CT-2007-006

COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act, R.S.C. 1985, c. C-34,* as amended;

AND IN THE MATTER of an inquiry under subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Premier Career Management Group Corp. and Minto Roy;

AND IN THE MATTER of an application by the Commissioner of Competition for an order under section *74.1* of the *Competition Act;*

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant.

and

PREMIER CAREER MANAGEMENT GROUP CORP.

and

M I NTO ROY

Respondents.

REPLY

Introduction

1) On September 14, 2007, the Applicant filed the Revised Motion Record for an order in default of response, as it appears from the file. Affidavits of former clients of PCMG and of one former employee were part of this record. These affidavits were filed to prove that the Respondents have engaged in the reviewable conducts alleged in the Notice of Application.

2) On October 3, 2007, the Respondents filed the "Respondents' Motion Record in Response to the Commissioner's Revised Motion Record for an Order in default of reponse", as it appears from the file. They also filed the affidavit of Minto Roy.

3) On October 12, 2007, the Respondents filed the "Response of Premier Career Management Group Corp. and Minto Roy".

4) On the same day, counsel for the Respondents informed counsel for the Applicant that the Respondents' Record in response to the Applicant's Revised Motion record for an order in default of response is comprised on the following documents;

   a) Response (October 12, 2007);

   b) Memorandum of Argument in Response to the Commissioner's Revised Motion Record for Order in Default of Response (October 3, 2007);

   c) Affidavit of Minto Roy (October 3, 2007).

5) The Applicant submits that the Tribunal has to now decide whether the delay provided at subrule 5(2) of the *Competition Tribunal Rules* should be extended to October 12, 2007 to allow the filing of the Respondents' Response. The Applicant submits that the extension of delay should be denied because the Respondents have not provided a reasonable explanation for the delay and because they do not present an arguable defence.

6) If the Tribunal allows the extension of delay and the filing of the Response, the Tribunal has to decide following 2 further questions:

   a) Whether the Tribunal should allow the Respondents' request for particulars to the allegations set out at paragraphs 14, 19, 21 and 22 of the Notice of Application, and regarding the tape evidence referred to in the Applicant's Disclosure Statement? The Applicant submits that this request should be denied because the requested particulars are not needed or because they have already been provided.

   b) Whether the Tribunal should allow the Respondents' request that they be granted a confidentiality order *"for materials filed in this proceeding"* that are labeled *"Confidential',* and also for some paragraphs of the Respondents' Memorandum and the affidavit of Minto Roy? The Applicant submits that this request should be denied because the Respondents have not proven that the information they seek to protect is in fact confidential.

II. Delays

II.A. Factors upon which the discretion to extend the delay should be exercised

7) Pursuant to rule 68 of the Competition *Tribunal* Rules, the Tribunal can extend the delay provided at subrule 5.1(2) to allow the filing of the Respondents' Response.

8 For PCMG, the delay for the filing of the Response would have to be extended from July 6, 2007 to October 12, 2007, i.e. by 98 days.

9) For Minto Roy, the delay for the filing of the Response would have to be extended from July 9, 2007 to October 12, 2007, i.e. by 95 days.

10)The Applicant submits that the Respondents must prove the following factors in regards to their request for an extension of time:[1] [2] [3]

a) Do they have a reasonable explanation for the delay?

b) Do the Respondents have an arguable defence?

II. B. Preliminary considerations before reviewing the factors

11)The Applicant submits that the Respondents should be put to the strict proof of the above noted factors for the following reasons:

a) The Notice of Application raises serious reviewable conducts;

b) The delay of 45 days provided in the *Competition Tribunal Rules* affords ample time for a defending party to prepare a response. In comparison, the *Federal* Courts Rules provide that the defence must be filed within 30 days;

c) At paragraph 20 of the Notice of Application, the Applicant alleges that the reviewable conducts continued even after the Respondents had received many complaints from their clients. The Applicant refers to the evidence of

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[1] Attorney General of Canada v. Hennelly,1999 CanLII 8190 (F.C.A.) - Annex "A".
[2] Minister of Citizenship and Immigration v. Simakov, 2001 FCT 469 (CanLII) - Annex "B"..
[3] Marshall v. Canada, 2002 FCA 172 (CanLII)-Annex "C".

4 former PCMG's clients[4]. Three of these former clients filed small claims actions before the B.C. Provincial Court in 2005, and the other, Rene Navarro-Gonzalez, entered into contact on January 12, 2006 with the Respondents,[5] i.e. after the small claims actions had been filed. The evidence shows that the Respondents made the same reviewable conducts in the case of Rene Gonzalez that for the 3 others. Accordingly, the Applicant has serious concerns that the reviewable conducts could be continuing;

d) Finally, for the reasons detailed hereafter, the Applicant submits that the attitude of the Respondents is questionable. Accordingly, the Applicant submits that they have not shown why they should be given the benefit of the doubt.

II. C. Justification of the delays

12)The Respondents argue that they *"have a reasonable explanation for the delay'.*[6] They say as follows at paragraph 22 of their Memorandum:

> *22. In these circumstances, where the Respondents were unable to respond to the documents sent by the Commissioner because of the financial and other consequences of the Commissioner's allegations, and the Respondents took reasonable steps to retain counsel, default judgment should not be granted.*
>
> (Emphasis added)

13)The Respondents file the affidavit dated October 3, 2007 of Minto Roy to explain the delays.

14)The Applicant submits that the explanations provided are not reasonable. They do not prove that the Respondents were "unable" to respond to the Applicant's Notice of Application. They rather demonstrate negligence.

15)At paragraph 12 of his affidavit, Minto Roy admits that the Notice of Application was left with his wife and another copy with Ray Williams on May 9 and 10, 2007.

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[4] Applicant's Revised Motion Record for an order in default of response, Tabs 6, 7, 8 and 9.
[5] Applicant's Revised Motion Record for an order in default of response, Tab 9, paragraph I3.k).
[6] Respondents' Record dated October 3, 2007, paragraph 20.

16) At paragraph 13 of his affidavit, Minto Roy admits that the Applicant's Disclosure Statement was left with Ray Williams and with his wife on May 22 and 23, 2007.

17) At paragraph 14 of his affidavit, Minto Roy says that on or about June 1, 2007, he met a lawyer for the purpose of retaining him in the present matter, but that he could not afford his pricing structure.

However, the Applicant submits that Minto Roy does not explain the following:

a) Knowing that the Notice of Application was served on May 9 and 10, 2007, why did Minto Roy wait three weeks before seeking legal advise?

b) Why Minto Roy did not try to find another lawyer who would charge less for the legal services?

c) Why Minto Roy did not retain Rebecca Beatch,[7] the counsel who had represented the Respondents in the matter of *Warren vs. PCMG and Minto Roy* that was argued before Justice Pendleton of the B.C. Provincial Court late 2006 and early 2007? The name of this counsel appears on the first page of Pendleton's decision.[8] This counsel knew very well the case and the issues similar to those raised in the present matter;

d) Why Minto Roy absolutely needed counsel to initiate the defence in the present matter or to justify the delays? Unless the Respondents decide to completely change their defence in the present matter, which would be unlikely, the legal advice obtained in the other similar case of *Warren vs. PCMG and Minto Roy is* surely relevant to the present matter. The Respondents were not is a situation where complex and lengthy legal work was needed to establish a defence.

18) At paragraphs 14 and 15 of his affidavit, Mr. Roy explains that after June 1, 2007 he devoted all of his time, energy and financial resources to save PCMG.

However, the Applicant submits that Minto Roy does not explain the following:

a) Why Minto Roy or another officer of PCMG did; not write the response?

b) Why Minto Roy or another officer of PCMG did not find any time to take care of the present matter and to seek directions from the Tribunal in regards to the delay?

Of the law firm Alexander, Holburn, Beaudin and Lang, LLP, Vancouver (httpalwww.ahbl.cal).

[8] Applicant's Revised Motion Record for an order in default of response, Tab 8, Exhibit "C".

c) Why Minto Roy or another officer of PCMG did not contact the registrar of the Tribunal to advise him of the situation and/or seek directions from the Presiding judge?

d) Why Minto Roy or another officer of PCMG did not contact the Applicant's counsel to discuss the matter?

19) At paragraph 16 of his affidavit, Minto Roy explains that he endeavored to raise funds and that he was in a position to retain a lawyer in September. He says that he *"initiated contact again with that lawyer".* The Applicant understands that it was the same lawyer that Minto Roy had met in June 2007. Minto Roy says that he was informed at that time that counsel was on vacation until October.

However, the Applicant submits that Minto Roy does not explain the following:

a) Knowing that the Respondents were already late in defending the present matter, why Minto Roy was ready to wait another month for the return of that lawyer from vacations instead of immediately trying to find another lawyer to take action?

b) Why he absolutely wanted and/or needed to have that particular lawyer?

20) At paragraph 17 of his affidavit, Minto Roy says that he received the Revised Motion Record on September 13, 2007 and that "[i]t *became apparent that* [he] *needed to retain counsel as soon as possible, and* [that he] *retained a different lawyer as soon as* [he] *could".*

However, the Applicant submits that Minto Roy does not explain the following:

a) Because the expression "as soon as possible" is implying a series of events that prevented Minto Roy from immediately acting upon receipt of the Applicant's Revised Motion Record on September 13, 2007, when did he retain counsel after September 13, 2007 and what prevented him to retain him sooner?

21) The Applicant submits that the Respondents have not explained the full period of the delay.

22) Serious questions can be raised about the chosen course of action of the Respondents starting from the service of the Notice of Application, especially considering who the Respondents are.

23 Minto Roy is a businessman. As it appears from PCMG's own website, [9] at the page titled "Management Team", he is presented as bringing *"more than a decade of experience in career management and has worked with thousands of clients advising them on their career search and career plans".* He is presented as being a *"sought-after speaker and media commentator, featured on CBC TV, CBC Morning Radio and various Channel M features on immigrant employment".* PCMG says that *"Minto provides expert commentary on employment issues and tends and has been a resource for the National Post, Globe and Mail, Vancouver Province and Toronto Star".*

24}Further, Minto Roy was not the only officer of PCMG. Ray Williams, Executive Vice-President and Principal for PCMG, was served with the Applicant's Notice of Application on May 9, 2007 [10] and with the Applicant's Disclosure Statement on May 22, 2007. [11] As principal of PCMG, the present matter was surely of interest to him. On PCMG's website, [12] one reads that Mr. Williams *"has been an executive, professional consultant, trainer and executive coach with more than 30 years experience".* Further, one reads that Mr. Williams:

> (...) *brings a unique and powerful combination of knowledge and training along with pragmatic experience as a senior* executive *in both the public and private sectors. He has numerous testimonials about the dynamic, thoroughly professional and extremely practical advice and training in leadership, business development and organizational change. He has received an award as one of the top education executives in North America and has served on numerous professional Boards in a leadership capacity.*

25}Furthermore, the Applicant also notes from PCMG's website that Tom Locke is the Executive Vice President of Corporate development for PCMG. Mr. Locke is presented as having:

> (...) *played an integral role in the founding of Rainmaker Digital Pictures Corporation ("Rainmaker') in 1995. Prior to this, he was President and Chief Executive Officer of Gastown Post and Transfer, Western Canada's largest independent post production facility. Gastown, which evolved into Rainmaker,*

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[9] Applicant's Revised Motion Record for an order in default of reponse, Tab 3, Exhibit "C" 4th page.
[10] Applicant's Revised Motion Record for an order in default of response, Tab 3, Exhibit "H".
[11] Applicant's Revised Motion Record for an order in default of response, Tab 3, Exhibit "L".
[12] Applicant's Revised Motion Record for an order in default of response, Tab 3, Exhibit "C", 4th page.

> *provides a complete range of digital post production services for national and international film, television and video producers.*

26)The Respondents say that they *"oppose all the grounds of relief requested in the Notice of Motion for an Order in Default of Response dated September 13, 2007'.* [13] Minto Roy says that he *"believes that* [he has] *a meritorious defence to the allegations made against* (him) *by the Commissioner".* [14]

27)If the Respondents held such a position and beliefs, Mr. Roy, Mr. Williams and Mr. Locke had certainly enough combined experience and know how to at least write a letter to the Tribunal or to counsel for the Applicant, or make telephone calls, to advise of the reasons why they felt they had a meritorious defence and why they could not file their response within the delays provided.

28)Instead, the Respondents remained silent.

29)The Applicant had to file a detailed Revised Motion Record for an order in default of response, and affidavit evidence, for the Respondents to finally act. As it obviously appears from the materials filed, some lengthy work and costs were associated with the drafting and service of the Applicant's Revised Motion Record for an order in default of response.

30)In the present circumstances, the Applicant submits that not having the money to retain counsel is not a recognized and valid reason to justify the complete inaction in regards to a judicial process.

31)In Thom v. *Canada,* [15] Evans J.A. said as follows:

> *[14] Nonetheless, litigation is a serious business which consumes public resources and, in fairness to the other party, the Rules governing it apply to everyone, including self represented litigants. Neither the Registry nor the Court can provide legal advice to litigants, actual or potential. Mr Thom appears to have made no effort to familiarise himself with the Rules or to provide a clear and credible explanation for his failure to commence an appeal within the prescribed time, or soon afterwards.*

32)The Applicant submits that the same reasoning applies to the situation of the Respondents in the present matter, *mutadis mutandis.*

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[13] Respondents' Record dated October 3, 2007, at paragraph 1.
[14] Minto Roy's affidavit, at paragraph 19.
[15] 2007 FCA 249 (CanLII) - Annex "D".

33)The Applicant submits that the evidence submitted by the Respondents simply do not prove a situation where a party would be unable to respond, or at least obtain directions from the Tribunal.

34)The Applicant submits the Respondents have not met the burden of proof in justifying the delays.

35)Accordingly, the Applicant submits that the request for the extension of the delay for the filing of the Response should, be denied.

36)ALTERNATIVELY, should the Tribunal decide to allow the reasons for delay or excuse the delay because of greater considerations, the Applicant submits that the Respondents' Record filed in response to the Applicant's Revised Motion for an order in default of response should be dismissed because it does not present an arguable defence.

II. D. No arguable defence

37)As discussed above, the Applicant submits that the Respondents must also prove that they have an arguable defence to be allowed to file their Response late.

38)The Applicant submits that such proof has not been met for the following reasons.

II. D.1. No specific defence is raised against the Applicant's evidence

39)On July 31, 2007, Madam Justice Simpson ordered as follows:

> 6. *The Applicant is to prepare a revised motion record containing submissions and affidavit evidence showing (1) that the Respondents failed to serve and file a response; and (2) that paragraph 74.01(1)(a) of the Act has been breached by the Respondents' representations to the public and that the remedy sought is appropriate.*
>
> *(...)*
>
> 8. *The Respondents shall, within 24 days after being served with the revised motion record, serve and file a responding*

motion record, failing which the motion for a default order will proceed without further notice.

40) On September 14, 2007, the Applicant filed the Revised Motion Record for an order in default of response. This record contains detailed and specific affidavit evidence in regards to the allegations raised in the Notice of Application about the reviewable conducts (para.74.01(1)(a)).

41) On October 3, 2007, the Respondents filed their Memorandum of argument and the affidavit of Minto Roy.

42) On October 12, 2007, the Respondents filed their Response to the Notice of Application.

43) Because of the materials found in the Applicant's Revised Motion Record for an order in default of response, the Respondents are placed in the unusual and advantageous position of having before them all of the evidence presented by the Applicant in support of the application for the default order.

44) Such affidavit evidence is detailed and it is backed by documents, where applicable, the whole as it appears from the affidavit evidence filed with Applicant's Revised Motion Record.

45) Also, the Applicant's Revised Motion Record includes detailed written submissions at Tab 2 of this record. As it appears from these written representations, they constitute in fact the Notice of Application to which is added references to the affidavit evidence and arguments on the merits.

46) However, nowhere in their response Record do the Respondents deny with affidavit evidence of Minto Roy or from another officer of PCMG the affidavit evidence of the following witnesses:

a) Ian Spence -the Bureau's official;

b) Tanya Threatful - former client;

c) Johan de Vaal -former client;

d) Bruce Nickson -former client;

e) William Warren -former client;

f) Rene Navarro-Gonzalez - former client;

g) Steve Wills - PCMG's former employee.

47)At paragraph 19 of his affidavit, Minto Roy says as follows:

> *I believe that I have a meritorious defence to the allegations made against me by the Commissioner.*

48)However, Minto Roy says nothing about the affidavit evidence presented by the Applicant's witnesses.

49)The Applicant submits that this silence is fatal to the Respondents. They have failed to challenge with proper affidavit evidence of Minto Roy or other officers of PCMG the affidavit evidence presented by the Applicant in support of the Revised Motion for an order in default of response.

5o)The Applicant submits that such silence is even more surprising considering the Respondents' decision to request particulars in regards to the allegations of reviewable conduct found at paragraph 14 of the Notice of Application. They say as follows at paragraph 12 of their Response:

> *12. In response to paragraph 14 of the Notice of Application, the Respondents submit that the Commissioner has failed to specify what the specific misrepresentations are, who made the specific representations, the time and date that the specific misrepresentations were made, and the form of publication the contained the specific misrepresentations. The Respondents submit that the vagueness of the allegations makes it difficult to accurately respond to them.*
>
> (Emphasis added)

51)However, at paragraphs 11 to 18 of the written representations filed with the Revised Motion Record for an order in default of response, [16] the Applicant specifically refers to the affidavit evidence of the former clients and of one former employee. All the above noted particulars are specifically given, i.e. the what, who, when and how of former clients and one former employee. Even if such details are specifically provided, the Respondents do not respond to them in their Record.

52)In particular, former clients directly challenge Minto Roy by saying that he made certain representations to them, but the latter does not give his

[16] Applicant's Revised Motion Record for an order in default of response, Tab 2.

evidence in response. The Applicant submits that negative inferences can be drawn from this silence.

53) Furthermore, in his affidavit found at Tab 8 of the Applicant's Revised Motion Record, William Warren refers to his case in the matter of *Warren vs. PCMG and Mint Roy.*[17] In his decision, Justice Pendleton made the following factual determinations based on similar evidence:

> ...In *cross examination* [Minto *Roy] denied the suggestion he told the claimant that 96% of the defendants' clients obtained new employment in one to one hundred days... When asked again in cross examination he admitted he has and does tell clients that the defendant has a 96% success rate in placing clients in new jobs within one to one hundred days. (para.19)*

> *The Court listened carefully to the evidence of Roy.. in the course of his marketing and promoting the defendants' services and obtaining clients like Warren, I have no doubt, after listening to Roy, that his presentation to potential clients would be very polished and persuasive ...Roy had a tendency to go on at some length answering straight forward questions. He contradicted himself regarding the company's success rate in placing clients in a new job within a specific time frame. (para.20)*

> *The Court listened carefully to the evidence of De Vaal and Turenne. Both were very good witnesses who had good recollections of their meetings with Roy. I found them to be careful, consistent, reliable and credible witnesses. Both agreed that Roy did not guarantee them a job with any particular company, at a particular salary, but I accept that he told them they should have no trouble finding a new job within a matter of weeks and at a salary similar to what they had been earning and that this could be accomplished because the defendants had contacts with senior level employers who were looking for individuals with their background and skills. Roy denied making these representations but he was not credible. (para.30)*

"Applicant's Revised Motion Record for an order in default of response, Tab 8, para.19.

> *... I accept Warren's assertions that Roy represented that PCMG would provide him contacts with senior level employers and that he could expect to secure employment within 90 days. Roy said he didn't make these statements but I don't believe him. (para.39)*

54) The Applicant obviously admits that this Tribunal is not bound by Justice Pendleton's findings. However, the existence of Justice Pendleton's decision is a fact this Tribunal could decide to consider in reviewing the present matter.

55) Again, nowhere in their Record do the Respondents refer to the Pendleton's decision to say where he would have erred and why his findings are not reasonable? Also, why did the Respondents not appeal this decision? The Applicant submits that the Respondents should have also presented an arguable defence against the Pendleton's decision because it is a fact raised in the present matter through the affidavit evidence of William Warren.

56) In conclusion, the Applicant submits that the Respondents have failed to prove an arguable defence through affidavit evidence presented in the Respondents' Record. The Respondents do not deny whatsoever the specific affidavit evidence found in the Applicant's Revised Motion Record for an order in default of response.

57) Accordingly, the Applicant submits that the Respondents' Response should be denied and that the Tribunal should proceed to hear the Revised Motion Record for an order in default of response.

II. D.2. Paragraph 14(c) of the Notice of Application

58) The Respondents' only challenge of the affidavit evidence filed with the Applicant's Revised Motion Record pertains to the reviewable conduct alleged at paragraph 14(c) of the Notice of Application.

59) At paragraph 24 of their Memorandum, the Respondents argue that the default order should not be made unless the evidence supports the conclusions sought.

6o) At paragraph 25 of their Memorandum, the Respondents argue *"that the evidence presented in support of the Commissioner's falls far short of this requirement".*

61) Paragraph 14(c) of the Notice of Application states as follows:

> *14. Starting in 2004 and for the purpose of promoting their services to prospective clients, the Respondents made the following representations which were false or misleading in a material respect:*
>
> *c) PCMG and Minto Roy made representations that conveyed the general impression that potential clients will almost certainly find work quickly with their help, typically within 90 days, and at a position with salary and benefits equal to or better than their previous job.*
>
> *However, contrary to the representations made, this was not the case;*

62) At paragraph 25 of their Memorandum, the Respondents argue that

> *[i]t is clear from the affidavits contained in the Commissioner's Revised Motion Record that that (sic) many of the complaining PCMG clients did not even participate in the PCMG program for a full 90 days. Therefore, these affidavits cannot be proper evidence as to whether this alleged statement was false or misleading in a material respect.*

63) The Respondents go on to review the affidavits of Tanya Threatful, Johan de Vaal, Bruce Nickson and William Warren, and they say the evidence presented does not prove that they stayed with the PCMG program for at least 90 days.

64) First, the Applicant notes that the Respondents do not refer to the affidavit of Rene Navarro-Gonzalez, [18] for obvious reasons. At paragraph 20 of his affidavit, Mr. Gonzales says as follows:

> *20) As time passed, I became more and more concerned about the services provided, and ninety days came and went and I still had not been given contacts, introductions, or referrals for interviews.*

[18] Applicant's Revised Motion Record for an order in default of response, Tab 9.

65)Second, no evidence shows that the PCMG clients were told that they had to participate to the program for at least a full 90 days to find work with the help of PCMG, at a position with salary and benefits equal to or better than their previous job.

66)The affidavit evidence proves they were told that they would find work quickly, typically within 90 days, and this was material in their decision to retain the services of PCMG.

67)The affidavit evidence of the former clients further proves that all witnesses quickly realized that the services provided by PCMG were going nowhere and that they were not getting referrals or introductions, and they complained about this to the Respondents. They had serious reasons to raise their concerns.

68)For these reasons, the Applicant submits that Respondents' attempt to challenge the affidavit evidence filed in regards to paragraph 14(c) clearly fails.

69)Notwithstanding the above, paragraph 14(c) of the Notice of Application is distinct and separate from the other reviewable conducts alleged at paragraphs 14(a) and 14(b). Assuming that the affidavit evidence does not prove the allegations of paragraph 14(c), although this is expressly denied, the Applicant submits that a default order can nevertheless be rendered in regards to paragraphs 14(a) and 14(b) of the Notice of Application. The Respondents do not say why this would not be a possibility.

U D.3.Other considerations concerning the Response

70)On September 13, 2007, the Respondents were served with affidavit evidence in regards to the impugned representations. These affidavits were part of the Revised Motion Record. Minto Roy admits having received such record on that day, as it appears at paragraph 17 of his affidavit, and he says that it became apparent at that time that he had to retain counsel as soon as he could.

71) I n their Response dated October 12, 2007, the Respondents have elected to offer a general defence concerning the impugned representations. They argue that there was no actual "disconnect" between the representations made about their services and the services rendered, at no time whatsoever.

72)The Respondents completely ignore in their Response the specific affidavit evidence filed on September 14, 2007.

73) Former clients and one former employee provide affidavit evidence of clear and irreconcilable "disconnects" between the representations and the services rendered, and their materiality, and the Respondents do not even deny such specific evidence.

74) Further, it is important to note at paragraph 11 of the affidavit of Ian Spence that the Applicant has received since late 2004 twenty-four complaints about the Respondents. The Applicant decided to only produce the affidavit evidence of 5 former clients and 1 former employee because it was felt that such evidence was enough to prove the impugned representations on the balance of probabilities. However, should this matter proceed to trial, the Applicant could decide to bring forward additional witnesses and documents.

75) Notwithstanding such affidavit evidence, the Respondents argue at paragraph 13 of their Response that the "ordinary citizen" would have understood the representations differently. They further go on to raise various general defences to the Applicant's allegations.

76) The Applicant submits that a general defence is no defence to specific allegations made by former clients and by one former employee.

77) For these additional reasons, the Applicant submits that the Respondents are not presenting an arguable defence.

III. Request for particulars

78) At paragraph 14 of their Response, the Respondents say that the Applicant has failed to specify the following at paragraph 14 of the Notice of Application:

a) What are the specific misrepresentations;

b) Who made the specific misrepresentations;

c) The time and date that the specific misrepresentations were made; and

d) The form of publication that contained the specific misrepresentations.

79) The Respondents further argue that the *"vagueness of the allegations make it difficult to accurately respond to them".*

80) Furthermore, the Respondents request further and better particulars about the allegations found at paragraphs 19, 21 and 22, but they do not explain what particulars they want.

81) Also, at paragraph 38 of the Response, the Respondents ask more particulars about how the taped evidence was obtained. This taped evidence is about PCMG's Sales Meetings and it is mentioned in the Applicant's Disclosure Statement.

82) The Applicant submits that the Respondents' requests for particulars are not founded for the following reasons:

a) With regards to paragraph 14 of the Notice of Application, the Respondents have detailed facts through the affidavit evidence of 5 former clients and 1 former employee that were filed in the Applicant's Revised Motion Record for an order in default of response. However, even if they are provided with such facts, they ignore them in their Response. They make a general defence by saying that at no time was there ever a "disconnect" between the representations made to prospective clients and the actual services rendered by PCMG. The Applicant submits that the Respondents do not need further facts to know what case the Applicant intends to make against them.

b) With regards to paragraphs 19 (advertising of PCMG's services), 21 (typical clients) and 22 (materiality of the impugned representations) and as stated above, the Respondents do not say why they need further particulars. The need for particulars has to be proven and the Respondents have not met this burden of proof. Further, the Applicant has filed detailed affidavit evidence in the Revised Motion Record that addresses the allegations found at paragraphs 19, 21 and 22. The Applicant submits that the Respondents do not need further facts to know what case the Applicant intends to make against them.

c) With regards to the taped evidence, the Respondents do not say why they need the information sought. The Applicant submits that a request for particulars must be proven and the Respondents have not proven the need for such particulars.

83) For the above reasons, the Applicant submits that the Respondents' requests for particulars should be denied.

IV. Confidentiality order

84) At paragraphs 36 and 37 of their Response, the Respondents ask for a confidentiality order for the following documents:

a) All documents marked "Confidential";

b) Paragraphs 20 and 22 of the Respondent's Memorandum of Argument in Response to the Commissioner's Revised Motion Record for an order in Default of Response;

c) Paragraphs 14,15 and 16 of the affidavit of Minto Roy;

d) Paragraph 33 of the Response.

85) Further, at paragraph 36, the Respondents ask that the documents marked "Confidential" should not be published on the Tribunal's website.

86) On October 15, 2007, counsel for the Respondents sent to counsel for the Respondents the following documents:

a) A public version of the Response;

b) A confidential version of the Response;

c) A public version of the Memorandum and the affidavit of Minto Roy;

d) A confidential version of the, Memorandum and the affidavit of Minto Roy.

87) The Applicant submits that the confidentiality orders sought should be denied for the following reasons:

a) Rule 63 of the *Competition Tribunal Rules* provides that *"every person is entitled to access to the documents filed or received in evidence",* subject to rule 64;

b Rule 64 of the *Competition Tribunal Rules* provides that the Tribunal may declare "confidential" a document filed or received in evidence, or a document listed in a disclosure statement, but the party making the request must include *"details of the specific, direct harm that would allegedly result from public access to the document";*

c) The Applicant submits that rule 64 of the *Competition Tribunal Rules* applies in regards to the Respondents' request of a confidentiality order for all or parts of the affidavit of Minto Roy;

d) The *Competition Tribunal Rules* are otherwise silent in regards to confidentiality orders concerning other documents than *"documents filed or received in evidence".* Such other documents would include notably responses, memorandum, written arguments, etc. The practice and procedure set out in *Federal Courts Rules* would have to be followed for confidentiality orders pertaining to these other documents, as per rule 72(1) of the *Competition Tribunal Rules;*

e) Rule 151 of the *Federal Courts Rules* states as follows:

> *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.*

f) The Applicant submits that rule 151 of the *Federal Courts Rules* applies in regards to the Respondents' request of a confidentiality order for all or parts of the Respondents' Memorandum and their Response;

g) In any event, whether the request is made pursuant to rule 64 of the *Competition Tribunal Rules* or rule 151 of the *Federal Courts Rules,* the Applicant submits that the party seeking the confidentiality order must present a clear and probative demonstration of their right to this order. The Applicant further submits that the principles enunciated and the test established by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*[19] apply to such requests;

h) In the *Sierra Club of Canada* case, the Supreme Court of Canada wrote as follows:

> *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.*
>
> *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*

[19] [2002] 2 S.C.R. 522 - Annex "E".

Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

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

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 <u>seen</u> to be done, such public scrutiny is fundamental. The open court principle has been described as `the very soul of justice'; guaranteeing that justice is administered in a non-arbitrary manner: New Brunswick, at para. 22.

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 Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(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, 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 F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

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 and Co. v. Novopharm Ltd. (1994), 56 C.P.R. (3d) 437 (F. C. 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.*

i) The Applicant submits that the conditions of the *Sierra Club of Canada* test are not met in the present matter for the following reasons:

   i) First, the Respondents did not file an affidavit in support of their request for a confidentiality order;

   ii) Second, the Respondents did not prove that the confidentiality order is needed to prevent a *"serious risk to an important interesf',* as this factor is defined by the Supreme Court;

   iii) Third, the Respondents did not prove that the *"salutary effects of the confidentiality order ... outweigh its deleterious effects",* again as this factor is defined by the Supreme Court.

88) Finally, in regards to the Respondents' arguments that documents marked "Confidential" not be published on the Tribunal's website, the Applicant submits the request should be denied for the following reasons:

a) The Applicant has received a copy entirely marked as "Confidential" for the Response, for the Respondent's Memorandum and for the affidavit of M i nto Roy;

b) The Applicant is not sure about the Respondents' intentions with respect to these documents entirely marked as "Confidential";

c) In any event, the Applicant submits that documents can be filed as "Confidential" only if a confidentiality order has been rendered, and this is not yet the case;

d) Further, the Respondents do not demonstrate why the above noted documents that are all marked as "Confidential" include confidential information, as per the *Sierra Club of Canada* test;

e) Furthermore, the Applicant submits that the Tribunal's website is an important instrument to facilitate public information and to guarantee the rights of third parties discussed in the *Sierra Club of Canada* case. If the confidentiality orders are not rendered by this Tribunal, the Applicant submits that the Respondents have no right to request that the above noted documents that are completely marked as "Confidential" not be made available on the Tribunal's website.

V. Final considerations

V.A. Rule 211 of the *Federal Courts Rules*

89) The Respondents raise various points in regards to the substitutional service of the Notice of Application at paragraphs 15 to 19 of their Memorandum dated October 3, 2007. They refer to rule 211 of the *Federal Courts Rules.* They say that the default order cannot be rendered because of this rule.

90) The Applicant submits that these arguments are not founded for the following reasons:

a) The Applicant referred to the *Federal Courts Rules* in the initial Motion Record for an order in default of response (dated July 23, 2007) only in regards to the request that the motion be heard *ex pane.* The Tribunal denied such a request. The present motion is only brought pursuant to Rule 7 of the *Competition Tribunal Rules.* Rule 211 is not relevant here.

b) The Applicant submits that the Respondents misinterpret rule 211 and that this rule must be read in conjunction with rule 210. Rule 210 provides that the court can hear default proceedings *ex pane.* Where substitutional service has taken place, there may be circumstances where a doubt exists as to whether the defendant has indeed received a copy of the statement of claim. As per rule 211, the court will not render the judgment in default *"unless it is satisfied that it is just to do so having regard to all the circumstances".* This could mean to seek corroboration evidence that the defendant knows about the statement of claim and the motion in default of defence.

c) For reasons stated in the Revised Motion Record, the Applicant submits that the Notice of Application was served in accordance with the Rules. The Tribunal authorized the substitutional service of the Notice of Application on Minto Roy. Further, at paragraph 12 of his affidavit dated October 3, 2007, Minto Roy confirms that the Notice of Application was left with his wife on May 9, 2007.

91)For these reasons, the Applicant submits that the Tribunal can be *"satisfied that the notice of application was served in accordance with these Rules", as* provided at rule 7 of the *Competition Tribunal Rules.*

V.B. Production of documents

92)At paragraph 2(c) of the Respondents' Memorandum dated October 3, 2007, the Respondents ask for the Applicant to *"produce to the Respondents all documents previously served on Minto Roy'.* This request is not explained.

93)The documents that were served by the Applicant on the Respondents, in conformity with the *Competition Tribunal Rules* and orders from this Tribunal, are the following:

a) Notice of Application - Rule 3;

b) Applicant's Disclosure Statement - Rule 4.1;

c) Applicant's Revised Motion Record for an order in default of response - order dated July 31, 2007 of Madam Justice Simpson.

94)The Applicant submits that this request should be denied for the following reasons:

a) With regards to the Notice of Application, the Respondents' counsel advise at paragraph 31 of the Respondents' Memorandum dated October 3, 2007, that they found the Notice of Application on the Tribunal's website. Hence, the Applicant submits that requesting that the Notice of Application be produced again is an abusive request that should be denied;

b) With regards to the Applicant's Disclosure Statement, counsel for the Applicant e-mailed a copy of the statement to counsel for the Respondents on October 3, 2007, within the hour after the request was made. Further, the actual documents listed in the Applicant's Disclosure Statement were sent to the Respondents' counsel. Hence, the Applicant submits that requesting that the Applicant's Disclosure Statement be produced again is an abusive request that should be denied;

c) Finally, in regards to the Applicant's Revised Motion, the Respondents' counsel refer to the document at paragraph 1 of the Respondents' Record dated October 3, 2007. They have a copy. Hence, the Applicant submits

that requesting that the Revised Motion Record be produced again is an abusive request that should be denied.

95) Further, at paragraph 2(d) of their Memorandum, the Respondents request that the Applicant "*produce to the Respondent all relevant documents related to this matter*". This request is not explained.

96) Furthermore, at paragraph 31, the Respondents make further representations about the documents they do not have.

97) In regards to these 2 last points, the Applicant submits that the documents relevant that will be relied upon are all listed in the Applicant's Disclosure Statement. All was prepared in accordance with rule 4.1 of the *Competition Tribunal Rules*.

98) The Respondents have all the documents they need to fully and completely understand the Applicant's case.

99) Accordingly, the Applicant submits that the Respondents do not need further documents, and, in any event, they are not entitled to any other documents in conformity with the *Competition Tribunal Rules*.

Gatineau, October 16, 2007.

Stephane Lilkoff / Roger Nassrallah
Deputy Attorney General of Canada

Counsel to the Applicant.

ANNEX "A"

Canada (Attorney General) v. Hennelly, 1999 CanLII 8190 (F.C.A.)

Date: 1999-06-02
Docket: A-617-95
Parallel citations: (1999), 167 F.T.R. 158
URL: http://www.canlii.org/en/ca/fca/doc/1999/1999canlii8190/1999canlii8190.html

Date: 19990602

Docket: A-617-95

CORAM: LINDEN J.A.

ROBERTSON J.A.

McDONALD J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

(Applicant)

- and -

PHILIP HENNELLY

Respondent

(Respondent)

Heard at Toronto, Ontario, Wednesday, June 2, 1999

Judgment delivered orally from the Bench

at Toronto, Ontario on Wednesday, June 2, 1999

REASONS FOR JUDGMENT OF THE COURT BY: McDONALD J.A.

Date: 19990602

Docket: A-617-95

CORAM: LINDEN J.A.

ROBERTSON J.A.

McDONALD J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

(Applicant)

- and -

PHILIP HENNELLY

Respondent

(Respondent)

REASONS FOR JUDGMENT OF THE COURT

(Delivered orally from the Bench at Toronto, Ontario

on Wednesday, June 2, 1999)

McDONALD J.A.

[1] We are all of the opinion that this appeal must be dismissed. We recognize that it is usually routine for parties to consent to extensions of time in circumstances such as these and equally routine for the Court to allow an extension on this basis.

[2] Nonetheless, the presence or absence of consent for an extension of time is not determinative of the issue.

[3] The proper test is whether the applicant has demonstrated

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

[4] Any determination of whether or not the applicant's explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case.

[5] We do not understand the Motions Judge to be saying that one of the criteria for granting an extension is whether or not consent has been given.

[6] In this case the Motions Judge found that inadvertence was an insufficient explanation for the appellant's delay.

[7] We can find no compelling reason to interfere with the Motions Judge's exercise of discretion in finding that the appellant failed to provide an adequate explanation which would justify granting an extension of time.

[8] The appeal will be dismissed with costs to the respondent fixed in the amount of $100.00.

"F.J. McDonald"

J.A.

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

DOCKET: A-617-95

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA

Appellant

(Applicant)

- and -

PHILIP HENNELLY
Respondent

(Respondent)

DATE OF HEARING: WEDNESDAY, JUNE 2, 1999

PLACE OF HEARING: TORONTO, ONTARIO

REASONS FOR JUDGMENT BY: McDONALD J.A.

Delivered at Toronto, Ontario

on Wednesday, June 2, 1999

APPEARANCES: Mr. Derek Edwards

For the Appellant

(Applicant)

Mr. Philip Hennelly

In Person For the Respondent

(Respondent)

SOLICITORS OF RECORD: Morris Rosenberg

Deputy Attorney General

of Canada

For the Appellant

(Applicant)

Philip Hennelly

489 Heatherhill Place

Waterloo, Ontario

N2T 1H7

In Person For the Respondent

(Respondent)

FEDERAL COURT OF APPEAL

Date: 19990602

Docket: A-617-95

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

(Applicant)

- and -

PHILIP HENNELLY

Respondent

(Respondent)

REASONS FOR JUDGMENT

OF THE COURT

ANNEX "B"

Canada (Minister of Citizenship and Immigration) v. Simakov, 2001 FCT 469 (CanLII)

Date: 2001-05-11
Docket: T-2120-00
URL: http://www.canlii.org/en/ca/fct/doc/2001/2001fct469/2001fct469.html

Date: 20010511

Docket No.: T-2120-00

Neutral Citation: 2001 FCT 469

Ottawa, Ontario, this 11th day of May, 2001

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

- and -

ALEXEI SIMAKOV

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the respondent, Alexei Simakov, for an order allowing the respondent an extension of time for serving and filing a Notice of Appearance in Form 305 pursuant to Rule 305 of the of the *Federal Court Rules, 1998*, SOR/98-106, an extension of time for serving and filing the respondent's affidavits pursuant to Rule 307, an extension of time for serving and filing the respondent's application record pursuant to Rule 310, and a rescheduling of the hearing date which has been set for May 15, 2001.

[2] Extensions of times are governed by Rule 8 of the *Federal Court Rules*, 1998 which reads:

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

8. (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

[3] McDonald J.A., in *Canada v. Hennelly* (1999), online: QL, F.C.J. No. 846 at paragraph 3, recently enunciated the criteria to be met by a party seeking an extension of time.

1. a continuing intention to pursue his or her application;

2. that the application has some merit;

3. that no prejudice to the respondent arises from the delay; and

4. that a reasonable explanation for the delay exists.

[4] Further, there are additional factors which may be considered and which were canvassed by the Federal Court of Appeal in the *Grewal* decision, (1986), 63 N.R. 106 (F.C.A.). In the words of Chief Justice Thurlow (at page 272 and at 277-78):

... which, it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension.

...

... in the end, whether or not the explanation justifies the necessary extension must depend on the facts of the particular case and it would, in my opinion, be wrong to attempt to lay down rules which would fetter a discretionary power which Parliament has not ... fettered.

[5] In separate reasons, Justice Marceau emphasized (at page 282):

...It seems to me that, in order to properly evaluate the situation and draw a valid conclusion, a balancing of the various factors involved is essential. For example, a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay.

[6] Applying these principles to the case at bar, I am satisfied, based on the affidavit of the respondent, that he had a continuing intention to pursue his application and I also find that based on the motion record that the application has merit and the respondent has established an arguable case.

[7] I have also considered the nature of the right involved in the proceedings, the remedy sought and its effect on the respondent, the prejudice to the applicant should the extension be granted, the time lapse since the filing of the application, and the fact that the respondent, until very recently, was self-represented.

[8] Although I find the explanation for the delay wanting, in the circumstances presented, It is my view that justice would require the grant of the extension and I will so order.

ORDER:

THIS COURT ORDERS that:

1. The motion for an extension of time allowing the respondent an extension of time for serving and filing a notice of appearance, an extension of time for serving and filing the respondent's affidavits, an extension of time for serving and filing the respondent's application record is granted.

2. The respondent shall serve and file his notice of appearance within five (5) days of the date of this order.

3. After the filing of the said notice of appearance, the parties shall comply with the time limits and procedural steps provided for in Part 5 of the *Federal Court Rules, 1998*.

4. The hearing, which has been set for May 15, 2001, will be rescheduled by the Judicial Administrator of this Court.

5. No costs are awarded.

"Edmond P. Blanchard"

Judge

ANNEX "C"

Marshall v. Canada, 2002 FCA 172 (CanLII)

Date: 2002-05-06
Docket: A-259-00
URL: http://www.canlii.org/en/ca/fca/doc/2002/2002fca172/2002fca172.html

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Date: 20020506

Docket: A-259-00

Neutral citation: 2002 FCA 172

Present: SHARLOW J.A.

BETWEEN:

JOSEPHINE E. MARSHALL

Appellant

and

HER MAJESTY THE QUEEN,

the PUBLIC SERVICE ALLIANCE OF CANADA, and the

UNION OF PUBLIC SERVICE COMMISSION EMPLOYEES

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario May 6, 2002.

REASONS FOR ORDER BY: SHARLOW J.A.

Date: 20020506

Docket: A-259-00

Neutral citation: 2002 FCA 172

Present: SHARLOW J.A.

BETWEEN:

JOSEPHINE E. MARSHALL

Appellant

and

HER MAJESTY THE QUEEN,

the PUBLIC SERVICE ALLIANCE OF CANADA, and the

UNION OF PUBLIC SERVICE COMMISSION EMPLOYEES

Respondents

REASONS FOR ORDER

SHARLOW J.A.

[1] The appellant seeks an extension of time for serving and filing her memorandum of fact and law. The principles to be applied are set out in *Canada (Attorney General)* v. *Hennelly* (1999), 244 N.R. 399 (C.A.), at paragraph 3:

The proper test is whether the applicant has demonstrated

1. a continuing intention to pursue his or her application;

2. that the application has some merit;

3. that no prejudice to the respondent arises from the delay; and

4. that a reasonable explanation for the delay exists.

[2] This case has been plagued by delay for reasons that are unusually complex. For that reason, it is necessary to set out the history of this case in some detail.

[3] This matter began in 1985 when Ms. Marshall filed a statement of claim in the Trial Division (T-1085-85). Apparently, her cause of action was work related. It appears that no steps were ever taken in that action. By letter to the Court dated June 27, 1989, Mr. Michael Iosipescu, a Nova Scotia lawyer, gave notice that he would be acting as solicitor for Ms. Marshall and that he intended to proceed with the matter. Still, nothing was done.

[4] Ms. Marshall wrote a number of letters to the Court over the years (January 23, 1989, September 13, 1990, July 15, 1991) indicating that ill health prevented her from moving this matter forward, but that she fully intended to do so. However, none of her letters suggest that Mr. Iosipescu had ceased to act for her.

[5] Ms. Marshall commenced a second action in 1992 (T-1029-92) which, according to some of the material in the record, refers to some of the same facts as the 1985 action. It appears that the 1992 action is proceeding under case management. The extent of the overlap between the 1985 action and the 1992 action is not clear.

[6] On March 29, 1996, then Associate Chief Justice Jerome notified Mr. Iosipescu, who apparently was still

on the record as Ms. Marshall's solicitor, that consideration was being given to dismissing the action for delay. No response was received and the action was dismissed by order dated June 26, 1996.

[7] The June 26, 1996 order was sent to Mr. Iosipescu. He responded with a letter dated July 8, 1996 indicating that he did not represent Ms. Marshall, that he only did research for her, and that he did not have an address to forward the order to her. The record discloses no explanation for the apparent contradiction between Mr. Iosipescu's letters of July 8, 1996 and June 27, 1989.

[8] Nor does the record indicate whether the Court made any attempt, after receiving Mr. Iosipescu's letter of July 8, 1996, to contact Ms. Marshall directly.

[9] Ms. Marshall says that she learned only in October of 1999 that her 1985 action had been dismissed on June 26, 1996. On or about March 14, 2000, Ms. Marshall filed a notice of motion for an order setting aside that order and also seeking an order consolidating her 1985 action and her 1992 action. That motion was dismissed by Blais J. on April 13, 2000. His order reads as follows:

UPON being satisfied that the plaintiff has failed to provide a sufficient basis to justify to set aside the order of Justice Jerome dated June 26, 1996, in fact eleven years after the statement of claim was filed in the Federal Court;

UPON being satisfied that the plaintiff has provided little justification for the long delay that occurred;

UPON being satisfied that the defendants would be prejudiced by this long delay;

AND UPON being satisfied that it would not be appropriate to consolidate the action of Court File No. T-1085-85 with that of Court File No. T-1029-92.

IT IS HEREBY ORDERED THAT:

The motion be dismissed without costs.

[10] On April 25, 2000, Ms. Marshall appealed that order, thus beginning the present proceeding. The notice of appeal was amended on May 8, 2000. The agreement as to the contents of the appeal book should have been filed on May 25, 2000. No agreement was filed by that date.

[11] On December 22, 2000, a notice of status review was issued. Submissions were made by Ms. Marshall and also by the respondent unions, who opposed the continuance of the appeal on the ground of excessive delay through the history of this matter and the 1992 action.

[12] On January 10, 2001, Rothstein J.A. made an order permitting the appeal to continue. He set a March 15, 2001 deadline for the filing of an agreement as to the contents of the appeal book or a motion to have the Court determine the contents. The order stated that a failure to comply could result in the appeal being dismissed without further notice.

[13] On March 15, 2001, Ms. Marshall sent the Court a letter seeking an extension of time, citing medical problems. The respondent unions took no position with respect to that request.

[14] Ms. Marshall wrote to the Court again on March 26, 2001 to seek a further extension for six months, again citing medical problems. The respondent unions did not comment on that letter, but a response was submitted by the Crown in the form of a letter from counsel dated April 2, 2001. The Crown objected to further delay. The basis of the objection was the history of delay in this matter as well as the 1992 action, which was then under case management. The letter states that in 1995, Ms. Marshall had commenced a third action against the Crown, apparently unrelated to

the other two, which was also under case management. The letter also attempts to cast some doubt on the credibility of Ms. Marshall's submissions as to her medical condition. The second last paragraph reads as follows:

The Appellant's letters of March 15 and 26 indicate that she is unable to deal with this matter as a result of complications following a stroke in November. The Court should be aware that the Appellant has not been prevented from proceeding with her other Federal Court proceedings during this same period. In action T-2208-95 the Plaintiff participated in several days of discovery examination in November 2000. In action T-2208-95 in December 2000 she prepared a lengthy and complicated submission for the purpose of settlement discussions in accordance with Rule 257. On December 20, 2000 the Appellant served and filed a requisition for a pre-trial conference accompanied by a pre-trial conference memorandum. On March 29, 2001 the Appellant participated in a pre-trial conference in that action.

The letter indicates that a copy was sent to counsel for the respondent unions, but there is no indication that a copy was sent to Ms. Marshall.

[15] Based on this correspondence, Stone J.A. made a direction on April 11, 2001 which reads as follows:

Advise the applicant that unless she moves expeditiously not later than May 11, 2001, for an extension of time to comply with the Court's order of January 10, 2001 by filing and serving a notice of motion pursuant to the Federal Court Rules, 1998, the Court will initiate steps to determine whether the appeal should be dismissed for delay.

[16] Ms. Marshall then filed a motion which resulted in an order by Desjardins J.A. on June 5, 2001 setting a new deadline of December 5, 2001 for the filing of an agreement as to the contents of the appeal book or a motion to have the Court determine its contents. That order apparently was complied with. The appeal books were filed on December 4, 2001.

[17] The next step should have been the filing of Ms. Marshall's memorandum of fact and law by January 21, 2002. That deadline was missed. On January 31, 2002, Ms. Marshall sought an extension of time for the filing of her memorandum of fact and law, again citing ill health and a problem with her typewriter. In support of her motion she filed an affidavit to which was appended the following:

(1) A report from Charles E. Maxner, MD, FRCPC (Ophthalmology Clinic, Victoria General Hospital, Halifax) dated January 3, 2001, describing the results of referral relating to Ms. Marshall's complaint of diplopia (double vision). The examination took place on December 8, 2000.

(2) An insurance form apparently signed on July 18, 1996 by a physician from the Environmental Health Clinic at the Victoria General Hospital, Halifax, indicated that Ms. Marshall was then suffering from chronic fatigue syndrome and other difficulties.

(3) A letter dated January 11, 1999 from Dr. Patricia Beresford, BA, MD, of Halifax to an insurance company requesting coverage for vitamin and mineral supplements.

(4) A laboratory report from October of 2001 apparently referring to a blood test that detected certain levels of mercury.

(5) A letter dated January 29, 2002 from Dr. Beresford (see item (3) above) addressed "to whom it may concern" which reads as follows:

I am writing to request an extension to the submission of the memorandum of Fact and Law regarding Docket A-259-00 in the Federal Court of Appeal.

The request is being made because of her medical conditions which affect her cognitive functions and which lead to

pain and fatigue. These problems have inhibited the submission of the documents on the previously designated due date.

Thank you for your assistance in this matter.

[18] The respondent unions consented to the motion and the Crown did not oppose it. It was granted by Malone J.A. on February 12, 2002. He set a new deadline of March 15, 2002 for the filing of the memorandum. That new deadline was missed.

[19] Today, I am dealing with a motion filed by Ms. Marshall on April 9, 2002 to seek a further extension of time for filing her memorandum. She again cites medical problems, but provides more detail than before. All respondents oppose the motion.

[20] Ms. Marshall's motion is supported by her own affidavit, sworn April 8, 2002. It reads in part as follows:

2. Since December 1985, I have been unemployable and under doctor's care due to work-related injuries and illness which began in 1975 and caused impairments of a physical, mental, emotional, and psychological nature.

3. Amongst other medical diagnoses, I have been diagnosed as suffering from toxic fumes poisoning, chronic fatigue syndrome, fibromyalgia, reactive anxiety, post-traumatic stress syndrome, toxic brain syndrome, depression, environmental sensitivities, chemical sensitivities and chemical contaminations; and arthritis.

4. In addition, the following incidents further strained my health and adversely affected my ability to function:

a) On November 17, 2000, I suffered a stroke which not only aggravated the pre-existing health problems but also generated new health problems;

b) On November 7, 2001, I was diagnosed as having a higher than normal level of mercury in my blood;

c) On December 14, 2001, the Halifax Police Department advised me that they were re-opening their investigation into the work-related sexual assaults I had previously reported, with several conversations and interviews having since been conducted.

[21] The affidavit also requests that reference be made to the material filed with her previous motion (see above), and describes in considerable detail the efforts she had made to complete her memorandum and the difficulties she had. Appended to her affidavit are the following documents:

(1) A disability tax credit certificate apparently signed by Dr. Beresford on March 8, 2002, describing Ms. Marshall's diagnosis as follows:

She suffers from chronic fatigue syndrome and cognitive impairment. Her cognition appeared to decline after chemical exposures in the workplace and after a head injury [illegible] in 1978. Her cognitive difficulties interfere with her ability to communicate and to problem solve in her day to day activities. She has grave difficulties working out money exchange and relies on others to help her. Thinking and communicating takes an inordinate amount of time. Please see report by Sharon Cruickshank, Psychologist.

The referenced report is attached. It is dated February 6, 1985 and relates to an "evaluation of auditory processing" due to complaints then attributed to a 1979 car accident.

(2) A letter dated October 17, 1998 from T.J. Marrie, MD, FRCP(C) to an insurance company, apparently in support of a disability insurance claim, setting out a history of Ms. Marshall's medical problems. The letter refers to

exposure to toxic fumes in 1975 while employed as a school teacher, a sexual assault the following year, certain infections she suffered in 1980 that she felt might have been attributed to problems with the buildings in which she was working at the time, and a period of unemployment in 1985 and 1986.

(3) A disability tax credit certificate apparently signed on March 16, 1989 by J. William LaValley, M.D.

(4) A report dated December 4, 1990 from Gerald H. Ross, MD, CCFP, DIBEM, FAAEM of the Environmental Health Clinic referring to his examination of Ms. Marshall on November 14, 1990. He listed her complaints at that time as "1. Brain fog. 2. Fatigue. 3. Chemical exposures. 4. Chemical sensitivity. 5. Digestive problems." His "diagnostic impression" was "1. Toxic brain syndrome. 2. Multiple chemical sensitivities by history. 3. Arthralgia/myalgia. 4. Reactive anxiety."

(5) A statement of disability apparently signed by Dr. Ross on August 24, 1993 for an insurance company.

(6) A letter dated February 27, 1997 from Dr. Beresford to a lawyer, apparently related to a workers' compensation claim, confirming the "diagnostic impressions" of Dr. Ross. This letter includes the following:

I began seeing Josephine on August 18, 1995 in follow up to Dr. Gerald Ross, in my position of staff physician at the Dalhousie Environmental Health Centre. At that time she gave a very tangential history, darting from one thing to another and I had a great deal of difficulty in following her. I did learn that she had multiple exposures and multiple traumatic experiences in the workplace, and we have since then reviewed these in detail. She reported exposures to toxic fumes and pesticides in an old building where she worked from 1972 to 1978. She also related exposures to formaldehyde and cigarette smoke from 1980 to 1985. I was most impressed by her inability to focus and organize her thoughts, certainly displaying abilities not in keeping with a person who taught for years and was a PHD candidate. On her first visit, she complained of sweats, fatigue and lethargy, intolerance to weather changes, should tendinitis, facial blemishes and vaginal bleeding.

I have seen Josephine subsequently on September 29, 1995; November 17, 1995; November 23, 1995; January 24, 1996; February 23, 1996; May 18, 1996; July 05, 1996; September 11, 1996; October 14, 1996; December 10, 1996 and February 19, 1997.

Her complaints have continued to include mental fog; intolerance to environments outside her home, for example her garden or shopping malls; arthralgias; she struggles with emotional responses to old traumas in the workplace; increasing difficulties coping with daily living; difficulties with getting organized to write or type; several episodes of eye problems (infections and dryness) and she continues to struggle with cognitive abilities and the frustrations associated with this.

(7) A letter dated July 14, 1998 from Lynda Johnson, MSW, RSW, to Dr. Beresford, apparently in support of Ms. Marshall's workers' compensation claim, describing the effect on Ms. Marshall of certain sexual assaults in the workplace in 1975, 1979 and 1980.

[22] As mentioned above, all respondents oppose this motion, arguing that none of the four conditions listed in *Hennelly* have been met. I will deal with each in turn.

[23] Has Ms. Marshall provided evidence of a continuing intention to pursue this appeal? In my view, she has. In spite of the fact that Ms. Marshall's progress in making this appeal ready for hearing has been slow, she has obviously tried to take the appropriate steps. The appeal is slightly more than two years old, which is not inordinate given the difficulties Ms. Marshall has apparently faced.

[24] Does the appeal have merit? It must be said that it may be difficult for Ms. Marshall to succeed in this appeal. The issue is whether Blais J. erred in making an order that has a significant discretionary component. However, having reviewed the appeal book filed by Ms. Marshall on December 4, 2001, I am not persuaded that the

merits of her case are so slight that it should be dismissed at this stage.

[25] Are the respondents prejudiced by the delay? The respondents say they are, but they appear to be focussing on the delay from 1985, when the underlying action was commenced. However, the only delay that is relevant for the purposes of this motion is the delay in prosecuting this appeal. If all steps had been completed on a timely basis, this appeal might have been heard a year ago. I find it impossible to accept that the additional year, even if extended further, would make it more difficult for the respondents to deal with the merits of the appeal.

[26] Is there a reasonable explanation for the delay? In this regard, I note that Ms. Marshall's material has left some gaps. For example, the reports submitted with her most recent affidavit do not substantiate her assertion that she suffered a stroke in November of 2000. Nor do they explain the relevance, if any, of elevated levels of mercury in the blood, or the connection between her medical problems and the investigation by the Halifax Police of her alleged sexual assaults. And there is evidence that Ms. Marshall has been able to take steps in some of the other proceedings. However, the questions raised by Ms. Marshall's material might well be explained by her medical problems, which apparently have resulted in a certain degree of cognitive dysfunction. The respondents have provided no evidence that casts doubt upon Ms. Marshall's assertions that she suffers from the conditions she has named. On balance, I am satisfied that the delay has been reasonably explained.

[27] I conclude that this motion should be allowed.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-259-00
STYLE OF CAUSE: ET AL.	JOSEPHINE E. MARSHALL v. HER MAJESTY THE QUEEN
REASONS FOR ORDER BY:	Sharlow, J.A.
DATED:	May 6, 2002

WRITTEN REPRESENTATIONS BY:

Ms. Josephine E. Marshall	Appellant on her own behalf
Mr. Martin C. Ward	for the Respondent, Her Majesty the Queen
Mr. David Yazbeck	for the Respondent, Unions

SOLICITORS OF RECORD:

Mr. Morris Rosenberg	for the Respondent, Her Majesty the

Deputy Attorney General of Canada	Queen
Raven, Allen, Cameron & Ballantyne	for the Respondent, Unions
Barristers & Solicitors	
Ottawa, Ontario	

ANNEX "D"

Thom v. Canada, 2007 FCA 249 (CanLII)

PDF Format
Date: 2007-06-26
Docket: 07-A-23
URL: http://www.canlii.org/en/ca/fca/doc/2007/2007fca249/2007fca249.html

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Date: 20070626
Docket: 07-A-23
Citation: 2007 FCA 249

Present: **EVANS J.A.**

BETWEEN:

RALPH THOM

Applicant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 26, 2007.

REASONS FOR ORDER BY: EVANS J.A.

Date: 20070626
Docket: 07-A-23
Citation: 2007 FCA 249

Present: EVANS J.A.

BETWEEN:

RALPH THOM

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER

EVANS J.A.

[1] Ralph Thom has brought a motion in writing pursuant to Rule 369 of the *Federal Courts Rules* requesting an extension of time to file a notice of appeal from a decision of the Tax Court of Canada, which had dismissed his appeal against the reassessments of his income tax liability for the taxation years 1999 and 2000.

[2] Mr Thom's motion is dated April 20, 2007. The judgment of the Tax Court against which Mr Thom wishes to appeal was delivered orally from the Bench on August 16, 2004, and the written judgment was signed by the Judge on August 31, 2004. An appeal to this Court from a final judgement of the Tax Court must be commenced within 30 days from the date of the judgment: *Federal Courts Act*, R.S.C. 1985, c. F-7, paragraph 27(2)(*b*). Thus, Mr Thom has requested an extension of time more than two and a half years after the time for appealing expired. The respondent opposes the motion.

[3] In exercising its discretion to grant an extension of time, the Court must consider, among other things, the length of the delay, and whether, before the time for appealing expired, the individual had an intention to appeal; whether there are circumstances justifying the delay; whether the appeal would have any merit; whether the respondent would be prejudiced by the extension of time requested; and whether, in all the circumstances, it would be in the interests of justice to grant the extension. I shall briefly consider these factors.

[4] Length of the delay: When Parliament has stated that an appeal must be commenced within 30 days. A delay of more than two and a half years is therefore substantial. This factor militates against granting the extension.

[5] Intention to appeal: Mr Thom has provided no evidence that, before the end of October 2004 when the appeal period expired, he intended to commence an appeal. Indeed, he does not allege in his motion that he had this intention. He first contacted the Court in September 2006 respecting an appeal, but his material was returned because he had not provided the necessary basic identity and contact information. The Registry provided him with a copy of the *Federal Courts Rules*. He subsequently attempted to file a motion for an extension of time, but again his material was not accepted because it did not comply with the Rules. When he went to the local office, Registry staff explained to him how to compile a motion record.

[6] This factor does not favour granting the extension.

[7] Special circumstances: Mr Thom says that he did not file a notice of appeal earlier because he was advised by an official of the Canada Revenue Agency after his appeal was dismissed that "the matter was under investigation" and that he did not receive a letter from the Agency stating that "the decision was final" until two years later. Mr Thom has not produced this letter, nor provided an affidavit or any other evidence to support his vague allegations. The respondent denies that the Tax Court decision was under investigation and states that there is no record of any contact with Mr Thom after the Tax Court dismissed his appeal.

[8] In view of the absence of evidence supporting Mr Thom's allegations, other than his own unsworn

statements, I cannot afford this factor much weight.

[9] Merit in an appeal: Mr Thom does not indicate in his motion on what grounds he wishes to appeal. Since he elected to proceed in the Tax Court by way of the informal procedure (*Tax Court of Canada Act*, R.S.C. 1985, c. T-2, section 18), he may only appeal on the limited grounds set out in subsection 27(1.3) of the *Federal Courts Act*. In essence, these grounds are restricted to errors of law, findings of fact supported by no evidence, and procedural unfairness.

[10] Mr Thom's failure to address these grounds in his motion, or to provide any information that would enable the Court to assess whether an appeal would have any prospect of success, militates against the grant of an extension of time.

[11] Prejudice to the respondent: The respondent states that it would be prejudiced if Mr Thom were permitted to commence an appeal so long after the time for appealing had expired. The Canada Revenue Agency was entitled to assume, after a delay, that there would be no appeal from the Tax Court's decision, and to act on the assumption that the matter was closed.

[12] Although the respondent did not make a more specific allegation of any actual prejudice that it would suffer if Mr Thom were permitted to appeal, this factor weighs against granting the extension.

[13] The interests of justice: Mr Thom is representing himself in this matter. I shall assume that he is not a lawyer and has no experience of litigation in this Court. Because most people are not familiar with the litigation process, the Court typically allows self-represented appellants some latitude when they fail to comply with the Rules, in order to enhance individuals' access to justice. And, as happened in this case, the Registry assists self-represented litigants.

[14] Nonetheless, litigation is a serious business which consumes public resources and, in fairness to the other party, the Rules governing it apply to everyone, including self-represented litigants. Neither the Registry nor the Court can provide legal advice to litigants, actual or potential. Mr Thom appears to have made no effort to familiarise himself with the Rules or to provide a clear and credible explanation for his failure to commence an appeal within the prescribed time, or soon afterwards.

[15] This factor does not assist Mr Thom.

[16] For these reasons, Mr Thom's motion is dismissed and his request for an extension of time is denied.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	07-A-23
STYLE OF CAUSE:	*Ralph Thom v. Her Majesty the Queen*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Evans J.A.
DATED:	June 26, 2007

WRITTEN REPRESENTATIONS BY:

Mr. Ralph Thom	ON HIS OWN BEHALF
Kandia Aird	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT

ANNEX "E"

Sierra Club of Canada *v.* Canada (Minister of Finance), [2002] 2 S.C.R. 522, 2002 SCC 41

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*

Indexed as: Sierra Club of Canada *v.* Canada (Minister of Finance)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

on appeal from the federal court of appeal

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to

provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(*b*) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain

criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing

them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some

respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and Welfare)*, [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(*b*), 8, 54, 54(2)(*b*).

Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and *Peter Chapin*, for the appellant.

Timothy J. Howard and *Franklin S. Gertler*, for the respondent Sierra Club of Canada.

Graham Garton, Q.C., and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important 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 Limited ("AECL") is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

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 Mr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

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 Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

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, Trial Division*, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought 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 Rule 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under Rule 312.

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

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in 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 and Welfare)*, [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the *CEAA*, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

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. 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 Rule 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

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

(1) The General Framework: Herein the *Dagenais* Principles

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

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the 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. 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 Rule 151 should echo the underlying principles laid out in *Dagenais*, although it must be tailored to the specific rights and interests engaged in this case.

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

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the

test from *R. v. Oakes*, [1986] 1 S.C.R. 103. At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

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

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(*b*) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, at para. 33; 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] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(*d*) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

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 "reflec[t] the substance of the *Oakes* test", we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

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

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, 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*, 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 Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(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*, 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 *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the

open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

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 and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.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 and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.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" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would

be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

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

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be 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. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(*b*) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

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*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the

courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

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, focusses 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. 1353-54:

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

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 Rule 151 of the *Federal Court Rules, 1998*.

Appeal allowed with costs.

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Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.