payable under a pension plan from "execution, seizure or attachment". For convenience, I repeat s. 66(4):

> Despite subsection (1), payments under a pension ... are subject to execution, seizure or attachment in satisfaction of an order for support enforceable in Ontario to a maximum of one-half the money payable.

36 This subsection, enacted in 1988 [6], provides that monies payable under a pension plan are subject to execution, seizure and attachment to a maximum of 50 per cent to satisfy support orders. This exemption applies to all support orders "enforceable in Ontario", which includes both orders made under the FLA and orders made under the DA, such as the one in this case. [7]

6 Pension Benefits Act, 1987, S.O. 1987, c. 35.

7 See s. 20(3) of the Divorce Act and s. 1(2)(a)(iv) of the Family Law Rules.

37 The 50 per cent exemption is replicated in the *Wages Act*, R.S.O. 1990 c. W.1, at ss. 7(2) and 7(3) (WA). However, unlike the PBA, ss. 7(4) and (5) of the WA give a court jurisdiction to increase or decrease the percentage exemption "if the judge is satisfied that it is just to do so, having regard to the nature of the debt owed to the creditor, the person's financial circumstances and any other matter the judge considers relevant." [8] The legislature did not give a court the same discretion with respect to exemptions in the case of pensions.

8 Wages Act, s. 7(2) Subject to subsection (3), 80 per cent of a person's wages are exempt from seizure or garnishment.
(3) Fifty per cent of a person's wages are exempt from seizure or garnishment in the enforcement of an order for support or maintenance enforceable in Ontario.

(4) A judge of the court in which a writ of execution or notice of garnishment enforceable against a person's wages is issued may, on motion by the creditor on notice to the person, order that the exemption set out in subsection (2) or (3) be decreased,

> if the judge is satisfied that it is just to do so, having regard to the nature of the debt owed to the creditor, the person's financial circumstances and any other matter the judge considers relevant.
>
> (5) A judge of the court in which a writ of execution or notice of garnishment enforceable against a person's wages is issued may, on motion by the person on notice to the creditor, order that the exemption set out in subsection (2) or (3) be increased, if the judge is satisfied that it is just to do so, having regard to the person's financial circumstances and any other matter the judge considers relevant.

38 The objective of pension preservation is reflected in s. 23(1) of the FRSAEA, which precludes the Director bringing enforcement proceedings under a Support Deduction Order from garnisheeing more than 50 per cent of a payor's pension. While the legislature also proposes to provide a judicial discretion to increase or decrease that exemption, that amendment has not yet been proclaimed in force. [9]

9 See proposed s. 23(4) of the FRSAEA, which has not yet come into force.

39 Since there is no similar proposed amendment to the PBA, the legislature can be taken to have determined that, at least currently, there should be no judicial authority to increase the 50 per cent exemption.

40 Accordingly, I conclude that, for the purpose of support enforcement, at law, s. 66(4) of the PBA permits execution against money payable under a pension plan to a maximum of 50 per cent.

41 I now turn to the question of whether a contrary result follows from an interpretation of s. 65(3) of the PBA.

(II) PBA - Assignment of Pensions

42 Despite the clear wording of s. 66(4), the respondent argues that execution to enforce a DA support order is permitted by the operation of s. 65(3). This section, however, must be considered in light of its purpose and its context. Section 65(1) begins by providing that "[e]very transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void." Section s. 65(3), at first blush, appears to describe a very broad exception to that prohibition:

> (3) Subsections (1) and (2) **do not apply to prevent the assignment of an interest in money payable under a pension plan** or money payable as a result of a purchase or transfer under section 42, 43, clause 48(1)(b) or subsection 73(2) (transfer rights on wind up) **by an order under the *Family Law Act* or by a domestic contract as defined in Part IV of that Act** [emphasis added].

43 Based on this broad language, the respondent argues that a court is not precluded from assigning 100 per cent of a pension to satisfy a support order. I disagree for several reasons.

44 First, the order in this case, to the extent it otherwise comes within s. 65(3) at all, is not an order made under the FLA. Rather, it was made under the DA. Accordingly, s. 65(3) cannot provide relief from the s. 65(1) general prohibition against pension assignment.

45 Second, the interpretation put forward by the respondent is inconsistent with the clear legislative intention of s. 66(4). Execution to satisfy support orders is specifically dealt with by s. 66(4) of the Act. If, by virtue of s. 65(3), a recipient spouse could by court order force the assignment of 100 per cent of a payor's pension, then s. 66(4) would be rendered meaningless. This would run afoul of the presumption of coherence in statutory interpretation. In essence, it is presumed that the legislature did not intend to make contradictory statements within the same statute. See *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (S.C.C.) at paras. 207-08 (per L'Heureux-Dube concurring) and R. Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths,

2002) at 168. In my view, s. 65(3) should not be interpreted to strip s. 66(4) of its purpose if other rational and consistent interpretations can be applied.

46 Third, such an interpretation is inconsistent with the legislative history of the provision. In 1988, the legislature deliberately moved from 100 per cent exigibility of pensions for support enforcement to 50 per cent. It would not be logical to cap pension exigibility at 50 per cent in s. 66(4), but leave it 100 per cent exigible under s. 65(3).

47 Fourth, s. 65(3) exempts only the assignment of pensions. An assignment of a pension is a transfer of rights to the pension. The Act continues to void all other transactions such as those that purport to "charge, anticipate or give as security money payable under a pension plan". Such transactions are akin to enforcement under s. 66 of the PBA and continue to be prohibited. These continued prohibitions reflect the legislature's continuing objective to preserve pensions.

48 Fifth, I acknowledge that s. 65(3) does not explicitly say that it is "subject to s. 51," or that its scope is confined to Part I FLA equalization orders. Legislative intent would have been clear were these points express. However, s. 65(3) cannot be read in isolation from s. 51. See p. 168 of *Dreidger*: "It is presumed that the provisions of legislation are meant to work together both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework."

49 When read in conjunction with s. 51, it is apparent that s. 65(3) was intended to provide the mechanism to permit the assignment of a pension to equalize property or, perhaps, for the purpose of lump sum spousal support, but not as an additional mechanism intended to denude s. 66(4) of meaning. I say this because s. 65(3) is necessary to provide a mechanism to satisfy a s. 51 equalization of a pension. The legislature addresses equalization of pensions in two parts of the PBA. First, the part entitled "Benefits" defines what benefits can be equalized and when:

> 51 (1) A domestic contract ... or an order under Part I of [the FLA] is not effective to require payment of a pension benefit [i.e. a benefit to which a pensioner will become entitled] before [the pension becomes available to the pensioner].
>
> (2) A domestic contract or an order mentioned in subsection (1) [i.e. for equalization] is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits ... accrued . . . when the party and the member or former member were spouses.

50 Section 51, however, does not provide a mechanism to accomplish that equalization. That mechanism is provided in that part of the PBA entitled "Locking In," which permits an assignment or transfer of money in pay under a FLA order.

51 The relationship between s. 51 and s. 65(3) is confirmed by the reference in s. 65(3) only to an order under the FLA; there is no reference to an order under the DA. This must be because an equalization order can only be made under the FLA and is not available under the DA. If the legislature intended an assignment order to be available to enforce support orders, it would have included a DA order in addition to a FLA order. However, the legislature chose not to do so, even though it amended s. 66 to address orders "enforceable in Ontario". As I have said, this phrase includes both DA and FLA orders for the purpose of execution.

52 By s. 51, the earliest payment of a pension benefit for equalization purposes must take place after the pension is payable and an equalization order cannot assign more than 50 per cent of the benefits accrued during the relevant period.

53 In this case, the respondent is not seeking an assignment of the appellant's pension for equalization purposes or even for the purpose of lump sum support. Rather, she is seeking to execute, seize or garnishee 100 per cent of the appellant's pension to enforce the appellant's outstanding obligations. In my view, she is precluded from doing so at law by s. 66(4) of the PBA.

(f) Equitable Execution

54 The respondent argues, however, that she is not seeking execution at law, but in equity, and that the PBA, unlike federal pension legislation that I will discuss later, does not preclude equitable relief. In support of her position, the respondent argues that a vesting order under s. 100 of the CJA is "equitable relief along the lines of the appointment of an equitable receiver" under s. 101 of the CJA. [10] I disagree for the following reasons.

10 Indeed, it seems that a vesting order has been used in certain family law cases as a less expensive substitute for the appointment of an equitable receiver.

55 A vesting order and an order for equitable receivership are fundamentally different. While a vesting order conveys ownership to the recipient, an equitable receivership does not. Such an order merely allows the receiver to collect and control the asset.

56 In any event, even if a vesting order is equivalent to a claim for equitable relief, as is argued by the respondent, this argument cannot succeed. I say this for two reasons. First, the authorities on which the respondent relies are distinguishable. Second, a court should decline to grant equitable relief that would run directly counter to a prescribed legislative scheme.

57 On appeal, the respondent relies on *Nicholas v. Nicholas* (1998), 37 R.F.L. (4th) 13 (Ont. Gen. Div.), *Simon v. Simon* (1984), 45 O.R. (2d) 534 (Ont. Div. Ct.), and *Saric v. Saric*, [1996] O.J. No. 2810 (Ont. Gen. Div.). In his reasons, the motion judge relied on *Kennedy v. Sinclair* (2001), 18 R.F.L. (5th) 91 (Ont. S.C.J.), aff'd (2003), 42 R.F.L. (5th) 46 (Ont. C.A.). [11]

11 In *Kennedy*, the court noted at para 45: "[I]t is clear that the exercise of the court's discretion to make such [a vesting] order should be founded on the basis that the respondent's previous actions and reasonably anticipated future behaviour indicate that the order granted will likely not be complied [with] without additional, more intrusive provisions, see for example: *Rostek v. Rostek*, [1994] O.J. No. 1606 (Ont. Gen. Div.) and *Alldred v. Alldred*, [1998] O.J. No. 3606 (Ont. Gen. Div.)." Those authorities, however, offer no analysis of the issue beyond the type of conduct required to trigger such an order. As well, neither case addressed the jurisdiction to make a vesting order with respect to pensions.

58 *Nicholas* came before a court only because the pension plan administrator refused to comply with the parties' settlement agreement and, to effect that settlement, the wife sought her appointment as equitable receiver. That case involved extraordinary circumstances where the husband agreed to vest 100 per cent of his pension in his wife: 50 per cent to satisfy an equalization order and the remaining 50 per cent for outstanding support. The PBA contains no prohibition against this type of order, which is known as a "stacking" order. [12] Since the arrangement did not offend against either of the PBA's 50 percent rules, *Nicholas* is of no application to this case.

12 For a discussion of stacking orders, see *Hooper*, *infra*, at para. 63

59 In *Simon*, the Divisional Court dismissed an appeal from an order that appointed an equitable receiver to collect 100 per cent of the defaulting payor's future pension benefits to satisfy an order made under the former *Family Law Reform Act*, R.S.O. 1980, c. 152 (FLRA). *Simon* was decided before 1988, when the PBA still permitted 100 per cent garnishment of pensions for an FLRA support order. Since the equitable relief granted in *Simon* did not conflict with the provisions of the PBA legislation then in effect, it does not provide authority in the instant case.

60 The court in *Saric* ordered the payor's house and RRSP vested in the recipient spouse "on account" of support arrears. The motion judge, however, had jurisdiction to make this order under s. 34(1)(c) of the FLA. Her *obiter* reference to the provisions of the DA included no analysis of those provisions, particularly in relation to the prohibitions of the PBA. Accordingly, *Saric* is also not helpful for the determination of this case.

61 *Kennedy*, *supra*, the case referenced by the motion judge, was heard as an uncontested motion for judgment. In that circumstance, the motion judge did not have the benefit of submissions by the respondent payor and undertook no analysis of the issues alive in this appeal. Furthermore, the vesting order granted in *Kennedy* was a stacking order, allocating 50 per cent of pension payments for support and 50 per cent for equalization. As was the case in *Nicholas* and *Simon*, this order did not come into direct conflict with the provisions of the PBA.

62 *Beattie v. Ladouceur* (1995), 23 O.R. (3d) 225 (Ont. Gen. Div.) and *Hooper v. Hooper* (2002), 59 O.R. (3d) 787 (Ont. C.A.) are the leading cases on the appointment of an equitable receiver in the pension context. [13] In *Beattie*, which considered federal legislation, an argument was raised by the recipient spouse similar to the one in this case - that the claim was not for execution but for an equitable receiver to be appointed to receive and apply 100 per cent of the payor's pension benefits to the outstanding support. In setting aside the order appointing the receiver, Justice Rutherford held that the equitable relief claimed was beyond the court's jurisdiction. He came to that conclusion based on the particular wording of the federal legislation that exempted pensions from execution either "at law or in equity." He held that the relief granted below amounted to indirect attachment or extra-legislative garnishment, in the sense that it contemplated the government exceeding the garnishment authority conferred by statute. Justice Rutherford explained at pp. 231-232:

13 See also *Bielanski v. Bielanski*, [2005] O.J. No. 2171 (Ont. S.C.J.) at paras. 21-25, where Gauthier J. declined to vest 100 per cent of the payor's private pension in the name of the recipient spouse to satisfy equalization and support arrears.

> [I]t should be remembered that the courts of equity fashioned "equitable" remedies to achieve justice which was unattainable largely because of the rigidity of legal remedies which were the creatures of the courts of law. Here, where Parliament has fashioned statutory remedies and placed limitations on those remedies with great specificity, I think it is the proper role of the courts to apply and maintain those remedies, including their limitations.

63 *Hooper* cited *Beattie* with approval when considering a court's jurisdiction to appoint a recipient spouse as equitable receiver of a payor's provincial pension to enforce outstanding FLA orders under the PBA and under the *Public Service Pension Act*, R.S.O. 1990, c. P.48, which also governed the pension at issue. *Hooper* considered an order made against the payor's pension to enforce an earlier unsatisfied equalization order. This court held that, although a court had jurisdiction under the PBA to make an assignment order as part of an equalization order, it had no jurisdiction to subsequently enforce an earlier equalization order by appointing the recipient spouse as equitable receiver of the payor's pension payments. Specifically, the court concluded, on the basis of similar legislation, that the court below erred in ordering equitable receivership where the PBA specifically prohibits the diversion of a pension for enforcement purposes.

64 In arriving at his conclusion at para. 44, Goudge J.A. commented on the rationale for statutory constraints on execution against pensions:

> The only exceptions relate to certain orders made against the pensioner pursuant to the Family Law Act, namely support orders or equalization orders that operate to entitle another to receive the pension benefits. With each of these exceptions, there is a cap. The legislative objective is to assure that, so far as possible, an employee's participation in a pension plan over the years will make available benefits to provide the sustenance he or she needs upon retirement. Even in those exceptional cases where an incursion is permitted on that assurance because of the overriding imperatives of family law, an upper limit is in place to preserve this objective at least to some extent.

65 Further, Goudge J.A. distinguished between equitable relief employed to overcome unfair common law principles and such relief employed to contravene the clear intention of the legislature. He observed at para. 51:

> The order appointing the respondent as equitable receiver is not an example of the court using its equitable jurisdiction to circumvent a common law obstacle of its own making. Rather, that order would effect a result which, for clear policy reasons, the legislation prohibits, namely the enforcing of the equalization order of Fedak J. against the appellant's pension payments. In my view, however strong the equities might otherwise be, it is not just or

> convenient in these circumstances to appoint an equitable receiver to achieve a result which is in direct conflict with the applicable legislation. In this I agree with Rutherford J. in *Beattie v. Ladouceur* (1995), 23 O.R. (3d) 225 (Gen. Div.), who came to the same conclusion in the context of similar federal legislation.

66 In my view, the analyses in *Beattie* and *Hooper* apply to the support issue in this case. Subsection 66(4) of the PBA clearly restricts execution to enforce a support order to 50 per cent of the payor's pension. Had the legislature intended to grant the court jurisdiction to increase that exemption, it would have so provided, as it has in the WA and as it proposes to do in the FRSAEA. It did not do so.

67 Even if available, equitable remedies should not be employed in this case. This is not a situation of invoking equity to overcome limitations in the common law system of enforcement. In this case there is no common law impediment to preclude garnishment. The impediment is a specific statutory one, crafted by the legislature, which was alive to and balanced the competing policies of pension preservation and the enforcement of support obligations in the family law context. In those circumstances, it cannot be either just or convenient to allow the result sought by the respondent.

68 In light of this conclusion, it is unnecessary to discuss the other grounds of appeal raised by the respondent with respect to this issue, such as the fact that a failure to provide for the actuarial value of the pension precluded a vesting order.

69 In the result, I would set aside the vesting order and the paragraphs ancillary to that order so that the respondent is entitled only to the garnishment of 50 per cent of the appellant's Nortel pension and is not entitled to a vesting order with respect to the Nortel pension.

2. Did the motion judge err in garnisheeing 100 per cent of the appellant's CPP and OAS benefits?

70 I turn now to the second issue raised on this appeal: whether the motion judge had jurisdiction to order the garnishment of 100 per cent of the appellant's CPP and OAS benefits.

71 This is also a question of statutory interpretation because both CPP and OAS benefits are creatures of statute, namely the *Canada Pension Plan*, R.S.C. 1985, c. C-8 and the *Old Age Security Act*, R.S.C. 1985, c. O-9, respectively. Generally, this legislation provides that neither CPP or OAS benefits may be assigned and neither are subject to execution:

> CPP s. 65 (1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.
>
> OAS s. 36 (1.1) A benefit is exempt from seizure and execution, **either at law or in equity** [emphasis added].

72 Since both these provisions explicitly prohibit execution both in equity as well as at law, the respondent did not seek equitable relief with respect to these benefits. Instead, she limited her claim to 100 per cent garnishment.

73 Although CPP and OAS benefits are generally protected from execution, they are subject to garnishment for support enforcement in the terms set out in Part II of the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.) (FOAEAA):

> 24. Notwithstanding any other Act of Parliament preventing the garnishment of Her Majesty, Her Majesty may, **for the enforcement of support orders** and support provisions, be garnisheed in accordance with this Part in respect of **all garnishable moneys** [emphasis added].
>
> 25. Subject to section 26 and any regulations made under this Part, garnishment under this Part shall be **in accordance with provincial garnishment law** [emphasis added].

26. In the event of any **inconsistency between this Part** or a regulation made under this Part **and provincial garnishment law**, the provincial garnishment law is overridden to the extent of the inconsistency [emphasis added].

74 On the facts of this case, this legislation raises four questions: first, whether the order in this case is a "support order"; second, whether the CPP and OAS benefits are "garnishable moneys"; third, whether there is any contradiction between the FOAEAA and provincial garnishment law such as to attract the override provision of s. 26; and fourth, whether 100 per cent garnishment of these benefits accords with Ontario's garnishment law.

75 On the first question, the order in this case comes within the FOAEAA definition of a "support order" as one "enforceable in any province". This is so because the DA specifies that a support order made under that Act may be "enforced in a province in any other manner provided for by the laws of that province." [14] Thus, with such an order, the recipient spouse may garnishee "all garnishable moneys."

14 DA, s. 20(3)(b).

76 On the second question, the appellant's CPP and OAS benefits are "garnishable moneys" subject to garnishment in accordance with the other provisions of the FOAEAA. By definition, "garnishable moneys" are moneys authorized to be paid by federal statute or designated by regulation. [15] Apart from certain exceptions that are not germane to this case, CPP and OAS benefits are so designated by ss. 3(g) and (h) of the *Family Support Orders and Agreements Garnishment Regulations*, S.O.R./88-181. Accordingly, these benefits are garnishable, subject to "provincial garnishment law."

15 FOAEAA, s. 23(1)

77 On the third issue, I see no conflict between the FOAEAA and Ontario's garnishment law, which I will review, such as to attract the override provision of FOAEAA's s. 26. First, I cannot accept the respondent's argument that the "all" in "all garnishable moneys" reflects a parliamentary intention to render all payments garnishable at 100 per cent under s. 24. If Parliament had intended this result, it would have said so clearly.

78 Second, the *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2 (GAPDA) relied upon by the appellant provides for 100 per cent garnishment for support, but it applies only against pension benefits payable under "Acts and like enactments referred to in the schedule." Since neither the CPP nor the OAS legislation is included in that schedule, the GAPDA has no application to this case.

79 Third, the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) governs private pension plans in connection with certain federal works, undertakings and businesses such as interprovincial and international transportation, radio broadcasting and banking. It does not apply to the appellant's CPP or OAS benefits. Finally, counsel did not cite any other federal legislation that impacts on the garnishment of these benefits.

80 On the fourth question, in my view, Ontario law caps garnishment at 50 per cent. I say this for the following reasons.

81 "Provincial garnishment law" is defined in s. 23(1) of the FOAEAA as "the law of a province relating to garnishment as it applies to the enforcement of support orders and support provisions".

82 The FLR do not specify a quantum of garnishment with respect to pensions or benefits. In any event, because the FLR are procedural in nature, as I have emphasized, they cannot constitute "provincial garnishment law" since they do not confer substantive jurisdiction.

83 One statute in Ontario, however, specifically defines itself as a "provincial garnishment law" for the purposes of support enforcement: the FRSAEA. Section 20(5) of that Act provides that a support deduction order "shall be deemed to be a notice of garnishment made under provincial garnishment law for the purposes of the *Family Orders and Agreements*

Enforcement Assistance Act (Canada)". Section 23(1) of the FRSAEA caps garnishment at 50 per cent of the payor's "income source", which is defined in s. 1 as including a "disability, retirement or other pension". In *Ontario (Director, Family Responsibility Office) v. Johnson*, [2003] O.J. No. 2318 (Ont. C.J.), the Director took the position that only 50 per cent of CPP and OAS benefits are garnishable. [16] I conclude that s. 23(1) of the FRSAEA restricts the Director's garnishment to 50 per cent of the appellant's CPP or OAS benefits.

16 This 50 per cent cap is subject to two proposed but unproclaimed amendments. First, s. 23(2) would allow for garnishment of not "less than the amount of ongoing support specified in the support order, even if that amount is greater than 50 per cent of the net income owed by the income source to the payor, unless the court [making the support order] orders otherwise". Second, s. 23(4) would authorize the Director to bring a motion to increase the quantum of moneys garnisheed up to the amount of the ongoing support ordered.

84 As I noted earlier in these reasons, the record before this court indicates that the support order and the Support Deduction Order in this case remain filed with the Director. In this circumstance, by ss. 6(7), 6(8), and 9(1) of the FRSAEA, support enforcement rests exclusively with the Director and, in the result, garnishment is capped at 50 per cent.

85 However, in my view, even if the respondent is seeking garnishment on her own behalf, garnishment must still be capped at 50 per cent.

86 The principle behind s. 66(4) of the PBA, which is the only other provincial statute that addresses garnishment for the enforcement of support, lends support to this conclusion. I refer to the principle behind s. 66(4) because, arguably, s. 66(4) has no direct application to the benefits at issue in this appeal. This is so because the PBA applies only to private pension plans that are organized and administered to provide pensions for employees, whereas the CPP and OAS benefits are provided by the government.

87 However, it is unnecessary to consider this argument because, even if the PBA's s. 66(4) does not apply, I am of the view that a court should exercise its discretion to limit garnishment to 50 per cent of CPP and OAS benefits. Such a discretion is provided by r. 29(19) of the FLR, which permits a court at a garnishment hearing to change "how much is being garnished" on account of either a periodic or non-periodic payment order. That discretion, in my view, should be exercised in a manner consistent with the FRSAEA, the FOAEAA and s. 66(4) of the PBA to restrict individual garnishment to 50 per cent, the same restriction as is placed on garnishment by the Director. It is a matter of common sense that the Director and the individual payee should have the same remedies available to enforce support orders.

88 Accordingly, I conclude that garnishment of CPP and OAS benefits ought to be restricted to 50 per cent and that the motion judge erred in garnisheeing 100 per cent of these benefits. I would set aside the order of the motion judge to the extent that it provides for 100 per cent garnishment.

3. Did the motion judge err in awarding costs of $10,000 against the appellant?

89 The appellant also appeals the costs award of $10,000 made by the motion judge.

90 I would not interfere with the costs order below. In my view, the motion judge did not err in the exercise of his discretion regarding costs for two reasons. First, the respondent was entirely successful in defending against the appellant's application to vary support and to rescind all arrears. Second, the respondent remains entitled to orders for garnishment of 50 per cent of the Nortel pension and the CPP and OAS benefits. In this sense, the respondent was successful below and is entitled to her costs.

91 Given the particular circumstances of this case, including the novelty of the issues raised before this court, I would make no order as to costs of the appeal.

Result

92 On the issues that were argued, I would allow the appeal. I would set aside the order below with the exceptions of paragraph 1 relating to the appellant's support arrears, paragraph 2 relating to the dismissal of the appellant's cross-motion to vary his child support obligations and to rescind his spousal support arrears, and paragraph 5 relating to beneficiary designation. Though the appellant seeks to "[set] aside the order made by Justice Fragomeni on September 14, 2005 in its entirety," as mentioned previously, the appellant did not appeal from the dismissal of his motion to vary. Further, neither party addressed whether the motion judge erred in designating the respondent as the sole beneficiary of the appellant's pension plans in Canada. Absent submissions made by counsel on this issue, I would decline to set aside this portion of the order.

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

I agree.

***Cronk J.A.*:**

I agree.

Appeal allowed in part.

TAB 3

2018 ONSC 78
Ontario Superior Court of Justice (Divisional Court)

Heinrichs v. 374427 Ontario Ltd.

2018 CarswellOnt 25, 2018 ONSC 78, 288 A.C.W.S. (3d) 159

VICTOR J. HEINRICHS and VICTOR J. HEINRICHS INC. (Plaintiffs / Appellants) and 374427 ONTARIO LTD. and JOHN FEDYNA (Defendants / Respondents)

Lederman J.

Heard: November 17, 2017
Judgment: January 5, 2018
Docket: 310/17

Counsel: Allan Morrison, Vibhu Sharma, for Plaintiffs / Appellants
Trung Nguyen, for Defendants / Respondents

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

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.15 Final or interlocutory
XXII.15.a Interlocutory judgment or order
XXII.15.a.i What constituting
XXII.15.a.i.A For purpose of appeal
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.vi Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence

Headnote

Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Miscellaneous
Plaintiffs registered lien and registered certificate of action against title to property owned by defendants — Company, which acquired property under power of sale, requested that lien be removed and offered to hold back on sale proceeds amount for security which comprised full amount of plaintiff's claim — Parties agreed, undertaking was given and lien was discharged — Plaintiffs did not take steps to prosecute action — Defendants brought motion to dismiss action and order directing release of funds held in trust — Master ordered plaintiffs were to have another chance to ready case for trial but held that this did not entitle them to have retained security for lien claim — Plaintiff's appealed — Appeal allowed — Master was in error in interpretation of undertaking in that master failed to take into account emails exchanged between counsel — In emails contemplation was that disbursement of monies held in trust would be dependent on resolution of dispute — Appropriate interpretation of undertaking was that lien would be discharged and monies held in trust would not be released until there was resolution.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Civil practice and procedure --- Judgments and orders — Final or interlocutory — Interlocutory judgment or order — What constituting — For purpose of appeal

Table of Authorities

Cases considered by *Lederman J.*:

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — followed

Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc. (2001), 2001 CarswellOnt 1437, 144 O.A.C. 136, 54 O.R. (3d) 76 (Ont. C.A.) — referred to

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

s. 37 — considered

s. 44 — considered

s. 46 — considered

s. 46(4) — considered

s. 47 — considered

s. 48 — considered

s. 71(1) — considered

s. 71(3)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

APPEAL by plaintiffs for relief from order that released funds held in trust.

***Lederman J.*:**

NATURE OF APPEAL

1 The appellants ("plaintiffs") appeal that part of the Order of Master Albert dated May 31, 2017, that ordered the release of $452,388.61 plus any accrued interest held in trust by Brattys LLP to the respondents ("defendants").

BACKGROUND

2 The underlying action herein is for fees for architectural services and materials allegedly provided by the plaintiffs to the defendants in connection with certain property in Richmond Hill, Ontario.

3 On December 1, 2014, the plaintiffs registered a lien and subsequently registered a certificate of action against title to the property under the *Construction Lien Act*, R.S.O. 1990, C. 30 ("*CLA*").

4 On December 11, 2014, the second mortgagee on the property transferred the property pursuant to a power of sale to Elgin House Properties Ltd. ('Elgin").

5 This action was commenced by statement of claim on January 11, 2015 under the *CLA*.

6 Subsequently, Elgin requested that the plaintiffs' lien be removed so that it could obtain financing to be secured by the property. Negotiations took place between the parties. As consideration for the release of lien, Elgin offered to hold back on the sale proceeds, an amount for the security which comprised the full amount of the plaintiffs' claim plus 25% for costs. The parties agreed to this and to an undertaking which was given on February 18, 2016 by Elgin's lawyers, Brattys LLP. It read:

> IN CONSIDERATION of the Instruments being **discharged** from the Lands on or before the 21 st day of February, 2016, Brattys LLP undertakes to hold the sum of FOUR HUNDRED FIFTY-TWO THOUSAND THREE HUNDRED AND EIGHTY-EIGHT DOLLARS AND SIXTY-TWO CENTS ($452,388.62) in escrow pending receiving a joint direction from Sahar Zomorodi and Allan L. Morrison or in the alternative a Court order directing the payment of the same (emphasis added) [the "Undertaking"].

7 The lien was discharged by way of an Application to Delete Construction Lien dated February 24, 2016.

8 Following the release of the lien instruments, the plaintiffs did not take any steps to prosecute the action or set it down for trial.

9 The defendants brought a motion before the Master to dismiss the action in its entirety for delay or, in the alternative, to direct that the action proceed as an action in contract under the ordinary *Rules of Civil Procedure*. In respect of both options, the defendants sought an order directing the release of funds held in trust by Brattys LLP.

10 The plaintiffs opposed the release of the security held by Brattys LLP pursuant to the Undertaking pending final determination of the action. The plaintiffs, by way of cross-motion, sought directions as to the action continuing as a contract action, given that on the discharge of the lien, the proceeding had become a non-lien action.

DECISION OF THE MASTER

11 The Master found that the plaintiffs had failed to prosecute the claim within a reasonable time. She stated that as they failed to take the steps that were required to ready the claim for trial and more than two years had passed and the action still had not been set down for trial, the lien action could have been dismissed for delay. However, rather than doing so, the Master allowed the plaintiffs to have another chance to ready the case for trial and proceed with the action pursuant to the *Rules of Civil Procedure.*

12 The Master held, however, that this "second chance" did not entitle the plaintiffs to retain the security for the lien claim that was placed with the solicitors in trust pursuant to the Undertaking and she ordered that those funds be paid out to the defendants. It is that part of the Order that is the subject of this appeal.

13 The Master's reasoning was that the security provided by the Undertaking was akin to security for the lien having been posted in court.

14 She stated at paras. 9 and 10 of her Reasons as follows:

> On the issue of the release of security, I find that it would be inappropriate to allow the plaintiff the benefit of the security contemplated by the *Construction Lien Act* in circumstances where the plaintiff failed to set down the lien action for trial within the two year limitation period required by section 37 of the Act. Had the security for the lien claim been posted in court pursuant to section 44 of the Act, and had the action not been set down for trial within two years as required by section 37 of the Act, then the lien would have expired and the funds would have been ordered released from court.
>
> Absent clear and unambiguous language in the undertaking by which the funds were retained by Brattys LLP, the plaintiff is not entitled to greater security than would be available had the funds been placed in court.

15 The Master was of the view that if the parties intended the funds held in trust to be retained until final determination of the plaintiffs' action, the Undertaking would have stated as such. Rather, she found at para. 16 that

> "Brattys LLP was simply an alternate repository of the security otherwise payable into court to vacate a lien, pursuant to s. 44 of the *Act*. The undertaking does not bestow greater rights on the plaintiff than those prescribed under the *Act*."

PRELIMINARY MATTERS

16 The plaintiffs brought a motion to introduce fresh evidence on the appeal. The so called new evidence is in the form of an email from a former associate at the law firm of plaintiffs' counsel, stating that during the discussions about the Undertaking among counsel,

> "the intention of the parties was to discharge the lien and proceed with the litigation as a contractual dispute. Upon the deletion of the lien and the related certificate of action, as intended by the parties, the action was converted into a non-lien action and the *CLA* no longer applied, and this action was to be prosecuted in the regular course."

17 The associate's recollection of the matter, which supports the plaintiffs' position, apparently came to light recently. However, this evidence certainly existed at the time of the motion before the Master and could have been adduced through the exercise of due diligence. This issue was of prime importance and central to the proceedings before the Master. This matter could have been easily discussed with the associate at the time and was readily available. Accordingly, the first branch of the test in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) has not been satisfied and the motion is denied for that reason alone.

18 The defendants raised a further issue to the effect that under s. 71(1) of the *CLA*, an appeal lies from a "judgment"; that the order of the Master under appeal is not a judgment but an interlocutory order, and by reason of s. 71(3) (b) of the *CLA*, no appeal lies from an interlocutory order made by the court.

19 The word "judgment" in s. 71(1) applies to any decision by which the rights of a party are finally disposed of (see *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*, [2001] O.J. No. 1605 (Ont. C.A.) at para. 8). The defendants submit that the Master's order did not finally dispose of the action on its merits. It simply released the security but allowed the balance of the contract claim to proceed under the *Rules of Civil Procedure*. As such, the defendants argue that the order has no bearing on the determination of the action on its merits which remain to be decided at trial and therefore it is an interlocutory order from which no right of appeal lies.

20 The basis for the Master's order releasing the trust funds was the fact that the plaintiffs had not set the action down within two years and that upon the expiry of the two year limitation period, the plaintiffs were no longer entitled to security for the lien. Accordingly, although the Master allowed the breach of contract action to continue, her interpretation of the Undertaking and the parties' intention concerning the action was the basis of her Order to release the security. That disposition is final in nature in that it finally determines those issues and I am of the view that an appeal from the order to this court was not prohibited by s. 71(3) (b) of the *CLA*.

STANDARD OF REVIEW

21 An appeal may be granted where it is shown that the Master erred in law or exercised discretion based on wrong principles or misapprehended the evidence such that there is a palpable and overriding error.

22 The Master's interpretation of the Undertaking, her application of the *CLA* and her decision to release the security is a question of mixed law and fact, subject to a standard of review of palpable and overriding error.

POSITION OF THE PARTIES

23 The plaintiffs submit that the Master erroneously relied on the provisions of the *CLA* to order a release of the funds held in trust with Brattys LLP as if they were akin to monies paid into court to vacate a lien under s. 44 of the *CLA*.

24 The plaintiffs submit that the Master misapprehended the evidence and failed to take into account the underlying agreement, context, discussions and intention of the parties in relation to the discharge/release of the lien. The plaintiffs argue that the parties had specifically agreed to a "discharge" of the lien with the placement of monies into the solicitors' trust account and they submit that sections 37, 44 and 47 of the *CLA* do not apply to an action such as this where the underlying lien has been discharged.

25 The defendants submit that the Master correctly identified and applied the relevant provisions of the *CLA* and made no palpable and overriding error in ordering the release of the security.

ANALYSIS

26 On this appeal, counsel for all parties agree that there is a distinction between "vacating" and "discharging" a lien. "Vacating" refers to the removal of the "registration" of a claim for lien and any certificate of action in respect of that lien under s. 44 of the *CLA*. "Discharging", on the other hand, has a special, statutory definition under s. 48 of the *CLA*. A discharge of a lien amounts to the extinction of the claim itself. Under s. 48, a discharge of a lien is irrevocable and cannot be revived (see Duncan W. Glaholt, *Conduct of a Lien Action*, (2017 Thomson Reuters) at pp. 136-138.

27 In the instant case, the parties agreed that the lien was to be "discharged" upon depositing the security in trust with the solicitors.

28 The Undertaking specifically states and contemplates that the lien "instruments being *discharged* from the Lands". In accordance with the Undertaking, the lien in this action was discharged by way of a release with the Application to Delete the Construction Lien dated February 24, 2016.

29 Upon the discharge, the lien, the certificate of action and all lien rights and remedies were extinguished.

30 Liens can be "vacated" as of right under s. 44 of the *CLA* upon the payment into court or posting security in the requisite amount. In such a case, the lien itself continues as a charge on those monies rather than a charge on the property and can be enforced against that substitute security. If a perfected lien has expired because of a failure to set the action down for trial within two years, then, under s. 46(4) of the *CLA*, upon motion to dismiss the action to enforce that lien, any amount of monies paid into court can be returned to the payor, or any security posted pursuant to s. 44 can be cancelled.

31 The parties in this case did not pay monies into court or post security in accordance with s. 44 of the *CLA*. They chose an alternate route of having the full security amount held in trust with the solicitors.

32 Because the lien was discharged in February 2016, there was no "perfected lien" that could expire under s. 37 of the *CLA* and thus sections 37, 44 and 46 of the *CLA* do not strictly apply to this situation.

33 Counsel for the defendants acknowledges that these sections do not, on their face, apply. He submits however, that the Master in effect, applied these statutory provisions by analogy. The Master stated that *had* the security for the lien claim been posted in court pursuant to s. 44 and *had* the action not been set down for trial within two years as required by s. 37, then the lien would have expired and the funds would have been ordered released from court (para. 9 of the Reasons).

34 The Master held that "absent, clear and unambiguous language" in the Undertaking, the plaintiffs were not entitled to greater security than would be available had the funds been paid into court.

35 I am of the view that the Master was in error in making such an analogy in circumstances where there was a prior "discharge" of the lien as expressly provided for in the Undertaking.

36 Further, the Master made a palpable and overriding error in interpreting the Undertaking and the underlying agreement of the parties which was the basis of the Undertaking. The Master failed to take into account the emails exchanged between counsel in this regard that formed part of the record. It is apparent from these emails that the contemplation was that the disbursement of the monies held in trust would be dependent upon a resolution of the dispute between the parties or court order.

37 Thus, the appropriate interpretation of the Undertaking and the underlying agreement was that the lien would be discharged and that the monies held in trust would not be released until there was a resolution among the parties or a court decided the merits of the claim. There was no intention that those monies would be subject to the operation of sections 37, 44 and 46 of the *CLA*.

CONCLUSION

38 In view of the Master's misapprehension of the evidence, in particular the agreement and intention of the parties, and misapplication of the *CLA*, the appeal is allowed and paragraph 2 of the Order that provided for payment of the security to the defendants is set aside.

39 If the parties cannot agree as to costs, they may make written submissions; the plaintiffs' submissions within 15 days; the defendants' submissions within 10 days thereafter; and reply, if any, within 5 days thereafter.

Appeal allowed.

TAB 4

1997 CarswellOnt 1752
Ontario Court of Justice (General Division)

Tom Jones Corp. v. OSBBC Ltd.

1997 CarswellOnt 1752, [1997] O.J. No. 2166, 34 C.L.R. (2d) 44, 35 O.T.C. 142, 71 A.C.W.S. (3d) 833

In The Matter of the Construction Lien Act, R.S.O. 1990, c. C. 30

In The Matter of the Claims for Lien of Tom Jones Corporation, Barber Equipment Ltd. and Lightning Sales and Rentals Incorporated, registered as Instrument Numbers A66125, A66138, and A66210 in Land Titles Office for Land Titles Division of Rainy River against lands owned by OSBBC Limited.

Tom Jones Corporation, Plaintiff, and OSBBC Limited, Casey Industrial International Inc., Bradleigh-Moore Structures International Inc., Alert Steel Erectors Ltd., and Canadian Imperial Bank of Commerce, Defendants

Lightning Sales and Rentals Inc., Plaintiff, and Alert Steel Erectors Ltd., Defendant

Barber Equipment Rental Ltd., Plaintiff, and Alert Steel Erectors Ltd. and Emile Ross and Lynn Ross, and OSBBC Limited and Casey Industrial International Inc., and Canadian Imperial Bank of Commerce, Defendants

Kozak J.

Judgment: May 20, 1997
Docket: Thunder Bay RE 4/96; 8/97; 6/97; 104/97

Counsel: *Ian S. McMillan, Esq.*, Counsel for B.M. Structures.
Frank W.B. Morrison, Esq., Counsel for Casey International.
Christopher D.J. Hacio, Esq., Counsel for Tom Jones.
W. Derksen, Esq., Counsel for Barber Equipment.
Anthony J. Potestio, Esq., Counsel for Lightning Sales.

Subject: Contracts; Corporate and Commercial
Related Abridgment Classifications
Construction law
IV Construction and builders' liens
IV.8 Payment of moneys into court
IV.8.c Effect of posting security
IV.8.c.iii Varying amount of security
Construction law
IV Construction and builders' liens
IV.8 Payment of moneys into court
IV.8.d Types of permissible security
Headnote
Construction law --- Construction and builders' liens — Payment of moneys into court — Effect of posting security — Varying amount of security
C agreed to construct plant for O on O's lands — B entered agreement with C to supply and install building on O's lands — B hired A as subcontractor to erect structural steel and A entered contract to engage services of plaintiffs — A abandoned work site and plaintiffs registered liens on O's lands — B brought motion to reduce amount of security — Motion granted — Claims limited to amounts actually owing to plaintiffs up to amount owing by B — Construction Lien Act, R.S.O. 1990, c. C.30.

Construction Law --- Construction and builders' liens — Payment of moneys into court — Types of permissible security C agreed to construct plant for O on O's lands — B entered agreement with C to supply and install building on O's lands — B hired A as subcontractor to erect structural steel and A entered contract to engage services of plaintiffs — A abandoned work site and plaintiffs registered liens on O's lands — B brought motion to substitute lien bond for cash security — Motion granted — Statute did not expressly mention substituting bonds and not allowing substitution was unduly restrictive — Construction Lien Act, R.S.O. 1990, c. C.30, s. 44(5)(b).

The defendant, O, entered into an agreement with C, the general contractor, to construct a plant on its lands. B, a subcontractor, entered into an agreement with C to supply and install a pre-engineered metal building upon the defendant's lands. A agreed to erect all of the structural steel necessary to support the building. B was to make progress payments to A twice a month. Ten progress payments were made. B then informed A that its performance was unacceptable and a second shift was needed to expedite the contract's completion. A abandoned the work site and notified B that it was no longer carrying on business. During the course of its work, A contracted the services of the plaintiffs. As a result of not being paid, the plaintiffs registered liens on title to O's lands. B enlisted the services of others to complete the work. C obtained an order to vacate the registered lien claims after paying into court the full amount of the claims plus costs, rather than posting a lien bond. B argued that it had no contractual obligation to the plaintiff lien claimants as there was no privity between itself and the lien claimants. B brought a motion to substitute a lien bond for the cash security and to reduce the amount of the security.

Held: The motion was granted.

The *Construction Lien Act* provides that when a person is required to pay the full amount of security for an order vacating a claim, he or she may move to have the amount reduced to a more reasonable amount. The effect of a vacating order is to remove the lien as a charge, thereby converting the lien to a charge upon the amount paid into court. The owner or payer is ultimately placed in the same position as if the lien had not been perfected. A claimant is unable to enforce a lien for more than is owed and the lien never attaches for more than is owed to the person with whom the claimant had privity. Here, the claims were limited to the amount actually owing by A to the plaintiffs up to the amount actually owing by B, whichever was the lesser amount, provided that the amount was not less than the amount required to be held back by B. There was no express mention of substituting bonds for cash or vice versa in ss. 44(5)(a) and (b) of the Act. The construction lien is purely a creature of statute and the wording receives a strict interpretation. However, not being able to substitute one type of security for another was unduly restrictive and absurd. The posting of a lien bond can free up working capital to facilitate the completion of the project.

Table of Authorities

Cases considered by *Kozak J.*:

Boehmers v. B.E. Project Managers Inc. (1993), 8 C.L.R. (2d) 51 (Ont. Gen. Div.) — considered

Com-Star Construction Ltd. v. Graduate Holdings Ltd. (January 20, 1993), Sandler Master (Ont. Master) — considered

Francon v. L. Nicolini Construction Ltd. (1988), 33 C.L.R. 107 (Ont. H.C.) — considered

J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc. (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.) — considered

Northern Air Construction Ltd. v. York (Borough) Public Library Board (1985), 50 O.R. (2d) 201, 13 C.L.R. 123, 16 D.L.R. (4th) 741, 8 O.A.C. 50 (Ont. Div. Ct.) — considered

Power Contracting Inc. v. Deemar Investments Ltd. (1992), 5 C.L.R. (2d) 119 (Ont. Master) — considered

Reliance Electric Ltd. v. G.N.S. Contractors Inc. (1989), 35 C.L.R. 310, 70 O.R. (2d) 364 (Ont. H.C.) — considered

Wasero Construction (1991) Ltd. v. 1024963 Ontario Ltd. (November 3, 1994), Doc. Newmarket 34438/94 (Ont. Gen. Div.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

s. 14 — referred to

s. 17(1) — considered

s. 17(2) — considered

s. 21 — referred to

s. 44(1) — considered

s. 44(2) — considered

s. 44(5) — considered

s. 44(5)(a) — referred to

s. 44(5)(b) — considered

s. 44(6) — considered

s. 44(9) — considered

s. 47 — referred to

s. 47(1)(a) — referred to

s. 47(1)(d) — referred to

Rules considered:

Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — referred to

MOTION to reduce amount of security and substitute lien bond for cash security.

Kozak J.:

1 This is a motion brought on behalf of Bradleigh-Moore Structures International Inc., (hereinafter referred to as B. M. Structures) pursuant to Section 44(5) of the *Construction Lien Act* for an Order:

(a) Reducing the amount of money paid into Court as security for the lien claims of Tom Jones Corporation, Barber Equipment Ltd., and Lightning Sales and Rentals Inc. as ordered by Master B. Sichy on December 30, 1996.

(b) Substituting the security posted from that of cash to a lien bond.

Factual Background

2 OSBBC Limited, the owner of the lands described in the lien claims, entered into an agreement with Casey Industrial (the general contractor) to construct an oriented strandboard plant upon its lands in the Town of Barwick, Ontario.

3 By an agreement dated June 22, 1995 between Casey Industrial and B. M. Structures, B. M. Structures agreed to supply and install a pre-engineered metal building upon the owner's lands.

4 By an agreement dated May 15, 1996 between B. M. Structures and Alert Steel Erectors as a subcontractor, Alert Steel agreed to erect all of the structural steel and appurtinances necessary to support the pre-engineered metal building for a contract price of $480,000.00 plus taxes. The payment provisions of Alert's contract required B. M. Structures to make progress payments to Alert on the 15th and 30th of each month for the work performed during the preceding 15 day payment period. The total value of the work done by Alert on this project up to the end of September 1996 amounted to $480,106.47. In accordance therewith B. M. Structures made ten progress payments to Alert amounting to $432,095.82 plus taxes.

5 In mid October 1996 B. M. Structures informed Alert that its performance on the project was unacceptable and that it should consider employing a second shift to expedite the completion of the contract.

6 On November 14, 1996 Alert abandoned the work site and on November 18, 1996 notified B. M. Structures that it was no longer carrying on business. In the interim period between the last progress payment on September 26, 1996 and Alert's abandonment of the project on November 14, 1996, the value of Alert's work on the project was increased by the sum of $7,250.00 for extras, and by the further sum of $15,000.00 for additional work. The total value of Alert's work on the project amounted to $502,356.47.

7 During the course of performing its work, Alert contracted the services of certain rental equipment suppliers, namely Tom Jones Corporation, Barber Equipment Rental, and Lightning Sales and Rentals Inc. As a result of not being paid for their services, these rental equipment suppliers caused claims for liens to be registered on the title to the owner's land as follows:

Claimant	Inst. No.	Registration Date	Amount of Lien
Tom Jones Corp.	A66125	1996-12-13	$ 70,777.24
Barber Equipment	A66138	1996-12-16	$ 99,207.01
Lightning Sales	A66210	1996-12-24	$ 10,713.75

8 As a result of Alert leaving the job site, B. M. Structures enlisted the services of Cockerel Construction Inc. and others to complete the work that had been contracted to Alert. The completion costs that were incurred totalled $155,960.43.

9 On December 30, 1996, Casey Industrial (the general contractor) moved without notice pursuant to Section 44(1) of the *Act* for an Order vacating the three registered claims for lien mentioned above. Upon payment into Court of the full amount of the claims plus costs as provided for, the said claims for lien were vacated. In this regard it should be noted that rather than posting a lien bond, the cash sum of $225,892.19 was paid into Court.

10 In his affidavit of March 7, 1997, Mike Moore, the president of B. M. Structures, states in paragraph 14 that although he has no reason to question the propriety of the claims for lien of Barber Equipment or Lightning Sales, in terms of either timeliness of the preservation or amount, he does however state that he has good reason to dispute the timeliness of the preservation of the Tom Jones claim for lien given the "stand by arrangement" which Jones claims to have had with Alert. According to Mike Moore, Alert denies any such arrangement. In this regard B. M. Structures, in disputing the claim of Ton Jones, is not doing so pursuant to Section 47 of the *Act*, but rather to raise the issue so as to provide the Court with alleged facts that might have a bearing in its determination as to whether the amount paid into Court is excessive and should be reduced.

11 There are no subsequent lien claimants who have registered any claims for lien against the lands owned by OSBBC Limited, nor have any Notices of Claim for lien been received. The work required of B. M. Structures, pursuant to its contract with Casey Industrial, is 99% complete and notice of the substantial performance thereof was published in the Daily Commercial News on February 4, 1997.

12 B. M. Structures states that there is no privity between itself and the three aforesaid lien claimants who furnished labour, material or equipment directly to Alert Steel, and therefore it has no contractual obligation to the three lien claimants. B. M. Structures takes the position that its obligations are limited to the holdback provisions of the *Act*, which in this case they say amounts to $50,235.65.

13 Roy Nisula, the site superintendent of the Tom Jones Corporation, swore an affidavit on April 8, 1997, in which he states that B. M. Structures at all material times were or should have been aware that Alert Steel would be unable to complete its contract with B. M. Structures in that the contract price of $480,000.00 was at least $500,000.00 less than the work in question would have cost.

14 Nisula then goes on to state that the services provided by Tom Jones consisted of the supply of a crane and operators which services he states, were requested by both Alert Steel and B. M. Structures, and that the crane was first made available on July 4, 1996. From July 4, 1996 to the date of its claim for lien, Nisula states that the crane and operators were available to Alert Steel and B. M. Structures who both had asked that the crane and operators be available to them on a full time basis. In paragraph 8 of his affidavit, Nisula states that he had some questions throughout as to whether they were actually contracting with Alert Steel or B. M. Structures in that four work orders were signed by the superintendent of B. M. Structures and three work orders were signed by an officer and director of Alert Steel.

15 When payment of their invoices was not forthcoming, Nisula contacted the superintendent of B. M. Structures about the accounts and states that he was also advised by Troy Jones, the project manager of Casey Industrial, that they would be paid for their services. He states that they delayed putting a lien on the project because of the promises made by B. M. Structures and Casey Industrial that they would be paid.

16 The Tom Jones Corporation states that its crane and operator were last used by Alert Steel on or about August 15, 1996, but that it considers its contract with Alert Steel and or B. M. Structures as never having been terminated and accordingly, that its crane and operator were available up to and including the day that they registered their claim for lien in December 1996.

17 In a responding affidavit sworn April 18, 1997, Mike Moore, the president of B. M. Structures, states that the contract price of $1.58 per square foot with Alert Steel is both competitive and commercially reasonable, and considers Nisula's statement that the price should have been doubled, as being absurd. He denies any awareness of financial inability on the part of Alert Steel to fulfil the contract.

18 As to the contracting for the services of a crane from Tom Jones, the services were contracted as between Tom Jones and Alert on a *bare basis* according to Moore, that is without an operator or oiler, at a monthly rate of $15,000.00 for the months of July and August 1996, in keeping with the construction schedule governing the erection of structural steel. Moore states that the work orders or invoices numbered 3605 and 3628 reference that arrangement.

19 Moore further states that their construction superintendent, Dwayne Phillips, never requested, on behalf of B. M. Structures, the services of the 90 ton crane in relation to any of Alert Steel's work, nor did Mr. Phillips or anyone else at B. M. Structures promise to pay Alert's account with Tom Jones. B. M. Structures' position in the matter is that they did not have a work force on the project site and subcontracted all of its contractual obligations. Dwayne Phillips was their site superintendent and since Mr. Ross of Alert Steel was seldom at the site, it was agreed that Mr. Phillips would verify or acknowledge the time sheets presented by Mr. Nisula as an accommodation to both Ross and Nisula.

20 Moore also states that Mr. Nisula had knowledge on November 14, 1996 that Alert's forces had left the site for good. Also, during the latter part of August 1996, the 90 ton crane of Tom Jones was not large enough for the ironwork from the exterior perimeter and Alert had to rent a larger 230 ton crane from E.S. Fox Limited, following which the 90 ton crane was dismantled, and thereafter not contracted to Alert Steel and certainly not to B. M. Structures.

21 In an affidavit sworn April 16, 1997, Troy Jones, the project manager of Casey Industrial, expresses the belief based upon advice which he received from Roy Nisula, John Jones, and Dwayne Phillips, that the Tom Jones Corporation provided the services of the crane to Alert Steel. He states that he did not ever advise Roy Nisula that the Jones Corporation would be paid for the services provided to Alert Steel by Casey Industrial.

22 It should be noted that the motion record was not served upon Alert Steel or OSBBC. Also, it is to be noted that responding affidavit materials were not filed on behalf of Barber Equipment or Lightning Sales. Nevertheless, the motion was argued in full and the Court was able to reach a determination on the materials filed.

Legal Considerations

23 Section 44 of the *Act* provides a complete code for the payment of monies, or the posting of security into Court in order to vacate the registration of liens and certificates of action. Such payment of monies or posting of security with the Court is done without any admission of liability and without any admission as to the validity of the claims for lien. Once a Court Order has been obtained, the liens become detached from the owner's interest in the property and attach to the monies or the security paid into Court, pursuant to Section 44(6) and are subject to the rules set out in Section 44(9).

24 Section 44(1) enables any person to bring a motion *ex parte*, for an Order vacating the registration of a claim for lien or certificate of action, upon paying into Court or posting security in an amount equal to the full amount claimed plus the lesser of $50,000.00 or 25 percent of the amount claimed for costs.

25 Section 44(5) then provides a right to reduce the amount of money or security paid into Court upon notice of motion served upon all interested parties. In this regard subsections (a) and (b) confer upon the Court a discretionary power to reduce the monies paid into Court or to substitute the security.

26 Section 44(2) is available to those persons who do not wish to pay the full amount of the claim into Court in order to obtain an Order vacating the claim for lien. The notice of motion must be served upon all affected parties together with supporting materials outlining the proposed calculation of the payment proposed. The power to make an Order under Section 44(2) for a payment which is smaller than that called for in Section 44(1), is discretionary and requires the Court to insure that *reasonable* provision is made for the satisfaction of the lien.

27 The *Act* provides that where a person for the sake of expediency, on an *ex parte* application, is required to pay the full amount for an Order vacating a claim for lien, may at a future point in time, move to have the amount paid into Court reduced to a more reasonable amount. In this regard the provisions of Section 44(2) and Section 44(5) can be used in tandem.

28 The effect of a vacating Order is to remove the lien as a charge against the property, the holdbacks, and all other amounts subject to a charge under Section 21 of the *Act*. The lien is thereby converted to a charge upon the amount paid into Court and the owner or payer is placed in the same position as if the lien had not been perfected.

29 Section 14 states that any person who supplies services or materials to an improvement has a lien for the value of the services performed or materials supplied and that this lien arises and takes effect upon the first supply of such services or materials.

30 The extent of the lien is limited firstly by Section 17(1) to the amount owing to the claimant in respect of the improvement and secondly, to the least amount owed by a payer to a person whose work was in part performed by the claimant's work. Therefore, a claimant may never enforce a lien for more than he is owed and his lien may never attach for more than is owed to the person with whom he had privity. Subsection 17(2) applies the same limitation not just to each individual contractor or subcontractor but to all lien claimants of the same class. In this regard see *J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc.* a decision of Madame Justice Bolan, of the Ontario Court (Gen. Division) delivered on June 25, 1992 and reported in (1992), 6 C.L.R. (2d) 141 (Ont. Gen. Div.); and Kirshs Case Finder as 44.24. Bolan J., succinctly states that a contractor is not liable to lien holders claiming under a subcontractor for any amount in excess of that owed by him to the subcontractor, other than for the amount of his statutory holdbacks.

31 In *Boehmers v. B.E. Project Managers Inc.* (1993), 8 C.L.R. (2d) 51 (Ont. Gen. Div.) Herold J. held that the maximum entitlement of the subcontractors to a lien against the land of the owner in a case where they were claiming through the general contractor, is restricted to the amount owed by the owner to the general contractor. In exercising his discretion under Section 44(2) Herold J. considered not only the gross amount owing under the contract, but also any proper setoffs which the owner might prove. The learned motions Court Judge also stated at paragraph 6:

I am further satisfied that the words *satisfy the lien* at the end of Section 44(2) means satisfy the lien or liens which can be proven and not the amounts as claimed (see *Reliance Electric Ltd. v. G. N. S. Contractors Inc.* (1989), 35 C.L.R. 310 (Ont. H.C.).

In arriving at an amount that the Court determined would be reasonable in the circumstances to satisfy the liens, it was found that a good hard look at the facts as contained in the materials filed is permitted.

32 However, it was stated in *Wasero Construction (1991) Ltd. v. 1024963 Ontario Ltd.* (November 3, 1994), Doc. Newmarket 34438/94 (Ont. Gen. Div.) that the purpose of Section 44(2) is not to have a trial before a trial, but rather to ensure that the amount paid in, in exchange for clear title, is reasonable in the circumstances.

33 In *Com-Star Construction Ltd. v. Graduate Holdings Ltd.* (January 20, 1993), Sandler Master (Ont. Master); the owners moved under Sections 44(2) and 44(5) to reduce the total security to an amount that constituted the proper holdback amount. Although the owner's calculations were disputed, none of the claimants filed materials disproving the owner's calculations. The owner's motion was dismissed. It was held that the owners might be entitled to such a motion if the amount of the holdback was undisputed or there was some other reason that the claimants could not succeed over a certain amount, but they were not entitled to the Order where the calculation was clearly disputed by all claimants. Section 44(5) was for determination of the proper security and it was improper to attempt to use this provision for the determination of substantive disputed issues of fact or law which should be determined at trial or under the summary judgment provisions of Rule 20 or Sections 47(1) (a), (d).

34 In *Power Contracting Inc. v. Deemar Investments Ltd.* (1992), 5 C.L.R. (2d) 119 (Ont. Master) the plaintiff contractor entered into a fixed price contract for $60,575.00 and invoiced $42,403.00 as a portion of the contract claim, before abandoning the work because of inappropriate working conditions. The plaintiff contractor alleged that it expended $142,516.00 to achieve the completion of the contract and filed a lien for $42,403.00 for the work done plus $142,516.00 for increased costs of work for a total of $184,914.00. The owners applied under Sections 44(1) and 44(2) to vacate the plaintiff's lien upon payment of reasonable security. It was held that the plaintiff's claim at $184,914.00 was reasonable in that there was a reasonable possibility that the plaintiff could succeed at that amount. The master rejected the owner's argument that the plaintiff's claim must be restricted to the invoice claim of $42,403.00 or to what they said was the actual value of the work done, namely $26,630.00.

35 In considering what constitutes a reasonable and proper payment into Court for the purpose of vacating a registered claim for lien, I was referred to and read the conflicting decisions of our Court as a result of the *Northern Air Doctrine* that dealt with the issue of the extent of the ultimate liability of the party posting security or paying monies into Court. In *Francon v. L. Nicolini Construction Ltd.* (1988), 33 C.L.R. 107 (Ont. H.C.), Mr. Justice Hollinger, purporting to follow *Northern Air*, held that the security once posted was available to satisfy the claims of all lien claimants without regard to the liability of the party posting the security. On the other hand, Mr. Justice Misner in *Reliance Electric Ltd. v. G.N.S. Contractors Inc.* (1989), 70 O.R. (2d) 364 (Ont. H.C.) held that the claim that is secured by the posting of security is not the full amount claimed by the lien claimant, but rather the amount that he can actually establish against the person posting the security.

36 It should be noted in the case at bar that the initial payment of money into Court, although paid in by Casey Industrial, was done so on behalf of B. M. Structures as a matter of expediency. The current motion to reduce the amount paid in is brought by B. M. Structures with the consent of Casey Industrial.

37 Counsel for B. M. Structures takes the position that the payment into Court should be reduced to the sum of $50,235.65 which would represent B. M. Structures' holdback. Counsel for the lien claimants argue that the full amounts claimed should be retained in Court in the form of cash based upon the decision in *Northern Air* and *Francon*.

Conclusions

38 At this stage in the proceedings it is not the intention of the Court to adjudicate all of the outstanding issues and thereby render the trial redundant. Such matters as the timeliness and preservation of the Tom Jones claim for lien, the consequences that flowed from an alleged improvident bargain as between B. M. Structures and Alert Steel, and the matter of setoff for completion costs are left for the trial Judge. This does not mean that a motions Court Judge should not take a good hard look at the material facts as presented so as to determine a reasonable amount of cash or security to be paid into Court to satisfy the liens in question.

39 To begin with, this Court is satisfied that there was no privity of contract as between the Tom Jones Corporation and B. M. Structures, or Tom Jones and Casey Industrial with respect to the services of the 90 ton crane and the payment for such services. The contractual agreement in this regard was between the Tom Jones Corporation and Alert Steel Erectors. Although there is a dispute as to the agreed upon costs for such services, the more cogent evidence would appear to call for the payment of a flat rate of $15,000.00 a month for the months of July and August 1996.

40 There is no dispute that the actual value of the work performed by Alert Steel prior to its abandonment of the project amounted to $502,356.47 and that the amount of money actually paid to Alert Steel by B. M. Structures pursuant to their contractual agreement totalled $432,095.82, leaving the sum of $70,260.65 as owing to Alert Steel by B. M. Structures. The amounts being claimed by Tom Jones, Barber Equipment, and Lightning Sales, all of whom supplied services to Alert Steel, are $70,777.24; $99,207.01; and $10,713.75 respectively for a total of $180,698.00.

41 The general liens of Tom Jones, Barber Equipment, and Lightning Sales are lien claims of the same class derived through Alert Steel. These claims are limited to the amounts actually owing to the lien claimants by Alert Steel for the actual value of their services or the amount actually owing by B. M. Structures to Alert Steel, whichever is the lesser amount, provided always that the amount cannot be less than the amount required to be held back by B. M. Structures.

42 It is the finding of this Court that the monies paid into Court on December 30, 1996 (i. e., the sum of $225,892.19 inclusive of costs) be reduced to the sum of $70,260.65 plus $17,552.24 for costs for a total payment in of $87,812.89.

43 The Court is also being asked to convert the reduced payment into Court from cash to a lien bond. There was some discussion as to whether the Court in exercising its discretion to reduce the monies paid into Court was able to substitute the cash with a lien bond. The basis for such concern would appear to be the wording of Section 44(5) (a) and (b) where it provides for the reduction of either the amount paid into Court or the reduction of security posted with the Court with no express mention of substituting bonds for cash or vice versa. It is acknowledged that the construction lien is purely a creature of statute and as such the wording of the statute should receive a strict interpretation. However, given the intention of the legislature and considering the modern rule of statutory interpretation which involves giving the words a contextual interpretation which best advance the object of the *Act*, the matter of being unable to substitute one type of security for another, under Section 44(5), would be unduly restrictive and perhaps absurd. Our Divisional Court in *Northern Air Construction Ltd. v. York (Borough) Public Library Board* (1985), 50 O.R. (2d) 201 (Ont. Div. Ct.) made it most clear that there is no difference between the posting of a letter of credit and a payment of money into Court or, for that matter, the filing of a lien bond in lieu of cash. On the other hand, it would make a difference to the person moving to vacate the lien in that the posting of a lien bond would free up working capital which could be put to better use, to facilitate the completion of the project.

44 Accordingly, it is hereby ordered that B.M. Structures be permitted to post security with the Court in the amount of $87,812.89 in the form of an approved lien bond to stand as security for the vacated liens. It is further ordered that the monies which were paid into Court on December 30, 1996 be paid out to the person who paid the money into Court.

45 Order to issue accordingly. Costs of this motion reserved to the trial Judge.

Motion granted.

End of Document

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

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

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

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

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

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

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

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

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous

Civil practice and procedure

XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination

XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous

Evidence

VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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Preuve — Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité

n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité

des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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s. 8 — referred to

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s. 54(2)(b) — referred to

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s. 486(1) — referred to

Rules considered:

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R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000]

4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

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

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the

information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the

Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

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

V. Issues

35

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

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

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

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

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

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for

sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the

disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real

risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary

evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate

> interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA

or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 6

2015 ONSC 1487
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 3261, 2015 ONSC 1487, 23 C.B.R. (6th) 314, 252 A.C.W.S. (3d) 9

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

G.B. Morawetz R.S.J.

Heard: March 5, 2015
Judgment: March 5, 2015
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Tracy Sandler, Shawn Irving for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
D.J. Miller for Oxford Properties Group Inc.
Jeff Carhart for Hamilton Beach Corp. et al.
Alan Mark, Melaney Wagner for Monitor, Alvarez & Marsal Inc.
Leonard Loewith for Solutions 2 Go et al.
Aubrey Kauffman for Ivanhoe Cambridge Inc.
Ruzbeh Hosseini for Amskor Corporation
Sean Zweig for RioCan Management Inc. and Kingsett Capital Inc.
Lou Brzezinski, Alexandra Teoderescu for Thyssenkrupp Elevator (Canada) Limited, Advitek, Universal Studios Canada Inc., Nintendo of Canada, Ltd., and Bentall Kennedy (Canada) LP Group
Melvyn L. Solmon for ISSI Inc.

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Retail chain store encountered financial difficulties and proceedings were engaged under Companies' Creditors Arrangement Act — Chain entered into agreement under which it was to surrender its interest in eleven leases to landlord entities in consideration for purchase price and certain other benefits — To enter into agreement, leases were withdrawn from auction and sale process — Sublessors, who were creditors, would require payment for breaking leases — Certain parties brought motion to approve sale — Motion granted — No indication debtor acted improvidently — Debtor, financial advisor and monitor felt lease transaction was in best interests of debtors and their stakeholders and that consideration received was reasonable, and this view was entitled to deference by court — Process for achieving sale was fair and reasonable — Actual price under agreement was commercially sensitive, and was ordered sealed.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 68 C.B.R. (5th) 233, 2010 CarswellOnt 3509, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) — 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.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

White Birch Paper Holding Co., Re (2010), 72 C.B.R. (5th) 74, 2010 CarswellQue 11534, 2010 QCCA 1950 (C.A. Que.) — referred to

Statutes considered:

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

s. 36(3) — considered

MOTION to approve sale agreement in proceedings under Companies' Creditors Arrangement Act.

***G.B. Morawetz R.S.J.*:**

1 On February 11, 2015, Target Canada Co. ("TCC") received Court approval to conduct a real estate sales process (the "Real Property Portfolio Sales Process") to seek qualified purchasers for TCC's leases and other real property, to be conducted by the Target Canada Entities in consultation with their financial advisor, Lazard Fréres & Co., LLC (the "Financial Advisor") and their real estate advisor, Northwest Atlantic (Canada) Co. (the "Broker"), with the supervision and oversight of the Monitor.

2 The Applicants bring this motion to approve a lease transaction agreement (the "Lease Transaction Agreement") that has been negotiated in response to an unsolicited bid by certain landlords (Oxford Properties Corporation ("Oxford") and Ivanhoe Cambridge Inc. ("IC") and certain others, together the "Landlord Entities").

3 Under the Lease Transaction Agreement, TCC will surrender its interest in eleven leases (the "Eleven Leases") to the Landlord Entities in consideration for the purchase price and certain other benefits.

4 The Target Entities decided, after considering the likely benefits and risks associated with the unsolicited offer by the Landlord Entities, to exercise their right under the terms of the Real Property Portfolio Sales Process to withdraw the applicable leases from the bidding and auction phases of the process. The Target Canada Entities contend that the decision to exercise this right was made based on the informed business judgment of the Target Canada Entities with advice from the Financial Advisor and the Broker, in consultation and with the approval of the Monitor.

5 The Applicants submit that the process by which the decision was made to pursue a potential transaction with the Landlord Entities, and withdraw the Eleven Leases from the bidding and auction phases of the Real Property Portfolio Sales Process, was fair and reasonable in light of the facts and circumstances. Further, they submit that the process by which the benefits of the Lease Transaction Agreement were evaluated, and the Lease Transaction Agreement was negotiated, was reasonable in the circumstances.

6 The Applicants contend that the purchase price being offered by the Landlord Entities is in the high-range of value for the Eleven Leases. As such, the Applicants contend that the price is reasonable, taking into account the market value of the assets. Moreover, the Applicants submit that the estate of the Target Canada Entities will benefit not only from the value represented by the purchase price, but from the release of claims. That includes the potentially material claims that the Landlord Entities may otherwise have been entitled to assert against the estate of the Target Canada Entities, if some or all of the Eleven Leases had been purchased by a third party or disclaimed by the Target Canada Entities.

7 The Target Canada Entities submit that it is in their best interests and that of their stakeholders to enter into the Lease Transaction Agreement. They also rely on the Monitor's approval of and consent to the Target Canada Entities entering into the Lease Transaction Agreement.

8 The Target Canada Entities are of the view that the Lease Transaction Agreement secures premium pricing for the Eleven Leases in a manner that is both certain and efficient, while allowing the Target Canada Entities to continue the Inventory Liquidation Process for the benefit of all stakeholders and to honour their commitments to the pharmacy franchisees.

9 The terms of the Lease Transaction Agreement are set out in the affidavit of Mark J. Wong, sworn February 27, 2015, and are also summarized in the Third Report of the Monitor. The Lease Transaction Agreement is also summarized in the factum submitted by the Applicants.

10 If approved, the closing of the Lease Transaction Agreement is scheduled for March 6, 2015.

11 One aspect of the Lease Transaction Agreement requires specific mention. Almost all of TCC's retail store leases were subleased to TCC Propco. The Premises were then subleased back to TCC. The Applicants contend that these arrangements were reflected in certain agreements between the parties (the "TCC Propco Agreements"). Mr. Wong states in his affidavit that it is a condition of the Lease Transaction Agreement that TCC terminate any subleases prior to closing. TCC will also wind-down other arrangements with TCC Propco.

12 The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms and an early termination payment is now owing as a result of this wind-down by TCC to TCC Propco, which, they contend, will be addressed within a claims process to be approved in due course by the Court. The claim of TCC Propco is not insignificant. This intercompany claim is expected to be in the range of $1.9 billion.

13 The relief requested by the Target Canada Entities was not opposed.

14 Section 36 of the CCAA sets out the applicable legal test for obtaining court approval where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

15 In deciding whether to grant authorization, pursuant to section 36(3), the Court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale or disposition;

(c) whether the Monitor filed with the Court a report stating that in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the asset is reasonable and fair, taking into account its market value.

16 The factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check list that must be followed in every sale transaction under the CCAA (see: *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.); leave to appeal refused 2010 QCCA 1950 (C.A. Que.).

17 The factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law (see: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]), citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("Soundair")).

18 I am satisfied, having reviewed the record and hearing submissions, that — taking into account the factors listed in s. 36(3) of the CCAA — the Lease Transaction Agreement should be approved. In arriving at this conclusion, I have taken the following into account: in the absence of any indication that the Target Canada Entities have acted improvidently, the informed business judgment of the Target Canada Entities (as supported by the advice of the Financial Advisor and the consent of the Monitor) that the Lease Transaction Agreement is in the best interests of the Target Canada Entities and their stakeholders is entitled to deference by this Court.

19 I am also satisfied that the process for achieving the Sale Transaction was fair and reasonable in the circumstances. It is also noted that the Monitor concurs with the assessment of the Target Canada Entities.

20 The Target Canada Entities, the Monitor and the Financial Advisor are all of the view that the consideration to be received by TCC is reasonable, taking into account the market value of the Eleven Leases.

21 I am also satisfied that the Transaction is in the best interest of the stakeholders.

22 The Applicants also submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied. Having reviewed the factum and, in particular, paragraphs 46 and 47, I accept this submission of the Applicants.

23 As referenced above, the relief requested by the Applicants was not opposed. However, it is necessary to consider this non-opposition in the context of the TCC Propco Agreements. The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms, and that the early termination payment now owing as a result of this wind-down by TCC to TCC Propco will be addressed within a claims process to be approved in due course as part of the CCAA proceedings.

24 The Monitor's consent to the entering into of the Termination Agreement, and the filing of the Third Report, do not constitute approval by the Monitor as to the validity, ranking or quantum of the intercompany claim. Further, when the intercompany claims are submitted in the claims process to be approved the Court, the Monitor will prepare a report thereon and make it available to the Court and all creditors. The creditors will have an opportunity to seek any remedy or relief with respect to the intercompany claim in the claims process.

25 In my view, it is necessary to stress the importance of the role of the Monitor in any assessment of the intercompany claim. It is appropriate for the Monitor to take an active and independent role in the review process, such that all creditors are satisfied with respect to the transparency of the process.

26 Finally, it is noted that the actual consideration is not disclosed in the public record.

27 The Applicants are of the view that the specific information relating to the consideration to be paid by the Landlord Entities and the valuation analysis of the Eleven Leases is sensitive commercial information, the disclosure of which could be harmful to stakeholders.

28 The Applicants have requested that Confidential Appendices "A" and "B" be sealed. Confidential Appendix "A" contains an unredacted version of the Lease Transaction Agreement. The Applicants request that this document be sealed until the closing of the transaction. The Applicants request that the transaction and valuation analysis as contained in Appendix "B" be sealed pending further order.

29 No party objected to the sealing requests.

30 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate, in the circumstances, to grant the sealing relief as requested by the Applicants.

31 In the result, the motion is granted. The approval and vesting order in respect of the Lease Transaction Agreement has been signed.

Motion granted.

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended

FIRM CAPITAL MORTGAGE FUND INC. - and - **FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED**

Applicant

Respondents

Court File No. CV-18-604993-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto, Ontario

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