CT-2019-005

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

PARRISH & HEIMBECKER, LIMITED

Respondent

COMMISSIONER'S BOOK OF AUTHORITIES
IN SUPPORT OF THE COMMISSIONER'S MOTION
TO DESIGNATE THE IDENTITES OF
THE COMMISSIONER'S FARMER WITNESSES AS CONFIDENTIAL

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Current to November 17, 2020

Last amended on July 1, 2020

À jour au 17 novembre 2020

Dernière modification le 1 juillet 2020

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 79 ou 92.

Definition of *competitor*

(11) In subsection (1), ***competitor*** includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

2009, c. 2, s. 429; 2018, c. 8, s. 115; 2018, c. 10, s. 87.

Définition de *concurrent*

(11) Au paragraphe (1), ***concurrent*** s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence de l'accord ou de l'arrangement.

2009, ch. 2, art. 429; 2018, ch. 8, art. 115; 2018, ch. 10, art. 87.

Mergers

Definition of *merger*

91 In sections 92 to 100, ***merger*** means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Fusionnements

Définition de *fusionnement*

91 Pour l'application des articles 92 à 100, ***fusionnement*** désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Order

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

Ordonnance en cas de diminution de la concurrence

92 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

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CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to November 17, 2020

À jour au 17 novembre 2020

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

as well as a copy of any statutory or regulatory provisions cited or relied on that have not been reproduced in another party's memorandum.

réglementaires citées ou invoquées qui ne sont pas reproduits dans le mémoire d'une autre partie.

Subpoena

7 (1) The Registrar or the person designated by the Registrar may issue a writ of subpoena for the attendance of witnesses and the production of documents.

Assignation

7 (1) Le registraire ou une personne désignée par celui-ci peut délivrer des assignations à témoigner et à produire des documents.

In blank

(2) The Registrar may issue a writ of subpoena in blank and the person to whom it is issued shall complete it and may include any number of names.

En blanc

(2) Le registraire peut délivrer une assignation en blanc; la personne à qui elle est délivrée la remplit et peut y inclure un nombre indéterminé de noms.

Service of Documents

Signification de documents

Originating document

8 (1) Service of an originating document shall be effected

(a) in the case of an individual, by leaving a certified copy of the originating document with the individual;

(b) in the case of a partnership, by leaving a certified copy of the originating document with one of the partners during business hours;

(c) in the case of a corporation, by leaving a certified copy of the originating document with an officer of the corporation or with a person apparently in charge of the head office or of a branch of the corporation in Canada during business hours;

(d) in the case of the Commissioner, by leaving a certified copy of the originating document at the Commissioner's office during business hours; and

(e) in the case of a person referred to in any of paragraphs (a) to (d) who is represented by counsel, by leaving a certified copy of the originating document with the counsel who accepts service of the document.

Acte introductif d'instance

8 (1) La signification d'un acte introductif d'instance se fait :

a) s'il s'agit d'un particulier, par remise d'une copie certifiée de l'acte à celui-ci;

b) s'il s'agit d'une société de personnes, par remise d'une copie certifiée de l'acte à l'un des associés pendant les heures de bureau;

c) s'il s'agit d'une personne morale, par remise d'une copie certifiée de l'acte à l'un de ses dirigeants ou à une personne qui semble être responsable de son siège social ou d'une de ses succursales au Canada, pendant les heures de bureau;

d) s'il s'agit du commissaire, par livraison d'une copie certifiée de l'acte à son bureau pendant les heures de bureau;

e) s'il s'agit d'une personne visée à l'un des alinéas a) à d) qui est représentée par un avocat, par la remise d'une copie certifiée de l'acte à l'avocat qui est disposé à en accepter la signification.

Alternative manner

(2) If a person is unable to serve an originating document in a manner described in subrule (1), the person may apply to a judicial member for an order setting out another manner for effecting service.

Mode alternatif

(2) La personne qui ne peut signifier l'acte introductif d'instance de la manière prévue au paragraphe (1) peut demander à un membre judiciaire de rendre une ordonnance prévoyant un autre mode de signification.

Service of order

(3) The person who obtains an order made under subrule (2) shall serve the order on each person named in the originating document.

Signification de l'ordonnance

(3) La personne qui obtient l'ordonnance visée au paragraphe (2) la signifie à chacune des personnes nommées dans l'acte introductif d'instance.

Access to Documents

Access to documents

65 Subject to any confidentiality order under rule 66, a party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents listed in the affidavit, unless those documents are subject to a claim for privilege or are not within the party's possession, power or control.

Confidentiality order

66 (1) The Tribunal may order that a document or information in a document be treated as confidential and make any order that it deems appropriate,

(a) upon the motion of a party who has served an affidavit of documents; or

(b) upon the motion of a party or intervenor who has filed or will file the document.

Clarification

(2) For greater certainty, the Tribunal may issue a single confidentiality order to cover the documents or information under paragraphs (1)(a) and (b).

Content of motion

67 The party or intervenor making a motion referred to in rule 66 shall

(a) include in the grounds for the motion details of the specific, direct harm that would allegedly result from unrestricted disclosure of the document or information; and

(b) include in the motion a draft confidentiality order including the following elements, namely,

(i) a description of the document or information or the category of documents or information for which the person seeks the confidentiality order,

(ii) the identification of the person or category of persons who are entitled to have access to the confidential document or information,

(iii) any document or information or category of documents or information to be made available to the person or category of persons referred to in subparagraph (ii),

(iv) any written confidentiality agreement to be signed by the person or persons referred to in

Accès aux documents

Accès aux documents

65 Sous réserve de l'ordonnance de confidentialité prévue à la règle 66, la partie qui a signifié un affidavit de documents à une autre partie permet à cette dernière d'examiner et de reproduire les documents mentionnés dans l'affidavit, sauf ceux qui sont visés par une allégation de privilège et ceux qui ne sont pas en sa possession, sous son autorité ou sous sa garde.

Ordonnance de confidentialité

66 (1) Le Tribunal peut ordonner qu'un document ou des renseignements qui s'y trouvent soient considérés comme confidentiels et rendre l'ordonnance qu'il juge indiquée :

a) à la requête d'une partie qui a signifié un affidavit de documents;

b) à la requête d'une partie ou d'un intervenant qui a déposé ou qui déposera le document.

Précision

(2) Il est entendu que le Tribunal peut rendre une ordonnance unique à l'égard des documents ou des renseignements visés aux alinéas (1)a) et b).

Contenu de la requête

67 La partie ou l'intervenant qui présente la requête visée à la règle 66 :

a) énonce en détail, dans les motifs de celle-ci, le préjudice direct et précis qu'occasionnerait la communication complète du document ou des renseignements;

b) joint à la requête un projet d'ordonnance de confidentialité qui comporte les éléments suivants :

(i) la désignation du document ou des renseignements ou des catégories de documents ou renseignements pour lesquels l'ordonnance est demandée,

(ii) le nom des personnes ou les catégories de personnes qui ont droit d'avoir accès au document ou aux renseignements confidentiels,

(iii) le document ou les renseignements ou les catégories de documents ou renseignements mis à la disposition des personnes ou des catégories de personnes visées au sous-alinéa (ii),

subparagraph (ii) and the provisions of that agreement,

(v) the number of copies of any confidential document to be provided to the person or persons referred to in subparagraph (ii) and any limitation on subsequent reproduction of that document by that person or those persons, and

(vi) the disposal of the confidential document following the final disposition of the proceeding.

Pre-hearing Disclosure

List of documents and witness statements

68 (1) The applicant shall, at least 60 days before the commencement of the hearing, serve on every other party and on all intervenors

(a) a list of documents on which the applicant intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and

(b) witness statements setting out the lay witnesses' evidence in chief in full.

Content of witness statements

(2) Unless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents.

Response

69 (1) Each respondent shall, at least 30 days before the commencement of the hearing, serve in response on every other party and on all intervenors

(a) a list of documents on which the respondent intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and

(b) witness statements setting out the lay witnesses' evidence in chief in full.

Content of witness statements

(2) Unless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents.

(iv) tout accord de confidentialité éventuel que devront signer les personnes visées au sous-alinéa (ii) et les dispositions de cet accord,

(v) le nombre de copies des documents confidentiels qui seront fournies aux personnes visées au sous-alinéa (ii) et les restrictions quant au droit de reproduire les documents,

(vi) les dispositions à prendre relativement aux documents confidentiels une fois l'instance terminée.

Divulgation préalable

Liste des documents et déclarations

68 (1) Au moins soixante jours avant le début de l'audience, le demandeur signifie aux autres parties et aux intervenants :

a) la liste des documents sur lesquels il entend se fonder lors de l'audience, en indiquant les renonciations aux privilèges qui s'attachent aux documents;

b) les déclarations des témoins ordinaires, qui énoncent en entier la preuve principale de chacun d'eux.

Contenu des déclarations des témoins

(2) Sauf entente contraire entre les parties, la déclaration d'un témoin se limite aux faits dont il pourrait témoigner oralement ainsi qu'aux documents admissibles comme pièces jointes ou aux renvois à ceux-ci.

Réponse

69 (1) Au moins trente jours avant le début de l'audience, chaque défendeur signifie en réponse aux autres parties et aux intervenants :

a) la liste des documents sur lesquels il entend se fonder lors de l'audience, en indiquant les renonciations aux privilèges qui s'attachent aux documents;

b) les déclarations des témoins ordinaires, qui énoncent en entier la preuve principale de chacun d'eux.

Contenu des déclarations des témoins

(2) Sauf entente contraire entre les parties, la déclaration d'un témoin se limite aux faits dont il pourrait témoigner oralement ainsi qu'aux documents admissibles comme pièces jointes ou aux renvois à ceux-ci.

Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 3
File No.: CT-2019-005
Registry Document No.: 30

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Decided on the basis of the written record
Before: D. Gascon J. (Chairperson)
Date of order: March 4, 2020

CONFIDENTIALITY ORDER

[1] FURTHER TO the application filed by the Commissioner of Competition (**"Commissioner"**) on December 19, 2019 against Parrish & Heimbecker, Limited (**"P & H"**), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34;

[2] AND FURTHER TO the draft confidentiality order filed on consent by the Commissioner and P & H;

THE TRIBUNAL ORDERS THAT:

[3] For the purpose of this Order:

(a) **"Act"** means the *Competition Act*, RSC 1985, c C-34, as amended;

(b) **"Affiliate"** has the same meaning as in subsection 2(2) of the Act;

(c) **"Designated Representatives"** means up to five additional individuals designated by the Respondent as its representatives who will be permitted access to Records designated as Level B Protected in accordance with the terms of this Order, which designations shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner. The Commissioner may make a motion to the Tribunal objecting to such designations;

(d) **"Independent Expert"** means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of the Respondent; (ii) has not been an employee of the Respondent within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of the Respondent; (iv) has not been an employee of a competitor of the Respondent within two years prior to the date of this Order; and (v) has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;

(e) **"Parties"** means the Commissioner and the Respondent collectively, and **"Party"** means either one of them;

(f) **"Person"** means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;

(g) **"Proceeding"** means the application filed by the Commissioner against the Respondent (File Number CT-2019-005) for orders pursuant to section 92 of the Act;

(h) **"Protected Record"** means any Record (including the information such Record contains) that is produced in the Proceeding, including Records listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to

undertakings, Records produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits and submissions that:

i. the Party producing the Record claims is confidential pursuant to Section 7 of this Order; or

ii. the Tribunal has determined is confidential;

(i) "**Record**" has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

(j) **"Record Review Vendor"** means a professional service provider retained by a Party with respect to the Proceeding to facilitate the review of Records, both digital and paper, by legal professionals and who has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;

(k) **"Respondent"** means Parrish & Heimbecker, Limited and its Affiliates;

(l) "**Third Party**" means any Person other than the Commissioner or the Respondent; and

(m) **"Tribunal"** means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended.

[4] Disclosure of Records containing any of the following types of information could cause specific and direct harm, to extent they or the information therein are not already publicly available, and such Records may be designated as Protected Records:

(a) information relating to prices, capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;

(b) confidential contractual arrangements between the Respondent and its customers, agents, and/or suppliers;

(c) financial data or reports, or financial information relating to the Respondent or its customers, suppliers or a Third Party;

(d) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;

(e) internal market studies and analyses;

(f) internal investigative and related Records belonging to the Commissioner;

(g) other Records containing competitively sensitive and/or proprietary information of a Party or a Third Party.

[5] Without prejudice to any position or argument the Respondent may take or make in the Proceeding and in any related appeals, including (without limiting the generality of the foregoing) with respect to any claim of privilege by the Commissioner, the Commissioner may designate as a Level B Protected (as defined below), any information that could identify a Third Party who is reasonably concerned about the public disclosure of its identity.

[6] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree in writing that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[7] Protected Records will be identified in the following manner for the purpose of this Proceeding:

(a) a Party claiming that a Record is a Protected Record shall, at the time of production of a Protected Record, mark it with the name of the Party producing the Record and with "Confidential – Level A" or "Confidential – Level B" on the face of each Record and/or on each page that is claimed as confidential;

(b) subject to Section 6 of this Order, all Records designated as Protected Records shall be treated as a Protected Record, save for determination otherwise by the Tribunal or re-designation pursuant to Section 11 below;

(c) the inadvertent failure to designate a Record or portion thereof as a Protected Record at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made;

(d) if a Record originates with or from more than one Party and is designated by at least one Party as a Protected Record, the highest level of confidentiality shall universally attach to that Record, subject to the resolution of any challenge to that claim of confidentiality;

(e) at any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts to agree as to whether the Records (or portions thereof) are to be treated as Protected Records; and

(f) if agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Record or a portion thereof is a Protected Record or what level of confidentiality should apply to a Protected Record.

[8] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked "Confidential – Level A" (**"Level A Protected"**) may be disclosed only to:

(a) the Commissioner, counsel to the Commissioner, and the Commissioner's staff who are directly involved in the Proceeding;

(b) outside counsel to the Respondent and outside counsel's staff who are directly involved in the Proceeding;

(c) Independent Experts and their staff who are directly involved in the Proceeding; and

(d) Record Review Vendors.

[9] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked "Confidential – Level B" (**"Level B Protected"**) may be disclosed only to:

(a) the individuals described in Section 8 above; and

(b) Designated Representatives of the Respondent who have executed the Confidentiality Undertaking in the form attached as Schedule A.

[10] Notwithstanding any provision of this Order, the Commissioner may disclose any Records designated as Level A Protected or Level B Protected that he has so designated, and that have not been produced in this Proceeding by the Respondent or otherwise originated from the Respondent or Louis Dreyfus, to any Person for the purpose of preparing for the hearing of this Proceeding, subject to the limits prescribed by section 29 of the Act.

[11] A Party may at any time and with prior reasonable notice to the other Party re-designate any of its own Records designated as Level A Protected as Level B Protected or public Records, and/or may re-designate any of its own Records designated as Level B Protected as public Records. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Records re-designated as public shall cease to be Protected Records and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Record to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[12] If a Party is required by law to disclose a Protected Record, or if a Party receives written notice from a Person who has signed a Confidentiality Undertaking pursuant to this Order that

they are required by law to disclose a Protected Record, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[13] Outside counsel to the Respondent and his or her staff, counsel to the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Record as they require in connection with the Proceeding.

[14] Nothing in this Order prevents either Party from having full access to or, in the case of the Respondent only, using or disclosing Protected Records that originated from that Party.

[15] For greater certainty, in accordance with section 62 of the *Competition Tribunal Rules*, all Persons who obtain access to Records and information through documentary, written and oral discovery through this Proceeding are subject to an implied undertaking to keep the Records and information confidential and to use the Records and information solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[16] At the hearing of the Proceeding:

(a) Protected Records tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with Paragraph 7(a), above;

(b) the Tribunal may determine whether the Record should be treated as a Protected Record;

(c) Protected Records shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record;

(d) Records over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Records shall be marked "Public" on the face of the Record; and

(e) Nothing in this Order shall abrogate or derogate any legal onus, burden or requirement applicable to a sealing order or abrogate or derogate in any way from the rights of the Parties to assert confidentiality claims during the course of the hearing.

[17] The Parties shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked "Public" on the face of the Record and shall form part of the public record in this Proceeding. Each Protected Record shall identify the portions of the Record which have been redacted from the "Public" version, by highlighting such portions in

the Protected Record in accordance with the Tribunal's *Practice Direction regarding the Filing of Confidential and Public Documents with the Tribunal* (March 2018).

[18] The termination of the Proceeding shall not relieve any Person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any Confidentiality Undertaking, subject to any further order of the Tribunal.

[19] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Records and any copies of Protected Records, with the exception of Protected Records in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Respondent and counsel to the Commissioner may keep copies of Protected Records in their files and that any copies of Protected Records as may exist in the Parties' automatic electronic backup and archival systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[20] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[21] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Records or information produced by another Party.

[22] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Vancouver, this 4th day of March 2020.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

[23] SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records,
I _____, of the City of _____, in the Province/State of _____, hereby undertake and agree to maintain the confidentiality of any Protected Documents that I obtain and, in particular, that:

1. I will not copy, disseminate, transfer or otherwise share or disclose any Protected Record to any other person, except, as applicable, (a) my staff who are directly involved in this matter; (b) outside counsel for the Party on whose behalf I have been retained, outside counsel's staff who are directly involved in this Proceeding and, in the case of the Commissioner, the Commissioner's staff directly involved in the Proceeding; and (c) Persons permitted by order of the Competition Tribunal.

2. I not use any Protected Record for any purpose other than in connection with this Proceeding and any related appeals.

3. Upon completion of this Proceeding and any related appeals, I agree that all Protected Records, and any copies of same, in my possession shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by the order of the Tribunal.

4. I have read the Confidentiality Order granted by the Tribunal on _____, a copy of which is attached to this Undertaking, and agree to be bound by same. I acknowledge that capitalized terms in this Undertaking have the same meaning as defined in the Confidentiality Order. I further acknowledge that any breach of this Undertaking by me will be considered to be a breach of the Confidentiality Order.

5. I acknowledge and agree that the completion of this Proceeding and any related appeals shall not relieve me of the obligation to maintain the confidentiality of Protected Records in accordance with the provisions of this Undertaking. I further acknowledge and agree that either Party shall be entitled to injunctive relief to prevent or enjoin breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

6. In the event that I am required by law to disclose any Protected Record, I will provide counsel for the Parties to this Proceeding with prompt written notice so that the Party that claimed confidentiality over the Protected Record may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Records

that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to it.

7. I will promptly, upon the request of the Party who provided Protected Records to me, advise where they are kept. At the conclusion of my involvement in this Proceeding and any related appeals, I will, upon the request and direction of the Party who provided Protected Records to me, destroy, return or otherwise dispose of all Protected Records received or made by me having been duly authorized and directed to do so.

8. I hereby attorn to the jurisdiction of the Tribunal to resolve any disputes arising under this Undertaking.

DATED this ___ day of _____, 2020.

SIGNED, SEALED & DELIVERED in the presence of:

Name of witness	Name of signatory

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Ellé Nekiar

For the respondent:

Parrish & Heimbecker, Limited

Robert S. Russell
Davit Akman

Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 4
File No.: CT-2019-005
Registry Document No.: 38

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Date of Case Management Conference: April 21, 2020
Before: D. Gascon J. (Chairperson)
Date of order: April 21, 2020

ORDER AMENDING THE SCHEDULING ORDER

[1] **FURTHER TO** the application (**"Application"**) filed by the Commissioner of Competition (**"Applicant"**) on December 19, 2019 against the Respondent Parrish & Heimbecker, Limited (**"Respondent"**), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 (**"Act"**), with respect to the acquisition by the Respondent of a primary grain elevator located in Virden, Manitoba;

[2] **AND FURTHER TO** the Scheduling Order issued by the Tribunal on March 4, 2020;

[3] **AND FURTHER TO** the Case Management Conference held on April 21, 2020 to discuss possible amendments and modifications to the Scheduling Order in light of the Tribunal's *Updated Notice regarding the COVID-19 Pandemic* dated April 15, 2020;

[4] **AND WHEREAS** counsel for the parties have reached an agreement to modify the dates for the first four steps contemplated in paragraph 5 of the Scheduling Order;

[5] **AND WHEREAS** the Tribunal has examined the proposed revised dates and, in the particular circumstances of this case, is satisfied that the minor amendments proposed by the parties (underlined hereafter in paragraph 7 of this Order) are appropriate and respect the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp);

[6] **AND WHEREAS** the Tribunal has agreed to convene another Case Management Conference around May 21, 2020, at a date and time to be determined after consultation with counsel for the parties, to further discuss the Scheduling Order in light of the developments that will have occurred by then regarding the COVID-19 pandemic;

THE TRIBUNAL ORDERS THAT:

[7] The schedule for the discovery and pre-hearing disclosure steps of the Application shall now be as follows:

Friday, April 17, 2020	Service of Affidavit of Documents and delivery of documents by the Applicant
Friday, May 29, 2020	Service of Affidavit of Documents and delivery of documents by the Respondent
Friday, June 12, 2020	Deadline for filing any motions arising from Affidavits of Documents and/or productions, including motions challenging claims of privilege
Friday, June 19, 2020	Hearing of any motions arising from Affidavits of Documents, productions and/or claims of privilege
Friday, July 3, 2020	Deadline for delivery of any additional productions resulting from any Affidavits of Documents, productions and/or claims or privilege motions

Monday, July 13, 2020 – Friday, July 24, 2020	Examinations for discovery according to a schedule to be settled between counsel
	Counsel for each Party shall have a maximum of three (3) days to conduct oral examination for discovery of a representative of the other Party
	The Tribunal will have a judicial member available on dates to be agreed to with counsel for the Parties to rule on objections arising during the examinations for discovery
Friday, August 7, 2020	Deadline for fulfilling answers to discovery undertakings
Friday, August 14, 2020	Deadline for filing any motions arising from examinations for discovery, answers to undertakings or refusals
Thursday, August 20, 2020	Hearing of any motions arising from examinations for discovery, answers to undertakings or refusals
Friday, August 28, 2020	Last day for follow-up examinations for discovery
Monday, August 31, 2020	Case management conference on pre-hearing disclosure steps and preliminary issues, if any
Friday, September 4, 2020	Applicant to serve documents relied upon and witness statements
	Applicant to serve and file expert report(s), if any
	Applicant to serve list of documents proposed to be admitted without proof
Monday, September 14, 2020	Deadline to exchange and file mediation briefs
Wednesday, September 23, 2020	Mediation
Monday, October 5, 2020	Respondent to serve documents relied upon and witness statements
	Respondent to serve and file expert report(s), if any, on all matters including efficiencies
Tuesday, October 13, 2020	Deadline for delivering any Requests for Admissions

Friday, October 16, 2020	Applicant to serve reply documents relied upon and reply witness statements
	Applicant to serve and file reply expert report(s), if any, and responding expert report on efficiencies
Monday, October 26, 2020	Respondent to serve and file reply expert report(s), if any, on matters related to efficiencies
Friday, October 30, 2020	Deadline for filing any motions related to the evidence (documents relied upon, witness statements and expert reports)
	Deadline for responding to any Requests for Admission
	Deadline to provide witness statements to the Tribunal
Monday, November 2, 2020	Pre-hearing case management conference
Friday, November 6, 2020	Hearing of any motions related to the evidence (documents relied upon, witness statements and expert reports)
Monday, November 9, 2020	Deadline to provide documents to the Tribunal for use at the hearing (e.g., Agreed Books of Documents and Joint Briefs of Authorities), including read-ins from examinations for discovery
	Deadline for delivering any agreed statement of facts

[8] Unless the parties and the Tribunal agree otherwise, the Tribunal shall hear all motions in the Hearing Room of the Tribunal located at 600-90 Sparks Street, Ottawa.

[9] The evidentiary portion of the hearing of the Application shall commence at 10:00 am on Monday, November 16, 2020 in the Hearing Room of the Tribunal located at 600-90 Sparks Street, Ottawa. The schedule shall be as follows:

Monday, November 16, 2020 – Friday, November 20, 2020	First week of hearing (5 days)
Monday, November 23, 2020 – Friday, November 27, 2020	Second week of hearing (5 days)

[10] The Tribunal will hear oral argument on Thursday, December 10, 2020, and Friday, December 11, 2020 in Ottawa.

[11] The Tribunal will shortly issue a Direction setting out a date and time for another Case Management Conference around May 21, 2020 to further discuss the schedule of this Application in light of the developments that will have occurred regarding the COVID-19 pandemic.

DATED at Ottawa, this 21st day of April 2020.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Ellé Nekiar

For the respondent:

Parrish & Heimbecker, Limited

Robert S. Russell
Davit Akman

Competition Tribunal Tribunal de la Concurrence

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 10
File No.: CT-2019-005
Registry Document No.:63

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended**.**

BETWEEN:

The Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Date of case management conference: October 7, 2020
Before: D. Gascon J. (Chairperson)
Date of order: October 9, 2020

ORDER AMENDING THE AMENDED SCHEDULING ORDER

[1] **FURTHER TO** the application filed by the Commissioner of Competition ("**Applicant**") on December 19, 2019 against the Respondent Parrish & Heimbecker, Limited ("**Respondent**"), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, with respect to the acquisition by the Respondent of a primary grain elevator located in Virden, Manitoba ("**Application**");

[2] **AND FURTHER TO** the Scheduling Order issued by the Tribunal on March 4, 2020;

[3] **AND FURTHER TO** the Order Amending the Scheduling Order dated April 21, 2020 ("**Amended Scheduling Order**");

[4] **AND FURTHER TO** the parties' request, made on consent on September 30, 2020, to make minor changes to the dates of the remaining pre-hearing steps;

[5] **AND WHEREAS** the Tribunal informally advised the parties, on October 1, 2020, that it would grant the parties' request except for their proposed revised dates for the delivery to the Tribunal of witness statements and documents for use at the hearing;

[6] **AND FURTHER TO** the Case Management Conference held on October 7, 2020 where the scheduling issues were further discussed;

[7] **AND FURTHER TO** the email received from counsel for the Applicant indicating that the parties have agreed to additional changes to be made to the dates for the delivery of documents for use at the hearing;

[8] **AND FURTHER TO** other exchanges between counsel for the parties and the Tribunal regarding other agreed-upon minor changes to be made to the Amended Scheduling Order;

[9] **AND WHEREAS** the Tribunal has examined the proposed revised dates and is satisfied that the minor amendments suggested by counsel and/or discussed at the Case Management Conference (underlined in paragraph 10 of this Order) are appropriate and respect the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp);

THE TRIBUNAL ORDERS THAT:

[10] The Amended Scheduling Order is further amended as follows:

Friday, October 9, 2020	Respondent to serve documents relied upon and witness statements except for the witness statement of Mr. Heimbecker Respondent to serve and file confidential expert report(s), if any, on all matters including efficiencies
Tuesday, October 13, 2020	Deadline for the Respondent to serve the witness statement of Mr. Heimbecker

Wednesday, October 14, 2020	Deadline to provide the Applicant's and the Respondent's witness statements to the Tribunal
Friday, October 16, 2020	Respondent to serve and file redacted version(s) of expert report(s)
Monday, October 19, 2020	Deadline for delivering any Requests for Admissions
Thursday, October 22, 2020	Applicant to serve reply documents relied upon and reply witness statements
	Applicant to serve and file reply expert report(s), if any, and responding expert report on efficiencies
Monday, October 26, 2020	Deadline to provide the Applicant's reply witness statements to the Tribunal
Friday, October 30, 2020	Deadline to provide the Agreed Books of Documents to the Tribunal
Monday, November 2, 2020	Respondent to serve and file reply expert report(s), if any, on matters related to efficiencies
Wednesday, November 4, 2020	Deadline for filing any motions related to the evidence (documents relied upon, witness statements and expert reports)
	Deadline for responding to any Requests for Admission
Thursday, November 5, 2020	Pre-hearing case management conference
Tuesday, November 10, 2020	Hearing of any motions related to the evidence (documents relied upon, witness statements and expert reports)
Thursday, November 12, 2020	Deadline to provide the read-ins from examinations on discovery to the Tribunal
	Deadline for delivering any agreed statement of facts
Friday, November 13, 2020	Deadline to provide the Joint Briefs of Authorities to the Tribunal.

[11] The Tribunal will shortly issue another order to specify, after consultations with the parties, where the evidentiary portion of the hearing of the Application will take place in light of the developments that are occurring regarding the COVID-19 pandemic, as well as the hearing format.

[12] The dates currently scheduled for the hearing of the evidence and the oral argument remains unchanged.

DATED at Montreal, this 9th day of October 2020.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Ellé Nekiar

For the respondent:

Parrish & Heimbecker, Limited

Robert S. Russell
Davit Akman

Competition Tribunal *Tribunal de la concurrence*

Registry Doc. No.: 138

Date: December 1, 2020

Matter: CT-2019-005 – *The Commissioner of Competition v Parrish & Heimbecker, Limited*

Direction to Counsel (from Mr. Justice Gascon, Chairperson)

FURTHER TO the Tribunal's Direction issued on November 13, 2020;

AND UPON CONSIDERING the November 27, 2020 email from counsel for the Commissioner of Competition ("**Commissioner**") requesting that the identities of five farmer witnesses be designated as confidential "Level B Protected" (as the term is defined in the Confidentiality Order of March 4, 2020);

AND UPON CONSIDERING the November 27, 2020 and November 30, 2020 letters from counsel for Parrish & Heimbecker, Limited ("**P & H**") submitting that the Commissioner's request ought to be made by way of a motion with a proper evidentiary record;

AND UPON CONSIDERING the November 30, 2020 letter from counsel for the Commissioner;

THE TRIBUNAL DIRECTS AS FOLLOWS:

1. In order for the Tribunal to determine whether the Commissioner's confidentiality requests for the five farmer witnesses should be granted, the Commissioner shall file a formal motion with supporting affidavits and any other evidence.
2. The Commissioner shall serve and file his motion record and memorandum of fact and law by 4:30 p.m. on Monday, December 7, 2020.
3. P & H shall serve and file its responding record and its memorandum of fact and law by 4:30 p.m. on Friday, December 11, 2020.
4. Should a hearing be needed for this motion, it shall be held by video conference during the week of December 14, 2020, at a time to be determined by the Tribunal at a case management conference.

Annie Ruhlmann
Registry Officer
Competition Tribunal
600-90 Sparks, Ottawa ON K1P 5B4
Tel.: 613-941-2440

Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. CCS Corporation et al.*, 2011 Comp. Trib. 5
File No.: CT-2011-002
Registry Document No.: 44

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

AND IN THE MATTER OF an Application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by CCS Corporation of Complete Environmental Inc.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey
(respondents)

Decided on the basis of the written record.
Before Judicial Member: Simpson J. (Chairperson)
Date of Order: July 5, 2011
Order signed by: Madam Justice Sandra J. Simpson

CONFIDENTIALITY (PROTECTIVE) ORDER

[1] **FURTHER** to the motion, on consent, by the Commissioner of Competition (the "Commissioner") for a confidentiality (protective) order;

[2] **AND FURTHER** to the draft confidentiality (protective) order filed on consent by the Commissioner, CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey;

THE TRIBUNAL ORDERS THAT:
[3] For the purposes of this Order:

(a) **"Commissioner"** means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on her behalf;

(b) **"Commissioner's Confidential Documents"** shall mean the Commissioner's Documents designated by the Commissioner as "Confidential-Level A" or "Confidential-Level B", to denote the parties who are permitted access to those documents. For greater certainty, only the Commissioner may assert a confidentiality claim over the Commissioner's Documents;

(c) **"Commissioner's Documents"** shall mean those documents originating with or from the Commissioner that are listed in the Commissioner's Affidavit of Documents, documents that have been or may otherwise be filed or produced in this Application or on any related motions by the Commissioner, other than any of the Respondents' Documents;

(d) **"Corporate Respondents"** shall mean CCS Corporation, Complete Environmental Inc., and Babkirk Land Services Inc. and "Corporate Respondent" shall mean any or either of them;

(e) **"Corporate Respondents' Confidential Documents"** shall mean those Documents designated by the Corporate Respondents as "Confidential-Level A" or "Confidential-Level B", to denote the parties who are permitted access to those documents. For greater certainty, only the Corporate Respondents may assert a confidentiality claim over their respective Corporate Respondents' Documents;

(f) "**Corporate Respondents' Documents"** shall mean those documents originating with or from the Corporate Respondents, documents listed in the Corporate Respondents' Affidavit of Documents, documents that have been or may otherwise be filed or produced in this Application or on any related motions by the Corporate Respondents, other than any of the Commissioner's Documents or Vendor Respondents' Documents;

(g) **"Designated Representatives"** shall mean those persons designated by any of the Respondents in accordance with paragraph 13 below;

(h) **"Expert"** shall mean an expert retained by a Party.

(i) **"Party"** shall mean the Commissioner or any of the Respondents and "Parties" shall mean both the Commissioner and the Respondents;

(j) **"Protected Documents"** means, collectively and individually, the Commissioner's Confidential Documents, Corporate Respondents' Confidential Documents, Vendor Respondents' Confidential Documents. For greater certainty, "Protected Documents" includes the information contained in those documents;

(k) **"Respondents"** shall mean the Corporate Respondents and Vendor Respondents and "Respondent" shall mean any or either of them;

(l) **"Respondents' Documents"** shall mean the Corporate Respondents' Documents and the Vendor Respondents' Documents;

(m) **"Vendor Respondents"** shall mean Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey and "Vendor Respondent" shall mean any or either of them;

(n) **"Vendor Respondents' Confidential Documents"** shall mean those Documents designated by the Vendor Respondents as "Confidential-Level A" or "Confidential-Level B", to denote the parties who are permitted access to those documents. For greater certainty, only the Vendor Respondents may assert a confidentiality claim over their respective Vendor Respondents' Documents;

(o) **"Vendor Respondents' Documents"** shall mean those documents originating with or from the Vendor Respondents, documents listed in the Vendor Respondents' Affidavit of Documents, documents that have been or may otherwise be filed or produced in this Application or on any related motions by the Vendor Respondents, other than any of the Commissioner's Documents or Corporate Respondents' Documents.

[4] This Order shall apply to all persons, to the extent that they acquire access to Protected Documents through the proceedings in this Application, provided that information that is acquired independently of the proceedings in this Application and information that is or becomes available in the public domain (other than inadvertently or through any breach of this Order) shall not be considered confidential under this Order.

[5] No Protected Document shall be disclosed, except with the prior written consent of the Party that claimed confidentiality over the Protected Document or in accordance with this Order or further order of the Tribunal.

[6] This Order shall not apply to any copies, whether in paper or electronic format, of any Protected Documents that came into the possession of a Party independent of and prior to the disclosure procedure in this Application.

[7] Confidential-Level A Documents may be disclosed only in accordance with paragraph 12 below. Confidential-Level B Documents may be disclosed only in accordance with paragraphs 14 and 15 below.

[8] Confidential-Level A Protected Documents shall be clearly marked "Confidential-Level A" on the face of the document and on each page that is claimed as confidential. Confidential-Level B Protected Documents shall be clearly marked "Confidential–Level B" on the face of the

document and on each page that is claimed as confidential. Inadvertent failure to assert a confidentiality status when producing a document or to mark a document or other materials in accordance with this paragraph does not constitute a waiver of the effect of this Order, but a Party claiming confidentiality shall remedy any such inadvertent failure as soon as it comes to that Party's attention.

[9] The Parties shall use their best efforts to resolve any issues that may arise between them concerning a claim of confidentiality or appropriate level of confidentiality for the Protected Documents. In the event of a disagreement regarding the confidentiality or appropriate confidentiality designation for any document, the document in issue shall be deemed to be Confidential-Level A pending the resolution of that disagreement. If agreement cannot be reached, any of the Parties may apply to the Tribunal to determine the confidentiality or appropriate level of confidentiality of any document.

[10] A Party may, at any time and with prior reasonable notice to the other Parties, change the confidentiality designations of any of its Protected Documents or re-designate any of its Protected Documents as non-confidential. Documents re-designated as non-confidential shall cease to be confidential and shall form part of the public record if introduced into evidence at the hearing of this Application, unless the Parties agree otherwise or the Tribunal orders otherwise.

[11] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further order or directions with respect to the use or disclosure of documents or information produced by another Party.

[12] Protected Documents designated as Confidential-Level A may be disclosed only to the Commissioner, counsel for the Commissioner, counsel's staff and Commissioner's staff involved in the Application, outside counsel for the Respondents involved in the Application, counsel's staff directly involved in the Application, third party litigation support vendors ("Litigation Support Vendors") retained by any of the Parties and, where disclosure is required to carry out their mandate, the Experts retained by the Parties and the staff of the Experts directly involved in the Application.

[13] Protected Documents designated as Confidential-Level B may be disclosed only to the persons identified in paragraph 12 above, and paragraphs 14 and 15 below**.**

[14] The Corporate Respondents may designate up to three representatives (the "Corporate Designated Representatives") who will be permitted to access those documents designated as Confidential-Level B within the Commissioner's Confidential Documents and Vendor Respondents' Confidential Documents. The designation of the Corporate Designated Representatives shall be made by written notice to the Tribunal, with a copy sent simultaneously to all Parties.

[15] The Vendor Respondents may designate up to two representatives (the "Vendors' Designated Representatives") who will be permitted to access those documents designated as Confidential-Level B within the Commissioner's Confidential Documents and Corporate Respondents' Confidential Documents. The designation of the Vendors' Designated

Representatives shall be made by written notice to the Tribunal, with a copy sent simultaneously to all Parties.

[16] Nothing in this Order shall affect the Parties' implied undertaking, and nothing in the implied undertaking shall affect this Order, provided however that if there is any conflict or inconsistency between the terms of this Order and the implied undertaking, then it shall be the terms of this Order and not the implied undertaking, that shall apply in respect of such conflict or inconsistency.

[17] Nothing in this Order prevents the Commissioner from disclosing the Commissioner's Confidential Documents to any person for the purpose of preparing for the hearing of this Application. However, this Order does not relieve the Commissioner of any other obligations she may have in respect of such documents, including the limits prescribed in section 29 of the *Competition Act*.

[18] Nothing in this Order shall in any way restrict the use (including without limitation, the disclosure) by a Respondent of any of that Respondent's Protected Documents.

[19] Experts, Litigation Support Vendors, and Designated Representatives shall not copy or disclose Protected Documents directly or indirectly to any other person, except for their staff directly involved in the application and persons permitted to receive such Protected Documents in accordance with this Order or any other order of the Tribunal.

[20] Prior to gaining access to Protected Documents, each Expert, Litigation Support Vendor, Designated Representative and court reporter attending a pre-hearing examination for this Application, shall execute a confidentiality agreement in the form attached as Schedule A to this Order ("Confidentiality Agreement").

[21] A Party, a Designated Representative, a Litigation Support Vendor or an Expert who is required by law to disclose any Protected Document, or any portion thereof, shall, prior to disclosing any Protected Document, give prompt written notice, including a description of the Protected Document(s) to be disclosed, to the Party that claimed confidentiality in respect of the Protected Document(s) in issue so that the latter Party, as the case may be, has a reasonable opportunity to seek a protective order or other appropriate remedy.

[22] Subject to a further agreement of the Parties or order of the Tribunal, documents over which no privilege or confidentiality claim has been asserted shall form part of the public record in this proceeding if introduced into evidence at the hearing of this Application or otherwise placed on the record.

[23] The confidentiality of Protected Documents shall be maintained up to and throughout the hearing of the Application and thereafter. Protected Documents shall not form part of the public record in the Application or other proceeding, unless the Parties agree otherwise or the Tribunal orders otherwise after hearing the submissions of the Parties. If information from a Protected Document is incorporated into any other document and that document is introduced into evidence at the hearing of this Application or other proceeding, the document shall be a Protected Document having the same level of confidentiality as the level applicable to the Protected Document from which the information came.

[24] The termination of proceedings in this Application shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such documents in accordance with the provisions of this Order, subject to any further order of the Tribunal.

[25] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[26] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction or order of the Tribunal, including in relation to the use of Protected Documents at the hearing of the Application. Each Party shall have liberty to apply to vary this Order.

DATED at Ottawa, this 5th day of July, 2011.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

[27] Schedule "A": Confidentiality Agreement

IN CONSIDERATION of being provided with information or documentation in connection with this Application over which claims for confidentiality have been advanced (the "Confidential Information"), I _____, of the City of _____, in the Province/State of _____, hereby agree to maintain the confidentiality of the Confidential Information so obtained.

I will not copy or disclose the Confidential Information so obtained to any other person, except (a) my staff who are directly involved in this matter; (b) counsel for the party on whose behalf I have been retained, members of his firm who are directly involved in this Application and, in the case of the Commissioner, the Commissioner's staff involved in the Application; (c) other experts retained by or on behalf of the Party on whose behalf I have been retained and who have signed a similar confidentiality agreement with the Parties to this Application; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Confidential Information so obtained for any purpose other than in connection with this Application and any related appeals.

Upon completion of this Application and any related appeals, I agree that the Confidential Information, and any copies of same, shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by the Order of the Competition Tribunal.

I acknowledge that I am aware of the Order granted by the Competition Tribunal on _____, in this regard, a copy of which is attached to this agreement and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said Order of the Competition Tribunal. I further acknowledge and agree that any Party shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

In the event that I am required by law to disclose any of the Confidential Information, I will provide **the Commissioner, CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey** with prompt written notice so that the Party that claimed confidentiality over such Confidential Information may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Confidential Information that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to the Confidential Information.

I will promptly, upon the request of the person providing the Confidential Information, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information, destroy, return or otherwise dispose of all Confidential Information received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Competition Tribunal to resolve any disputes arising under this agreement.

DATED this _____ day of _____, 2011.

SIGNED, SEALED & DELIVERED
in the presence of:

_____ _____ (seal)

Witness Name

COUNSEL:

For the applicant:

The Commissioner of Competition

Nikiforos Iatrou
Jonathan Hood

For the respondents:

CCS Corporation, Complete Environmental Inc. and
Babkirk Land Services Inc.

Linda M. Plumpton
R. Jay Holsten

Karen Louise Baker, Ronald John Baker,
Kenneth Scott Watson, Randy John Wolsey and
Thomas Craig Wolsey

J. Kevin Wright
Jonathan Gilhen

28020

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Supreme Court of Canada | Cour suprême du Canada

Atomic Energy of Canada Limited

- v. -

Sierra Club of Canada

- 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
(F.C.) (28020)

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Gonthier
The Honourable Mr. Justice Iacobucci
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Appeal heard:
November 6, 2001

Judgment rendered:
April 26, 2002

Reasons for judgment by:
The Honourable Mr. Justice Iacobucci

Concurred in by:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Gonthier
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Énergie atomique du Canada Limitée

- c. -

Sierra Club du Canada

- et -

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada (C.F.) (28020)

CORAM :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Appel entendu:
Le 6 novembre 2001

Jugement rendu:
Le 26 avril 2002

Motifs de jugement:
L'honorable juge Iacobucci

Souscrivent à l'avis de l'honorable juge Iacobucci:
La très honorable Beverley McLachlin, c.p.
L'honorable juge Gonthier
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Counsel at hearing:

For the appellant:
J. Brett Ledger
Peter Chapin

For the respondent the Sierra Club of Canada:
Franklin S. Gertler
Timothy J. Howard

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
Graham R. Garton, Q.C.
J. Sanderson Graham

Avocats à l'audience :

Pour l'appelante:
J. Brett Ledger
Peter Chapin

Pour l'intimée Sierra Club du Canada:
Franklin S. Gertler
Timothy J. Howard

Pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada
Graham R. Garton, c.r.
J. Sanderson Graham

Citations	Références
F.C.A.: [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).	C.A.F. : [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL).
F.C.T.D.: [2000] 2 F.C. 400, (1999), 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL).	C.F. 1re inst. : [2000] 2 C.F. 400, (1999), 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] x S.C.R. xxx, 2002 SCC 41.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : Sierra Club du Canada c. Canada (Ministre des Finances), [2002] x R.C.S. xxx, 2002 CSC 41.

sierra club *v.* canada (minister of finance)

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 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 court 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 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 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 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 (1), (2), 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.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

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

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

SUPREME COURT OF CANADA

ATOMIC ENERGY OF CANADA LIMITED

v.

SIERRA CLUB OF CANADA

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

CORAM: The Chief Justice and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

IACOBUCCI J. --

I. Introduction

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

order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

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

II. Facts

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

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

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

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under 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 "EIR's"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIR's and the PSAR . If admitted, the EIR's and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIR's were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

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

10 The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the

appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

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

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

IV. Judgments Below

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

12 Pelletier J. first considered whether leave should be granted pursuant to 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 respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

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

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

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

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

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

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

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

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

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

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

21 At the Federal Court of Appeal, AECL appealed the ruling under 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*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

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

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since

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

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

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

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

the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

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

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

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76, and its companion case *R. v. O.N.E.*, 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 "reflect . . . the substance of the *Oakes* test", we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

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

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

(2) The Rights and Interests of the Parties

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

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

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

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

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

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

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

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *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 (Ministers 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" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

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

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

64 There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to

expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

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

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current

confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

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

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

(2) The Proportionality Stage

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

(a) *Salutary Effects of the Confidentiality Order*

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

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the *CEAA* is found to apply to

the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

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

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

(b) *Deleterious Effects of the Confidentiality Order*

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

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, *per* Dickson C.J., at pp. 762-64. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(*b*) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-61. 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, per* Wilson J., at pp. 1357-58. 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.

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*.

50P

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.

scc	Thu, Feb 15, 2001 leave to appeal granted L'Heureux-Dube, Arbour and LeBel JJ. (2001), 267 N.R. 398 n
scc	Wed, Feb 13, 2002 McLachlin, L'Heureux-Dube, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and

Supreme Court of Canada | Cour suprême du Canada

05 186 073

Her Majesty the Queen

- v. -

Toronto Star Newspapers Limited, Canadian Broadcasting Corporation and Sun Media Corporation

- and -

Canadian Association of Journalists (Ont.) (30113)

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Mr. Justice Fish
The Honourable Madam Justice Abella
The Honourable Madam Justice Charron

Appeal heard:
February 9, 2005

Judgment rendered:
June 29, 2005

Reasons for judgment by:
The Honourable Mr. Justice Fish

Concurred in by:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Madam Justice Abella
The Honourable Madam Justice Charron

Sa Majesté la Reine

- c. -

Toronto Star Newspapers Limited, Société Radio-Canada et Corporation Sun Média

- et -

Association canadienne des journalistes (Ont.) (30113)

CORAM:
La très honorable Beverley McLachlin, c.p.
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Fish
L'honorable juge Abella
L'honorable juge Charron

Appel entendu:
Le 9 février 2005

Jugement rendu:
Le 29 juin 2005

Motifs de jugement :
L'honorable juge Fish

Souscrivent à l'avis de l'honorable juge Fish :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Abella
L'honorable juge Charron

Counsel at hearing:

For the appellant
Scott C. Hutchison
Melissa Ragsdale

For the respondents
Paul B. Schabas
Ryder Gilliland

For the intervener
Written submissions only by
John Norris

Avocats à l'audience:

Pour l'appelante
Scott C. Hutchison
Melissa Ragsdale

Pour les intimées
Paul B. Schabas
Ryder Gilliland

Pour l'intervenante
Argumentation écrite seulement par
John Norris

Citations	Références
Ont. C.A.: (2003), 67 O.R. (3d) 577, 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL).	C.A. Ont. : (2003), 67 O.R. (3d) 577, 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL)
Ont. Sup. Ct. J.: 2003 CarswellOnt. 4020, September 24, 2003 (McGarry J.).	C.S.J. Ont. : 2003 CarswellOnt. 4020, le 24 septembre 2003 (le juge McGarry).
Ont. Ct. J.: September 2, 2003 (Livingstone J.).	C.J. Ont. : le 2 septembre 2003 (la juge Livingstone).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Toronto Star Newspapers Ltd. v. Ontario*, [2005] x S.C.R. x, 2005 SCC 41.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *Toronto Star Newspapers Ltd. c. Ontario*, [2005] x R.C.S. x, 2005 CSC 41.

toronto star newspapers ltd. *v.* ontario

Her Majesty The Queen *Appellant*

v.

Toronto Star Newspapers Ltd., Canadian Broadcasting Corporation and Sun Media Corporation *Respondents*

and

Canadian Association of Journalists *Intervener*

Indexed as: Toronto Star Newspapers Ltd. *v.* Ontario

Neutral citation: 2005 SCC 41

File No.: 30113.

2005: February 9; 2005: June 29.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Freedom of expression — Freedom of the press — Dagenais/Mentuck test — Search warrants — Crown

requesting order sealing warrants and informations used to obtain warrants — Whether Dagenais/Mentuck test applicable to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.

Criminal law — Provincial offences — Search warrants — Sealing orders — Open court principle — Protection of confidential informant — Crown requesting order sealing warrants and informations used to obtain warrants — Whether Dagenais/Mentuck test applicable to sealing orders concerning search warrants and informations upon which issuance of warrants was judicially authorized — Whether Dagenais/Mentuck test applicable at pre-charge or "investigative stage" of criminal proceedings.

Search warrants relating to alleged violations of provincial legislation were issued. The Crown brought an *ex parte* application for an order sealing the search warrants, the informations used to obtain the warrants and related documents, claiming that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation. A court order directed that the warrants and informations be sealed. Various media outlets brought a motion for *certiorari* and *mandamus* in the Superior Court, which quashed the sealing order and ordered that the documents be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. Applying the *Dagenais/Mentuck* test, the Court of Appeal affirmed the decision to quash the sealing order but edited materials more extensively to protect informant's identity. [11] [14]

Held: The appeal should be dismissed.

The *Dagenais/Mentuck* test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings, including orders to seal search warrant materials made upon application by the Crown. Court proceedings are presumptively "open" in Canada and public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration. Though applicable at every stage of the judicial process, the *Dagenais/Mentuck* test must be applied in a flexible and contextual manner, and regard must be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. [4] [7-8] [30-31]

Here, the Crown has not demonstrated that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice, nor has it shown that the Court of Appeal failed to adopt a "contextual" approach. The evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. A party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. The party must, at the very least, allege a serious and specific risk to the integrity of the criminal investigation. The Crown has not discharged its burden in this case. [9-10] [34-35] [39]

Cases Cited

Applied: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; **referred to:** *Attorney General of*

Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43; *National Post Co. v. Ontario* (2003), 176 C.C.C. (3d) 432; *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL); *R. v. Flahiff* (1998), 157 D.L.R. (4th) 485 [[1998] R.J.Q. 327]; *Toronto Star Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (QL).

Statutes and Regulations Cited

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

Criminal Code, R.S.C. 1985, c. C-46, s. 487.3.

Provincial Offences Act, R.S.O. 1990, c. P.33.

APPEAL from a judgment of the Court of Appeal for Ontario (Doherty, Rosenberg and Borins JJ.A.) (2003), 67 O.R. (3d) 577 (*sub nom. R. v. Toronto Star Newspapers Ltd.*), 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL), allowing the Crown's appeal, to a very limited extent, from an order of McGarry J. quashing the sealing order of Livingstone J. Appeal dismissed.

Scott C. Hutchison and *Melissa Ragsdale*, for the appellant.

Paul B. Schabas and *Ryder Gilliland*, for the respondents.

Written submissions only by *John Norris*, for the intervener.

Solicitor for the appellant: Ministry of the Attorney General, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener: Ruby & Edwardh, Toronto.

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

- v. -

TORONTO STAR NEWSPAPERS LIMITED, CANADIAN BROADCASTING CORPORATION and SUN MEDIA CORPORATION

- and -

CANADIAN ASSOCIATION OF JOURNALISTS

CORAM: The Chief Justice and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

FISH J. —

I

1 In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.

2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of

public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration.*

5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined.. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter*.

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

10 In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not

discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal.

II

11 The relevant facts were fully and accurately set out in these terms by Doherty J.A. in the Court of Appeal for Ontario ((2003), 67 O.R. (3d) 577):

> On August 20, 2003, a justice of the peace issued six search warrants for various locations linked to the business of Aylmer Meat Packers Inc. ("Aylmer"). The informations sworn to obtain the warrants were identical. The warrants were obtained under the provisions of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and related to alleged violations of provincial legislation regulating the slaughter of cattle. The informations were sworn by Roger Weber, an agricultural investigator with the Ministry of Natural Resources. The warrants were executed on August 21 and 22, 2003.
>
> On about August 26, 2003, the investigation by the Ministry of Natural Resources into the operation of Aylmer became the subject of widespread media reports. The suitability for human consumption of meat slaughtered and processed by Aylmer became a matter of public concern.
>
> On about August 27, 2003, the Ontario Provincial Police commenced a fraud investigation into the business affairs of Aylmer. The officers involved in that investigation were advised that Inspector Weber had applied for and obtained the search warrants described above.
>
> On September 2, 2003, the Crown brought an *ex parte* application in open court in the Ontario Court of Justice for an order sealing the search warrants, the informations used to obtain the warrants and related documents. The Crown claimed that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation.
>
> Justice Livingstone made an order directing that the warrants and informations were to be sealed along with the affidavit of Detective Sergeant Andre Clelland, dated August 30, 2003 filed in support of the application for a sealing order and a letter, dated September 2, 2003, from Roger Weber indicating that the Ministry of Natural Resources took no objection to the application. The sealing order was to expire December 2, 2003. The Clelland affidavit and Inspector Weber's letter were subsequently made part of the public record on the consent of the Crown.

> The Toronto Star Newspapers Limited and other media outlets (respondents) brought a motion for *certiorari* and *mandamus* in the Superior Court. That application proceeded before McGarry J. on September 15 and 16, 2003. On September 24, 2003, McGarry J. released reasons quashing the sealing order and directing that the documents should be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. McGarry J. edited one of the informations to delete references to material that could identify the confidential informant and told counsel that the edited version would be made available to the respondents unless the Crown appealed within two days. . . . [paras. 1-6]

12 The Crown did, indeed, appeal – but with marginal success.

13 The Court of Appeal for Ontario held that Livingstone J. had exceeded her jurisdiction by refusing to grant a brief adjournment to allow counsel for the media to attend and make submissions on the application for a sealing order. Speaking for the court, Doherty J.A. found that the media can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings. "There was no good reason", he stated, "to deny *The London Free Press* an opportunity to make submissions" (para. 15). This amounted, in his view, to a denial of natural justice and resulted in a loss of jurisdiction. I find it unnecessary to express a decided view on this branch of the matter, since it is not in issue before us, and find it sufficient for present purposes to refer to the guidelines on notice to the media and media standing set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, particularly at pp. 868-69 and 890-91.

14 Doherty J.A. next addressed the merits of the request for a sealing order. Applying this Court's decision in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, he concluded that the Crown had not displaced the presumption that judicial

proceedings are open and public. Like McGarry J., Doherty J.A. recognized that the materials had to be edited to exclude information that could reveal the identity of the confidential informant and the editing he found appropriate was "somewhat more extensive than that done by McGarry J." (para. 28).

15 The order of the Court of Appeal has now become final and the factual basis for a sealing order has evaporated with the passage of time. In the absence of a stay, the edited material was released on October 29, 2003, and the proceedings have to that extent become moot.

16 The Crown nonetheless pursues its appeal to this Court with respect to the underlying question of law: What is the governing test on an application to delay public access to search warrant materials that would otherwise become accessible upon execution of the search warrant?

17 Essentially, the Crown contends that the Court of Appeal erred in law in applying the "stringent" *Dagenais/Mentuck* test without taking into account the particular characteristics and circumstances of the pre-charge, investigative phase of the proceedings.

III

18 Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice: *Attorney General of Nova Scotia v. MacIntyre* , [1982] 1 S.C.R. 175. "[W]hat should

be sought", it was held in *MacIntyre*, "is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime" (Dickson J., as he then was, speaking for the majority, at p. 184).

19 *MacIntyre* was not decided under the *Charter*. The Court was nonetheless alert in that case to the principles of openness and accountability in judicial proceedings that are now subsumed under the *Charter*'s guarantee of freedom of expression and of the press.

20 Search warrants are obtained *ex parte* and *in camera*, and generally executed before any charges have been laid. The Crown had contended in *MacIntyre* that they ought therefore to be presumptively shrouded in secrecy in order to preserve the integrity of the ongoing investigation. The Court found instead that the presumption of openness was effectively rebutted *until* the search warrant was executed – but not thereafter. In the words of Dickson J.:

> ... the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears.... The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance. [pp. 188-89]

21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.

22 These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 of Ontario. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.

23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

24 Since the advent of the *Charter*, the Court has had occasion to consider discretionary actions which limit the openness of judicial proceedings in other contexts. The governing principles were first set out in *Dagenais*.

25 In that case, four accused sought a ban on publication of a television mini-series, *The Boys of St. Vincent*, which was fictional in appearance – but strikingly similar in fact – to the subject matter of their trial. Writing for a majority of the Court, Lamer C.J. held that a ban should only be imposed where alternative measures cannot

prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the fairness of the trial. In addition, a ban should only be ordered where its salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban. Here, too, the presumption was said to favour openness, and the party seeking a restriction on disclosure was therefore required to justify the solicited limitation on freedom of expression.

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that 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. [para. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real*, *substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

28 The *Dagenais/Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to *all* discretionary actions which have that limiting effect:

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban ...; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41).
>
> (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 31)

29 Finally, in *Vancouver Sun*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness *extends to the pre-trial stage of judicial proceedings*. "The open court principle," it was held, "is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein." It therefore applies at every stage of proceedings (paras. 23-27).

30 The Crown now argues that the open court principle embodied in the *Dagenais/Mentuck* test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.

31 It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

32 In *Vancouver Sun*, the Court recognized that the evidentiary burden on an application to hold an investigative hearing *in camera* cannot be subject to the same stringent standard as applications for a publication ban at trial:

> Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice. [para. 43]

33 Similar considerations apply to other applications to limit openness at the investigative stage of the judicial process.

IV

34 The Crown has not demonstrated, on this appeal, that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice. The respondents, on the other hand, have drawn our attention to several cases in which the test was effectively and reasonably applied. Sealing orders or partial

sealing orders were in fact granted, for example, in *National Post Co. v. Ontario*, (2003), (176 C.C.C. (3d) 432 (Sup. Ct. J.); *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL) (Sup. Ct. J.); *R. v. Flahiff* (1998), 157 D.L.R. (4th) 485 (Que. C.A.); and *Toronto Star Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (QL) (Sup. Ct. J.).

35 Nor has the Crown satisfied us that Doherty J.A. failed to adopt a "contextual" approach to the order sought in this case.

36 In support of its application, the Crown relied exclusively on the affidavit of a police officer who asserted his belief, "based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation" (Appellant's Record, p. 72).

37 Doherty J.A. rejected these broad assertions for two reasons.

38 First, he found that they amounted to a "general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses" (para. 26). In Doherty J.A.'s view, if that general proposition were sufficient to obtain a sealing order,

> ... the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information. [para. 26]

39 Second, Doherty J.A. found that the affiant's concern, for which he offered no specific basis, amounted to a mere assertion that "the police might have an advantage in questioning some individuals if those individuals [are] unaware of the details of the police investigation" (para. 27). In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation*.

40 Finally, the Crown submits that Doherty J.A. applied a "stringent" standard – presumably, an *excessively* stringent standard – in assessing the merits of the sealing application. This complaint is unfounded.

41 Quite properly, Doherty J.A. emphasized the importance of freedom of expression and of the press, and noted that applications to intrude on that freedom must be "subject to close scrutiny and meet rigorous standards" (para. 19). Ultimately, however, he rejected the Crown's claim in this instance because it rested entirely on a general assertion that publicity can compromise investigative integrity.

42 At no point in his reasons did Doherty J.A. demand or require a high degree of predictive certainty in the Crown's evidence of necessity.

V

43 For all of these reasons, I propose that we dismiss the appeal, with costs to the respondents, on a party-and-party basis.

toronto star newspapers ltd. *c.* ontario

Sa Majesté la Reine *Appelante*

c.

Toronto Star Newspapers Ltd., Société Radio-Canada, et Corporation Sun Media *Intimées*

et

Association canadienne des Journalistes *Intervenante*

Répertorié : Toronto Star Newspapers Ltd. *c.* Ontario

Référence neutre : 2005 CSC 41

N° du greffe : 30113.

2005 : 9 février; 2005 : 29 juin.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

en appel de la cour d'appel de l'ontario

Droit constitutionnel — Charte des droits — Liberté d'expression — Liberté de la presse — Critère de Dagenais/Mentuck — Mandats de perquisition — Demande

par le ministère public de mise sous scellés des mandats et des dénonciations utilisées pour les obtenir — Le critère de Dagenais/Mentuck est-il applicable chaque fois que qu'un juge exerce son pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse relativement à des procédures judiciaires?

Droit criminel — Infractions provinciales — Mandats de perquisition — Ordonnances de mise sous scellés — Principe de la publicité des débats judiciaires — Protection d'un informateur — Demande par le ministère public de mise sous scellés des mandats et des dénonciations utilisées pour les obtenir — Le critère de Dagenais/Mentuck est-il applicable aux ordonnances de mise sous scellés visant les mandats de perquisition et les dénonciations qui en ont justifié la délivrance — [5] Le critère de Dagenais/Mentuck est-il applicable à l'étape antérieure au dépôt d'accusations ou à « l'étape de l'enquête » dans une procédure criminelle.

Des mandats de perquisition ont été décernés relativement à des contraventions alléguées à la législation provinciale. Le ministère public a déposé une requête *ex parte* afin d'obtenir la mise sous scellés des mandats de perquisition, des dénonciations ayant servi à obtenir les mandats ainsi que de documents connexes, en faisant valoir que la divulgation de ces documents au public pourrait permettre d'identifier un informateur et compromettre l'enquête criminelle en cours. Le tribunal a ordonné la mise sous scellés des mandats et des dénonciations. Différents organes médiatiques ont présenté une requête en *certiorari* et *mandamus* devant la Cour supérieure, qui a annulé l'ordonnance de mise sous scellés et ordonné que les documents soient rendus publics, sauf dans la mesure où la teneur des dénonciations pouvait révéler l'identité d'un informateur. Appliquant le critère de *Dagenais/Mentuck*, la Cour d'appel

a confirmé l'ordonnance de mise sous scellés, mais elle procédé à une épuration plus étendue des documents afin de préserver la confidentialité de l'identité de l'informateur.

Arrêt : Le pourvoi est rejeté.

Le critère de *Dagenais/Mentuck* s'applique chaque fois qu'un juge exerce son pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse relativement à des procédures judiciaires, y compris lorsque le ministère sollicite la mise sous scellés des documents relatifs à une demande de mandat de perquisition. La présomption de « publicité » des procédures judiciaires est bien établie au Canada et l'accès du public ne sera interdit que lorsque le tribunal compétent conclut, dans l'exercice de son pouvoir discrétionnaire, que la divulgation serait préjudiciable aux fins de la justice ou nuirait indûment à la bonne administration de la justice. Bien qu'il soit applicable à chacune des étapes du processus judiciaire, le critère de *Dagenais/Mentuck* doit être utilisé avec souplesse et en fonction du contexte, en tenant compte des circonstances dans lesquelles une ordonnance de mise sous scellés est demandée par le ministère public ou par d'autres parties qui ont établi leur intérêt véritable à retarder la divulgation au public. [4] [7-8] [30-31]

En l'espèce, le ministère public n'a pas démontré que le critère souple de *Dagenais/Mentuck*, tel qu'il est appliqué aux documents relatifs à des mandats de perquisition, ne convient pas en pratique, ni que la Cour d'appel a omis d'adopter une approche « contextuelle ». La preuve soumise par le ministère public à l'appui de sa demande de report de la divulgation équivalait à une allégation générale d'entrave éventuelle à une enquête en cours. Une allégation générale selon laquelle la publicité des débats pourrait compromettre l'efficacité de l'enquête ne peut étayer à elle seule une

demande visant à restreindre l'accès du public à des procédures judiciaires. La partie qui demande le secret doit au moins alléguer l'existence d'un risque grave et précis pour l'intégrité de l'enquête criminelle. Le ministère public ne s'est pas acquitté du fardeau qui lui incombait en l'espèce. [9-10] [34-35] [39]

Jurisprudence

Arrêts appliqués : *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; **arrêts mentionnés :** *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *Vancouver Sun (Re)*, [2004] 2 R.C.S. 332, 2004 CSC 43; *National Post Co. c. Ontario* (2003), 176 C.C.C. (3d) 432; *R. c. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (QL); *R. c. Flahiff*, [1998] R.J.Q. 327; *Toronto Star Newspapers Ltd. c. Ontario*, [2000] O.J. No. 2398 (QL).

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2*b*).

Code criminel, L.R.C. 1985, ch. C-46, art. 487.3.

Loi sur les infractions provinciales, L.R.O. 1990, ch. P.33.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg et Borins) (2003), 67 O.R. (3d) 577 (*sub nom. R. c. Toronto Star Newspapers Ltd.*), 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL), qui a accueilli, mais de façon très limitée, l'appel du ministère public contre une décision du juge McGarry infirmant l'ordonnance de mise sous scellés des documents de la cour prononcée par la juge Livingstone. Pourvoi rejeté.

Scott C. Hutchison et *Melissa Ragsdale*, pour l'appelante.

Paul B. Schabas et *Ryder Gilliland*, pour les intimées.

Argumentation écrite seulement par *John Norris*, pour l'intervenante.

Procureur pour l'appelante : Ministère du Procureur général, Toronto.

Procureurs des intimées : Blake, Cassels & Graydon, Toronto.

Procureurs de l'intervenante : Ruby & Edwardh, Toronto.

Traduction

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

- c. -

TORONTO STAR NEWSPAPERS LIMITED, SOCIÉTÉ RADIO-CANADA et SUN MEDIA CORPORATION

- et -

ASSOCIATION CANADIENNE DES JOURNALISTES

CORAM : La Juge en chef et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron

LE JUGE FISH —

I

1 Dans tout environnement constitutionnel, l'administration de la justice s'épanouit au grand jour — et s'étiole sous le voile du secret.

2 Cette leçon de l'histoire a été consacrée dans la *Charte canadienne des droits et libertés*. L'alinéa 2*b)* de la *Charte* garantit, en termes plus généraux, la liberté de communication et la liberté d'expression. La vitalité de ces deux libertés fondamentales

voisines repose sur l'accès du public aux renseignements d'intérêt public. Ce qui se passe devant les tribunaux devrait donc être, et est effectivement, au coeur des préoccupations des Canadiens.

3 Bien que fondamentales, les libertés que je viens de mentionner ne sont aucunement absolues. Dans certaines circonstances, l'accès du public à des renseignements confidentiels ou de nature délicate se rapportant à des procédures judiciaires compromettra l'intégrité de notre système de justice au lieu de la préserver. Dans certains cas, un bouclier temporaire suffira; dans d'autres, une protection permanente sera justifiée.

4 Les demandes concurrentes se rapportant à des procédures judiciaires amènent nécessairement les tribunaux à exercer leur pouvoir discrétionnaire. La présomption de « publicité » des procédures judiciaires est désormais bien établie au Canada. L'accès du public ne sera interdit que lorsque le tribunal compétent conclut, dans l'exercice de son pouvoir discrétionnaire, que la divulgation *serait préjudiciable aux fins de la justice* ou *nuirait indûment à la bonne administration de la justice*.

5 Ce critère est maintenant appelé le critère de *Dagenais/Mentuck*, d'après les arrêts dans lesquels notre Cour a formulé et précisé les principes applicables. Il s'agit en l'espèce de déterminer si ce critère, élaboré relativement à des interdictions de publication au moment du procès, s'applique également à l'étape antérieure au dépôt d'accusations ou à « l'étape de l'enquête » dans une procédure criminelle. Il faut plus particulièrement décider s'il s'applique aux « ordonnances de mise sous scellés » visant les mandats de perquisition et les dénonciations qui en ont justifié la délivrance.

6 La Cour d'appel de l'Ontario a statué que ce critère s'applique effectivement à cette étape et le ministère public se pourvoit maintenant contre cette décision.

7 Je suis d'avis de rejeter le pourvoi. J'estime que le critère de *Dagenais/Mentuck* s'applique à *chaque fois* qu'un juge exerce son pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse relativement à des procédures judiciaires. Toute autre conclusion romprait, à mon avis, avec la jurisprudence de notre Cour, qui est demeurée constante au cours des vingt dernières années. Elle porterait également atteinte au principe de la publicité des débats judiciaires qui est inextricablement lié aux valeurs fondamentales consacrées à l'al. 2*b)* de la *Charte*.

8 Bien qu'il soit applicable à chacune des étapes du processus judiciaire, le critère de *Dagenais/Mentuck* est depuis toujours censé être utilisé avec souplesse et en fonction du contexte. Par exemple, un risque important pour la bonne administration de la justice à l'étape de l'enquête ira souvent de pair avec des considérations qui auront perdu toute leur pertinence au moment du procès. Par contre, il peut être beaucoup plus difficile à cette étape préliminaire de démontrer concrètement le risque perçu. Le fait qu'une ordonnance de mise sous scellés soit demandée à cette étape pour une courte période seulement peut à lui seul inciter le tribunal à faire preuve de prudence avant d'ordonner une divulgation complète et immédiate.

9 Toutefois, même dans ce cas, une allégation générale selon laquelle la publicité des débats pourrait compromettre l'efficacité de l'enquête ne pourra étayer à elle seule une demande visant à restreindre l'accès du public à des procédures judiciaires. Si une telle allégation générale suffisait à justifier une ordonnance de mise sous scellés,

la présomption jouerait en faveur du secret, plutôt que de la publicité des débats, ce qui serait tout simplement inacceptable.

10 En l'espèce, la preuve soumise par le ministère public à l'appui de sa demande de report de la divulgation équivaut à une allégation générale d'entrave éventuelle à une enquête en cours. La Cour d'appel a donc conclu que le ministère public ne s'était pas acquitté du fardeau qui lui incombait. Comme je l'ai dit précédemment, je suis d'avis de ne pas modifier cette conclusion et je propose en conséquence que nous rejetions le présent pourvoi.

II

11 Le juge Doherty de la Cour d'appel de l'Ontario a rapporté intégralement et fidèlement les faits pertinents ((2003), 67 O.R. (3d) 577) :

> [TRADUCTION] Le 20 août 2003, un juge de paix a délivré six mandats de perquisition visant divers endroits liés à l'entreprise Aylmer Meat Packers Inc. (« Aylmer »). Les dénonciations faites sous serment dans le but d'obtenir les mandats étaient identiques. Les mandats ont été obtenus en vertu des dispositions de la *Loi sur les infractions provinciales*, L.R.O. 1990, ch. P.33, et concernaient des contraventions alléguées à la législation provinciale réglementant l'abattage des bovins. Les dénonciations ont été faites sous serment par Roger Weber, un enquêteur du secteur agricole au ministère des Richesses naturelles. Les mandats ont été exécutés les 21 et 22 août 2003.
>
> Vers le 26 août 2003, l'enquête du ministère des Richesses naturelles sur les activités d'Aylmer a commencé à faire beaucoup de bruit dans les médias. La question de savoir si la viande des animaux abattus et traités par Aylmer étaient propre à la consommation humaine est devenue un sujet d'intérêt public.
>
> Vers le 27 août 2003, la Police provinciale de l'Ontario a entrepris une enquête pour fraude concernant les activités commerciales d'Aylmer. Les policiers participant à cette enquête ont été informés que l'inspecteur Weber avait demandé et obtenu les mandats de perquisition décrits précédemment.

> Le 2 septembre 2003, le ministère public a déposé une requête *ex parte* lors d'une audience publique devant la Cour de justice de l'Ontario afin d'obtenir la mise sous scellés des mandats de perquisition, des dénonciations ayant servi à obtenir les mandats ainsi que des documents connexes. Le ministère public a fait valoir que la divulgation de ces documents au public pourrait permettre d'identifier un informateur et compromettre l'enquête criminelle en cours.
>
> La juge Livingstone a ordonné la mise sous scellés des mandats et des dénonciations ainsi que de l'affidavit du sergent-détective Andre Clelland, en date du 30 août 2003, produit à l'appui de la demande de mise sous scellés, et d'une lettre de Roger Weber, en date du 2 septembre 2003, indiquant que le ministère des Richesses naturelles ne s'opposait pas à la demande. L'ordonnance de mise sous scellés devait cesser d'avoir effet le 2 décembre 2003. L'affidavit du sergent-détective Clelland et la lettre de l'inspecteur Weber ont plus tard été versés au dossier public avec le consentement du ministère public.
>
> Toronto Star Newspapers Limited et d'autres organes médiatiques (intimés) ont présenté une requête en *certiorari* et *mandamus* devant la Cour supérieure. Cette requête a été entendue par le juge McGarry les 15 et 16 septembre 2003. Le 24 septembre 2003, le juge McGarry a prononcé les motifs de sa décision d'annuler l'ordonnance de mise sous scellés et d'ordonner que les documents soient rendus publics, sauf dans la mesure où la teneur des dénonciations pouvait révéler l'identité d'un informateur. Le juge McGarry a épuré l'une des dénonciations en en supprimant les éléments qui pourraient permettre d'identifier l'informateur et a déclaré aux avocats que les intimées auraient accès à la version épurée, à moins que le ministère public interjette appel dans les deux jours. . . [Par. 1 à 6.]

12 Le ministère public a effectivement interjeté appel, mais il a alors obtenu un jugement qui lui était à peine plus favorable que la décision de première instance.

13 La Cour d'appel de l'Ontario a statué que la juge Livingstone avait outrepassé sa compétence en refusant d'accorder un bref ajournement pour permettre aux avocats des médias de comparaître et de soumettre des observations relativement à la demande de mise sous scellés. S'exprimant au nom de la Cour, le juge Doherty a conclu qu'on pouvait légitimement s'attendre à ce que les médias jouent un rôle important lors de la présentation de demandes visant à leur interdire, ainsi qu'au public dont ils servent les intérêts, l'accès à des dossiers et débats judiciaires. Selon lui, [TRADUCTION] « il

n'existait aucun motif valable de refuser de donner à *The London Free Press* l'occasion de présenter des observations » (par. 15). À son avis, un tel refus constituait un déni de justice naturelle et entraînait une perte de compétence. J'estime qu'il n'est pas nécessaire que je statue sur cet aspect de l'affaire, car il n'est pas en litige dans le présent pourvoi; il suffit pour l'instant de se reporter aux principes directeurs concernant l'avis aux médias et leur qualité pour agir, énoncés dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, plus particulièrement aux p. 868-869 et 890-891.

14 Le juge Doherty a ensuite examiné le bien-fondé de la demande de mise sous scellés. Appliquant l'arrêt de notre Cour *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, il a conclu que le ministère public n'avait pas réfuté la présomption de publicité des procédures judiciaires. Comme le juge McGarry, le juge Doherty a reconnu que les documents devaient être épurés par la suppression des renseignements pouvant révéler l'identité de l'informateur et il estimait que cette épuration devait être [TRADUCTION] « un peu plus étendue que celle faite par le juge McGarry » (par. 28).

15 L'ordonnance de la Cour d'appel est maintenant définitive et le fondement factuel qui justifiait la mise sous scellés est disparu avec le temps. En l'absence de sursis d'exécution, les documents épurés ont été rendus publics le 29 octobre 2003 et, en ce qui les concerne, l'instance ne présente plus qu'un intérêt théorique.

16 Le ministère public poursuit néanmoins son pourvoi devant notre Cour relativement à la question de droit sous-jacente : Quel critère s'applique à une demande de report de la divulgation des renseignements relatifs à un mandat de perquisition qui deviendraient normalement accessibles dès l'exécution du mandat?

17 Pour l'essentiel, le ministère public prétend que la Cour d'appel a commis une erreur de droit en appliquant le critère « rigoureux » de *Dagenais/Mentuck* sans tenir compte des caractéristiques et des circonstances particulières de l'étape de l'enquête antérieure au dépôt des accusations.

III

18 Une fois un mandat de perquisition exécuté, le mandat et la dénonciation qui a permis d'en obtenir la délivrance doivent être rendus publics, sauf si la personne qui sollicite une ordonnance de mise sous scellés peut démontrer que leur divulgation serait préjudiciable aux fins de la justice : *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175. La Cour a statué dans *MacIntyre* que « ce qu'il faut viser, c'est le maximum de responsabilité et d'accessibilité, sans aller jusqu'à causer un tort à un innocent ou à réduire l'efficacité du mandat de perquisition comme arme dans la lutte continue de la société contre le crime » (le juge Dickson, devenu plus tard Juge en chef, s'exprimant au nom de la majorité, à la p. 184).

19 L'affaire *MacIntyre* n'a pas été tranchée sous le régime de la *Charte*. La Cour était néanmoins consciente dans cet arrêt des principes de publicité des débats et d'imputabilité dans l'exercice du pouvoir judiciaire qui sont désormais inclus dans la liberté d'expression et la liberté de la presse garanties par la *Charte*.

20 Les mandats de perquisition sont obtenus *ex parte* et à huis clos; en général, ils sont exécutés avant que des accusations ne soient portées. Le ministère public avait fait valoir dans *MacIntyre* qu'on pouvait donc présumer qu'ils devaient être gardés secrets afin de préserver l'intégrité de l'enquête en cours. La Cour a plutôt conclu que

la présomption de la publicité des procédures judiciaires était effectivement réfutée *jusqu'à ce que* le mandat de perquisition soit exécuté - mais non après. Comme l'a dit le juge Dickson :

> . . . la valeur de la thèse de « l'administration de la justice » diminue après l'exécution du mandat, c.-à.-d. après la visite des lieux et la perquisition. Le caractère confidentiel de la procédure a, par la suite, moins d'importance puisque les objectifs que vise le principe du secret sont en grande partie sinon complètement atteints. La nécessité de maintenir le secret a en pratique disparu [. . .] C'est avec beaucoup d'hésitation que l'on se résoudra à restreindre l'accès traditionnellement absolu du public aux travaux des tribunaux. [p. 188-189]

21 Une fois le mandat de perquisition exécuté, la présomption devait jouer en faveur de la publicité des débats. La partie qui cherchait à interdire l'accès du public aux renseignements devait donc, après l'exécution du mandat, prouver que leur divulgation serait préjudiciable aux fins de la justice.

22 Ces principes, tels qu'ils s'appliquent dans les enquêtes de nature criminelle, ont été plus tard adoptés par le Parlement et codifiés à l'art. 487.3 du *Code criminel*. Cette disposition ne s'applique pas à l'affaire qui nous est soumise, puisqu'elle porte sur des mandats décernés sous le régime de la *Loi sur les infractions provinciales*, L.R.O. 1990, ch. P.33. Elle nous fournit néanmoins un élément de référence utile puisqu'elle résume, dans une disposition législative, les règles de common law qui s'appliquent partout au Canada en l'absence d'une loi contraire valide.

23 Le paragraphe 487.3(2) est particulièrement pertinent en l'espèce. Il prévoit qu'une ordonnance de mise sous scellés peut être fondée sur le fait que la communication serait préjudiciable aux fins de la justice parce qu'elle compromettrait la nature et l'étendue d'une enquête en cours. C'est ce motif que le ministère public fait valoir en

l'espèce. Il s'agit certainement d'un motif valable de mettre sous scellés une dénonciation utilisée pour obtenir un mandat provincial, en plus des dénonciations faites sous le régime du *Code criminel*. Dans les deux cas, il ne suffit cependant pas d'invoquer ce motif dans l'abstrait; il faut l'étayer d'allégations spécifiques liées à l'enquête que l'on prétend compromise. C'est ce qui n'a pas été fait en l'espèce, selon le juge Doherty, comme nous le verrons plus loin.

24 Depuis l'entrée en vigueur de la *Charte*, la Cour a eu l'occasion d'examiner l'exercice du pouvoir discrétionnaire de restreindre la publicité des procédures judiciaires dans d'autres contextes. Les principes applicables ont été initialement formulés dans *Dagenais*.

25 Dans cette affaire, quatre accusés ont demandé au tribunal d'interdire la télédiffusion d'une mini-série intitulée *Les garçons de Saint-Vincent*, un drame fictif en apparence, mais dont les faits étaient remarquablement semblables à ceux dont il était question dans leur procès. S'exprimant au nom de la majorité de la Cour, le juge en chef Lamer a statué que l'interdiction ne devait être accordée que s'il n'existait pas d'autres mesures raisonnables pouvant écarter le risque sérieux pour les intérêts en jeu et, même dans ce cas, seulement dans la mesure où la Cour l'estimait nécessaire pour écarter un risque réel et important que le procès soit inéquitable. De plus, une interdiction ne doit être prononcée que lorsque ses effets bénéfiques l'emportent sur son incidence négative sur la liberté d'expression des personnes visées. Dans cette affaire aussi, on a affirmé que la présomption jouait en faveur de la publicité et que, par conséquent, la partie qui voulait restreindre la divulgation devait justifier cette atteinte à la liberté d'expression.

26 Dans *Mentuck*, la Cour a réaffirmé, tout en le reformulant dans une certaine mesure, le critère énoncé dans *Dagenais*. Dans *Mentuck*, le ministère public demandait une interdiction de publication visant l'identité de policiers banalisés et les techniques d'enquête qu'ils avaient utilisées. La Cour a statué que l'exercice du pouvoir discrétionnaire de restreindre la liberté d'expression relativement à des procédures judiciaires touche divers droits et qu'une ordonnance de non-publication ne doit être rendue que si :

> a) elle est nécessaire pour écarter un risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice. [Par. 32.]

27 S'exprimant au nom de la Cour, le juge Iacobucci a souligné que le « risque » dont il est question dans le premier volet de l'analyse doit être *réel et important* et qu'il doit s'agir d'un risque dont l'existence *est bien appuyée par la preuve* : « il faut que ce soit un danger grave que l'on cherche à éviter, et non un important bénéfice ou avantage pour l'administration de la justice que l'on cherche à obtenir » (par. 34).

28 Le critère de *Dagenais/Mentuck*, tel qu'il est appelé désormais, a été appliqué à l'exercice du pouvoir discrétionnaire de restreindre la liberté d'expression et la liberté de la presse dans divers contextes juridiques. Notre Cour a récemment statué que ce critère s'applique *chaque fois* que l'exercice du pouvoir discrétionnaire a cet effet restrictif :

> Même si le critère a été élaboré dans le contexte des interdictions de publication, il s'applique également chaque fois que le juge de première

> instance exerce son pouvoir discrétionnaire de restreindre la liberté d'expression de la presse durant les procédures judiciaires. Le pouvoir discrétionnaire doit être exercé en conformité avec la *Charte*, peu importe qu'il soit issu de la common law, comme c'est le cas pour l'interdiction de publication [. . .]; d'origine législative, par exemple sous le régime du par. 486(1) du *Code criminel*, lequel permet d'exclure le public des procédures judiciaires dans certains cas (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [[1996] 3 R.C.S. 480], par. 69]; ou prévu dans des règles de pratique, par exemple, dans le cas d'une ordonnance de confidentialité (*Sierra Club du Canada c. Canada (Ministre des Finances)*, [2002] 2 R.C.S. 522, 2002 CSC 41). (*Vancouver Sun (Re)*, [2004] 2 R.C.S. 332, 2004 CSC 43, par. 31)

29 Enfin, dans *Vancouver Sun*, la Cour a approuvé expressément les motifs du juge Dickson dans *MacIntyre* et a souligné que la présomption de publicité des procédures judiciaires *s'applique aussi au stade précédant le procès*. Elle a statué que le « principe de la publicité des débats en justice » est « inextricablement lié à la liberté d'expression garantie par l'al. 2*b)* de la *Charte* et sert à promouvoir les valeurs fondamentales qu'elle véhicule. » Ce principe s'applique donc à chacune des étapes de la procédure (par. 23-27).

30 Le ministère public fait maintenant valoir que le principe de la publicité des débats en justice, incorporé au critère de *Dagenais/Mentuck*, ne doit pas être appliqué lorsque le ministère sollicite la mise sous scellés des documents relatifs à une demande de mandat de perquisition. Cet argument est voué à l'échec en raison des décisions constantes rendues par notre Cour depuis plus de vingt ans : le critère de *Dagenais/Mentuck* a été appliqué régulièrement et à maintes reprises, chaque fois qu'une ordonnance judiciaire discrétionnaire restreignait la publicité des procédures judiciaires.

31 Cela ne veut toutefois pas dire que le critère de *Dagenais/Mentuck* devrait être appliqué de manière mécanique. Il faut toujours tenir compte des circonstances dans lesquelles une ordonnance de mise sous scellés est demandée par le ministère public ou

par d'autres parties qui ont établi leur intérêt véritable à retarder la divulgation au public. Bien qu'il s'applique à *toutes* les étapes, ce critère est souple et doit être appliqué en fonction du contexte. Les tribunaux l'ont donc formulé de manière à ce qu'il s'adapte à diverses mesures discrétionnaires, dont les ordonnances de confidentialité, les investigations judiciaires et les demandes présentées par le ministère public en vue d'obtenir des interdictions de publication.

32 Dans *Vancouver Sun*, la Cour a reconnu que le fardeau de la preuve ne peut être soumis au même critère rigoureux dans le cas d'une demande visant la tenue d'une investigation judiciaire à huis clos que dans le cas d'une demande d'interdiction de publication au procès :

> Il est possible que la preuve ne révèle pas beaucoup plus qu'on pourrait raisonnablement exiger, mais c'est souvent tout ce à quoi on peut s'attendre à cette étape de la procédure, et le juge qui préside, en appliquant le critère de *Dagenais/Mentuck* en fonction du contexte, aurait le droit de se fonder sur la preuve qui le convainc que la publicité des débats ne nuirait pas indûment à la bonne administration de la justice. [Par. 43]

33 Des considérations similaires s'appliquent aux autres demandes visant à restreindre la publicité au stade de l'enquête dans le processus judiciaire.

IV

34 Le ministère public n'a pas démontré, dans le présent pourvoi, que le critère souple de *Dagenais/Mentuck*, tel qu'il est appliqué aux documents relatifs à des mandats de perquisition, ne convient pas en pratique. En revanche, les intimées ont attiré notre attention sur diverses décisions dans lesquelles ce critère a été utilisé efficacement et de manière raisonnable. Des ordonnances de mise sous scellés totale ou partielle ont

effectivement été rendues, par exemple, dans *National Post Co. c. Ontario* (2003), 176 C.C.C. (3d) 432 (C. sup.de just.); *R. c. Eurocopter Canada Ltd.*, [2001] O.J. nº 1591 (QL) (C. sup.de just.); *R. c. Flahiff* (1998), 157 D.L.R. (4th) 485 (C.A. Qc), et *Toronto Star Newspapers Ltd. c. Ontario*, [2000] O.J. nº 2398 (QL) (C. sup. de just.).

35 Le ministère public ne nous a pas convaincus non plus que le juge Doherty a omis d'adopter une approche « contextuelle » relativement à l'ordonnance sollicitée en l'espèce.

36 Au soutien de sa demande, le ministère public s'est appuyé exclusivement sur l'affidavit d'un policier qui a affirmé avoir des motifs de croire, [TRADUCTION] « compte tenu de [sa] participation à l'enquête, que la divulgation des mandats, de la dénonciation produite en vue d'obtenir les mandats et d'autres documents compromettrait l'intégrité de l'enquête policière en cours » (Dossier de l'appelante, p. 70). Le policier a dit que, si la teneur de la dénonciation était rendue publique, des témoins pourraient être influencés par des renseignements provenant d'autres sources, dont ils n'ont pas une connaissance personnelle, et que, à son avis, [TRADUCTION] « la divulgation des détails contenus dans les dénonciations produites en vue d'obtenir [les mandats de perquisition] pourrait rendre plus ardue la recherche par la Police provinciale de l'Ontario de la meilleure preuve pour son enquête » (Dossier de l'appelante, p. 72).

37 Le juge Doherty a rejeté ces allégations générales pour deux motifs.

38 Premièrement, il a conclu qu'il s'agissait d'un [TRADUCTION] « énoncé général selon lequel la publication avant le procès des détails d'une enquête policière risque d'influencer les déclarations obtenues de témoins éventuels » (par. 26). De l'avis

du juge Doherty, si un tel énoncé général était suffisant pour obtenir une ordonnance de mise sous scellés,

> [TRADUCTION] . . . la présomption jouerait en faveur du secret et non de la publicité avant le procès. Une allégation générale selon laquelle la divulgation au public est susceptible d'empêcher la police d'obtenir la vérité parce qu'elle peut influencer les déclarations d'un témoin éventuel n'est pas plus valable que l'allégation tout aussi générale, mais contraire, voulant que la divulgation au public facilite pour la police la découverte de la vérité parce qu'elle peut amener les citoyens intéressés qui possèdent des renseignements valables à se manifester. [Par. 26.]

39 Deuxièmement, le juge Doherty a conclu que les inquiétudes de l'auteur de l'affidavit, pour lesquelles il n'a pas fourni de raisons précises, signifiaient simplement que [TRADUCTION] « la police pourrait jouir d'un avantage lorsqu'elle interroge certains individus si ces derniers ignorent les détails de l'enquête policière » (par. 27). Dans sa plaidoirie devant notre Cour, l'avocat du ministère public a parlé à cet égard de [TRADUCTION] « l'avantage lié à l'effet de surprise. » À cet égard, le juge Doherty a rappelé la conclusion énoncée par le juge Iacobucci, au par. 34 de l'arrêt *Mentuck,* que l'accès à des documents du tribunal ne saurait être refusé dans le seul but de conférer aux responsables de l'application de la loi un *avantage* pour le déroulement de l'enquête; au contraire, la partie qui demande le secret doit au moins alléguer l'existence d'un *risque grave et précis pour l'intégrité de l'enquête criminelle.*

40 Enfin, le ministère public soutient que le juge Doherty a appliqué une norme « rigoureuse » — sans doute même *trop* rigoureuse — lorsqu'il a examiné le bien-fondé de la demande de mise sous scellés. Cette prétention n'est pas fondée.

41 Le juge Doherty a insisté à juste titre sur l'importance de la liberté d'expression et de la liberté de la presse, et il a souligné que les demandes visant à empiéter sur ces libertés doivent être [TRADUCTION] « scrutées à la loupe et satisfaire à des normes rigoureuses » (par. 19). Toutefois, il a finalement rejeté la demande présentée par le ministère public en l'espèce parce qu'elle reposait entièrement sur une allégation générale portant que la publicité peut compromettre l'intégrité de l'enquête.

42 Nulle part dans ses motifs le juge Doherty n'exige un degré élevé de certitude des prédictions incluses dans la preuve de nécessité produite par le ministère public.

V

43 Pour tous ces motifs, je propose que nous rejetions le pourvoi, avec dépens partie-partie en faveur des intimées.

Supreme Court of Canada — Cour suprême du Canada

IN THE MATTER OF SECTIONS 2(*b*) AND 52(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, BEING PART 1 OF THE CONSTITUTION ACT, 1982;

AND IN THE MATTER OF SECTIONS 25 AND 30 OF THE JUDICATURE ACT, BEING CHAPTER J-1 OF THE REVISED STATUTES OF ALBERTA, 1980;

BETWEEN:

THE EDMONTON JOURNAL, A DIVISION OF SOUTHAM INC.

- and -

THE ATTORNEY GENERAL FOR ALBERTA
THE ATTORNEY GENERAL OF CANADA

- and -

THE ATTORNEY GENERAL FOR ONTARIO

CORAM:

The Rt. Hon. Mr. Brian Dickson, P.C.
The Hon. Mr. Justice Lamer
The Hon. Mme Justice Wilson
The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Cory

Appeal heard:

March 3, 1989

Judgment rendered:

December 21, 1989

Reasons for judgment by:

The Hon. Mr. Justice Cory

DANS L'AFFAIRE DE L'ALINÉA 2*b*) ET DU PARAGRAPHE 52(1) DE LA CHARTE CANADIENNE DES DROITS ET LIBERTÉS, PARTIE I DE LA LOI CONSTITUTIONNELLE DE 1982;

ET DANS L'AFFAIRE DES ARTICLES 25 ET 30 DE LA JUDICATURE ACT, CHAPITRE J-1 DES LOIS RÉVISÉES DE L'ALBERTA, 1980;

ENTRE:

THE EDMONTON JOURNAL, UNE DIVISION DE SOUTHAM INC.

- et -

LE PROCUREUR GÉNÉRAL DE L'ALBERTA
LE PROCUREUR GÉNÉRAL DU CANADA

- et -

LE PROCUREUR GÉNÉRAL DE L'ONTARIO

CORAM:

Le très hon. Brian Dickson, c.p.
L'honorable juge Lamer
L'honorable juge Wilson
L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka
L'honorable juge Cory

Appel entendu:

le 3 mars 1989

Jugement rendu:

le 21 décembre 1989

Motifs de jugement par:

L'honorable juge Cory

Concurred in by:

The Rt. Hon. Mr. Brian Dickson, P.C.
The Hon. Mr. Justice Lamer

Concurring reasons by:

The Hon. Mme Justice Wilson

Dissenting reasons in part by:

The Hon. Mr. Justice La Forest

Concurred in by:

The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka

Counsel at hearing:

For the appellant

Mr. A. Lefever
Mr. F. Kozak

For the Respondent the Attorney General for Alberta

Mr. N. Steed

For the Intervener

Mr. D. Lepofski
Mr. T. Macklem

Souscrivent à l'avis du juge Cory:

Le très hon. Brian Dickson, c.p.
L'honorable juge Lamer

Motifs au même effet par:

L'honorable juge Wilson

Motifs de dissidence partielle:

L'honorable juge La Forest

Souscrivent à l'avis du juge La Forest

L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka

Avocats à l'audience:

Pour l'appelant

Me A. Lefever
Me F. Kozak

Pour l'intimé le Procureur Général de l'Alberta

Me N. Steed

Pour l'intervenant

Me D. Lepofski
Me T. Macklem

Citation	Référence
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Alta. C.A.: (1987), 53 Alta. L.R. (2d) 193, 78 A.R. 375, 41 D.L.R. (4th) 502, [1987] 5 W.W.R. 385, 34 C.R.R. 111.	C.A. Alb.: (1987), 53 Alta. L.R. (2d) 193, 78 A.R. 375, 41 D.L.R. (4th) 502, [1987] 5 W.W.R. 385, 34 C.R.R. 111.

edmonton journal *v.* alta (a.g.)

IN THE MATTER OF sections 2(*b*) and 52(1) of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*;

AND IN THE MATTER OF sections 25 and 30 of the *Judicature Act*, being chapter J-1 of the Revised Statutes of Alberta, 1980;

BETWEEN:

Edmonton Journal, a division of Southam Inc. *Appellant*

v.

The Attorney General for Alberta and the Attorney General of Canada *Respondents*

and

The Attorney General for Ontario *Intervener*

indexed as: edmonton journal *v.* alberta (attorney general)

File No.: 20608.

1989: March 3; 1989: December 21.

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, and Cory JJ.

on appeal from the court of appeal for alberta

Constitutional law -- Charter of Rights -- Freedom of expression -- Freedom of the press -- Open court process -- Reports of judicial proceedings Provincial legislation restricting publication of certain information obtained in matrimonial proceedings and at pre-trial stages of civil actions -- Whether legislation violates s. 2(b) of the Canadian Charter of Rights and Freedoms -- If so, whether legislation justifiable under s. 1 of the Charter -- Judicature Act, R.S.A. 1980, c. J-1, s. 30.

Constitutional law -- Charter of Rights -- Equality before the law -- Reports of judicial proceedings -- Provincial legislation restricting publication of certain information obtained in matrimonial proceedings and at pre-trial stages of civil actions -- Whether legislation violates s. 15 of the Canadian Charter of Rights and Freedoms -- If so, whether legislation justifiable under s. 1 of the Charter -- Whether s. 15 applicable to corporations -- Judicature Act, R.S.A. 1980, c. J-1, s. 30.

The appellant sought a declaration that s. 30 of the Alberta *Judicature Act* contravenes ss. 2(*b*) and 15 of the *Canadian Charter of Rights and Freedoms* which respectively guarantee freedom of expression and legal equality. Section 30(1) of the Act prohibits the publication of any detail relating to matrimonial proceedings other than the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences, counter-charges and legal submissions; and the summing up of the

judge, the findings of the jury and the judgment of the court. Section 30(2) prohibits the publication before trial of anything contained in the pleadings of civil proceedings, except the names of the parties and the general nature of the claim and of the defence. Section 30(3) provides for various types and forms of publication when ordered by the court, including the publication of matters otherwise prohibited. Both the Court of Queen's Bench and the Court of Appeal dismissed the application on the ground that s. 30 constitutes a reasonable limit to s. 2(*b*) under s. 1 of the *Charter* and that it did not violate s. 15.

Held (La Forest, L'Heureux-Dubé and Sopinka JJ. dissenting in part): The appeal should be allowed. Section 30(1) and (2) of the Act infringe s. 2(*b*) of the *Charter* and are not justifiable under s. 1 of the *Charter*. In light of the this conclusion, it is not necessary to deal with the argument based on s. 15 of the *Charter*.

Per Dickson C.J. and Lamer and Cory JJ.: Freedom of expression is of fundamental importance to a democratic society and should only be restricted in the clearest of circumstances. 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 thus be free to comment and report upon court proceedings to ensure that the courts are in fact seen by all to operate openly in the penetrating light of public scrutiny. It is only through the press that most individuals can really learn of what is occurring in the courts. The members of the public, as "listeners" or "readers", have a right to receive information pertaining to public institutions, in particular the courts. Here, there is no doubt that the

provisions of s. 30(1) and (2) of the Act contravene s. 2(*b*) of the *Charter*. Section 30(1) represses the publication of important aspects of court proceedings in matrimonial causes, including information on the evidence adduced at trial and the comments of counsel or of the presiding judge. Section 30(2) creates an almost total restriction on providing information pertaining to pleadings or documents filed in any civil proceedings, including cases involving matters of administrative or constitutional law, before they have been heard.

The limits imposed by s. 30(1) and (2) on s. 2(*b*) are not justifiable under s. 1 of the *Charter*. While the objectives of protecting the privacy of individual (s. 30(1) and (2)) and of ensuring a fair trial (s. 30(2)) constitute pressing and substantial concerns for the purpose of s. 1 of the *Charter*, both subsections do not interfere as little as possible with the fundamental right of freedom of expression, nor do they reflect that proportionality which is required between the effect of the impugned measure on the protected right and the attainment of the objectives. The restrictions in s. 30(1) and (2) are too extensive and go much further then necessary to protect the objectives of the legislation. Section 30 by its restrictive ban on publication results in a very substantial interference with freedom of expression and significantly reduces the openness of the courts. Any need to protect the privacy of the parties, their children or of the witnesses, or to ensure a fair trial could have been accomplished by far less sweeping measures.

Because s. 30(1) and (2) contravene s. 2(*b*), and in light of the conclusion that it cannot be justified pursuant to s. 1 of the *Charter*, it is not necessary to deal with the argument based on s. 15 of the *Charter*.

Per Wilson J.: The *Charter* should be applied to individual cases using a contextual rather than an abstract approach. A contextual approach recognizes that a particular right or freedom may have a different value depending on the context and brings into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. This approach is more sensitive to the reality of the dilemma posed by the particular facts of a case and is more conducive to finding a fair and just compromise between two competing values under s. 1. The importance of a *Charter*'s right or freedom, therefore, must be assessed in context rather than in the abstract and its purpose must also be ascertained in context.

The values in conflict in the context of this particular case are the right of the public to an open court process, which includes the right of the press to publish what goes on in the courtroom, and the right of litigants to the protection of their privacy in matrimonial proceedings. In particular, the purpose of s. 30(1) of the Act is to protect these litigants against the embarrassment, grief or humiliation that may flow from the publication of the particulars of their private life disclosed in the courtroom. To do so, s. 30(1) has placed serious limits on the publication of what takes place in a courtroom. These limits clearly infringe the freedom of the press guaranteed by s. 2(*b*) of the *Charter*. They restrict the right of the press to report the details of judicial proceedings and go against the traditional emphasis which has been placed in our justice system upon an open court process. The importance of the open court process in our society is supported by several compelling

reasons and only powerful considerations would justify inroads into such a process.

Section 30(1) of the Act does not constitute a reasonable limit on the freedom of the press which can be justified by s. 1 of the *Charter*. While the protection of privacy is a legitimate government objective, s. 30(1) lacks the required degree of proportionality. There is unquestionably a small proportion of matrimonial cases in which publication of the evidence would cause severe emotional and psychological trauma and public humiliation for the parties (and their children) as to warrant a ban on publication. Section 30(1), however, is not restricted to such cases. It encompasses all matrimonial causes presumably on the assumption that they are all inevitably attended by such consequences. This assumption may have been valid at one time but it is wholly unrealistic today. Many allegations that might once have been acutely embarrassing and painful are today a routine feature of matrimonial causes to which little, if any, public stigma attaches. Legislation seeking to place restrictions on freedom of the press in this area need to be much more carefully tailored.

Section 30(2) of the Act infringes s. 2(*b*) of the *Charter* and is not justifiable under s. 1.

In light of the conclusion with respect to ss. 2(*b*) and 1 of the *Charter*, it is not necessary to deal with the appellant's contention that s. 30(1) and (2) of the Act violate s. 15 of the *Charter*.

Per La Forest, L'Heureux-Dubé and Sopinka JJ. (dissenting in part): The freedom of expression and the concept of open courts are essential to a free and democratic society. However, like other rights and freedoms guaranteed by the *Charter*, the freedom of expression, which includes the freedom of the press and other media, is subject to such limits prescribed by law as can be demonstrably justified in a free and democratic society. Here, s. 30(1), as modified by s. 30(3) of the Act, was justifiable under s. 1 of the *Charter*. First, the protection of the privacy of the parties (including their children and the witnesses) and the protection of the access to the courts are two objectives sufficiently important to warrant a reasonable limitation on publication of the details of matrimonial disputes. An individual involved in a matrimonial case is forced to reveal many aspects of his private life. While the divulging of such personal information by the mass media serves little or no public interest, it can do incalculable harm to that individual and his family. The unrestrained publicity of the details of familial activities would also discourage some people from seeking relief in matrimonial causes. It would be a great wrong if those in need of redress shrank from seeking it because their intimate affairs would needlessly become publicly known. Second, given the very limited character of the restriction as compared with the serious deleterious effects on the important values -- right to privacy and access to the courts -- sought to be protected by the legislation, s. 30(1) meets the test of proportionality. Section 30(1) is rationally connected to the objectives and imposes only minimal limits on the freedom of the press. The interference with the freedom is narrowly defined and carefully tailored to resolve a real and serious problem. Section 30(1) is limited to the details and particularities of the case in specific proceedings that deal with personal and family matters,

often of a particularly private, and sometimes, of an intimate character. It does not prohibit reporting about the conduct of judges or counsel. The principle of open courts is respected: publication for those having a serious interest in court proceedings or family law is permitted under s. 30(3) of the Act, and all the general information about the nature of the case may be published by the mass media. Finally, a provision under which a judge would retain a discretionary power to prohibit publication in an appropriate case has been tried elsewhere and proven ineffective.

Section 30(2) of the Act infringes s. 2(*b*) of the *Charter* and is not justifiable under s. 1. Section 30(2) is simply too broad a restriction without adequate justification to afford a defence under s. 1.

Section 30 of the Act does not infringe s. 15 of the *Charter*. Section 15 is limited to individuals and does not apply to corporations. Moreover, appellant faces serious problems of standing. Though it may have an interest in the matter, appellant is not directly affected. In any event, although s. 30 imposes a prohibition not found in other jurisdictions in Canada, and discriminates against print media and between newspapers in general circulation and professional journals, these distinctions do not fall within the ambit of s. 15.

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By Cory J.

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APPEAL from a judgment of the Alberta Court of Appeal (1987), 53 Alta. L.R. (2d) 193, 78 A.R. 375, 41 D.L.R. (4th) 502, [1987] 5 W.W.R. 385, 34 C.R.R. 111, affirming a judgment of Foster J. (1985), 40 Alta. L.R. (2d) 326, 63 A.R. 114, 22 D.L.R. (4th) 446, [1986] 1 W.W.R. 453, 23 C.R.R. 356. Appeal allowed, La Forest, L'Heureux-Dubé and Sopinka JJ. dissenting in part.

Allan Lefever and *Fred Kozak*, for the appellant.

Nolan D. Steed, for the respondent the Attorney General for Alberta.

David Lepofsky and *Timothy Macklem*, for the intervener.

Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton.

Solicitor for the respondent the Attorney General for Alberta: The Department of the Attorney General, Edmonton.

Solicitor for the intervener: The Ministry of the Attorney General, Toronto.

SUPREME COURT OF CANADA

IN THE MATTER OF SECTIONS 2(*b*) AND 52(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, BEING PART 1 OF THE CONSTITUTION ACT, 1982;

AND IN THE MATTER OF SECTIONS 25 AND 30 OF THE JUDICATURE ACT, BEING CHAPTER J-1 OF THE REVISED STATUTES OF ALBERTA, 1980;

BETWEEN:

THE EDMONTON JOURNAL,
A DIVISION OF SOUTHAM INC.

- and -

THE ATTORNEY GENERAL FOR ALBERTA and
THE ATTORNEY GENERAL OF CANADA

- and -

THE ATTORNEY GENERAL FOR ONTARIO

CORAM: The Chief Justice and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Cory JJ.

CORY J.:

On this appeal the appellant has challenged the validity of s. 30 of the Alberta *Judicature Act*, R.S.A. 1980, c. J-1, on the grounds that it contravenes s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and that

the section does not constitute a reasonable limit upon that right so as to come within s. 1 of the *Charter*. The Attorney General for Alberta has conceded that the impugned section contravenes s. 2(*b*) of the *Charter* but contends that it constitutes a reasonable limit and thus comes within the scope of s. 1 of the *Charter*.

It may be convenient here to set out s. 30 and the enforcement provision of s. 31. Those sections provide:

> 30(1) No person shall within Alberta print or publish or cause or procure to be printed or published in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section, or any other particulars except
>
> (a) the names, addresses and occupations of the parties and witnesses,
>
> (b) a concise statement of the charges, defenses and counter-charges in support of which evidence has been given,
>
> (c) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and
>
> (d) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment.
>
> (2) No person shall, before the trial of any proceedings had in a court of civil jurisdiction in Alberta or, if there is no trial, before the determination of the proceedings within Alberta, print or publish or cause to be printed or published anything contained in a statement of claim, statement of defence or other pleading, examination for discovery or in an affidavit or other document other than

(a) the names and addresses of the parties and their solicitors, and

(b) a concise statement of the nature of the claim or of the defence, as the case may be, in general words such as, "the claim is for the price of goods sold and delivered", or "the claim is for damages for personal injuries caused by the negligent operation of an automobile", or as the case may be.

(3) Nothing in this section applies

(a) to the printing of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding,

(b) to the communication of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding to persons concerned in the proceeding,

(c) to the printing or publishing of a notice or report pursuant to an order or direction given by a court competent to so order or direct, or

(d) to the printing or publishing of a matter

(i) in a separate volume or part of a bona fide series of law reports that does not form part of another publication and that consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character bona fide intended for circulation among members of the legal or medical professions.

31(1) A person who contravenes section 30 is guilty of an offence and, in respect of each offence, liable

(a) if a natural person to a fine of not more than $1,000 and in default of payment to imprisonment for a term of not more than one year, and

(b) if a corporation to a fine of not more than $5,000.

(2) When the offence consists in the printing and publication of a matter, detail or thing in a newspaper, circular or other publication printed and published in Alberta, the proprietor of the newspaper, the

editor of the newspaper and the publisher are each guilty of the offence.

(3) When the offence consists of the publication in Alberta of a matter or thing contained in a newspaper, circular or other publication that is printed outside Alberta and that continually or repeatedly publishes writings or articles that are obscene, immoral or otherwise injurious to public morals, every person within Alberta is guilty of an offence who

(a) receives that newspaper, circular or other publication, and

(b) is engaged in the public distribution of it or does an act or thing for the purpose of the public distribution of it.

(4) In a prosecution with respect to an offence under subsection (3), the fact that the accused was in possession of more than 6 copies of a newspaper, circular or other publication referred to in subsection (3) is prima facie proof that the accused was engaged in the public distribution of it.

(5) No prosecution for an offence under subsection (3) may be commenced by any person without the consent of the Attorney General.

The issues raised require consideration of ss. 1 and 2(*b*) of the *Charter.* These sections provide:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Importance of s. 2(*b*) of the *Charter* and the Reporting of Court Proceedings

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(*b*) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(*b*) should therefore only be restricted in the clearest of circumstances.

The vital and fundamental importance of freedom of expression has been recognized in decisions of this Court. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J., speaking for the majority, put the position in this way at p. 583:

> Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.
>
> The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the*

Liberty of Unlicenc'd Printing, to the Parliament of England (1644), and as well John Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (Oxford, 1946), at p. 14:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility, he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.

The importance of the concept that justice be done openly has been known to our law for centuries. In Blackstone's *Commentaries on the Laws of England* (1768), Book III, ch. 23, at p. 373, the following observation appears:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk...

This principle has been recognized by the United States Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). Stewart J., writing for the majority, said this (at p. 386, n. 15):

> As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil *as well as* criminal matters".

In the United States this principle is not restricted to hearings. The principle embraces the recognition of the existence of a common law right "to inspect and copy public records and documents, including judicial records and documents". See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597.

In Canada this Court has emphasized the importance of the public scrutiny of the courts. It was put in this way by Dickson J., as he then was, writing for the majority in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185:

> Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no

basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

He then went on to discuss the application of that same principle to court records. He observed that Canadian law differs somewhat from the law of England which appears to take a more restrictive approach towards the publicity of documents. He said this at p. 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.
>
> I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

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.

There is another aspect to freedom of expression which was recognized by this Court in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers". That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents. It was

put in this way by Anne Elizabeth Cohen in her article "Access to Pretrial Documents Under the First Amendment" (1984), 84 *Colum. L. Rev.* 1813, at p. 1827:

> Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious, spectators.

It is against this background which recognizes the crucial importance of both the freedom of expression and the openness of courts that s. 30 of the Alberta *Judicature Act* must be considered.

The Effect of the Prohibitions Contained in s. 30 of the Alberta Legislation

It will be recalled that s. 30(1) prohibits printing and publishing "in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section". The section then goes on to set out the exceptions: a) the names, addresses and occupations of the parties and witnesses; b) a concise statement of the charges, defences and counter-charges in support of which evidence has been given; c) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and d) the summing up of the judge and the findings of the jury, if

any, and the judgment of the court and the observations made by the judge in giving judgment.

The sweeping effect of the prohibition can be readily seen. The term "or in relation to a marriage" is a broad one. It encompasses matters pertaining to custody of children, access to children, division of property and the payment of maintenance. All are matters of public interest yet the evidence given on any of these issues cannot be published. The dangers of this type of restriction are obvious. Members of the public are prevented from learning what evidence is likely to be called in a matrimonial cause, what might be expected by way of division of property and how that evidence is to be put forward. Neither would they be aware of what questioning might be expected. These are matters of great importance to those concerned with the application of family law. It is information people might wish to have before they even consider consulting a lawyer. The very people who would seem to have the greatest need to know of family court proceedings are prevented from obtaining important information by the provisions of s. 30.

As well, the comments of counsel and the presiding judge are excluded from publication. How then is the community to know if judges conduct themselves properly. How will it know whether remarks might have been made, for example, that a wife should submit to acts of violence from her husband or that a wife should endure the verbal abuse or blows of her husband. The community has a right to know if such remarks are made yet if there is no right to publish, the judge's comments may be hidden from public view. Thus it

can be seen that the effect of s. 30(1) is to repress the publication of important aspects of court proceedings. The prohibitions are unnecessarily extensive.

With regard to s. 30(2), it creates an almost total restriction on providing information pertaining to pleadings or documents filed in any civil proceedings before they have been heard. Thus cases involving matters of administrative law or constitutional law are affected by the prohibition. People are prevented from learning the particular allegations made in these cases although they may have a vital impact on the lives of all the residents of the province. The restriction set out in s. 30(2) is unique to the province of Alberta.

Contraventions of s. 2(*b*)

There can be no doubt that the provisions of s. 30(1) and (2) of the Alberta *Judicature Act* contravene s. 2(*b*) of the *Charter*. This was recognized by the Alberta Court of Appeal and conceded by the Attorney General for Alberta before this Court. The legislation then can only be saved if the province of Alberta has satisfied the onus which it must bear to show that the section constitutes a reasonable limitation that comes within the purview of s. 1 of the *Charter*.

Consideration of s. 1 of the *Charter*

In order to constitute a reasonable limitation contemplated by s. 1 of the *Charter*, the impugned section must meet the criteria set forth in *R. v. Oakes*, [1986] 1 S.C.R. 103. There Chief Justice Dickson, speaking for the majority, indicated that the legislation in question has to satisfy two sets of conditions if it is to meet the test under s. 1. The first is that the objective of the impugned legislation which sought to impose a limit on a *Charter* right must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (p. 138). Quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, he observed that the standard must be high in order to ensure that objectives of a trivial nature did not gain s. 1 protection. The objective must be of a pressing and a substantial nature before it can be characterized as sufficiently important to override a *Charter* right. Second, "the means chosen to attain those objectives must be proportional or appropriate to the ends": *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 768.

Considering that first condition, what then are the objectives of this legislation? There were three put forward by the Attorney General for Alberta. First, it was said that the aim of the legislation, particularly s. 30(1), was to safeguard public morals. Undoubtedly this was the primary basis for the enactment of the legislation in 1935. However, it must be reviewed by current standards and it cannot be accepted that this objective remains pertinent in today's society. Although allegations of adultery and the misconduct of the

parties may have been the height of scandal at the time of the passage of the legislation they can hardly raise an eyebrow today. Television in day-time soap operas and prime time programmes, the movies and magazines, all deal in considerable and colourful detail with every possible permutation and combination of human relationships. That is now the staple fare of society. By comparison the evidence of a matrimonial case is very tame fare indeed. The problems before the court in matrimonial causes could not conceivably be said to so affect public morals that the public should be shielded from the proceedings.

The Attorney General for Alberta submitted that a second purpose of the legislation was to ensure access to the courts by people who might wish to litigate matrimonial matters. It was said that if people had knowledge that their case would be the subject of printed reports they might not seek to achieve their rights in court. But no evidence was introduced to support the contention that in the absence of s. 30(1), potential litigants would be dissuaded from going to court. Indeed, what statistical evidence there is suggests the opposite. The Statistics Canada Report, *Marrying and Divorcing: A Status Report of Canada* (1988), indicates that in the period from 1984 to 1986, no less than 28 per cent of all marriages ended in divorce compared with 19 per cent in the period 1970 to 1972. This amounts to almost one-third of marriages and the rate of divorce is far higher with younger couples. Furthermore, the Report concludes at p. 11 that "Canadians marry, divorce and remarry at uniform rates from one end of the country to the other". A historical comparison is enlightening. In 1984, the divorce rate was some 20 times higher

than in 1935, and some 40 times higher than in 1920: see Statistics Canada, *Divorce: Law and the Family in Canada* (1983), at p. 48, and *Marriages and Divorces: Vital Statistics 1985* (1986), at p. 2. The grounds alleged for these marriage breakdowns are revealing as well. The most recent unpublished Statistics Canada figures on grounds for divorce show that for the period of December 1, 1987 to June 30, 1988, 82.8 per cent of divorces were on grounds of one year of separation, 5.4 per cent for adultery, 6.4 per cent for physical cruelty and 5.4 per cent for mixed grounds. Indeed, in Ontario well over 90 per cent of the divorces that appeared on the trial list were undefended: see "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1988" (1989), 23 *L. Soc. Gaz.* 4, at p. 24.

The question of access to judicial proceedings must be judged against this background of modern family law which has developed new mechanisms for helping parties to resolve their problems. In particular, the statistics demonstrate that departure from the fault-based model of divorce has in large measure eliminated the legal stigma attached to marriage breakdown. In light of the statistics it is difficult to accept the submission that access to court proceedings is significantly impeded by fear of publicity in the press. One need only observe the large number of actions for divorce and corollary relief brought in every province to recognize that litigants are coming to court in large numbers in those provinces where there is no mandatory press ban in place. Thus there is no indication that people are not seeking to enforce their rights in matrimonial causes. As well it is clear that adultery is not the predominant ground put forward as the basis for divorce.

Thirdly, it was alleged that the legislation was aimed at protecting the privacy of individuals. This aspect or aim of the legislation does indeed relate to a pressing and substantial concern in a free and democratic society. Our society has cherished and given protection to privacy. This Court has on a number of occasions underlined the importance of the privacy interest in Canadian law. See *Attorney General of Nova Scotia v. MacIntyre, supra*; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60; *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, at p. 40, and *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28. It is of such importance that on this view it can be said that s. 30(1) has met the first of the two conditions enunciated in *R. v. Oakes, supra.*

With regard to s. 30(2), the Attorney General for Alberta submitted that its purpose was two-fold, to ensure the right to a fair trial and to protect reputation and privacy. I will assume, for the purposes of these reasons, that s. 30(2) as well meets that first test and that both the objectives, that of securing a fair trial and that of protecting the right to privacy with regard to pre-trial documents constitute pressing and substantial objectives sufficient to permit the overriding of the right to freedom of expression.

Once a sufficiently significant objective has been demonstrated then the party invoking s. 1 (here the province of Alberta) must show that the means chosen are reasonable and demonstrably justified in order to satisfy the proportionality test set forth in *Oakes, supra.*

In *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 20, Chief Justice Dickson noted that there are three components of the proportionality test:

> ... the measures must be carefully designed to achieve the objective of the legislation, with a rational connection to the objective. The second component is that the measure should impair the right or freedom as little as possible. Finally, there must be proportionality between the effects of the impugned measures on the protected right and the attainment of the objective.

Section 30 neither impairs the right of freedom of expression as little as possible nor is there the required proportionality between the effect of the impugned measure on the protected right and the attainment of the objective. Both ss. 30(1) and 30(2) go much further than is necessary to protect the privacy of persons involved in proceedings. Their deleterious effect has been noted.

It can be seen that if, for example, a newspaper chose to publish a story which scrupulously avoided revealing the identity of parties or witnesses but discussed in general terms the kind of evidence introduced in matrimonial proceedings, the newspaper would be in contravention of s. 30(1) and subject to a fine even though no privacy interest had been affected. Similarly, if a newspaper chose to comment on the conduct or remarks of a judge or counsel during court proceedings, then although this would not be an invasion of privacy, the newspaper would be in contravention of the section. The exceptions provided in s. 30(1) do not permit a proper reporting of the

proceedings and cannot be said to constitute a minimal interference with the right of freedom of expression.

Nor can it be said that there is the requisite proportionality between the overly restrictive provisions of s. 30(1) and the important right to report freely upon trial proceedings. In today's society it is the press reports of trials that make the courts truly open to the public. The principle that courts must function openly is fundamental to our system of justice. The public's need to know is undeniable. Section 30 by its restrictive ban on publication results in a very substantial interference with freedom of expression and significantly reduces the openness of the courts. Any need for the protection of privacy of witnesses or children could be readily accomplished by far less sweeping measures. For example, it could be accomplished by the exercise of discretion by the trial judge to prohibit publication or to hold in-camera hearings in those few circumstances where it would be necessary to do so in order to protect the privacy interest of parties, their children or witnesses.

The importance of freedom of expression and of public access to the courts through the press reports of the evidence, arguments and the conduct of judges and judicial officers is of such paramount importance that any interference with it must be of a minimal nature.

It cannot be said that s. 30(1) interferes as little as possible with the fundamentally important right to freedom of expression particularly as it applies to informing the public of court proceedings. Nor does it reflect that

proportionality which is required between the effect of the measure and the attainment of the objectives.

Counsel for the Attorney General for Alberta took the position that the exceptions set out in s. 30(1) permitted the publication of sufficient details so that the ban on publication was minimal. In support of his position he placed great stress upon the decision of this Court in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, particularly that portion of the reasons by by Lamer J., speaking for the Court, as follows at p. 132:

> Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it. [Emphasis in original.]

However, Justice Lamer was careful to note that the ban in those circumstances was a minimal impairment of a freedom of expression. At page 133 he stated:

> The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public.

In the case at bar the restriction is much broader. As noted earlier, the publishing ban is wide and sweeping in its effect. In the circumstances the *Canadian Newspapers* case is distinguishable and the reasoning is not applicable to s. 30 of the *Judicature Act.*

The Attorney General for the province of Alberta also observed that s. 30(1) of the Alberta legislation was in virtually the same wording as s. 166(1)*(b)* of the *Criminal Code*, R.S.C., 1985, C-46. He sought comfort in the fact that thus the two jurisdictions of the Dominion of Canada as well as the province had passed such legislation. However, it is interesting to note that there are no reported cases under that section of the *Criminal Code.* Nor do I think this supports his position. The lack of cases pertaining to this section of the *Code* may indicate that its provisions have fallen into disuse, or that it had never been necessary or appropriate to bring them into play. It may reflect no more than a wise manifestation of the exercise of prosecutorial discretion.

Counsel for the Attorney General for Alberta argued that s. 30(2) was necessary in order to ensure a fair trial of actions and to protect the privacy of individuals. It may well be that in certain situations those considerations will require the court to take measures to ensure that some portions of the documents filed in judicial proceedings are not published. Nevertheless, the provision is far too broad. The legislation would ban the publication of court documents that might have a wide public interest and would prevent the public from knowing about a great many issues in which discussion should be fostered. For example, all actions involving government agencies, administrative

boards and tribunals would seem to have a far greater interest for the public than most private litigation. Even in private actions the public might have an interest in knowing the submissions put forward in claims such as those for wrongful dismissal or for personal damages. Yet the details of those actions could not be published. Section 30(2) is overly broad and repressive.

When it considered s. 30(2) the Alberta Court of Appeal relied on the decision of the House of Lords in the *Sunday Times* case which had a long litigious history. An injunction against publication had been granted by the judges of first instance, [1973] Q.B. 710 (Div. Ct.). It was removed by the Court of Appeal for the reasons given by Lord Denning, M.R., [1973] 1 All E.R. 815 (C.A.). The injunction was then restored by the House of Lords, [1974] A.C. 273. The case was then taken to the European Court of Human Rights (judgment of 26 April 1979, Series A No. 30) which set aside the decision of the House of Lords. In the course of its reasons the majority of that court had this to say at pp. 41-42:

> The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question.
>
> As the Court has already observed, Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed.

> In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the "authority of the judiciary".

These words are apposite to a consideration of s. 30(2) and should govern the decision made pertaining to that subsection.

As well it is not without significance that the ban prescribed by s. 30(2) of the Alberta legislation is unique to that province. No other jurisdiction in Canada has found it necessary to impose such a restriction.

Further, there can be no doubt that in order to ensure a fair trial and to protect privacy interests, the court can always use its supervisory power over its own record to grant restraining orders in appropriate cases.

For the foregoing reasons, I am led to the conclusion that s. 30(2) does not interfere as little as possible with the vitally important fundamental right of freedom of expression, particularly as it applies to informing the public as to pending court proceedings. Nor does it reflect that proportionality which is required between the effect of the measure and the attainment of the objectives.

Summary

I recognize that the limitation imposed by the legislation under attack need not be either the best possible limitation nor does it have to be the least intrusive legislation imaginable. Nevertheless it must be a reasonable limit. The proportionality test must vary depending on the circumstances of each case presented to the Court. Here the legislation in issue is not like legislation fixing the age of children at which advertising may be directed as in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. Nor is it like legislation fixing the maximum number of employees a firm could have to be eligible for an exemption from Sunday closing rules as in *R. v. Edwards Books and Art Ltd., supra.* Rather in this case the Court must balance the interest of society as a whole in freedom of expression and the right of the public to know of court proceedings against the bans imposed on publication by s. 30(1) and (2) of the Alberta legislation. In my view it is apparent that the impugned legislation is not carefully designed to achieve the objective of protecting privacy, nor does it affect as little as possible the vitally important rights and freedoms in question. Neither s. 30(1) nor 30(2) can be upheld by reference to s. 1 of the *Charter.*

Re Section 15 of the *Charter*

The appellant argued that the legislation contravened s. 15 of the *Charter* as the press was singled out from all the news media and made subject

to fines for printing and for publishing. Because, as is conceded, the legislation contravenes s. 2(*b*), and in light of the conclusion that it cannot be justified pursuant to s. 1 of the *Charter*, it is not necessary to deal with this argument.

Disposition

I would allow the appeal with costs and answer the Constitutional questions as follows:

1. Does s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, infringe or deny the right of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes.

2. If the answer to question 1 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

   Answer: No.

3. Does s. 30 of the *Judicature Act* infringe or deny the right to equality guaranteed by s. 15 of the *Charter*?

   Answer: This question need not be answered.

4. If the answer to question 3 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

   Answer: This question need not be answered.

SUPREME COURT OF CANADA

IN THE MATTER OF SECTIONS 2(*b*) AND 52(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, BEING PART 1 OF THE CONSTITUTION ACT, 1982;

AND IN THE MATTER OF SECTIONS 25 AND 30 OF THE JUDICATURE ACT, BEING CHAPTER J-1 OF THE REVISED STATUTES OF ALBERTA, 1980;

BETWEEN:

THE EDMONTON JOURNAL
A DIVISION OF SOUTHAM INC.

- and -

THE ATTORNEY GENERAL OF CANADA and
THE ATTORNEY GENERAL FOR ALBERTA

- and -

THE ATTORNEY GENERAL FOR ONTARIO

CORAM: The Chief Justice and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Cory JJ.

WILSON J.:

I have had the benefit of reading the reasons of my colleagues Justice La Forest and Justice Cory and I am in agreement with the result they reach with respect to s. 30(2) of the Alberta *Judicature Act*, R.S.A. 1980, c. J-1.

With respect to s. 30(1) of that Act, I have reached the same conclusion as Cory J., although for somewhat different reasons.

1. Methodology of *Charter* Application

In my view, this case raises an important issue regarding the proper method of application of the ***Canadian Charter of Rights and Freedoms*** to individual cases and, because my reasons for finding s. 30(1) of the Alberta *Judicature Act* unconstitutional reflect one of two possible approaches to the *Charter*'s application, I thought it might be appropriate at the outset to say a word or two about the different approaches.

Of the two possible approaches to the *Charter*'s application one might be described as the abstract approach and the other the contextual approach. While the mechanics of application, i.e. the proper analytical steps to be taken are the same under each, which one is adopted may tend to affect the result of the balancing process called for under s. 1.

Under each approach it is necessary to ascertain the underlying value which the right alleged to be violated was designed to protect. This is achieved through a purposive interpretation of *Charter* rights. It is also necessary under each approach to ascertain the legislative objective sought to be advanced by the impugned legislation. This is done by ascertaining the intention of the legislator in enacting the particular piece of legislation. When both the underlying value and the legislative objective have been identified, and

it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society.

It seems to me that under the abstract approach the underlying value sought to be protected by s. 2(*b*) of the *Charter* is determined at large as my colleague Cory J. has done. He finds freedom of expression to have been fundamental to the historical development of our political, social and educational institutions in Canada. He emphasizes the seriousness of restricting the free exchange of ideas and opinions in a democratic form of society and concludes that it is difficult to imagine a more important right in a democracy than freedom of expression.

I do not disagree with my colleague that freedom of expression plays that vital role in a political democracy. The problem is that the values in conflict in the context of this particular case are the right of litigants to the protection of their privacy in matrimonial disputes and the right of the public to an open court process. Both cannot be fully respected. One must yield to the exigencies of the other. I ask myself therefore whether a contextual approach in balancing the right to privacy against freedom of the press under s. 1 is not more appropriate than an approach which assesses the relative importance of the competing values in the abstract or at large.

It is of interest to note in this connection that La Forest J. completely agrees with Cory J. about the importance of freedom of expression in the abstract. He acknowledges that it is fundamental in a democratic society. He sees the issue in the case, however, as being whether an open court process should prevail over the litigant's right to privacy. In other words, while not disputing the values which are protected by s. 2(*b*) as identified by Cory J., he takes a contextual approach to the definition of the conflict in this particular case. Notwithstanding the enormous importance of freedom of expression in a political context, he finds that it must yield in the context of this case to the litigant's right to privacy. The impugned legislation is accordingly, in his view, a reasonable limit on freedom of the press. Cory J. reaches the converse conclusion and the concern raised is whether the difference in result may be conditioned by the methodology adopted in assessing the importance of the values in conflict.

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. Nor should one, it seems to me, balance a private interest, i.e. litigant x's interest in his privacy against a public one, the public's interest in an open court process. Both interests must be seen as public interests, in this case the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process.

It seems to me that the majority and minority decisions in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, were largely influenced by the different approaches taken by the members of the Court to freedom of association under s. 2(*d*) of the *Charter*. Chief Justice Dickson in his dissent clearly applied a combined purposive and contextual approach to the issue in that case. He asked himself what the purpose of freedom of association was in the context of labour relations. Why did workers associate to form unions? What was the aim and object? He stated at pp. 365-66:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

And again at p. 368:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.

The Chief Justice concluded that the collective bargaining process was within the constitutional protection of s. 2(*d*).

The issue for the majority, however, was whether associational activities generally were constitutionally protected by s. 2(*d*), not whether the special kind of associational activities forming the subject of the dispute before the Court were protected by the section. Quoting from Le Dain J. at pp. 390-91:

> In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter* it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

Since the activities of a golf or curling club were clearly not deserving of constitutional protection, the answer to the question the majority posed for themselves was clearly no. Associational activities generally were not protected. The collective bargaining process engaged in by unions was likewise not protected.

One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smoke-stacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then, in accordance with the dictates of this Court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.

2. The Legislation

I turn now to the impugned legislation and reproduce it here for convenience:

> 30 (1) No person shall within Alberta print or publish or cause or procure to be printed or published in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section, or any other particulars except
>
> (a) the names, addresses and occupations of the parties and witnesses,
>
> (b) a concise statement of the charges, defences and counter-charges in support of which evidence has been given,
>
> (c) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and
>
> (d) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment.
>
> ...
>
> (3) Nothing in this section applies
>
> (a) to the printing of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding,
>
> (b) to the communication of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding to persons concerned in the proceeding,
>
> (c) to the printing or publishing of a notice or report pursuant to an order or direction given by a court competent to so order or direct, or
>
> (d) to the printing or publishing of a matter

> (i) in a separate volume or part of a bona fide series of law reports that does not form part of another publication and that consists solely of reports of proceedings in courts of law, or
>
> (ii) in a publication of a technical character bona fide intended for circulation among members of the legal or medical professions. [Emphasis added.]

I note at the outset that my colleagues have reached different conclusions about the effect of these provisions. Cory J. construes them as preventing the publication of any evidence called in a matrimonial cause as well as the comments of counsel and the presiding judge. La Forest J., on the other hand, states that "s. 30(1) extends only to the particulars of the evidence in matrimonial and similar proceedings where individuals are required to divulge some of the most private aspects of their lives". I agree with Cory J.'s interpretation. I think that the legislation has placed quite serious limits on the publication of what goes on in a courtroom. Section 30(1)(b) and (c) prohibit the press from publishing the details of evidence adduced in the course of a trial and s. 30(1)(d) prevents the press from reporting any remarks that the presiding judge may make other than his or her "summing up".

3. The Open Court Process

There can be little doubt that restricting the freedom of the press to report cases before the courts goes against the traditional emphasis which has been placed in our justice system upon an open court process. Several reasons have been advanced in support of the importance of such a process. The one

most frequently advanced, and certainly the one with the deepest roots in the history of our law, stresses the importance of an open trial for the evidentiary process. As Cory J. notes, Blackstone stressed that the open examination of witnesses "in the presence of all mankind" was more conducive to ascertaining the truth than secret examinations: see Blackstone's *Commentaries on the Laws of England* (1768), Book III, ch. 23, at p. 373. Subsequently, in his *Rationale of Judicial Evidence* (1827), vol. 1, Jeremy Bentham explained at p. 522 that:

> The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent, and, in a way not less important...upon the judge.

Dean Wigmore wrote extensively on the requirement that judicial proceedings be open to the public, Wigmore, *Evidence*, vol. 6 (Chadbourn rev. 1976), para. 1834, and noted at pp. 435-36 that:

> Its operation in tending to *improve the quality of testimony* is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.
>
> The operation of this latter reason was not uncommonly exemplified in earlier days in England, when *attendance at court* was a common mode of passing the time for all classes of persons....The same advantage is gained, and much relied on, in more modern times,

> when the publicity given by newspaper reports of trials is often the means of securing useful testimony. [Emphasis in original.]

More recently the Supreme Court of the United States has addressed these considerations in a series of cases dealing with criminal trials. For example, in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), Blackmun J. provides an extensive review of the history underlying the requirement that trials be held in open court and observes that there is strong evidence that the public trial, which developed before other procedural rights now routinely afforded the accused, was perceived as serving important social interests relating to the integrity of the trial process that existed quite apart from the interests of the litigants. He emphasizes at p. 427 that there is no reason to think that the requirement is not equally important to-day:

> The courts and the scholars of the common law perceived the public-trial tradition as one serving to protect the integrity of the trial and to guard against partiality on the part of the court. The same concerns are generally served by the public trial today.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court of the United States again emphasized the importance of publicity in preserving the integrity of the evidentiary process. Holding that the press's interest in being able to report what takes place in court is constitutionally protected by the First and Fourteenth Amendments of the United States Constitution, Chief Justice Burger went on to point out at pp. 572-73 that:

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard....

This is an important point and serves to remind us that any harm that may flow from limiting the press's ability to recount what takes place in court cannot readily be rationalized or minimized by saying that, although the press is constrained, the public is still free to attend. The media are, as Chief Justice Burger so truly observed, "surrogates for the public".

Another reason for allowing the press to provide complete accounts of what goes on in the courtroom is that an open trial is more likely to ensure that the judge and jury conduct themselves properly so as to inspire confidence in the litigants that the procedures followed and the results reached are fair. In a criminal law setting the importance of an impartial judge and jury is obvious and the role of an open trial in compelling judge and jury to act responsibly has repeatedly been noted: see *Gannett v DePasquale, supra,* at p. 380, *per* Stewart J.; *Richmond Newspapers, supra,* at p. 593, *per* Brennan and Marshall JJ.; and *Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1 (1986), at pp. 8 to 9, *per* Burger C.J. This concern is obviously not confined to criminal trials. We are all aware that judges presiding in matrimonial causes from time to time disclose outmoded attitudes to the marriage relationship which might well affect their decisions. It is crucial that the press be able to

report any statements of this nature made by a judge in the course of the proceedings. Only in this way can the public be assured that the judiciary is capable of overcoming its own social biases and reflecting through their office the values of the community.

Thus, not only is an open trial more likely to be a fair trial but it is also *seen to be* a fair trial and thereby contributes in a meaningful way to public confidence in the operation of the courts. As Bentham observed in his *Treatise on Judicial Evidence* (1825), at p. 69:

> The effects of publicity are at their *maximum* of importance, when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments.

It is also worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them. Bentham recognized the importance of publicity in fostering public discussion of judicial matters, *Treatise on Judicial Evidence*, op. cit., at p. 68, and Wigmore pointed out in *Evidence,* op. cit., para. 1834, at p. 438, that "[t]he educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy". Dickson J., as he then was, reminded us of the importance of this when, writing for the

majority in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, he stated at p. 185:

> Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. [Emphasis added.]

In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need 1) to maintain an effective evidentiary process; 2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; 3) to promote a shared sense that our courts operate with integrity and dispense justice; and 4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

But in addition to the interest of the public at large in an open court process there may be compelling arguments in its favour related to the interests of litigants generally. Many may feel vindicated by the public airing of the injustices they feel they have suffered alone and without any support in the community. Indeed, this may be the first time that a spouse is able to speak openly about events that have taken place in the privacy of the home. They may welcome the public endorsement of the system for what they have suffered in private ignominy. I do not mean to suggest, of course, that in every marriage that runs into difficulty there will be a party anxious to tell his

or her side of the story to the public. But we cannot ignore the fact that for every litigant concerned about the adverse impact of publicity upon his or her image in the community there may be another equally concerned about public vindication and community support.

For all of these reasons it seems to me that there would have to be very powerful considerations in order to justify inroads into the open court process. The arguments in favour of the right of the press to report the details of judicial proceedings are strong. Restrictions on that right clearly infringe s. 2(*b*) of the *Charter*. It is necessary therefore to determine whether s. 30(1) can be justified as a reasonable limit under s. 1.

4. The Right to Privacy

I agree with La Forest J. that the purpose of the legislation is to provide some measure of protection for a litigant's privacy. But it is, in my view, important to identify what aspect of the broad concept of privacy is actually engaged by the impugned legislation. Again, a contextual approach would seem to be appropriate.

Privacy as a value deserving of protection by the law is not, of course, new. It has traditionally been protected by the law of torts through causes of action such as trespass, assault and defamation. Some have suggested that underlying these seemingly distinct torts is a unified concept of a relationship beween privacy and human dignity: see S. D. Warren and L. D.

Brandeis, "The Right to Privacy" (1890), 4 *Harv. L. Rev.* 193; E. J. Bloustein, "Privacy as an Aspect of Human Dignity" (1964), 39 *N.Y.U. L. Rev.* 962; and S. Stoljar, "A Re-examination of Privacy: An Answer to Dean Prosser" (1984), 4 *Legal Studies* 67. Not everyone agrees: see W. L. Prosser, "Privacy" (1960), 48 *Calif. L. Rev.* 383. Legal and political philosophers have engaged in extensive discussions about the value of privacy. Charles Fried, for example, thought that the ability to control the nature of information imparted to others about oneself is "related to ends and relations of the most fundamental sort: respect, love, friendship and trust": see C. Fried, "Privacy" (1968), 77 *Yale L. J.* 475, at p. 477; and for a similar point of view, see H. Gross, "The Concept of Privacy" (1967), 42 *N.Y.U. L. Rev.* 34. It is worth noting, however, that even the most ardent exponents of the importance of a right to privacy do not suggest that it is an unqualified right. Indeed, Warren and Brandeis accepted that privacy might on some occasions have to yield to the demands of "the public welfare or of private justice": see Warren and Brandeis, loc. cit., at p. 214, and Fried states that "[i]n concrete situations and actual societies, control over information about oneself, like control over one's bodily security or property, can only be relative and qualified": see Fried, loc. cit., at p. 486.

This Court has recently considered the right to privacy in cases involving the search of a person's property without his or her consent (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Genest*, [1989] 1 S.C.R. 59) and the search of a person's body without his or her consent (see *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Dyment*, [1988] 2 S.C.R. 417; and *R. v. Simmons*, [1988] 2 S.C.R. 495). While the Court in these cases has recognized the need to

protect privacy, it has also consistently stressed that "claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement": see *R. v. Dyment, supra*, at p. 428, *per* La Forest J.; *Hunter v. Southam Inc., supra*, at p. 159; *R. v. Simmons, supra*, at p. 526.

This case addresses a somewhat different aspect of privacy, one more closely related to the protection of one's dignity. It seems to me that the purpose of s. 30(1) of the Alberta *Judicature Act* is to afford some protection against the embarrassment or grief or loss of face that may flow from the publication of the particulars of one's intimate private life disclosed in the courtroom. This Court has already discussed in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 57 and 60, the psychological stress or trauma that can arise from violations of a person's emotional or physical integrity and it has adverted to the fact in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at p. 130, that such trauma can be the result of wide-spread publication of matters that are embarrassing or humiliating. In my view, this legislation addresses a similar concern, namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers.

Two points are worth noting at this stage of the analysis. First, the interest that the press might have in publishing evidence about a person's private life and the degree of embarrassment or humiliation that that person may suffer as a consequence is likely to depend on who that person is. Clearly, it is not everyone's matrimonial disputes that are of consuming interest

to the public and therefore to the media. Nor does everyone involved in matrimonial litigation have a public persona the preservation of which is of paramount concern to him or her. Second, the interest that the press might have in publishing details of a person's private life will also, no doubt, depend on the nature of the allegations made about such person's conduct. As Cory J. points out, the "run of the mill" divorce proceeding is less likely to be of public interest than one that involves allegations of particularly immoral or aberrant behaviour. I make these points, not to suggest that matrimonial disputes are not extremely upsetting and painful for all those involved in them as well as for members of their families, but to point out that the concern addressed by the impugned legislation does not impact uniformly on all litigants in matrimonial disputes but more particularly on some.

The right to privacy was asserted unsuccessfully in *McPherson v. McPherson*, [1936] A.C. 177 (P.C.), which concerned a petition for divorce filed by Alberta's Minister of Public Works. The action was tried in the judge's library which had the word "Private" on the door. It was not the intention to exclude the public from the hearing. The Judicial Committee of the Privy Council referred to Lord Halsbury's observation in *Scott v. Scott,* [1913] A.C. 417, at p. 440, that "every Court of justice is open to every subject of the King". It was held that this was not a trial in "open court". Lord Blanesburgh discussed the importance of the open court principle at pp. 200-202:

> To this rule, there are, it need hardly be stated, certain strictly defined exceptions. Applications properly made in chambers, and infant cases, may be particularized. But publicity is the authentic

> hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.
>
> ...
>
> And their Lordships, in reaching the conclusion that the public must be treated as having been excluded from the library on this occasion, have not been uninfluenced by the fact that the cause then being tried was an undefended divorce case. To no class of civil action is Lord Halsbury's statement more appropriate. In no class of case is the privilege more likely to be denied unless every tendency in a contrary direction, whenever manifested, is definitely checked.
>
> ...
>
> And there is perhaps no available way to correct these tendencies more effectively than to require that the trial of these cases shall always take place, and in the fullest sense, in open court. This requirement must be insisted upon because there is no class of case in which the desire of parties to avoid publicity is more widespread. There is no class of case in which in particular circumstances, it can be so clearly demonstrated even to a judge that privacy in that instance would be both harmless and merciful.
>
> ...
>
> These are some of the considerations which have led their Lordships to take a more serious view of the absence of the public from the trial of this divorce action than has obtained in the Courts below. Influenced by them, their Lordships have felt impelled to regard the inroad upon the rule of publicity made in this instance - unconscious though it was - as one not to be justified, and now that it has been disclosed, as one that must be condemned so that it shall not again be permitted. [Emphasis added.]

Lord Blanesburgh's remarks, in my view, provide a stern reminder of the importance of not allowing one's compassion for that limited group of people who are of particular interest to the public (because of who they are or what they are alleged to have done) to undermine a principle which is fundamentally sound in its general application.

In his discussion of exceptions to the general rule in favour of publicity Wigmore was quick to warn of the dangers of legislation that makes certain exceptions compulsory rather than giving the trial judge a discretion to deal with individual cases: see Wigmore, op. cit., para. 1835, at pp. 449-50. Perhaps as a consequence, the range of circumstances in which statutory provisions have been deemed necessary to protect the welfare of parties to litigation has been closely circumscribed. As far as the relationship of marriage is concerned, it is of some interest to note that the rules of evidence that formerly placed restrictions on the compellability of the spouse of a party to litigation and on the admissibility of the spouse's evidence have now been relaxed by legislation in most jurisdictions in Canada: see S. Schiff, *Evidence in the Litigation Process* (3rd ed. 1988), vol. 2, at p. 1015. I think this is an expression of the growing acceptance of the proposition that the evidence of every person who can contribute to the ascertainment of the facts is needed and should be exposed to public scrutiny. It is also of interest to note that evidence adduced in criminal trials, e.g. for sexual offences, and in civil trials, e.g. for bankruptcy, which also expose to public view details of individuals' personal lives and conduct, i.e. the accused or the bankrupt which they would no doubt prefer to keep private, often gives rise to great, if not greater, potential for embarrassment, grief, humiliation and loss of public esteem as the evidence in matrimonial litigation. While matrimonial litigation may well involve allegations of cruel, immoral and aberrant behaviour which may, as La Forest J. points out, adversely impact on the children of the marriage, I think that legislation seeking to address that concern should do so specifically or through

the grant of judicial discretion and should be strictly confined to that narrow range of cases.

5. Section 1 of the *Charter*

In this case the values in conflict are the right of the public to an open court process, which includes the right of the press to publish what goes on in the courtroom, and the right of litigants to the protection of their privacy in matrimonial disputes. It is clear that both values cannot be fully respected given the context in which they come into conflict in this case. The question is whether s. 30(1) of the Alberta *Judicature Act* constitutes a reasonable limit on the freedom of the press which can be justified under s. 1 of the *Charter*. My colleague La Forest J. concludes that it is a reasonable limit and my colleague Cory J. that it is not.

I would respectfully agree with Cory J. that it is not a reasonable limit. I agree with him that the first two requirements laid down in *R. v. Oakes*, [1986] 1 S.C.R. 103, are met. The protection of privacy is a legitimate government objective and the impugned legislation is rationally connected to it. I also agree with him that it lacks the required degree of proportionality. I believe it is important to keep in perspective the proportion of matrimonial cases in which publication of the evidence would cause such severe emotional and psychological trauma and public humiliation for the parties and/or their children as to warrant a ban on publication. There are unquestionably some cases where this is so but s. 30(1) of Alberta's *Judicature Act* is not restricted

to such cases. It encompasses all matrimonial causes presumably on the assumption that they are all inevitably attended by such consequences. While this assumption may have been valid at one time, I think it is wholly unrealistic to make this assumption today. Many allegations that might once have been acutely embarrassing and painful are today a routine feature of matrimonial causes to which little, if any, public stigma attaches. While some "high profile" litigants may have reputations that will be harmed by revelations about their matrimonial behaviour, I do not think this warrants legislation as all-encompassing as s. 30(1) of Alberta's *Judicature Act*. Legislation seeking to place restrictions on freedom of the press in this area would, in my view, have to be much more carefully tailored.

6. Section 15 of the *Charter*

In light of my conclusion with respect to ss. 2(*b*) and 1 of the *Charter*, it is not necessary to deal with the appellant's contention that the impugned legislation violates s. 15 of the *Charter*.

7. Disposition

I would allow the appeal with costs and would answer the constitutional questions raised in this appeal as follows:

> 1. Does s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, infringe or deny the right of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If the answer to question 1 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

Answer: No.

3. Does s. 30 of the *Judicature Act* infringe or deny the right to equality guaranteed by s. 15 of the *Charter*?

Answer: This question need not be answered.

4. If the answer to question 3 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

Answer: This question need not be answered.

SUPREME COURT OF CANADA

IN THE MATTER OF SECTIONS 2(*b*) AND 52(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, BEING PART 1 OF THE CONSTITUTION ACT, 1982;

AND IN THE MATTER OF SECTIONS 25 AND 30 OF THE JUDICATURE ACT, BEING CHAPTER J-1 OF THE REVISED STATUTES OF ALBERTA, 1980;

BETWEEN:

THE EDMONTON JOURNAL,
A Division of SOUTHAM INC.

- and -

THE ATTORNEY GENERAL FOR ALBERTA and
THE ATTORNEY GENERAL OF CANADA

- and -

THE ATTORNEY GENERAL FOR ONTARIO

CORAM: The Chief Justice and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Cory JJ.

LA FOREST J.:

The principal point in this case involves the balancing of the freedom of the press and the individual's right to privacy under the *Canadian Charter of Rights and Freedoms*. It also raises the application of s. 15 of the *Charter* to corporations.

Facts

The Edmonton Journal seeks a declaration that s. 30 of the Alberta *Judicature Act*, R.S.A. 1980, c. J-1, is inconsistent with s. 2(*b*) and s. 15 of the *Charter* which respectively guarantee freedom of the press and legal equality. Both the trial judge, Foster J. (1985), 40 Alta. L.R. (2d) 326, and the Alberta Court of Appeal (1987), 53 Alta. L.R. (2d) 193 refused to make that declaration on the ground that the provision constituted a reasonable limit to s. 2(*b*) under s. 1 of the *Charter* and that it did not violate s. 15. In this Court, the Attorney General for Alberta conceded that s. 30 contravened s. 2(*b*) of the *Charter* so that the sole question on that aspect of the case is whether s. 30 constitutes a reasonable limit to the freedom of the press.

Section 30(2)

My colleague, Justice Cory, has concluded that s. 30 does not constitute such a reasonable limit. I agree with him that s. 30(2) which prohibits the publication before trial of anything contained in any pleading (except the names of the parties and the general nature of the claim or defence) is simply too broad a restriction without adequate justification to afford a defence under s. 1, and I shall say no more about it. With respect, however, I do not share his view regarding the remainder of the section.

Section 30(1) and (3)

Section 30(1) and (3) of the Alberta *Judicature Act* reads as follows:

30(1) No person shall within Alberta print or publish or cause or procure to be printed or published in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section, or any other particulars except

(a) the names, addresses and occupations of the parties and witnesses,

(b) a concise statement of the charges, defences and counter-charges in support of which evidence has been given,

(c) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and

(d) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment.

...

(3) Nothing in this section applies

(a) to the printing of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding,

(b) to the communication of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding to persons concerned in the proceeding,

(c) to the printing or publishing of a notice or report pursuant to an order or direction given by a court competent to so order or direct, or

(d) to the printing or publishing of a matter

(i) in a separate volume or part of a bona fide series of law reports that does not form part of another publication and

> that consists solely of reports of proceedings in courts of law, or
>
> (ii) in a publication of a technical character bona fide intended for circulation among members of the legal or medical professions.

In essence, the interdiction in s. 30(1) extends only to the particulars of the evidence in matrimonial and similar proceedings where individuals are required to divulge some of the most private aspects of their lives (a mortification perhaps equalled only by the interest people take in the intimate secrets of others). The provision attempts to balance the public's right to know with the right of the individual, even in the open forums of the courts, to shield certain aspects of his or her existence from public scrutiny. It also affords a modicum of protection to those who are drawn into matrimonial proceedings by "ricochet". As noted by Kerans J.A. in the Court of Appeal, "concern for the effect on children, witnesses and the victims of false allegations remains valid today" (p. 206).

This approach to the provision is reinforced by the considerable latitude provided for the reporting of matrimonial proceedings: the parties and witnesses may be named, charges and defences may be summarized, and legal submissions, the summing up of the judge and the decision may be published without restriction. As well, the principle of open court (about which I share my colleague's sentiments) is maintained and nothing is wholly excluded from publication. Section 30(3) provides for various types of publication so as to balance the various social interests sought to be accommodated and in addition

to the listed forms in which publication may take place, publication of other material may be allowed pursuant to an order of the court.

The reading I have given to the provision as being confined to the broad publication of details of particulars of the evidence is fortified by an examination of its purpose. The provision was taken from a similar one in England, which was incidentally later adopted in the *Criminal Code*, R.S.C., 1985, c. C-46, s. 166, as well as in various other parts of the Commonwealth; see *Family Law Act 1975*, S. Aust. 1975, No. 53, s. 121(1); *Family Proceedings Act 1980*, S.N.Z. 1980, No. 94, s. 169(1), (2). The English provision originated from the recommendations of a Royal Commission on Divorce and Matrimonial Causes set up to consider concerns that had arisen out of the extensive and sensational press coverage of divorce trials; see *Report of the Royal Commission on Divorce and Matrimonial Causes* (1912), Part XVII. This was followed by the establishment of a select committee of the British House of Commons which examined proposed legislation; see *Report and Special Report from the Select Committee on the Matrimonial Causes (Regulation of Reports) Bill* (1923). The concerns expressed in these reports may thus be summarized:

> (1) The privacy of the parties involved in the proceedings and innocent third parties (including the children of the parties) was being violated.
>
> (2) Citizens were being discouraged from participating as witnesses or parties in the judicial process because of the threat of publicity.

(3) The morals of society and in particular the youth of society were being adversely affected.

The debates in the British House of Commons are replete with statements of these concerns and were mirrored in those leading to the adoption of the provincial statute. These concerns were those relied upon by the Attorney General for Alberta in arguing that the impugned provisions constitute a reasonable limit to the freedom of the press. I should add that the Royal Commission was fully mindful of the delicate balance that needs to be achieved between the rights sought to be protected and the requirements of a free press in playing its part in the interchange of information and ideas in a democratic society. At paragraph 494 of its report, for example, it stated:

> With the evidence before us, we take it as established that the evils of excessive publication are real and serious. When we come, however, to consider the remedies, we are confronted with a great variety of opinions. On the one hand, it is admitted that the liberty of the Press should be exercised for the public benefit, and is not so exercised when it is used to disseminate among the masses of the people literature of a demoralising tendency; on the other hand, there is a genuine anxiety lest, in seeking to cure this abuse, we should obstruct the free play of a healthy public opinion.

The Values in Conflict

I am, of course, in agreement with the general sentiments of my colleague regarding the importance in a free and democratic society of freedom of expression as well as the concept of open courts. I share with Duff C.J. the view that the "right of free public discussion of public affairs, notwithstanding

its incidental mischiefs, is the breath of life for parliamentary institutions"; see *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 133. Equally, public scrutiny of the judicial branch of government is essential to a free society. In all of this, I recognize as well the critical role of the press and other media in the broad dissemination of information and ideas in a complex modern society. The *Charter* indeed expressly includes "freedom of the press and other media of communication" in its guarantee of freedom of expression.

The freedom of the press and media, however, is not absolute. Like other rights and freedoms guaranteed by the *Charter*, it is subject under s. 1 of the *Charter* to such limits prescribed by law as can be demonstrably justified in a free and democratic society. The necessity for this balancing has always been recognized in Canada. Thus Duff C.J., in the course of the discussion in *Reference re Alberta Statutes* from which I have just cited, had this to say, at p. 133:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James* v. *Commonwealth*, [1936] A.C. 578, "freedom governed by law."

See also *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 462-63.

This Court has in recent cases recognized that freedom of expression, including the freedom of the press and other media, remains subject to restrictions since the enactment of the *Charter* so long as these conform to the exigencies of s. 1; see *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; see also *Re Global Communications Ltd. and Attorney General of Canada* (1984), 5 D.L.R. (4th) 634 (Ont. C.A.). This is consistent with the approach of the leading international instruments for the protection of human rights. Thus Article 19(3) of the *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), recognizes that the right to freedom of expression carries with it special duties and responsibilities and may, therefore, be subjected to certain restrictions; see also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (1950), Art. 10(2).

The question, then, becomes one of balancing the values sought to be protected by the *Charter* guarantee against the values of a free and democratic society sought to be fostered by the proposed law. The criteria to be taken into account in effecting this task have been frequently stated and I do not propose to itemize them here; see *R. v. Oakes*, [1986] 1 S.C.R. 103. I shall, however, refer to them as I go along. Here I should simply mention that the onus of establishing a reasonable limit to a guaranteed right is on those supporting the law, an onus the Attorney General for Alberta sought to establish on the grounds already mentioned.

An important step in this process of balancing must of course involve an examination of the extent of the interference with a guaranteed right of freedom and an appreciation of the extent to which the interference affects the underlying purpose of the right or freedom; see *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469. Here the interference with the freedom is narrowly defined and carefully tailored. It is limited to the details and particularities of the case in specific proceedings that deal with personal and family matters, often of a particularly private, and sometimes of an intimate character. I share Kerans J.A.'s skepticism of the significance of the negative impact of the legislation on the freedom of the press and media, and the public right to be informed of matters of public interest. As earlier noted, the principle of open courts is respected, publication for those having serious interest in court proceedings or family law is permitted, and all the general information about the nature of the case may be published by the mass media. I find it difficult to take seriously the contention that the general public would learn very much about what their rights are or how their problems might be dealt with in court by permitting the revelation by the media of specific details of particular cases dealing with marital questions. A general discussion of the kinds of evidence would not be caught by the prohibition, and there is sufficient information in the types of publications permitted to allow newspapers and other mass media to inform the general public of the nature of such evidence. Kerans J.A. observes that while the appellant has published a newspaper in Alberta throughout the last fifty years, no evidence was presented of a single instance where the impugned provision forbade it from reporting something of which the public should have been informed. Kerans J.A.

concluded that the interference with the public's right to know how justice is administered is more apparent than real.

If the legislation prohibited reporting about the conduct of judges and counsel, I would share the concerns of my colleague about the legislation. But I do not think the legislation is directed to these matters. It is aimed rather at the details and particularities of the case. As long ago as *Heydon's Case* (1584), 3 Co. Rep. 7a, at p. 7b; 76 E.R. 637, at p. 638, we were instructed that legislation should be read in accordance with its purpose. And what both the terms of the legislation itself and the problems identified by preparatory documents clearly reveal is that what the statute was intended to prohibit was not discussion of how courts go about their business, but reports of the details of people's lives that are routinely divulged in the proceedings referred to in the legislation. To read the legislation in the literal way proposed would require that the names of the judges and lawyers involved not be revealed since they are not expressly named in the exceptions to the prohibition. Such a construction is, I suggest, obviously unreasonable.

As I see it, then, the contravention objected to is of a quite limited character. As against the value infringed by such contravention must be weighed the other values of a free and democratic society sought to be promoted by the legislature, namely personal privacy, access to the courts, and public morals. The Attorney General for Alberta concedes that the order of importance of these values has significantly altered since the legislation was

originally enacted, but suggests their continued validity, some of greater, some of lesser weight than at that time.

Today there is no question that the individual's interest in personal privacy is the most pressing of the justifications advanced. That interest has been recognized by this Court as having constitutional significance. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, it was held to underlie the protection against unreasonable search and seizure enshrined in s. 8 of the *Charter*. Speaking on this point on behalf of the Court in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28, I had this to say of the approach adopted in *Hunter v. Southam Inc., supra*:

> The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

These considerations may well indicate that, in some contexts at least, privacy interests may well be invoked as an aspect of the liberty and security of the person guaranteed by s. 7 of the *Charter*; see *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, at p. 412. However that may be, there can be no doubt that in this modern age, it ranks high in the hierarchy of values meriting protection in a free and democratic society.

The right to personal privacy, including the privacy of one's family and home, has also been recognized by leading international documents aimed at the protection of human rights. The *International Covenant on Civil and Political Rights* (Art. 17), the *Universal Declaration of Human Rights* (Art. 12), G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Art. 8) all contain provisions to ensure respect for the private and family life of the individual.

The right or interest in privacy extends, of course, to informational privacy. In *R. v. Dyment*, *supra*, at pp. 429-30, I thus commented on this aspect of privacy:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force [on Computers and Privacy] put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.

That case and the instances there referred to had reference to governmental interferences with privacy. But in our society, the privacy of the individual is as often threatened by other powerful or influential entities

against which the individual is powerless. It should come as no great revelation that the divulgation of personal information about an individual by the mass media can do incalculable harm to that individual and his or her family. Small wonder, then, that the international documents I have just cited expressly underline that freedom of expression carries with it special duties and responsibilities and recognize the need for restrictions; see *International Covenant on Civil and Political Rights*, Art. 19(3); *Universal Declaration of Human Rights*, Art. 12; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 10(2). I should observe interstitially that recent cases in this Court recognize that in considering issues of this kind, the relative power of those whose activities are restricted and those for whose benefit the restriction is made is a relevant factor to weigh in the equation; see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Irwin Toy, supra.*

In matrimonial cases, the individual is forced to reveal many aspects of his or her private life in order to comply with the demands of the state in ordering his or her life. This necessary intrusion on family privacy, we saw, may have a serious impact not only on the litigants themselves but on witnesses and, even more important, children. There has, no doubt, been a change in emphasis in the nature of evidence in matrimonial causes since the enactment of the Act but it remains true that much is revealed that can, if publicized, seriously affect the autonomy and privacy of the individual and members of his or her family, general publication of which serves little or no public interest. As Kerans J.A. put it (at p. 206): "While one hears less today in divorce court

about 'what the housemaid saw', one hears much more about the financial dealings of a family and other very private matters, like psychological assessments of the parties in terms of fitness as parents."

The protection from intrusion on the privacy of the individual, the family and witnesses, in my view, in itself affords a sufficiently compelling objective to warrant some curtailment of the freedom of the press in the present context. But privacy is not the only value sought to be protected; the provision was intended to prevent obstacles to access to the courts, an interest that is also clearly of great importance in a free and democratic society; see *Canadian Newspapers Co. v. Canada (Attorney General)*, *supra*, where this Court upheld the restriction imposed by s. 442(3) of the *Criminal Code*, which enables the victim of sexual assault to require the issuance of a court order prohibiting the media from revealing the identity of the complainant on any information that could disclose that identity. Similarly, it was argued, unrestrained publicity of the details of familial activities would very likely discourage some people from seeking relief in matrimonial causes. That certainly appears to have been so when the original English legislation was enacted. The number of matrimonial causes rose dramatically immediately afterwards. While I am prepared to concede that this inhibitory effect of publicity would not be as strong today, I am satisfied that it continues to be a relevant factor. The prospect of divulging personal information in a court of law is one that many a litigant and witness approaches with considerable trepidation. It must be remembered that in many cases, the parties are undergoing one of the most painful experiences of their lives. To be told in addition that one risks broad

public exposure through the media would significantly increase this feeling. I agree with Kerans J.A. that it would be a great wrong if those in need of redress shrank from seeking it because their intimate affairs would needlessly become publicly known.

The Attorney General for Alberta attached little weight to the third justification, the protection of public morals, and I agree that in this day and age this ground is only of residual interest in the existing context. But the other two grounds constitute sufficient legislative objectives to warrant a reasonable limitation on publication of the details of matrimonial disputes. It is significant that similar objectives have been pursued in other countries. I have mentioned the Commonwealth countries that have a similar Act. The Royal Commission on the matter noted that foreign observers had expressed surprise at the lack of such provisions in Great Britain before the enactment of the predecessor of the impugned provision.

I thus have no doubt of the rationality of the legislative response. Moreover, given the very limited character of the restriction as compared with the serious deleterious effects on the important values sought to be protected by the legislation, I am also of the view that it meets the test of proportionality.

The question, then, is whether the restriction is excessive to achieve its purposes or, as it is ordinarily put, whether the constitutional right is limited "as little as possible". What will be "as little as possible" will vary

depending on the legislative objective, the nature of the freedom or the right infringed, the extent of the infringement and the means available to the legislature to effect its objectives. I have already referred to the limited nature of the restriction. Only details and particularities of the case are prohibited from publication, and the prohibition is confined to matrimonial disputes where matters of a peculiarly private and sensitive nature often arise. The areas are sufficiently clear and rationally based. The legislature must be afforded reasonable leeway in "line drawing"; see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy, supra.* It must also be given adequate scope as to the choice of response to problems. There may, as was argued, be other ways to achieve the legislative purpose, for example, the protection of anonymity. But there are difficulties with this too. Public knowledge of divorce is necessary and attempts at securing anonymity may easily fail or be suspect by the litigant or witnesses. At all events, the exceptions from the prohibition are extensive.

The most serious attack on the provision, however, was the automatic character of the prohibition. It was argued that a discretionary power in the judge to prohibit publication would be enough. The trouble with this argument, as Kerans J.A. pointed out, is that it had been tried and proved ineffective. The Select Committee of the British House of Commons had this to say about it (at p. iv):

> It has sometimes been suggested that a simple solution can be found by empowering Judges, at their discretion to forbid publication of any evidence or other part of the proceedings which they held to be injurious to public morals, under penalty of contempt of court; but

> apart from the likelihood of different judges taking different views, Your Committee are satisfied from personal knowledge that this course is not in fact practicable, and that even if the power were granted, its exercise would prove precarious and spasmodic.

The validity of the rule was also questioned on the basis of its absolute character but, as the Court of Appeal observed, the experience of fifty years, to which I alluded earlier, does not support the view that the law is too restrictive. A law must be approached at the practical, not the theoretical, level and, as I earlier noted, the restriction is minimal, more apparent than real. On the other hand, the problems to be resolved are, in the words of the Royal Commission, "real and serious". I am, in any event, by no means sure that the rule is as absolute as has been supposed. Given the obvious intention of the Act, as it appears both in its terms and the preparatory documents, to sensitively balance the public's right to know with the individual's right to privacy, it is my view that a court, in its discretion, could by order under s. 30(3)(c) permit the reporting of matters otherwise prohibited in those rare cases where the interest of the public in the publication of details overrode the right to privacy. But I do not attach too much importance to this. All in all, I am of the view that s. 30(1), as modified by s. 30(3), constitutes a reasonable limitation to the freedom of the media in a free and democratic society. It restricts that freedom as little as reasonably possible. The underlying purpose of the freedom is hardly affected, if at all.

Section 15

The appellant also submitted that the impugned legislation infringes on its s. 15 *Charter* rights by imposing an interdiction not found in other jurisdictions in Canada, and by discriminating against print media and between newspapers in general circulation and professional journals. Since s. 15 is limited to individuals, it does not apply to corporations like the appellant; see, *inter alia, Re Aluminum Co. of Canada, Ltd. and The Queen in Right of Ontario* (1986), 55 O.R. (2d) 522 (Div. Ct.); leave to appeal to Ont. C.A. refused September 2, 1986; *Parkdale Hotel Ltd. v. Canada (Attorney General),* [1986] 2 F.C. 514; *Milk Board v. Clearview Dairy Farm Inc.*, [1987] 4 W.W.R. 279 (B.C.C.A.), leave to appeal to this Court refused, [1987] 1 S.C.R. vii; *Nissho Corp. v. Bank of British Columbia* (1987), 39 D.L.R. (4th) 453 (Alta. Q.B.). Moreover, though the appellant may have an interest in the matter, it is not directly affected and the issue may come to the courts in other ways, so the appellant faces serious problems of standing. I need not, however, dwell on these matters because the distinctions about which it complains do not fall within the ambit of s. 15 under the principles enunciated in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143. None of these distinctions are in any way analogous to the enumerated grounds in that provision; see also *Reference Re Workers' Compensation Act, 1983 (Nfld.),* [1989] 1 S.C.R. 922; *R. v. Turpin,* [1989] 1 S.C.R. 1296.

Disposition

I would allow the appeal as it relates to s. 30(2) of the Alberta *Judicature Act* and dismiss it as it relates to the rest of the section. I would answer the constitutional questions as follows:

1. Does s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, infringe or deny the right of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

   Yes.

2. If the answer to question 1 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

   No as to s. 30(2); yes as to the rest of s. 30.

3. Does s. 30 of the *Judicature Act* infringe or deny the right to equality guaranteed by s. 15 of the *Charter*?

   No.

4. If the answer to question 3 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

   This question need not be answered.

Canada (Commissioner of Competition) v. CCS Corp., [2012] C.C.T.D. No. 14

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Panel: S. Simpson J. (Chairperson), P. Crampton C.J. and Dr. W. Askanas

Heard: November 16-18, 22-25, 29-30 and December 1-2, 13-14,

2011.

Decision: May 29, 2012.

File No.: CT-2011-002

Registry Document No.: 189

[2012] C.C.T.D. No. 14 | *[2012] D.T.C.C. no 14* | *2012 Comp. Trib. 14*

Reasons for Order and Order IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; AND IN THE MATTER OF an Application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act; AND IN THE MATTER OF the acquisition by CCS Corporation of Complete Environmental Inc. Between The Commissioner of Competition (applicant), and CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey (respondents)

(409 paras.)

Case Summary

Commercial law — Competition — Restrictive trade practices — Mergers — Powers of Competition Tribunal — Factors to be considered — Barriers to entry — Whether effective competition will remain — Removal of a competitor — Order in respect of completed merger — Application by Competition Commissioner for order pursuant to s. 92 of Competition Act allowed — CCS purchased shares of Complete Environmental, acquiring Babkirk Land Services facility — Commissioner alleged prevention of competition between secure landfills taking hazardous solid waste — Despite likely un-profitability of bioremediation processing, Babkirk facility would have operated in meaningful competition with a CCS secure landfill site in area until spring 2013 — Efficiencies claimed by CCS did not satisfy s. 96 of Act, as meaningful competition would have reduced tipping fees by 10 per cent — Least intrusive remedy was order for divesture of shares — Competition Act, ss. 2(1), 91, 92, 96.

Application by the Commissioner of Competition for an order pursuant to s. 92 of the Competition Act. CCS was a private energy and environmental waste management company that served oil and gas producers in Western Canada. It owned the only two secure landfills in North-Eastern British Columbia permitted to accept solid hazardous waste. Babkirk Land Services (BLS) operated a facility with a permit for treatment and short-term storage of hazardous waste. The facility stopped accepting waste and steps were taken to obtain permits for construction of a secure landfill capable of accepting solid, hazardous waste at the Babkirk site. In 2009, Complete Environmental was created to acquire the shares of BLS from its original principals. Complete Environmental operated other landfill and solid waste business interests. In February 2010, BLS received a permit authorizing construction of a secure landfill, but had not commenced operations. In January 2011, CCS

acquired the shares of Complete Environmental and ownership of BLS. The Commissioner alleged that the merger was likely to prevent competition substantially in the market for hazardous waste disposal services in North-Eastern British Columbia. The Commissioner alleged that CCS owned the only two operational secure landfills for solid hazardous waste in the area and thus had a monopoly and market power that allowed price discrimination and pricing of tipping fees above a competitive level. The Commissioner alleged that, as at the date of the merger, Complete Environmental was a poised entrant to the market, as it had obtained the regulatory approvals needed to operate a secure landfill for hazardous solid waste at the Babkirk site. The Commissioner applied for an order dissolving the transaction, or alternatively, a divestiture order requiring CCS to dispose of the shares or assets of BLS in a manner to be directed by the Tribunal. The respondents submitted that a merger was not effected within the contemplation of the Competition Act, as there was no business in operation at the Babkirk site. They contended that Complete Environmental was not a viable market entrant and that in the absence of the merger, the vendors would likely have processed waste using bioremediation, a type of treatment that would not have resulted in meaningful competition with CCS in respect of the supply of secure landfill services. They further challenged the Commissioner's interpretation of the potentially contestable area, and the quantifiable effects of the merger.

HELD: Application allowed.

The acquisition constituted a merger under the Competition Act, as Complete Environmental was actively engaged in the development of the Babkirk Site as a hazardous waste treatment facility at the time of the transaction. The merger was likely to prevent competition substantially in the market for the supply of secure landfill services for solid hazardous waste from oil and gas producers in the geographic market, or potentially contestable area, as identified by the CCS expert. The significant time and uncertainty associated with market entry required 30 months from site selection to the completed construction and operation of a secure landfill in the relevant market. In the absence of the merger, the vendors would likely have operated the Babkirk facility themselves and constructed a new secure landfill by October 2011, operating as a complement to their bioremediation business until no later than October 2012. The bioremediation business would likely have been unprofitable, requiring the vendors to either focus on the secure landfill business, or sell the facility to a secure landfill operator. In either case, until no later than spring 2013, the Babkirk facility would have operated in meaningful competition with one of the CCS secure landfill sites in the area. The prevention of that competition by the merger constituted a likely substantial prevention of competition for the purpose of the Act. The efficiencies claimed by CCS did not meet the requirements of s. 96 of the Act given the absence of meaningful competition. CCS was a monopolist in that market and its significant exercise of market power was maintained as a result of the merger. A decrease in average tipping fees of at least 10 per cent was prevented by the merger. Divestiture was an effective remedy and was the least intrusive option. The Tribunal thus ordered CCS to divest the shares or assets of BLS.

Statutes, Regulations and Rules Cited:

Competition Act, *R.S.C. 1985, c. C-34, s. 2*(1), s. 45, s. 45.1, s. 79, s. 79(7), s. 90.1, s. 90.1(10), s. 91, s. 92, s. 93, s. 96, s. 96(1), s. 96(3), s. 100

Environmental Management Act, *SBC 2003, c 53*,

Hazardous Waste Regulation, (*B.C. Reg. 63/88*),

Interpretation Act, *R.S.C. 1985, c. I-21, s. 12*

Investment Canada Act, *R.S.C. 1985, c. 28 (1st Supp.)*,

Appearances

For the applicant:

The Commissioner of Competition:

Nikiforos Iatrou Jonathan Hood

For the respondents:

CCS Corporation, Complete Environmental Inc. and Babkirk Land Services Inc.:

Linda Plumpton Crawford Smith Dany Assaf Justin Necpal

Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey:

J. Kevin Wright Morgan Burris Brent Meckling

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REASONS FOR ORDER AND ORDER

A. EXECUTIVE SUMMARY

1 The Tribunal has decided on a balance of probabilities that the Merger is likely to prevent competition substantially in the market for the supply of secure landfill services for solid hazardous waste from oil and gas producers in a geographic market which, at a minimum, is the area identified by CCS' expert, Dr. Kahwaty, as the "Potentially Contestable Area".

2 The Tribunal has concluded that CCS is a monopolist in the geographic market and that it exercises significant market power which is being maintained as a result of the Merger.

3 Although Dr. Baye, the Commissioner's expert, suggested a wide range of likely price decreases in the absence of the Merger, the Tribunal has found that a decrease in average tipping fees of at least 10% was prevented by the Merger.

4 There is significant time and uncertainty associated with entry. The Tribunal has concluded that effective entry would likely take a minimum of 30 months from site selection to the completed construction and operation of a secure landfill in the relevant market.

5 The Tribunal has also decided that, in the absence of the Merger, the Vendors would likely not have sold the Babkirk Facility in the summer of 2010 but would have operated it themselves and would have constructed a new secure landfill with a capacity of 125,000 tonnes by October of 2011. This landfill would likely have operated as a complement to the Vendors' bioremediation business until no later than October 2012.

6 The Tribunal has also concluded that the Vendors' bioremediation business would likely have been unprofitable and that by October 2012, the Vendors would likely have changed their business plan to significantly focus on the secure landfill part of their business or would have sold the Babkirk Facility to a secure landfill operator. In either case, no later than the spring of 2013, the Babkirk Facility would have operated in meaningful competition with CCS' Silverberry secure landfill. It is the prevention of this competition by the Merger which constitutes a likely substantial prevention of competition.

7 The efficiencies claimed by CCS do not meet the requirements of section 96 of the Act.

8 Divestiture is an effective remedy and is the least intrusive option.

9 The application has been allowed. The Tribunal has ordered CCS to divest the shares or assets of BLS.

10 In dealing with the facts of this case, the Tribunal's conclusions were all based on an analysis of whether the events at issue were likely to occur.

B. INTRODUCTION

11 The Commissioner of Competition (the "Commissioner") has applied for an order under section 92 of the *Competition Act*, *R.S.C. 1985, c. C-34*, as amended (the "Act"), dissolving a transaction in which CCS Corporation ("CCS") acquired the shares of Complete Environmental Inc. ("Complete") and ownership of its wholly-owned subsidiary Babkirk Land Services Inc. ("BLS") on January 7, 2011 (the "Merger"). In the alternative, the Commissioner requests a divestiture order requiring CCS to dispose of the shares or assets of BLS in a manner to be directed by the Tribunal.

12 In her application (the "Application"), the Commissioner alleges that the Merger is likely to prevent competition substantially in the market for hazardous waste disposal services in North-Eastern British Columbia ("NEBC") because, at the date of the Merger, Complete was a poised entrant by reason of having obtained the regulatory approvals needed to operate a secure landfill for hazardous solid waste on a site at Mile 115, Alaska Highway, Wonowon, B.C. (the "Babkirk Site").

13 Pending the Tribunal's decision on this application, CCS undertook to maintain all approvals, registrations, consents, licenses, permits, certificates and other authorizations necessary for the operation of a hazardous waste disposal facility (the "Babkirk Facility" or "Babkirk") on the Babkirk Site. Complete's other assets and businesses were not subject to this undertaking.

C. THE PARTIES

14 The Commissioner is the public official who is responsible for the enforcement of the Act.

15 CCS is a private energy and environmental waste management company. Its customers are mainly oil and gas producers in Western Canada. CCS owns the only two operating secure landfills in NEBC that are permitted to accept solid hazardous waste. One is the Silverberry secure landfill ("Silverberry"). It opened in 2002. It is located approximately 50 km north-west of Fort St. John. The other is called Northern Rockies secure landfill ("Northern Rockies"). It opened in 2009 and is situated about 340 km northwest of Silverberry, about 260 km from the Babkirk Site and approximately 20 km south of Ft. Nelson. CCS also operates a variety of different types of secure landfills in Alberta and Saskatchewan and owns a separate waste management business called Hazco Waste Management ("Hazco"). Schedule "A" hereto is a map showing the locations of the landfills which are relevant to this Application.

16 BLS was founded in 1996 by Murray and Kathy Babkirk (the "Babkirks"). BLS operated a facility which was not a secure landfill. It had a permit for the treatment and short-term storage of hazardous waste on the 150 acre (approx.) Babkirk Site. It is located approximately 81 km or 1 1/2 hours by car, northwest of Silverberry. The Babkirks operated their facility for approximately six years under a permit from the British Columbia Ministry of the Environment ("MOE") which was issued in 1998. However, in 2004, they stopped accepting waste. Two years later, the Babkirks retained SNC Lavalin ("SNCL") to prepare the documents BLS needed to apply for permits for the construction of a secure landfill capable of accepting solid, hazardous waste at the Babkirk Site.

17 The individual Respondents are the former shareholders of Complete who sold their shares to CCS in the Merger. Karen and Ron Baker are married and Ken Watson is their son-in-law. Tom Wolsey is Randy Wolsey's father. The former shareholders will be referred collectively as the "Vendors". All the Vendors, except Tom Wolsey, gave evidence in this proceeding.

18 In November of 2006, Randy Wolsey, acting on his own behalf and on behalf of other individual Respondents,

negotiated a "handshake agreement" with the Babkirks to purchase the shares of BLS. The deal was conditional on BLS obtaining approval for the secure landfill from the Environmental Assessment Office ("EAO"). In April 2007, the Vendors incorporated Complete (initially called Newco) to be the company that would eventually purchase the shares of BLS. After an extensive process of consultation and review, the EAO issued a certificate (the "EA Certificate") to BLS on December 3, 2008. Four months later, in April 2009, Complete acquired all the outstanding shares of BLS and it became a wholly-owned subsidiary of Complete. Thereafter, on February 26, 2010, BLS received a permit from the MOE authorizing the construction of a secure landfill, with a maximum storage capacity of 750,000 tonnes, and a storage and treatment facility with a maximum capacity of 90,000 tonnes (the "MOE Permit").

19 At the time of the Merger, Complete had other business interests. It operated municipal solid waste landfills for the Peace River Regional District as well as a solid waste transfer station. In addition, it owned a roll-off container rental business (the "Roll-off Bin Business"). Since the Merger, those businesses have been operated by Hazco.

20 CCS, Complete and BLS will be described collectively as the "Corporate Respondents".

D. THE PARTIES' POSITIONS The Commissioner

21 The Commissioner alleges that because CCS owns the only two operational secure landfills for solid hazardous waste in NEBC, it has a monopoly and associated market power which allows it to price discriminate between different customers and set the prices for hazardous waste disposal above a competitive level. These prices are known as "Tipping Fees".

22 The Commissioner alleges that Complete was ready to enter the market for secure landfill services in NEBC and that it was likely that competition between Complete and CCS would have caused a decline in average Tipping Fees in NEBC of at least 10%. Alternatively, the Commissioner alleges that the Vendors would have sold Complete to a purchaser which would have operated a secure landfill in competition with CCS. Finally, the Commissioner maintains that any efficiencies associated with the Merger are likely to be *de minimis*.

The Respondents

23 The Vendors submit that their sale of Complete was not a Merger under the Act because there was no business in operation at the Babkirk Site. They also deny (i) that Complete was poised to enter the market for the direct disposal of hazardous waste into a secure landfill and (ii) that, in the absence of the Merger, an alternative buyer would have purchased Complete and operated a secure landfill. The Respondents maintain that if the Vendors had not sold Complete to CCS, they would likely have processed hazardous waste at the Babkirk Facility using a treatment technique called bioremediation. This type of treatment would have been complemented by a half cell (125,000 tonnes) of secure landfill. The secure landfill would only have been used to store the small amount of hazardous waste that could not be successfully treated, and would not have been used to engage in meaningful competition with CCS in respect of the supply of secure landfill services.

24 The Corporate Respondents challenge both the Commissioner's interpretation of CCS' pricing behaviour and her prediction of the anti-competitive effects she has alleged would likely result from the Merger. Among other things, they allege that the Commissioner's approach to market definition is fundamentally flawed and that the area in which there is scope for competition between the Babkirk and Silverberry facilities is, at best, limited to the very small "Potentially Contestable Area" identified by CCS' expert, Dr. Kahwaty (the "Contestable Area").

25 The Corporate Respondents also submit that the efficiencies resulting from the Merger are likely to be greater than, and will offset, the effects of any prevention of competition brought about by the Merger. They further argue that the Commissioner failed to meet her burden of quantifying the deadweight loss as part of her case in chief. As a result, they say that the Tribunal should conclude that the Merger is not likely to result in any quantifiable effects.

26 Finally, all the Respondents submit that if there is to be remedy, it should be divestiture, rather than dissolution.

E. THE EVIDENCE

27 Attached as Schedule "B" is a list of the witnesses who testified for each party and a description of the documentary evidence.

F. INDUSTRY BACKGROUND

28 The management of solid hazardous waste generated by oil and gas operators is regulated in British Columbia by the *Environmental Management Act*, *SBC 2003, c 53* (the "EMA") and regulations. If the waste produced meets the definition of "hazardous waste" found in the *Hazardous Waste Regulation*, (*B.C. Reg. 63/88*) (the "HW Regulation"), oil and gas operators wishing to dispose of hazardous waste must do so within the confines of the legislative framework. The MOE is responsible for administering the EMA and HW Regulation. Hereinafter, hazardous waste as defined in the HW Regulation which is solid will be described as "Hazardous Waste".

29 Under the HW Regulation, a person must receive a permit from the MOE to operate a facility called a secure landfill that can accept Hazardous Waste for disposal. A "secure landfill" is defined in the HW Regulation as a disposal facility where Hazardous Waste is placed in or on land that is designed, constructed and operated to prevent any pollution from being caused by the facility outside of the area of the facility ("Secure Landfill").

Disposal at Secure Landfills

30 Oil and gas drilling operators (also called waste generators) produce two major types of Hazardous Waste that can be disposed of at a Secure Landfill: contaminated soil and drill cuttings. The contaminants are typically hydrocarbons, salts, and metals.

31 Hydrocarbons are categorized as light-end hydrocarbons and heavy-end hydrocarbons. The evidence shows that Hazardous Waste often includes hydrocarbons of both types.

32 Oil and gas generators can contaminate soil with salt when, among other things, they inadvertently spill produced water or brine. Produced water is water that has been trapped in underground formations and is brought to the surface along with the oil or gas. Metals can be found in Hazardous Waste because they occur naturally or because they have been included in additives used in drilling.

33 The HW Regulation states that a Secure Landfill cannot be used to dispose of liquid hazardous waste.

34 Hazardous Waste from "legacy sites" can also be disposed of at Secure Landfills. Dr. Baye defined legacy waste as "accumulated waste from decades of drilling activity that has been left at the drilling site" ("Legacy Waste").

35 Operators pay third-party trucking companies to transport Hazardous Waste to Secure Landfills. Transportation costs are typically a substantial portion of waste generators' overall costs of disposal. Dr. Baye estimated that a generator would pay $4 to $6 per tonne for every hour spent transporting waste from, and returning to a generator's site.

36 At the hearing, Mr. **[CONFIDENTIAL]** and Mr. **[CONFIDENTIAL]**, indicated that no ongoing liability is shown on their books once Hazardous Waste is sent to Secure Landfills, even though generators could be liable if a Secure Landfill operator goes bankrupt or if the landfill fails and Hazardous Waste leaches out of the facility.

37 The MOE has issued five permits for Secure Landfills. Four of them are in NEBC and are currently valid: Silverberry, Northern Rockies, Babkirk and Peejay.

38 Silverberry has a permitted capacity which allows it to accept 6,000,000 tonnes of waste. At 1.52 tonnes per

cubic meter, which is the same figure used to calculate tonnes at Silverberry, Northern Rockies' permitted capacity is 3,344,000 tonnes. In 2010, **[CONFIDENTIAL]** tonnes of Hazardous Waste was tipped at Silverberry and, in that year, Northern Rockies accepted **[CONFIDENTIAL]** tonnes.

39 Tipping Fees vary depending on the type of waste. According to the evidence given by Dr. Baye, the average Tipping Fee for all substances at Silverberry was **[CONFIDENTIAL]** per tonne in 2010 and the average Tipping Fee for all waste tipped at Northern Rockies in the same year was **[CONFIDENTIAL]** per tonne.

40 Peejay is located in a relatively inaccessible area near the Alberta border. It was developed by a First Nations community to serve nearby drilling operators such as Canadian Natural Resources Limited ("CNRL"). Construction specifications and an operational plan for Peejay were approved by the MOE on March 11, 2009. However, the Secure Landfill has not yet been constructed and there may be financial difficulties at the project.

41 There are presently no Secure Landfills in operation in NEBC which are owned by oil and gas generators.

Bioremediation - Methodology

42 Bioremediation is a method of treating soil by using micro-organisms to reduce contamination. The microbes can be naturally occurring or they can be deliberately added to facilitate bioremediation. In NEBC, bioremediation usually takes place on an oil and gas producing site where the waste is generated. Bioremediation can also be undertaken offsite but the evidence indicates that there are no offsite bioremediation facilities currently operating in NEBC.

43 A common bioremediation technique is landfarming. In landfarming, contaminated waste is placed on impermeable liners and is periodically aerated by being turned over or tilled. The landfarming technique the Vendors planned to use involves turning soil to create windrows which are **[CONFIDENTIAL]** triangular-shaped piles of soil **[CONFIDENTIAL]**.

44 The preponderance of the evidence showed that, given sufficient time, light-end hydrocarbons can be successfully bioremediated in NEBC despite the cold if the clay soil is broken up. However, the Tribunal has concluded that soil contaminated with heavy-end hydrocarbons is not amenable to cost effective bioremediation because it is difficult, unpredictable, and very time consuming. Further, waste contaminated with metals and salts cannot be effectively bioremediated with technologies currently approved for use in Canada.

45 Once bioremediation is complete, an operator will normally hire a consultant to determine whether the Hazardous Waste can be certified as "delisted" in accordance with a delisting protocol. If so, there is no further liability associated with that particular waste.

46 Mr. Watson testified that his company, Integrated Resource Technologies Ltd. ("IRTL"), had successfully bioremediated hydrocarbon-contaminated soil throughout the winter in NEBC and Northern Alberta. Since about 2002, he has been using a specially designed machine from Finland, the "ALLU AS-38H". This machine **[CONFIDENTIAL]** is capable of breaking up heavy clay so that bacteria can enter the windrow and consume the hydrocarbon contaminants.

G. THE ISSUES

47 The following broad issues are raised in this proceeding:

1. Is CCS' acquisition of Complete a "merger"?
2. What is the product dimension of the relevant market?
3. What is the geographic dimension of the relevant market?

4. Is the Merger Pro-Competitive?
5. What is the analytical framework in a "prevent" case?
6. Is the Merger likely to prevent competition substantially?
7. What is the burden of proof on the Commissioner and on a Respondent when the efficiencies defence is pleaded pursuant to section 96 of the Act?
8. Has CCS successfully established an efficiencies defence?
9. Is the appropriate remedy dissolution or divestiture?

ISSUE 1 **IS CCS' ACQUISITION OF COMPLETE A MERGER?**

48 As a threshold matter, the Vendors submit that the Application should be dismissed because, at the date of the Merger, Complete was not a "business" within the meaning of section 91 of the Act, given that it was not actively accepting and treating Hazardous Waste, and was not otherwise operational in relation to the supply of Secure Landfill services. Instead, they maintain that Complete was simply an entity which held the assets of BLS, i.e. permits and property. Accordingly, the Vendors' position is that, because CCS acquired assets which had not yet been deployed, it did not acquire a "business", as contemplated by section 91 of the Act. The Vendors also submit that the other businesses owned by Complete and acquired in the Merger are not relevant for the purposes of this Application because the Commissioner does not allege that they caused or contributed to a substantial prevention of competition.

49 A merger is defined in section 91 as the acquisition of a "business". The section reads as follows:

> In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.
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> * * *
>
> Pour l'application des articles 92 à 100, "fusionnement" désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

50 Business is defined as follows in subsection 2(1) of the Act (the "Definition"):

> "business" includes the business of
>
> (*a*) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
>
> (*b*) acquiring, supplying and otherwise dealing in services.
>
> It also includes the raising of funds for charitable or other non-profit purposes.
>
> * * *
>
> "entreprise" Sont comprises parmi les entreprises les entreprises :

a) de fabrication, de production, de transport, d'acquisition, de fourniture, d'emmagasinage et de tout autre commerce portant sur des articles;

b) d'acquisition, de prestation de services et de tout autre commerce portant sur des services.

Est également comprise parmi les entreprises la collecte de fonds à des fins de charité ou à d'autres fins non lucratives.

51 The Tribunal notes two features of the Definition. First, it uses the word "includes", which means that it is not exhaustive. Second, unlike the definitions of the term "business" found in statutes such as the *Investment Canada Act*, *R.S.C. 1985, c. 28 (1st Supp.)*, the Definition makes no reference to generating profits or revenues.

52 Turning to the facts, it is the Tribunal's view that, for the reasons described below, Complete was actively engaged in the development of the Babkirk Site as a hazardous waste treatment facility.

53 Before the Merger, Complete had taken the following steps:

* It had purchased the shares of BLS, thereby acquiring the EA Certificate and the Babkirk Site;
* It had continued the application process and had secured the MOE Permit;
* It had held numerous shareholders' meetings to plan how the Babkirk Site would be developed as a bioremediation facility and how that facility would operate in conjunction with other businesses owned by the Vendors;
* Its shareholders had discussed bioremediation with Petro-Canada and had solicited its interest in becoming a customer for both bioremediation and Secure Landfill services;
* It had hired IRTL and had paid it **[CONFIDENTIAL]** to bioremediate the soil in cell #1 at the Babkirk Facility. This work was undertaken because it was a condition precedent to the construction of the half cell of Secure Landfill;
* It was developing an operations plan for the Babkirk Facility.

54 In the Tribunal's view, these activities demonstrate that Complete was engaged in the business of developing the Babkirk Site as a Hazardous Waste treatment service that included a Secure Landfill. Since the Definition is not exhaustive, the Tribunal has concluded that it encompasses the activities in which Complete and its shareholders had been engaged at the time of its purchase by CCS. Further, the absence of a requirement for revenue in the Definition suggests to the Tribunal that it covers a business in its developmental stage.

55 For all these reasons, the Tribunal has concluded that Complete was a business under section 91 of the Act at the date of the Merger.

56 In view of this conclusion, it is not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be businesses for the purposes of section 91 of the Act.

57 However, in the Chairperson's view, a business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste. In his separate reasons, Crampton C.J. has taken a different position on this point.

ISSUE 2 WHAT IS THE PRODUCT DIMENSION OF THE RELEVANT MARKET?

The Analysis

58 In defining relevant markets, the Tribunal generally follows the hypothetical monopolist approach. As noted in *Commissioner of Competition v. Superior Propane,* 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 (Comp. Trib.) ("*Propane 1*"), at para. 57, the Tribunal embraces the description of that approach set forth at paragraph 4.3 in the Commissioner's Merger Enforcement Guidelines ("MEGs"), which state:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

59 The price that would likely have existed in the absence of or "but for" the merger in a "prevent case" is the Base Price. The burden is on the Commissioner to demonstrate the "Base Price". In this case, Dr. Baye has predicted a decrease in Tipping Fees in the absence of the Merger of at least 10% and in some of his economic modelling the price decrease is as large as 21%. In *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.,* 2001 Comp. Trib. 3; 11 C.P.R. (4th) 425; aff'd 2003 FCA 131, at para. 92, the Tribunal observed that, when a price change can be predicted with confidence, it is appropriate to delineate markets based on the likely future price even if the future level of that price cannot be predicted precisely. In such cases, it may be sufficient for the Commissioner to demonstrate a range in which the likely future price would have fallen.

60 However, if a reasonable approximation of the likely future price cannot be demonstrated, it may be difficult for the Tribunal to clearly define the boundaries of the relevant market. In such cases, it will nevertheless be helpful for the Tribunal to be provided with sufficient evidence to demonstrate why substitutes that appear to be acceptable at the prevailing price level would or would not remain acceptable at price levels that would likely exist "but for" the merger or anti-competitive practice in question. In any event, evidence about various practical indicia is typically required to apply the hypothetical monopolist approach. The Tribunal recognizes that, like other approaches to market definition, the hypothetical monopolist approach is susceptible to being somewhat subjective in its practical application, in the absence of some indication of what constitutes a "small but significant and non-transitory increase in price" (SSNIP). For this reason, objective benchmarks such as a five percent price increase lasting one year, can be helpful in circumscribing and focusing the inquiry.

61 In the Application at paragraph 11, the Commissioner alleged that "[t]he anti-competitive effects of the Merger "primarily" affect oil and gas companies disposing of Hazardous Waste produced at oil and gas fields within NEBC." [our emphasis]. However, in his initial report Dr. Baye did not limit the product market to Hazardous Waste produced at oil and gas fields. Nevertheless, during the hearing, Dr. Baye and Dr. Kahwaty essentially agreed that the amount of solid hazardous waste generated by non-oil and gas sources and tipped at Secure Landfills in British Columbia is so small that it does not warrant consideration in these proceedings. Accordingly, in the Tribunal's view, the Commissioner's product market definition is "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC".

62 However, the Respondents deny that the product market is as narrow as the Commissioner suggests. They say that it also includes bioremediation and the storage or risk management of waste on the sites where the waste was generated. They assert that these options constrain any market power that CCS may have. We will deal with these positions in turn.

Evidence about the Use of Bioremediation

63 Bioremediation has been described above and the evidence is clear that it is not an acceptable substitute for generators of Hazardous Waste if soil is contaminated with salts or metals. The Tribunal also accepts that, if heavy-end hydrocarbons are present, bioremediation is not cost effective or successful in a reasonable timeframe.

64 Mr. Andrews gave evidence about the use of bioremediation. He joined the MOE in January 2011. At that time, he was asked to review the E-Licensing Database, which keeps track of the progress made by operators who are bioremediating Hazardous Waste. He found that approximately 50% of the operators who had entries in the Database had reported no annual activity. He said that this indicated that many operators "had stopped actively treating H[azardous] W[aste] at these sites, or at least had stopped reporting any activities to the MOE."

65 He therefore contacted Conoco Philips Canada, Suncor Energy Inc. ("Suncor"), Progress, Devon Canada Corporation ("Devon") and Apache Canada Ltd. ("Apache"). They accounted for 80% of the registered sites with no reported activity. Among other things, he asked these operators to update their operations plans and submit annual reports.

66 According to Mr. Andrews' witness statement, three of the operators reported that they had dealt with the Hazardous Waste they were bioremediating by sending it to a Secure Landfill and he anticipated that the remaining operators would do the same because bioremediation had failed. Mr. Andrews also said that Suncor filed an operations plan for its registered bioremediation sites which stated that, in the future, it would be sending all its Hazardous Waste to a Secure Landfill.

67 Mr. Andrews also described his experience with onsite treatment before he joined the MOE. He stated the following in his witness statement [paragraphs 23-26]:

> I managed the HW at seven sites that CNRL had registered. These sites were allocated north of Fort St John and on existing oil and gas lease sites or on abandoned sites. There were approximately 50,000 tonnes of HW at these sites.
>
> Initially, we tried treating the HW onsite. At each of these sites we put the HW into windrows and used a turner to turn the HW three times per year at each site. Hazco Environmental Services was the contractor that provided the windrow turner. We also added fertilizers and nutrients in the soil to assist in the bioremediation process. The fertilizer is meant to add additional nutrients to aid the bacteria to process the hydrocarbons.
>
> CNRL pursued this treatment process for two years. While CNRL was able to reduce the contaminants in the HW at these sites, it failed to reduce the contaminants enough to "delist" the HW. Delisting HW means reducing the presence of contaminants low enough so that the soil is no longer considered to be HW. CNRL spent significant amounts of money on treatment because the sites required constant monitoring. The sites would get wet and require dewatering out to prevent berm overflow and enable equipment access.
>
> Ultimately, after two years of treatment, it was clear that bioremediation would not work to address the contamination issues. CNRL decided to send the remaining HW to a Secure Landfill, specifically Silverberry, which was the landfill closest to the sites. I was also responsible for this process. It took CNRL approximately 2-3 years and several million dollars to send all the waste to Silverberry.

68 **[CONFIDENTIAL]**, who works as a Contracting and Procurement Analysist for **[CONFIDENTIAL]**, testified that its current operations in NEBC are in two fields called **[CONFIDENTIAL]**. He indicated that **[CONFIDENTIAL]** uses Secure Landfills to dispose of its Hazardous Waste and that it does not bioremediate because of the associated costs, the time necessary to bioremediate, and the manpower required to undertake bioremediation. He stated that liability has the potential to remain if the Hazardous Waste is not effectively bioremediated and that additional costs might be incurred if the Hazardous Waste, which is not effectively treated, must be tipped into a Secure Landfill. He added that there is ongoing uncertainty about whether bioremediation is effective or not.

69 **[CONFIDENTIAL]**, the Vice-President of Operations at **[CONFIDENTIAL]**, testified that **[CONFIDENTIAL]** uses an oil-based mud system to reduce friction on horizontal wells and that the oil-based mud cuttings are typically tipped into Secure Landfills. He also stated that **[CONFIDENTIAL]** sees disposal at a Secure Landfill as the most economic alternative for dealing with the Hazardous Waste from drilling, as disposal eliminates the increased

environmental risk and cost of long term storage and/or site remediation. He explained that "[c]ontainment, transport and disposal of hazardous waste generated from drilling operations is currently the only option used by **[CONFIDENTIAL]** for managing hazardous waste generated from drilling." Accordingly, it is clear that, at its current drilling sites, only Secure Landfills are used for disposal.

70 However, with respect to the Legacy Waste in NEBC on drilling sites which **[CONFIDENTIAL]**, Mr. **[CONFIDENTIAL]** testified that **[CONFIDENTIAL]** will bioremediate some of the waste on these sites. He explained that bioremediation of the Legacy Waste had already been started by **[CONFIDENTIAL]**. He stated that the decision to dispose of Hazardous Waste instead of treating it is taken on a case-by-case basis, and depends on the type and amount of Hazardous Waste present on the legacy site, the likelihood of successful remediation, and the cost of excavation, transport and disposal.

71 During a review of the HW Regulation undertaken by the MOE, the MOE retained Conestoga-Rovers & Associates to conduct a report on Secure Landfill disposal. The report is entitled "Secure Landfill Disposal Policy Review" and dated March 2011. It states:

> Based on equal weighting of cost, cost variability, timeline, and treatment certainty landfilling [Secure Landfill] is the preferred option under all scenarios. Landfarming [bioremediation] can be an appropriate method for treating hydrocarbon contaminated soils given appropriate concentrations and a multi-year timeline.

72 Devin Scheck, the Director of Waste Management and Reclamation at the British Columbia Oil and Gas Commission, testified that many operators still choose to dispose of their contaminated soils in Secure Landfills, even in situations where bioremediation is feasible, because of the associated costs and timeframe. He said the following in his witness statement [paragraphs 25-27]:

> In my experience, a significant number of the sites that Operators seek to remediate are remediated by the Operator disposing of the contaminated soils at a landfill. With sites that are only contaminated with light end hydrocarbons, Operators may seek to bioremediate the soil on site, but heavy end hydrocarbons tend to have a poor response to bioremediation. As well, tight clay (which is prevalent in North Eastern B.C. where the oil and gas activity is most prevalent) makes bioremediation difficult, as does the relatively cold weather in the region. The presence of other contaminants, such as salts or metals that exceed CSR standards, prevent bioremediation from being an appropriate option, as salts and metals cannot be bioremediated.
>
> Accordingly, when dealing with anything other than light end hydrocarbons, my experience is that Operators will usually dig up the soil, and dispose of it at a Secure Landfill like Silverberry in B.C. or a closer landfill across the Alberta border, such as the CCS Class II Alberta Landfill at LaGlace.
>
> In my experience, even where bioremediation may be feasible, many Operators will still choose to landfill their contaminated soils. With bioremediation there is much uncertainty about costs, and the timeframe required for treatment is also uncertain. Weather conditions, site access issues, amount/type of treatment, future equipment and labour costs, as well as the costs of ongoing access for treatment and sampling to determine if the soils are remediated contribute to this uncertainty.

73 Mark Polet, an expert environmental biologist with specialized knowledge in environmental assessment, remediation and reclamation, as well as waste facility management development, stated as follows in paragraph 17 of his expert report:

> Once an Operator in NEBC decides to clean up its waste, the two most practical options available are: 1) the disposal of the waste at an appropriate landfill; or 2) the treatment of the waste onsite through a process known as bioremediation. Operators do not have a uniform preference for either option but, in my experience, will choose an option based on cost, risk, efficacy and other reasons such as environmental stewardship.

74 At the hearing, Mr. Polet testified that the costs of bioremediation and secure landfilling can be comparable. He stated:

> Once you define the types [of contaminants], you can decide on the most prudent response. And so, for instance, if I found on a site just the light end hydrocarbons with no other types of contamination mixed with it, I would look at bioremediation as an alternative. If it had salts and metals associated with the contamination, as well, then I would lean very strongly to landfill. If it had heavier end hydrocarbons, I would lean strongly to landfill, as well.
>
> In terms of cost, there -- can be quite comparable in price, but of course bioremediation is very limited in what it can be applied to. And the one thing that we've noticed in working in the field is that when bioremediation is not managed properly, then much material actually lands back up in the landfill, anyway. So it has to be well managed to work properly.

75 There is also evidence about bioremediation in the Statement of Agreed Facts (the "Agreed Facts"). However, at the hearing it became clear that, contrary to the way in which they are presented, some of the facts were not actually agreed. The problematic evidence concerns bioremediation and was gathered in two ways. The evidence in paragraphs 63-67 of the Agreed Facts was given directly to the Commissioner's staff. This evidence will be called "Evidence A".

76 Evidence A has two significant characteristics. The sources are not named and the Agreed Facts state in paragraph 63 that "...the Bureau has not confirmed the truth of the facts communicated to it by the operators..." Evidence A is in the Agreed Facts because CCS insisted that it be included and CCS asks the Tribunal to give it weight and assume it is true.

77 Evidence A reflects that operator "F" bioremediates at least 70% of its waste in BC because it considers bioremediation to be better for the environment. Operators "H" and "J" bioremediate about 50% their waste. These operators appear to be bioremediating on their drilling sites to avoid the transportation charges and Tipping Fees associated with Secure Landfills.

78 Although the Commissioner cannot confirm its truth, the Tribunal is nevertheless prepared to give Evidence A some weight because it can see no reason why industry participants would lie to the Commissioner about their use of onsite bioremediation. However, without knowing the volume of waste produced by "F", "H" and "J", it is impossible to determine whether bioremediation is being undertaken on a significant scale. In any event, it is clear that, even for these waste generators, there is a substantial portion of Hazardous Waste in respect of which bioremediation is not used.

79 The second category of evidence is found in paragraphs 69-74 of the Agreed Facts. It was gathered in July 2011 by representatives of National Economic Research Associates ("NERA"). Dr. Baye works at NERA and it appears that NERA was retained by the Commissioner to interview industry participants. The Commissioner's staff attended these interviews and the six sources are named (**[CONFIDENTIAL]**). No concern is expressed about the reliability of this evidence. This evidence will be called "Evidence B".

80 The Commissioner only called witnesses from **[CONFIDENTIAL]** and **[CONFIDENTIAL]** who, as discussed above, indicated that they do not bioremediate as a matter of policy **[CONFIDENTIAL]**.

81 CCS states the evidence of the other four operators, described in Evidence B, shows that they are active bioremediators and CCS asks the Tribunal to draw an adverse inference from the fact that they were not called by the Commissioner. However, in the Tribunal's view, no such inference should be drawn because the Commissioner had no obligation to adduce the evidence and it was open to CCS to do so.

82 Evidence B shows that **[CONFIDENTIAL]** bioremediates 10-15% of its waste. **[CONFIDENTIAL]** engages in

some bioremediation at about 70% of its sites and **[CONFIDENTIAL]** bioremediates about 75% of its treatable material onsite. (It also appears to treat the balance of treatable material offsite but this is not explained. Since there are no offsite bioremediation facilities in NEBC, the Tribunal has concluded that this statement must refer to offsite treatment elsewhere.) **[CONFIDENTIAL]** bioremediates onsite and sometimes moves waste between its sites for bioremediation. In the last 3-4 years, it has bioremediated 60-70% of its abandoned well waste.

83 It is noteworthy that this evidence gives no volumes for treatable and Legacy Hazardous Waste. In these circumstances, and given that the Respondent did not call witnesses from these four operators or other operators, the Tribunal is not persuaded that bioremediation is being undertaken on a significant scale in NEBC.

Evidence about Storage and Risk Management

84 Storage means that Hazardous Waste is left untreated on a drilling site which is still under lease. As long as the MOE does not order a cleanup, this option is available even though drilling has finished, as long as the operator continues to make the lease/tenure payments for the site. Since such payments are low compared to the cost of cleaning up the site, doing nothing may be an attractive option in some cases and the evidence from Trevor Mackay's examination for discovery is that "many" operators have waste stored on their sites. However, Mr. **[CONFIDENTIAL]** testified that **[CONFIDENTIAL]** does not store the Hazardous Waste generated from drilling operations for long periods of time, due to the cost and potential liability issues. He explained that the typical well site storage costs during drilling operations are **[CONFIDENTIAL]** per well.

85 Risk Management is a process undertaken when drilling is finished and an operator wishes to terminate a lease. The operator must restore the site's surface as nearly as possible to the condition it was in before drilling. Once this has been accomplished, a Certificate of Restoration (also referred to as a Certificate of Compliance) is issued and the operator's lease is terminated. However, the operator remains liable for any issues arising from the Hazardous Waste that is left behind and is obliged to comply with conditions such as monitoring even after the certificate is issued.

86 On this topic, Mark Polet said the following in his reply report:

> Based on my experience, Operators use risk management as a last resort if treatment or disposal are not practical. I rarely recommend it because even if approval is obtained, which in my experience is very difficult, the Operator retains liability and there is a recognition that the site may need to be revisited if issues arise.

87 Pete Marshal, an expert in Hazardous Waste management, testified that, although disposal in a Secure Landfill, bioremediation and risk management are each potentially available methods for dealing with Hazardous Waste, he did not know how many operators choose risk management.

88 This evidence leads the Tribunal to conclude that risk management is seldom used and is not considered to be an acceptable substitute for disposing of Hazardous Waste in a Secure Landfill.

Conclusions about the Product Market

89 Although some operators with Hazardous Waste which is contaminated with light-end hydrocarbons consider bioremediation to be an acceptable substitute for disposal in a Secure Landfill, there is no evidence about the volumes of waste which are successfully bioremediated. More importantly, there is no evidence that the availability of bioremediation has any constraining impact on Tipping Fees in NEBC. In addition, the Tribunal finds that bioremediation is not considered by at least some waste generators to be an acceptable substitute for disposal in a Secure Landfill, particularly in respect of soil that is contaminated with heavy-end hydro-carbons, salts or metals.

90 With regard to storage and risk management, there was no evidence about the volumes stored in NEBC and no

evidence to suggest that the tenure payments or the cost to obtain a certificate of restoration have any impact on Tipping Fees at Silverberry.

91 Because bioremediation is not cost effective and is slow for a substantial volume of contaminated soil in NEBC and because it does not work at all on salts and metals, the Tribunal is satisfied that a substantial number of generators do not consider bioremediation to be a good substitute for the disposal of such Hazardous Waste in a Secure Landfill and would not likely switch to bioremediation in response to a SSNIP. Accordingly, the Tribunal is satisfied that the relevant product is "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC".

ISSUE 3 WHAT IS THE GEOGRAPHIC DIMENSION OF THE RELEVANT MARKET?

92 The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of mergers under the Act. (See, for example, *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* *(1992), 41 C.P.R. (3d) 289*, at 297; *Canada (Director of Investigation and Research) v. Southam Inc*, *[1997] 1 S.C.R. 748*, at para. 79). However, they have cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. (*Southam*, above; "*Propane 1*", above, at para. 48). With this admonition in mind, it is the Tribunal's view that, in this case, the Tribunal may evaluate the competitive effects of the Merger without precisely defining the relevant geographic market.

93 This conclusion is important because, as will be discussed below, the evidence that has been adduced does not permit the Tribunal to delineate the exact boundaries of the geographic market.

94 The Tribunal agrees with the approach taken in the MEGs. The process begins with a small area around one of the merging parties' locations (in this case, a Secure Landfill site) and then asks whether all rivals operating at locations in that area, if acting as a hypothetical monopolist, would have the ability and incentive to impose a small but significant price increase (typically 5%) and sustain that increase for a non-transitory period of time (typically one year). If the postulated price increase would likely cause purchasers of the relevant product in that area to switch sufficient quantities of their purchases to suppliers located outside that area to render the price increase unprofitable, then the geographic dimension of the relevant market would be progressively expanded until the point at which a seller of the relevant product, if acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP.

95 In the case at bar, the evidence dealt with three geographic regions:

I. **The Contestable Area** - this was identified by Dr. Kahwaty on behalf of CCS.

II. **All of NEBC** - the Commissioner, supported by her expert Dr. Baye, submitted this definition of the geographic market.

III. **The Babkirk Polygon** - this area was identified in internal CCS documents dealing with the potential impact of the Babkirk Facility on CCS.

I. The Contestable Area

96 In broad terms, the Contestable Area identified by Dr. Kahwaty encompasses an hourglass shaped area of 11,000 square kilometres which lies between the Babkirk Site and Silverberry. In his analysis, the road network in this area is such that there are some areas in which both Silverberry and a potential landfill at the Babkirk Site may be viable disposal options for customers with well sites in those areas. Dr. Kahwaty acknowledges that the transportation costs required to reach Silverberry or the Babkirk Site are such that both may be economic

alternatives for these customers. In Dr. Kahwaty's view, the geographic scope of the relevant market should be limited to this area.

97 Dr. Kahwaty used Dr. Baye's 10% predicted decline in Tipping Fees as his benchmark for defining the geographic scope of the relevant market. In short, he assessed every well site and calculated whether, if given a 10% reduction off the Tipping Fees paid at Silverberry, the customer would be indifferent as between tipping at Babkirk and Silverberry, having regard for the fact that their total disposal cost (transportation plus Tipping Fee) would be the same for each Secure Landfill. Twelve such customers were identified, accounting for approximately 41,900 tonnes in the Contestable Area. Dr. Kahwaty acknowledged that a larger critical price discount would produce a larger contestable area.

98 The Tribunal is satisfied that a hypothetical monopolist supplying Secure Landfill services to these twelve customers in respect of the Hazardous Waste generated in the Contestable Area would have the ability and incentive to impose and sustain a SSNIP above levels that would likely exist in the absence of the Merger.

99 Indeed, the Tribunal considers that the Contestable Area is likely understated and, in fact, smaller than the minimum area in which a hypothetical monopolist would have the ability and incentive to impose and sustain a SSNIP. The Tribunal has reached this view for several reasons. First, the Tribunal accepts Dr. Baye's position that "Babkirk need not have a location advantage for a customer - and the customer need not switch from Silverberry to Babkirk - for that customer to significantly benefit from the lower Tipping Fees stemming from competition". Second, the evidence suggests that new wells are likely to be drilled in the area between Babkirk and Northern Rockies, and that there is Legacy Waste sitting on abandoned well-sites in that region. Meaningful price and non-price competition between Babkirk and Northern Rockies for at least some of that waste likely would have developed in the absence of the Merger. Third, the geographic extent of the Contestable Area is necessarily limited by Dr. Kahwaty's assumption of a base price that is only 10% below prevailing levels. If that figure is too low Dr. Kahwaty admitted that the geographic market would be larger than the Contestable Area.

100 In addition, the Tribunal notes that the volume of Hazardous Waste generated in the Contestable Area likely is greater than reported by Dr. Kahwaty because he only used data for 2010. Moreover, Dr. Kahwaty excluded CCS' national customers from his analysis and this may also have resulted in an understated geographic market.

101 With respect to the possibility that Secure Landfills in Alberta might be economically accessible for generators of waste in the Contested Area, Dr. Kahwaty stated that "transportation costs are too great for [customers located to the south and east of Silverberry, who currently tip their waste in Alberta] to opt to dispose at a potential landfill at the Babkirk site (even with a significant discount) as compared to disposing at Silverberry at current prices." The Tribunal extrapolates from this and concludes that customers generating Hazardous Waste in the Contestable Area are unlikely to transport their waste to secure landfill sites in Alberta due to the significant transportation costs and potential liability that would be associated with hauling waste over such a long distance.

102 For all these reasons, the Tribunal concludes that the geographic market is at least as large as the Contestable Area. We now turn to whether it could be as large as all of NEBC.

II. All of NEBC

103 NEBC covers approximately 118,800 square kilometres and is vast in comparison to Dr. Kahwaty's Contestable Area. NEBC and the much smaller Contestable Area are compared on the map attached hereto as Schedule "C", which is taken from Tab 29 of Dr. Kahwaty's report of October 21, 2011.

104 Dr. Baye concludes that the relevant geographic market is NEBC on the basis that this is the region where targeted customers are located, including current customers at both Silverberry and Northern Rockies Secure Landfills.

105 In reaching this conclusion, Dr. Baye relies on an economic theory of market equilibrium which predicts that

CCS would have an incentive to compete with an independently operated Babkirk Facility for customers located outside of Dr. Kahwaty's Contested Area. This theory is based on his understanding that CCS' average 2010 Tipping Fees at Silverberry were approximately **[CONFIDENTIAL]** per tonne and its average landfill costs were approximately **[CONFIDENTIAL]** per tonne, yielding a margin in excess of 60%. Using these figures, Dr. Baye assumes that CCS would be prepared to reduce its Tipping Fees by 25% or greater in some areas to retain business in the face of competition from an independent Babkirk Facility.

106 However, among other problems, Dr. Baye's theory fails to take into account the opportunity cost to CCS that would be associated with substantially reducing its Tipping Fees to sell landfill capacity today, which could be sold in the future at higher Tipping Fees to customers located closer to Silverberry. In the absence of any analysis of how this opportunity cost would factor into CCS' current decision-making process, the Tribunal finds that the economic theory relied on by Dr. Baye is not particularly helpful in defining the geographic scope of the relevant market.

107 In his initial report, Dr. Baye also provides estimates based on econometric regression models which he asserts are consistent with this theory and his definition of the geographic market as extending throughout all of NEBC. The first set of models, found at Exhibits 19 and 20 of Dr. Baye's initial report, test his hypothesis that the distance between a Secure Landfill and its closest competitor is a significant predictor of the average Tipping Fees at that landfill.

108 Exhibit 20 predicts that the opening of an independent landfill at the Babkirk Site will result in a large decline in average Tipping Fees at Northern Rockies, because it would reduce the distance to Northern Rockies' nearest competitor to three hours and 49 minutes. However, this ignores (i) the substantial transportation costs that the vast majority of customers who tip at Northern Rockies would have to incur to transport their waste to Babkirk, (ii) the very small number of well-sites located between those two facilities, and (iii) the apparent absence of any incentive for CCS to alter its Tipping Fees at Northern Rockies in response to entry at Babkirk.

109 The second set of regression models are estimates offered by Dr. Baye which relate to a "natural experiment" involving SES' entry at Willesden Green, Alberta, in December 2008. That facility became the closest competitor to CCS' Rocky Mountain House landfill ("Rocky"), located approximately one hour away. In his analysis of CCS' 2010 transactions data, Dr. Baye discovered that CCS substantially reduced the Tipping Fees it charged to several customers subsequent to the opening of SES' facility at Willesden Green.

110 To address the possibility that these substantial price reductions were purely coincidental, Dr. Baye developed "difference in difference" ("DiD") regression models, reported at Exhibit 26 of his initial report. The DiD approach controls for unobserved events, other than SES' entry at Willesden Green, which might have led to the observed decline in Tipping Fees at Rocky. In short, the DiD models include a "treatment" setting in which the event (in this case, entry) occurred and a "control" setting in which the event did not occur. Dr. Baye took the change in Tipping Fees that occurred in the treatment setting and subtracted any change that occurred in the control setting. He interpreted the difference in the change (or the "difference in difference") as the effect of entry at Willesden Green on Tipping Fees at Rocky.

111 It is significant that, in selecting a control landfill, Dr. Baye considered it important to pick a site that "is unlikely to be affected by the treatment event - in this case entry at Willesden Green." One of the principal criteria that he employed in making that selection was that the control landfill had to be "at least 300 km away" from Willesden Green. The same logic would imply that entry at Babkirk would not likely affect Tipping Fees at Northern Rockies, which is situated 260 km away from the Babkirk Site. A key assumption underlying Dr. Baye's DiD models is therefore inconsistent with his definition of the geographic market as all of NEBC. This, together with the fact that Northern Rockies is almost four times further away from Babkirk than SES' Willesden Green facility is away from CCS' Rocky facility, lead the Tribunal to conclude that Dr. Baye's DiD analysis is not particularly helpful in defining the geographic scope of the relevant market. That said, as discussed in detail below, the transactions data which reveals substantial price reductions by CCS to seven of its customers following SES' entry at Willesden Green is relevant to the Tribunal's assessment of the likely competitive effects of the Merger.

112 Finally, the Tribunal notes that Dr. Baye also points to internal documents of CCS which he says are consistent with his definition of the relevant geographic market. However, those documents simply: (i) make projections of the overall annual operating margin (**[CONFIDENTIAL]**) that CCS stood to lose at Silverberry and Northern Rockies were an independent landfill to open at the Babkirk Site; (ii) predict a pricing war if the Babkirk Facility was operated independently or acquired by a third party; (iii) discuss the likelihood of having to compete through "value propositions"; and (iv) reflect that CCS likely takes into account its customers' transportation costs to the next closest competing landfill in setting its Tipping Fees. While these types of statements assist in assessing whether the Merger is likely to prevent competition substantially, they are not particularly helpful to the Tribunal in defining the geographic scope of the relevant market.

III. The Babkirk Polygon

113 The Babkirk Polygon is the third area that was discussed at the hearing. That area was identified by a member of CCS' business development team who was asked to project Babkirk's market capture area. The Tribunal has added a rough depiction of that area on Schedule "C" hereto.

114 The Babkirk Polygon was apparently intended to identify the locations of existing Silverberry customers who would be likely to tip at Babkirk rather than at Silverberry, if Babkirk was operated as a Secure Landfill. In other words, the Babkirk Polygon was CCS' representation of the geographic locations of business it risked losing if Babkirk opened as a Secure Landfill. It includes territory north and west of Babkirk and is a larger area than Dr. Kahwaty's Contestable Area.

115 The Tribunal is satisfied that the locational advantage that the Babkirk Facility would enjoy for customers with drilling operations situated to its north and west is such that those customers would not likely tip at Silverberry in the absence of a very substantial reduction in its Tipping Fees. Given the opportunity cost that CCS would incur by offering such a substantial reduction in its Tipping Fees, and given the absence of any analysis by the Commissioner or Dr. Baye of the impact of that opportunity cost on CCS's decision-making, the Tribunal is not persuaded that CCS would have an incentive to compete for those customers in the absence of the Merger.

116 Likewise, the Tribunal has not been persuaded on a balance of probabilities that such customers who operate to the north and west of the Babkirk Facility would tip at Silverberry, in response to a SSNIP above the maximum average tipping fee level that it believes is likely to exist in the absence of the Merger. For the reasons discussed below, the Tribunal has concluded that such price level will be at least 10% below existing levels. However, transportation costs and the liability associated with transporting Hazardous Waste over the long distance to Silverberry are such that it would require more than a SSNIP to induce waste generators located in those regions to tip their Hazardous Waste at Silverberry.

117 The Tribunal has concluded that the geographic scope of the relevant market is at least as large as the Contestable Area identified by Dr. Kahwaty, and likely falls between the limits of that area and the bounds of the Babkirk Polygon, which includes some of the Contestable Area, but adds significant territory north and west of Babkirk.

118 The Tribunal is satisfied that it would not matter if the geographic scope of the relevant market actually includes additional customer locations in the Babkirk Polygon, beyond the Contestable Area, because CCS would remain the sole supplier of Secure Landfill services to any reasonably defined broader group of customers.

ISSUE 4 IS THE MERGER PRO-COMPETITIVE?

119 CCS has suggested that the Merger is pro-competitive because it brings to the market a new Secure Landfill at the Babkirk Site. CCS further asserts that the Merger will most quickly transform the Babkirk Site into a Secure Landfill to complement CCS' existing business and serve the growing oil and gas industry in NEBC. CCS says that these facts explain its customers' failure to complain about the Merger.

120 The Tribunal disagrees. In its view, a merger which prevents all actual or likely rivalry in a relevant market cannot be "pro-competitive," even if it expands market demand more quickly than might otherwise be the case. Such a merger might be efficiency-enhancing, as contemplated by the efficiency defence in section 96 of the Act. However, it has adverse consequences for the dynamic process of competition and the benefits that such process typically yields. In the absence of actual rivalry, or a very real and credible threat of future rivalry, meaningful competition does not exist.

ISSUE 5 WHAT IS THE ANALYTICAL FRAMEWORK IN A "PREVENT CASE?

121 The "prevention" branch of section 92 was raised in three previous Tribunal cases: *Canada (Director of Investigation and Research) v. Southam Inc.* *(1992), 43 C.P.R. (3d) 161* (Comp. Trib.), rev'd on other grounds *(1995), 63 C.P.R. (3d) 1* (F.C.A.), rev'd, *[1997] 1 S.C.R. 748*, *Propane 1* and *Canadian Waste Services*. However, since those cases were primarily concerned with allegations involving a substantial lessening of competition, the Tribunal did not address in any detail the analytical framework applicable to the assessment of an alleged substantial prevention of competition.

122 In determining whether competition is likely to be prevented, the Tribunal will assess whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger, acting alone or interdependently with one or more rivals. For the purposes of this case, this requires comparing a world in which CCS owns the relevant Secure Landfills in NEBC (i.e. Northern Rockies, Silverberry and Babkirk) with a world in which Babkirk is independently operated as a Secure Landfill.

123 In assessing cases under the "prevent" branch of section 92, the Tribunal focuses on the new entry, or the increased competition from within the relevant market, that the Commissioner alleges was, or would be, prevented by the merger in question. In the case of a proposed merger, the Tribunal assesses whether it is likely that new entry or expansion would be sufficiently timely, and occur on a sufficient scale, to result in: (i) a material reduction of prices, or in a material increase in non-price competition, relative to prevailing price and non-price levels of competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years. If so and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will conclude that the prevention of competition is likely to be substantial.

124 The Tribunal also considers whether other firms would be likely to enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion would probably occur, it is unlikely to conclude that the merger is likely to prevent competition substantially.

125 As noted earlier and as recognized by all parties, the price against which the prevailing prices will be compared will be the price that would likely have existed in the absence of the merger. The burden will be on the Commissioner to demonstrate that price level, or the range of prices, that likely would have existed "but for" the merger.

126 In final argument, the Commissioner and CCS suggested that helpful guidance on the approach that should be taken to prevention of competition cases can be provided by the U.S. jurisprudence pertaining to mergers that have been alleged to reduce potential competition. In the Tribunal's view, that jurisprudence is not particularly helpful to merger assessment under the Act, because it was developed in respect of a different statutory test and, for the most part, many years ago. (It appears that the US Supreme Court and the federal appellate courts have not had an opportunity to revisit that jurisprudence since the 1980s. See M. Sean Royall and Adam J. Di Vincenzo, "Evaluating Mergers between Potential Competitors under the New Horizontal Merger Guidelines", *Antitrust* (Fall 2010) 33, at 35.)

ISSUE 6 IS THERE A SUBSTANTIAL PREVENTION OF COMPETITION?

A. The "But For" analysis

Introduction

127 In *Commissioner of Competition v. Canada Pipe Company Ltd.*, *2006 FCA 233*, the Federal Court of Appeal decided that a "but for" analysis was the appropriate approach to take when considering whether, under paragraph 79(1)(c) of the Act, "...the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially." The specific question to be asked is stated, as follows, at paragraph 38 of the decision "...would the relevant markets - in the past, present or future - be substantially more competitive but for the impugned practice of anti-competitive acts?"

128 Language similar to that found in section 79 appears in section 92 of the Act. Section 92 says that an order may be made where "...the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially." For this reason, the parties and the Tribunal have determined that the "but for" approach is also appropriate for use in cases under section 92 of the Act. The parties recognize that the findings will be forward looking in nature and CCS has cautioned the Tribunal against unfounded speculation. With this background, we turn to the "but for" analysis.

129 The discussion below will address the threshold issue of whether effective competition in the supply of Secure Landfill services in the Contestable Area identified by Dr. Kahwaty likely would have materialized in the absence of the Merger. Stated alternatively, would effective competition in the relevant market likely have emerged "but for" the Merger? After addressing this issue, the Tribunal will turn to the section 93 factors that are relevant in this case, as well as the issue of countervailing power.

130 In undertaking the "but for" analysis, the Tribunal will consider the following questions:

(i) If the Merger had not occurred, what new competition, if any, would likely have emerged in the Contestable Area?

(ii) If the Merger had not occurred, what would have been the likely scale of that new competition?

(iii) If the Merger had not occurred, when would the new competition likely have entered the market?

131 The Commissioner suggested that either June or July, 2010 be used as the timeframe for considering the "but for" world. CCS, on the other hand, was more precise and suggested that the relevant time for this purpose should be the end of July 2010, when CCS and Complete signed the letter of intent which led to the Merger. Since the parties have essentially agreed, the Tribunal will focus on the end of July.

132 The Tribunal's view is that, as of the end of July 2010, there were only two realistic scenarios for the Babkirk Site absent the Merger. They were:

1. The Vendors would have sold to a waste company called Secure Energy Services Inc. ("SES"), which would have operated a Secure Landfill; or
2. The Vendors would have operated a bioremediation facility together with a half cell of Secure Landfill.

133 Extensive evidence was adduced on these topics. The discussion below summarizes the most important aspects of that evidence.

Scenario #1 - A sale of Complete to SES

134 In February of 2007 when the Vendors first met to organize Complete, they decided that their exit strategy would be to sell the company to Newalta Corporation or to CCS. Newalta is a waste company which operates Secure Landfills in Alberta. However, it was always the Vendors' intention to sell only when they could achieve an acceptable return on their investment.

135 In November 2007, Canaccord Capital sent a four-person investment team to Fort St. John to investigate the purchase of a number of the Vendors' companies, including Complete. At that time, the Vendors' intentions about a sale of Complete were recorded in the company's minutes, which, among other things, stated:

> ...consensus at Complete's meeting was to carry on the way we are going unless we are presented with a very attractive proposal from outside. We don't want to do all the work for the benefit of others - better to take a longer time, but to have higher rewards for ourselves...

136 Subsequently, a Vision Statement, dated June 22, 2008, was prepared by Karen Baker. That document stated that they wanted to make a "good return on sale of company". The Statement also observed:

> The VISION of Complete Environmental Inc. is to become a diversified, highly efficient, environmental corporation in NEBC generating a high profit margin thus, presenting itself as an attractive acquisition to multiple potential purchasers.

137 After Complete received its MOE Permit on February 26, 2010, Ken Watson's company, IRTL, offered to purchase Complete for **[CONFIDENTIAL]**. Before that offer was made, the Vendors had not been actively considering a sale. However, IRTL's offer spurred them to seriously consider the matter and, before they responded to IRTL's, they authorized Randy Wolsey to contact CCS and SES for expressions of interest.

138 On March 23, 2010, Randy Wolsey spoke to SES but was told that it had no interest in making an offer because it was busy with its initial public share offering. However, SES did indicate a possible future interest and stated that it valued BLS at approximately **[CONFIDENTIAL]** in either mixed cash and shares or **[CONFIDENTIAL]** plus a share offering. In contrast, CCS expressed immediate interest and Dan Wallace of CCS verbally offered **[CONFIDENTIAL]** for BLS.

139 The Vendors eventually decided to sell Complete to IRTL. However, IRTL's offer was withdrawn in early June 2010 after Ken Watson learned that, contrary to his expectations, Canaccord Capital would not finance IRTL's acquisition of Complete. After Cannacord declined, he did not have time to arrange alternative financing.

140 According to Karen Baker, after IRTL's offer was withdrawn, the Vendors decided to try to sell Complete one last time. They concluded that, if they did not receive an interesting offer, they would operate the Babkirk Facility themselves. This would involve moving forward with an operating plan and constructing a half cell of Secure Landfill. To ascertain if a sale was possible, Randy Wolsey was again asked to contact CCS and SES. In addition, he was asked to contact Newalta. He did so, but Newalta did not respond to his email.

141 At about that time, Dan Wallace of CCS apparently heard that IRTL's offer had fallen through and sent Randy Wolsey an email asking if CCS could renew its earlier offer. Mr. Wolsey responded by offering to sell BLS for **[CONFIDENTIAL]**. On June 22, 2010, CCS agreed to purchase the shares of BLS for that amount.

142 Inexplicably, Randy Wolsey did not tell the other Vendors about his deal with CCS. Instead, he arranged a meeting with SES (the "Meeting"). It was held on June 29, 2010 and was attended by Rene Amirault, President and

CEO of SES, Dan Steinke, SES' Vice-President of Business Development, and Corey Higham, SES' Business Development Representative (the "SES Group").

143 According to the Vendors, the SES Group spent much of the Meeting giving a presentation to show that SES was an attractive investment. An SES brochure prepared for potential investors was used for this purpose. However, the Vendors were not interested in acquiring shares of SES and they testified that no price for BLS or Complete was ever suggested and no offer was discussed.

144 According to Mr. Amirault, he indicated during the Meeting that an all cash offer could be made. The Vendors denied this. Since this evidence is significant and was not included in Mr. Amirault's witness statement, the Tribunal has concluded an all cash offer was not mentioned and that the Vendors understood that SES would only purchase Complete if it could use its shares to finance part of the purchase price.

145 During the Meeting, the SES Group had questions about how to secure the necessary regulatory approvals to allow SES to expand the permitted capacity of the Babkirk Facility and to upgrade the design of the Secure Landfill cells (the "Questions"). The Vendors could not answer the Questions and Mr. Amirault testified that he asked for and was refused permission to speak to Del Reinheimer about the Questions. However, some Vendors could not remember anyone from the SES Group asking for permission to speak to Del Reinheimer about the Questions and other Vendors denied that anyone asked for such permission at that time. Mr. Reinheimer was the Section Head, Environmental Management in the Environmental Protection Division of the MOE.

146 Mr. Amirault stated that following the Meeting, SES was actively interested in purchasing Complete and gave the following reasons to explain its failure to make an offer or submit a letter of intent in July 2010:

* The Questions had to be answered before a price could be established.
* There was no particular urgency about making an offer because there were no other buyers. Mr. Amirault testified that the Vendors had indicated at the Meeting that Complete had promised a First Nation that it would not sell to CCS and the SES Group knew that Newalta was not interested.

147 Mr. Amirault acknowledged that the Questions were about process i.e. "how to" go about getting approvals for increased permitted capacity and enhanced cell design. He also stated that he had no doubt that the approvals would be forthcoming. In these circumstances and because, as described below, SES was actively engaged in the development of another Secure Landfill, it is the Tribunal's view that SES would have known what it needed to spend to increase the permitted capacity and upgrade the landfill cells at the Babkirk Site. Accordingly, the Tribunal does not accept Mr. Amirault's evidence that SES could not establish a purchase price without the answers to the Questions.

148 There is a dispute about whether, on July 6, 2010, Corey Higham sent Ron Baker an email setting out the Questions which had been discussed at the Meeting. Mr. Amirault stated in hearsay evidence in his witness statement that Corey Higham had told him that the email had been sent. A photocopy of that alleged email was appended to Mr. Amirault's witness statement. However, after Ron Baker made a witness statement stating that he did not recall having received the email, no reply evidence was filed by Corey Higham to say that it had, in fact, been sent. The email is an important document to the extent that it evidences an ongoing interest by SES in receiving answers to the Questions. However, given that it was not properly adduced, the Tribunal gives it no weight.

149 As mentioned above, Mr. Amirault testified that Ron Baker told the SES Group during the Meeting that he had promised a First Nation that the Vendors would not sell the Babkirk Facility to CCS. This meant that SES understood that the Vendors were not likely to receive a competing offer. However, this apparently significant detail did not appear in Mr. Amirault's witness statement and was not referred to in his examination-in-chief. It was mentioned for the first time in answer to a question posed by the Tribunal. For this reason, this evidence is not accepted as an explanation for SES' failure to show a more active interest in purchasing Complete.

150 Mr. Amirault acknowledged that the window for undertaking construction in 2010 "...was closing, closing fast" and that SES wanted to begin construction at Babkirk at the end of August or by mid-September at the latest. This meant that, if SES had been actively interested in acquiring Complete, it would have moved quickly to present the Vendors with a letter of intent. Mr. Amirault also testified that, apart from updating its earlier market study of the Babkirk Facility, no further due diligence was required. In addition, he testified that he did not need the approval of his Board of Directors to deliver a letter of intent. In these circumstances, the Tribunal has concluded that SES' failure to follow up more quickly on its meeting with the Vendors and its failure to demonstrate any interest in making an offer at that time are attributable to a lack of active interest in acquiring BLS in July 2010.

151 Ron Baker recalls that he was called by Corey Higham on July 28, 2010. However, Mr. Baker does not remember what Mr. Higham said during that telephone call. Since Corey Higham did not give evidence, the Tribunal considers it fair to assume that he did not make an offer to purchase Complete or propose a letter of intent. Although Mr. Baker does not recall much of his own side of the conversation, he does remember telling Mr. Higham that Complete had just signed a letter of intent with CCS.

152 The Tribunal considers it noteworthy that, since 2007, SES had been developing a new Secure Landfill called Heritage. It was located approximately 153 km south of the Babkirk Site. However, it was not favourably received during public consultations because it was to be located near a populated area and on a site where a landslide had occurred. Corey Higham of SES was told on July 26, 2010 that the EA's review of the Heritage Project had been "suspended" pending further evidence from SES about the suitability of the site. SES eventually abandoned the project in December of 2010.

153 Based on this evidence, the Tribunal has concluded that SES had an ongoing general interest in the Babkirk Facility. It had spoken to Murray Babkirk when he owned BLS and it had indicated possible future interest when Randy Wolsey contacted it in March of 2010. SES also sent its most senior executive to the Meeting in June 2010. However, the Tribunal has also concluded that SES was not actively interested in a purchase in July 2010. It never discussed a potential price, and, although it asked the Questions, the answers were not crucial to setting the price and SES already knew that it would be granted the additional approvals it sought. Finally, although Mr. Amirault testified that there was no due diligence of any consequence to be undertaken, SES did not send a letter of intent and there are no internal SES documents showing that it was preparing to make an offer. The Tribunal has concluded that SES' failure to take a more active interest in purchasing Babkirk is explained by the fact that it was still giving priority to its project at the Heritage site. This is understandable, since it had already invested three years and approximately $1.3 million in developing the project.

154 In all these circumstances, the Tribunal has concluded, on a balance of probabilities, that SES likely would not have made an acceptable offer for Complete by the end of July 2010 or at any time in the summer of 2010 and that the Vendors would have moved forward with their own plans to develop the Babkirk Facility.

Scenario #2 - The Vendors Operate Babkirk

155 The Vendors' position is that Complete was created to purchase BLS and to operate a bioremediation facility on the Babkirk Site. They assert that their plan was to accept only Hazardous Waste contaminated with light-end hydrocarbons which could be treated using bioremediation.

156 However, the Vendors recognized that bioremediation might sometimes fail and that they might be left with clumps of contaminated soil ("Hot Spots") after the surrounding waste had been successfully treated. The Vendors understood that the contaminated soil would have to be placed in a Secure Landfill before the remaining soil could be tested and de-listed as non-hazardous waste.

157 To enable BLS to permanently dispose of the contaminated soil from the Hot Spots and to attract customers to the Babkirk Facility, the Vendors proposed to construct a Secure Landfill on the Babkirk Site, which they described as "incidental" to their treatment operation. This meant that only soil that was not successfully treated using

bioremediation would be moved into the Secure Landfill. The Tribunal will give this meaning to the term "Incidental" in the context of the Vendors' Secure Landfill in the balance of this decision.

158 The Commissioner denies that the Vendors' Secure Landfill was only to be used on an Incidental basis. She maintains that the Vendors always intended to accept and directly and permanently dispose of all types of Hazardous Waste in their Secure Landfill. We will refer to this business model as a "Full Service" Secure Landfill. To support her position, the Commissioner relies, in part, on the documents used to obtain the EA Certificate and the MOE Permit. These documents will be described collectively as the Regulatory Approval Documents ("RADs"). As discussed below, the RADs clearly indicate that a Secure Landfill was to be opened on the Babkirk Site. The Commissioner also relies on the Draft Operations Plans (the "Operations Plan") for the Babkirk Site, which show that a Full Service Secure Landfill was planned.

159 Finally, the Commissioner relies on statements in a variety of documents which she asserts reflect that the Vendors intended to compete with CCS. She submits that references in those documents to competing with CCS meant operating the Babkirk Facility as a Full Service Secure Landfill.

The Vendors' Documents

160 The Vendors explained that they needed an EA Certificate and an MOE Permit for a Secure Landfill in order to accept Hazardous Waste of any kind for any type of treatment at the Babkirk Facility. However, they also stated that neither document required them to operate on a Full Service basis. In other words, although they were entitled to do so, they were not required to accept all types of Hazardous Waste for direct disposal. Instead, they were free to operate an "Incidental" Secure Landfill.

161 The Vendors ask the Tribunal to focus on the documents which were prepared when Complete was being incorporated and when the MOE Permit was finally granted, as the best evidence of their intention, which they say was to use the Secure Landfill on the Babkirk Site only as Incidental to their bioremediation. The five documents in this category will be described as the "Vendors' Documents". We will deal with them in turn below.

162 Minutes of a meeting that Randy Wolsey and Ken Watson attended with Del Reinheimer and other MOE and EAO officials on January 24, 2007. The minutes state:

> Ken [Watson] discussed the remediation side of the facility's operations, which will continue even after (if) the landfill is constructed. He stated that he has had interest expressed from companies who wish to pursue remediation as well as landfilling. Ken outlined some of the practices and equipment currently used in other operations with which he is involved, and showed some pictures and videos of the equipment (e.g. ALLU AS 38 composting machine) in action.
>
> Ken and Randy stated that their intention would be to have an ALLU AS 38 kept at the facility full-time. They cited that it would be capable of processing up to about 25,000m per day of Peace River region clay.

[our emphasis]

163 In his testimony, Mr. Reinheimer agreed that his understanding was that the Vendors were going to operate a bioremediation facility and that it was an open question whether or not the Secure Landfill, for which application had been made, would ever be built. In the Tribunal's view, this evidence supports the Incidental nature of the Secure Landfill.

164 Minutes of a Newco meeting dated in February 2007. These minutes record the Vendors' vision for their new business, which was to become Complete. The minutes make no mention of a Secure Landfill at the Babkirk Site. They speak only of processing waste. The document also describes CNRL and Petro-Canada as customers

for treatment and indicates that Petro-Canada has been interested for years. In context, it is clear that Petro-Canada's interest was in bioremediation. The fact that a Secure Landfill is not mentioned even though the application for its approval was already underway, strongly suggests that it was to play an Incidental role in Complete's business at the Babkirk Site.

165 The minutes read as follows:

> **Newco name** should be "**Environmental Services Co**." not "Waste Management (Facility) Co." **Services** to be offered by Newco were suggested to include drilling for sites in the 115 area, remediation on clients' sites, excavation at client sites, and processing at 115 landfill. We could also coordinate the trucking to haul clients' contaminated dirt that we would excavate at client sites to Mile 115 for processing, although we would not own such trucks.
>
> The **Target Market** would be environmental engineering companies and end-user oil and gas companies such as PetroCanada and CNRL. It would be good if we could get a letter from PetroCan/Matrix regarding the potential amount of work. Our services are needed - PetroCan has been interested for years now. This should be a "Market Pull" rather than "Product Push" situation.
>
> There would considerable **landfill preparation** at Mile 115 [the Babkirk Site]. Randy suggested Tom would probably like to be involved here with heavy equipment operation. We expect to have the permit by Nov 1/07. It would probably take 1 year for money to come in from sales for the landfill itself since we have to build the cells.
>
> [the emphasis is in the original]

166 The Tribunal has studied the final passage quoted above and has concluded that, although the term "landfill" is used, the topic under discussion was actually bioremediation and the Vendors' plan to sell the successfully treated soil.

167 A diagram outlining Newco's operation. This document shows how Complete's treatment facility on the Babkirk Site would complement other businesses operated by the Vendors. The diagram does not refer to the existence of a Secure Landfill. This omission also suggests that a Secure Landfill was not a significant part of Complete's business or of the Vendors' plan to integrate a number of their businesses.

168 Minutes of January 20, 2010. This document describes a meeting that Ken Watson and Ron Baker attended with Del Reinheimer and other officials from the MOE to discuss the Vendors' plans for the Babkirk Site. By this time, Complete owned Babkirk and had received the EA Certificate. The issuance of the MOE Permit for the Secure Landfill was the next step. The relevant portions of the minutes read as follows:

> Ken [Watson] and Ron [Baker] both stressed that although they would rather not use Babkirk as a Landfill but as a treatment facility, industry demands that Babkirk is Permitted as a Secure Landfill prior to transporting materials to or using Babkirk in any way. The term "Secure" appears to be of utmost importance to all major oil and gas companies.
>
> * Although Del [Reinheimer of the MOE] didn't understand why industry perceives as such, he realized the concern.
> * He stated that even though the Permit may be approved, operation of a Secure Landfill may not begin until the Operating Plan is also approved and the landfill has been constructed.
> * Ken and Ron agreed it is rather the perception of the word "Secure" that is required at this time to entice clients, than the use of an actual operating landfill.
> * Ken suggested that prior to approved Secure Landfill operations, unacceptable material could be sent to CCS (small amount around contamination source) and the remainder could be accepted at Babkirk.

> All agreed construction of the landfill is to commence within 2 years of Permit issuance; and that the Landfill Operating Plan must be completed prior to construction but the issuance of the Permit itself is not affected by the existence or not of the Operating Plan.
>
> Ron [Baker] suggested that the Permit read that the construction phase of the landfill be completed in small segments of a 1/2 cell over a period of time rather than the construction of a full 1/2 cell at one time (as suggested by Reg).

[our emphasis]

169 In the Tribunal's view, there are several reasons why this document indicates that the Secure Landfill at the Babkirk Site was to be Incidental. First, Ron Baker was suggesting that even a half cell was not needed and proposed that smaller segments be constructed. This approach makes sense only if the Secure Landfill was to be Incidental. No one intending to compete with CCS' Full Service Secure Landfill at Silverberry would contemplate the construction of a small segment of a half cell.

170 Second, the Incidental nature of the Secure Landfill is disclosed when Ken Watson suggested that, before the Secure Landfill was operational at Babkirk, unacceptable material could be moved to CCS. The interesting point is that the unacceptable material is not material delivered by waste generators for direct disposal into the Secure Landfill at the Babkirk Site. Rather, it is only the "small amount around [the] contamination source" or, in other words, the material around Hot Spots. Once again, this confirms that the Vendors' intention was that their Secure Landfill would only be used on an Incidental basis.

171 Minutes dated March 20, 2010. These minutes reflect the Vendors' thinking in response to the offer to purchase that they received from IRTL. The minutes indicate that, at that time, they believed they had the following three options:

1. Operate start first secure cell and bioremediate [inc salt];
2. Bioremediate without cell;
3. Sell ???

The Minutes also stated:

> "Need 12 month season to see how well bioremediation works."

172 The Vendors ask the Tribunal to note that this evidence all predates CCS' purchase of Complete and the Commissioner's interest in the Merger. The Vendors also submit that their evidence at the hearing was consistent with their intention to operate only an Incidental Secure Landfill. Both the proposed manager of the Babkirk Facility (Randy Wolsey) and the man who would be in charge of daily operations (Ken Watson) testified that the only waste they intended to accept at Babkirk was waste which could be bioremediated.

The RADs

173 There are numerous RADs, however, those which are particularly relevant are: the "Terms of Reference" dated August 29, 2007; the "Application for an Environmental Assessment Certificate" dated February 11, 2008; the "Babkirk Secure Landfill Project Assessment Report" dated November 12, 2008; and a "BC Information Bulletin" dated December 9, 2008.

174 The first significant RAD is the Terms of Reference for the Babkirk Secure Landfill Project. It was approved by the EAO on August 29, 2007.

175 Section 3.1 reads as follows:

> The Proponent [Murray Babkirk] has experienced a considerable decline in the amount of waste brought to the existing facility for storage and treatment since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, B.C.) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.
>
> [...]
>
> This section will provide:
>
> [...]
>
> - a list of the materials to be accepted at the Project for disposal;
>
> - a general description of the criteria that will be used to determine whether contaminated soil will be disposed of directly into the secure landfill or treated by bioremediation;
>
> [...]
>
> [our emphasis]

176 This document suggests that the proposed facility on the Babkirk Site would accept Hazardous Waste for direct disposal into the Secure Landfill and that the Secure Landfill was being developed so that the Babkirk Site could compete with CCS at Silverberry. This document was first drafted by SNCL on the instructions of Murray Babkirk, who was effectively the proponent, since, with his wife, he owned BLS. However, as discussed below, some of the Vendors later reviewed it and they did not suggest changes to reflect their intention to operate only an Incidental Secure Landfill. Since the further RADs contain similar language, it is not necessary to describe them in detail. The Tribunal is satisfied that they all indicate that there would be a Full Service Secure Landfill on the Babkirk Site.

177 It is clear that some of the Vendors were, in Karen Baker's words, "integrally involved" during the regulatory process leading to the EA Certificate. Some attended and assisted with information sessions, consultation meetings, and presentations to First Nations; some were included in correspondence regarding the EA Certificate; some participated directly in drafting or reviewing some of the RADs; and some assisted the Babkirks with technical matters. The Vendors also advanced funds which the Babkirks were able to use to finance the environmental assessment process and pay the fees charged by SNCL. This financial support totalled approximately $300,000 and was deducted from the purchase price that Complete eventually paid the Babkirks for the BLS shares. In all these circumstances, the Commissioner submits that the RADs reflect the Vendors' true intentions.

178 However, the Vendors state that while the RADs authorized the construction of a Full Service Secure Landfill, they say nothing about the Vendors' intentions. Mr. Baker explained that, as far as the Vendors were concerned, as long as they had an approval for a Secure Landfill, no one would complain if they chose to operate it on an Incidental basis. He also stated that, if they had asked to amend the Terms of Reference, which is clearly the document on which the later RADs were based, it would have slowed down the approval process for changes that, in the Vendors' opinion, were unnecessary.

179 The Tribunal has concluded that this explanation is reasonable and that it underpins Mr. Baker's response when he was asked why the Vendors didn't correct the Terms of Reference to reflect their intention to operate an Incidental Secure Landfill. He testified:

> [...] There was nothing in it that was that onerous to us or important to us to warrant changing.

180 In view of this explanation and in view of the Vendors' Documents which, starting in January 2007, consistently show that their plan was to operate an Incidental Secure Landfill, the Tribunal concludes that, although the RADs accurately described what could be offered at the Babkirk Facility, they did not accurately reflect the Vendors' intentions.

The Operations Plan

181 The Vendors never completed an Operations Plan for the Secure Landfill on the Babkirk Site.

182 The first Operations Plan was prepared by SNCL. An early and incomplete draft of that document is dated January 9, 2008. The evidence showed that a revision was prepared in December 2008. The Tribunal is satisfied that both versions provided in several places that the Secure Landfill could be operated on a Full Service basis. For example:

> [...] The addition of secure landfill capabilities to this facility would allow for direct disposal in addition to treatment and remediation of contaminated soil. This addition would allow the Babkirk facility to compete with the nearby Silverberry Secure Landfill facilities. The proposed facilities would be contained entirely within the footprint of the former facilities.
>
> [our emphasis]

183 Mr. Baker's evidence was that the Vendors worked directly with SNCL on the Operations Plan and that they had worked "quite a little bit" on revisions to the first draft. However, he testified that when the Vendors reviewed the revised version they were not satisfied and decided to prepare their own plan. He added that writing a new plan would have taken "months" of work.

184 However, other evidence makes it clear that the Vendors did not pursue the idea of rewriting the Operations Plan. Minutes of Complete's meeting, which Ron Baker attended in March 2010, show that the Vendors then thought that it was "mostly in order" and that only a couple of weeks were needed to put it in final form for the MOE. Minutes of a later meeting in May 2010 suggest that the Operations Plan needed "4-5 days work".

185 Mr. Baker acknowledged that he understood the Operations Plan to be saying that waste generators could directly and finally dispose of untreatable Hazardous Waste into the Secure Landfill at the Babkirk Site. In this regard, the transcript of his cross-examination at p. 1212 reads:

> **Mr. Iatrou**: So you would accept waste. Some of it might be highly contaminated, not really treatable. That would stay in [the secure landfill], but the stuff that could be treated would come out of that cell as capacity and the bioremediation cell was freed up?
>
> **Mr. Baker**: That's correct.

186 However, a review of Mr. Baker's entire cross-examination on the Operations Plan reveals, in the Tribunal's view, that when he gave that answer, he was not saying that the Vendors intended to operate a Full Service Secure Landfill. Rather, he was describing what was possible under the plan. This difference becomes clear in the following

exchange:

> **Mr. Iatrou**: You would accept the same sort of material that you could take to Silverberry?
>
> **Mr. Baker:** Yes, correct. We could accept it. Our plan was not to accept the type of soil that can only go to Silverberry, if you get my drift here. I suppose I have to explain that slightly.

[our emphasis]

187 Towards the end of his cross-examination, Mr. Baker began to answer questions from the Vendors' perspective. For example, when asked about the section of the Operations Plan that spoke about closing secure cells once they were filled, he stated "This was the concept, that if we ever got around to using the Secure Landfill section of our facility..." [our emphasis].

188 And at the end of his examination, when asked whether or not all three secure cells had to be built at once, Mr. Baker said "No, no, no. This whole idea of graded construction was that we - our intention half of one cell and never have to do anything further. That was our intention. We would store so little of this landfillable material in that portion of a cell that it would last us the lifetime of our interest in this operation." [our emphasis].

189 In the Tribunal's view, it is clear that the Vendors' approach to the Operations Plan was the same as it had been to the RADs. A plan that permitted the direct disposal of Hazardous Waste did not oblige the Vendors to accept it. It is obvious to the Tribunal that, from the early days of Newco in 2007, the Vendors wanted to make the Babkirk Facility as attractive as possible for sale and this meant that it had to be capable of being operated as a Full Service Secure Landfill. However, this does not mean that the Vendors intended to operate the Babkirk Facility in that manner given their long expressed preference for a bioremediation facility with an Incidental Secure Landfill.

Was Babkirk Going to Compete with CCS?

190 The Commissioner also relies on what she describes as the Vendors' expressed intention to compete with CCS to support her allegation that Complete was poised to operate a Full Service Secure Landfill at the Babkirk Site. The statements on which she relies are found in the RADs, the Operations Plan and in Complete's minutes.

191 There is no doubt that, in 2006 when the Babkirks approached SNCL to work on documents for the EA Certificate, they intended to operate a Full Service Secure Landfill on the Babkirk Site once the approvals were in place. As noted earlier, the original project description prepared by SNCL makes this clear when it says:

> The Proponent [BLS owned by the Babkirks] has reportedly experienced a considerable decline in his soil storage and treatment business since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, BC) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.

[our emphasis]

192 This language is repeated in the Terms of Reference and the point is made even more clearly in the application for the EA Certificate. It states that the proposed facility would allow the proponent to provide "market

competition for direct disposal of waste soil" and speaks of the Babkirk Facility being in "direct competition" with CCS at Silverberry.

193 The Vendors' Operations Plan also mentions that the Secure Landfill has been added to the Babkirk Site to allow it to compete with Silverberry and, in the Vision Statement she wrote for Newco, which is attached to minutes dated June 22, 2008, Karen Baker stated that the Vendors wanted Complete "...to become the Number One Competitor to the industry leader [CCS/Newalta]".

194 In his cross-examination at the hearing, Randy Wolsey acknowledged an intention to compete with CCS. However, he testified that while landfilling and competing with Silverberry was "going to happen", it would be on a "very different scale" because the Vendors were going to supply a "brand new service".

195 Mr. Baker also acknowledged in his testimony that the Vendors did intend to compete with CCS and others, but not on price. He stated that they were going to compete by offering a service that was different from anything offered by CCS or Newalta.

196 The Tribunal has concluded that Complete intended to "compete" with Silverberry by offering a new bioremediation service, and that its statements about competition were not intended to mean that the Vendors planned to operate a Full Service Secure Landfill on the Babkirk Site.

Conclusions

197 If the Merger had not occurred, it is the Tribunal's view that, at the end of July 2010, in the absence of a letter of intent from SES, the Vendors would have proceeded to develop the Babkirk Facility. This would have involved:

* Completing the Operations Plan;
* Securing the MOE's approval for the Operations Plan;
* Constructing a half cell of Secure Landfill capacity i.e. 125,000 tonnes; and
* Accepting Hazardous Waste for bioremediation and moving waste that could not be successfully bioremediated into the Incidental Secure Landfill.

198 Although there was evidence to suggest that the Vendors might have decided to start accepting waste for bioremediation without any Secure Landfill capacity, the Tribunal has concluded that the Vendors would likely have built their half cell of Secure Landfill as soon as possible for two reasons. First, the Vendors told Del Reinheimer of the MOE on January 20, 2010 about the importance customers placed on having Secure Landfill capacity available. Indeed, Petro-Canada had refused to deliver waste for bioremediation until the Vendors opened a Secure Landfill. Second, Ken Watson testified that the plan was to store in the Secure Landfill all waste that was awaiting treatment. Presumably, this storage capacity would have been needed as soon as the business started in earnest.

199 The Tribunal has also concluded that it is more likely than not that the Vendors would have had an approved operations plan by the end of October 2010 and that the three months of preparatory work, which Ken Watson testified was needed before the Babkirk Facility could accept waste, would have been substantially completed by the end of October 2010.

200 This means that in the spring of 2011, the Vendors would have been able to accept waste for bioremediation. However, since generators had advised that they would not tip until a Secure Landfill was available, it is unlikely that any meaningful quantity of waste would have been delivered. Construction of the half cell of Incidental Secure Landfill would have begun as soon as the construction season opened in June 2011. Accordingly, given that the evidence showed that the construction would take three or four months, the Tribunal has concluded that the Babkirk Facility would have been fully operational by October 2011.

201 The evidence establishes that the Vendors felt that a twelve month period was needed to see how well bioremediation would work. The Tribunal therefore considers it reasonable to project that the Vendors would have carried on with bioremediation as their principal focus through the fall of 2012. However, the Tribunal has also concluded that, notwithstanding Ken Watson's contacts and his experience with bioremediation, the Vendors' bioremediation business would have been unprofitable for the reasons discussed below.

202 There would have been few if any customers for two reasons. First, while the evidence showed that there is a significant amount of treatable soil on drilling sites in the area around the Babkirk Facility, the bioremediation that presently occurs is done by generators on their own sites. There was no evidence that any companies are paying to transport waste to offsite bioremediation facilities in NEBC. Although Ken Watson testified that he expected that CNRL, Encana, and Bonavista would be interested in disposing of their waste in this fashion and, although Petro-Canada had been interested, the Vendors did not call evidence from any prospective customers to say that they would be prepared to truck their waste to the Babkirk Facility for bioremediation. Further, the Vendors provided the Commissioner with a list of potential customers and **[CONFIDENTIAL]** was first on that list. However, Mr. **[CONFIDENTIAL],** Vice-President, Operations at **[CONFIDENTIAL]**, testified for the Commissioner that **[CONFIDENTIAL]** philosophy is "going to landfill". In other words, his company was not a significant potential customer for the Vendors' bioremediation facility.

203 Second, the Vendors testified that the Tipping Fees they would charge for bioremediation would be significantly higher than Silverberry's Tipping Fees for Secure Landfill services. It is difficult to imagine that generators with waste that could be bioremediated on their own sites would pay large sums to transport their Hazardous Waste to Babkirk and tip there at rates higher than those at Silverberry, given that they could continue to bioremediate on their own sites or tip for less at Silverberry.

204 Further, there was no evidence from any potential purchasers who might have bought treated waste from Complete for use as cover for municipal dumps or as backfill for excavations. It does not appear that any such sales would have been available to generate revenue for Complete.

205 It is not clear how long the Vendors would have been prepared to operate on an unprofitable basis, without beginning to accept more waste at the Secure Landfill part of the Babkirk Facility. In their final written submissions, the Vendors ask the Tribunal to assume that they would have incurred losses for two years before they decided that their venture had failed.

206 However, the Tribunal has concluded that, because there was no evidence that the Vendors have deep pockets or significant borrowing power, it is unreasonable to suppose that they would have been prepared to operate unprofitably beyond the fall of 2012, when they could have generated additional revenues by accepting more waste into the Secure Landfill part of their facility.

207 Accordingly, it is the Tribunal's view that the Vendors would have started to operate a Full Service Secure Landfill at least by the spring of 2013. In other words, they would have begun to accept significant quantities of Hazardous Waste for direct disposal into Babkirk's Secure Landfill, in competition with CCS. In the alternative, they would have sold Complete or BLS to a purchaser which would have operated a Full Service Secure Landfill. Given that the Vendors had a valuable and scarce asset and given the evidence that demand for Secure Landfill services has, for some time, been projected to increase as new drilling is undertaken in the area north and west of Babkirk, the Tribunal is satisfied that such a sale would have been readily available to the Vendors. Finally, whether Babkirk was operated by the Vendors or a new owner, Babkirk and Silverberry would have become direct and serious competitors by no later than the spring of 2013.

208 We have reached this conclusion notwithstanding CCS' submission that the Vendors' lack of experience and the smaller capacity of the Babkirk Facility would have constrained it from functioning as a serious competitor. In our view, as they had done in the past when they retained IRTL, the Vendors would have hired experts, if needed,

to redress their lack of expertise. Moreover, 750,000 tonnes of permitted capacity was sufficient to allow the Vendors or a purchaser to compete effectively with CCS at Silverberry.

209 To summarize, the Tribunal has decided that it is likely that the Vendors would have operated a bioremediation treatment facility with an Incidental Secure Landfill for approximately one year from October 2011 to October 2012 (the "Initial Operating Period"). Thereafter, in the spring of 2013, the Babkirk Facility would have become a Full Service Secure Landfill.

210 Turning to the impact of these developments, it is the Tribunal's view that, as soon as the half cell of the Secure Landfill capacity at the Babkirk Facility was operational in October of 2011, waste generators who tipped at Silverberry would have seen that there was a potential alternative to Silverberry at the Babkirk Facility. The Tribunal cannot predict what would actually have happened. However, we can reasonably expect that, during the Initial Operating Period, some generators of Hazardous Waste would have asked the Vendors to take their waste for direct disposal, if only to use the possibility of disposing at Babkirk as a basis for negotiating lower Tipping Fees at Silverberry. This would have been possible because many oil and gas producers have one year non-exclusive contracts with CCS.

211 As well, given that the Vendors would have needed revenue and given that it might have been convenient for some of their customers, it is reasonable to assume that the Vendors would have accepted at least some Hazardous Waste for direct disposal during the Initial Operating Period, in spite of their evidence that this was not their intention. This possibility was foreseen by Ron Baker when, in his cross-examination, he was asked about the decision matrix in the Operations Plan which reflected that soil which arrived and could not be bioremediated would be landfilled with other soil that could not be bioremediated. He said that, "if we had room", "chances are" such soil would be put in the Secure Landfill.

212 The question is whether this competition afforded by Babkirk in the Initial Operating Period can be considered substantial. In *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* *(1997), 73 C.P.R. (3d) 1*, the Tribunal addressed the question of the potential importance of a small amount of competition, in the course of examining the impact on Yellow Pages consultants of Tele-Direct's discriminatory anti-competitive practices. In that case, the Tribunal was considering whether there had been a substantial lessening of competition.

213 The Tribunal heard evidence that consultants, who charged fees to place Yellow Pages advertisements, had lost time and money and that their ability to attract new customers had been damaged by Tele-Direct's conduct. The Tribunal also found that, although the consultants only occupied a small segment of the market and had a limited and fragile ability to compete with Tele-Direct, they had had a significant positive influence on the level of service Tele-Direct provided to customers who were purchasing yellow pages advertisements. In this context the Tribunal stated at paragraph 758:

> Where a firm with a high degree of market power [Tele-Direct] is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial.

214 In contrast, in this case, the Tribunal has concluded that the competition offered by the Babkirk Facility in the Initial Operating Period would likely have had no material, let alone significant, impact on pricing at Silverberry, because any competition would have been offered on an extremely small scale. In our view, during the Initial Operating Period, Silverberry could have ignored any requests by customers for lower prices because the Babkirk Facility would not have been a viable alternative for the volumes of Hazardous Waste oil and gas producers tipped at Silverberry. This means that the prevention of any competition that would have developed in the Initial Operating Period would not have been "substantial".

215 Turning to the spring of 2013, the competition that would have been offered by Babkirk as a Full Service

Secure Landfill would have been direct and substantial and, as discussed below, it is this competition that was substantially prevented by the Merger.

B. What are the Relevant Assessment Factors?

Conditions of Entry

216 The conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially. This is because, "[i]n the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time"(*Hillsdown*, above, at 324; see also *Propane 1*, above, at para. 127).

217 To be effective, entry must be timely, likely and sufficient to ensure that any prevention of future competition will not be substantial.

218 CCS maintains that the evidence in this case is that the Secure Landfill business is not characterized by significant entry barriers and that the conditions for entry are conducive for potential competitors. In this regard, CCS asserts that (i) the regulatory regime is permissive, as evidenced by the fact that a number of permits to operate a Secure Landfill have been granted in NEBC in recent years, (ii) there is a growing market in the NEBC region for oil and gas drilling and related services, coupled with a growing demand and pressure for socially responsible waste management alternatives, and (iii) the industry practice of engaging in short-term contracts is conducive to entry. CCS further asserts that the Commissioner's reliance on the fact that BLS took nearly four years to obtain its Secure Landfill permit is misplaced, most importantly because BLS did not pursue concurrent permitting. Concurrent permitting allows an applicant to pursue applications for EA Certificates and an MOE Permits (together the "Authorizations") in tandem. CCS also asserts that entry is much less time consuming if a remote area near Babkirk is selected. Thus, attempts to develop secure landfills in populated areas around Dawson Creek should not be accepted as precedents for the timing that entry might involve near Babkirk.

219 Among other things, prior to seeking the Authorizations, a new entrant must spend several months selecting a site from among various potential sites. This involves drilling test holes to determine whether the site's subsurface characteristics are appropriate for Secure Landfilling. If so, a further assessment is undertaken which involves drilling multiple test holes and installing monitoring equipment. There is no evidence about the time needed to complete only a site selection. However, **[CONFIDENTIAL]** spent 15 to 18 months on site selection and the preparation of an application for a potential landfill.

220 Once a potential entrant has completed the site selection described above, it must then obtain the required Authorizations. The evidence is that this process would likely take at least 18-24 months and that a further 3 to 4 months are needed for construction.

221 Notwithstanding the time and money ($1.3 million) it spent during the development process, as described earlier, SES abandoned its plans to open the Heritage landfill and, after spending $885,000.00, CCS abandoned its proposed Sunrise Landfill in NEBC, due to opposition from local residents. These two incidents of site abandonment by knowledgeable industry participants underscore the risk and uncertainty associated with new entry, as well as the "sunk" nature of the entry costs in the event that an entry initiative is unsuccessful.

222 Based on this evidence, the Tribunal has concluded that, even in a remote location and even with concurrent permitting, it would take a new entrant at least 30 months to complete the process of selecting a new site, obtaining the required Authorizations and constructing a new Secure Landfill. That said, the Tribunal notes that there is no evidence of any proposed entry in the Contestable Area.

Absence of Acceptable Substitutes/Effective Remaining Competition

223 For the reasons given earlier, the Tribunal is satisfied that, for some product and for some generators,

bioremediation does not compete in the same market as the supply of Secure Landfill services and does not exercise any constraining influence on price or non-price competition within the latter market.

224 This conclusion is supported by the fact that CCS' Tipping Fees are significantly higher in areas where it does not face competition from other Secure Landfill operators, than they are in areas where CCS does face such competition. In addition, the "natural experiment" that occurred when SES opened its facility in Willesden Green Alberta, and CCS substantially reduced its Tipping Fees to seven of its significant customers, strongly suggests that CCS' pricing behaviour is primarily determined by reference to the location of competing suppliers of Secure Landfill services, rather than by competition with suppliers of bioremediation services.

225 Dr. Baye provided extensive evidence with respect to CCS' alleged ability to price discriminate in order to show that it had market power. However, given the foregoing and because CCS is a monopolist in the relevant market and is not constrained by any actual or potential competition from within or outside the market, it is clear that CCS has significant market power. This conclusion is further supported by the discussion of countervailing market power immediately below. For this reason, it is not necessary to consider the allegation of price discrimination.

Countervailing Power

226 CCS correctly notes that none of its customers have complained about the Merger. CCS encourages the Tribunal to infer from this that the Merger is not likely to prevent competition substantially. However, the Tribunal is not persuaded that this is a reasonable inference.

227 The Tribunal recognizes that CCS' largest customers pay lower Tipping Fees than its smaller customers. However, the Tribunal notes that Dr. Baye's report indicates that even CCS' largest customers are forced to pay higher Tipping Fees in areas where CCS faces no competition than in areas where such competition exists and this evidence was not contested. In 2010, the average Tipping Fees at Silverberry and Northern Rockies were **[CONFIDENTIAL]** and **[CONFIDENTIAL]** respectively. However, Tipping Fees at CCS' South Grande Prairie **[CONFIDENTIAL]** and Rocky **[CONFIDENTIAL]** in Alberta were significantly lower because they both face competition from SES. This no doubt explains why Mr. **[CONFIDENTIAL]**, who testified for the Commissioner, made it clear in his testimony that he would welcome competition for CCS in NEBC.

228 The attenuated or limited nature of any countervailing power that may be in the hands of CCS' largest customers is also reflected in the evidence that written requests by them for price relief were rejected by CCS during the industry downturn in late 2008 and early 2009.

C. Conclusions

229

(i) Based on all of the foregoing, the Tribunal has concluded that the Merger is likely to prevent competition substantially. The Merger prevented likely future competition between the Vendors and CCS in the supply of Secure Landfilling services in, at the very least, the Contestable Area. Although the competition that was prevented in 2012 is not likely to be substantial, the Tribunal is satisfied that by no later than the spring of 2013, either the Vendors or a party that purchased the Babkirk Facility would have operated in direct and serious competition with CCS in the supply of Secure Landfill services in the Contestable Area.

(ii) In estimating the magnitude of the likely adverse price effects of the Merger, the Commissioner relied on expert evidence adduced by Dr. Baye. That evidence included economic theory and regression models. However, for reasons discussed below the Tribunal has not given significant weight to that economic theory or to those regression models in assessing the magnitude of the likely adverse price effects of the Merger. In reaching this decision, the Tribunal took into account the fact that the models do not control for costs, and the fact that, although Dr. Baye acknowledged

that his theory of spatial competition should only be used if other data were unavailable, he used his theory even though he had actual CCS data.

(iii) Nevertheless, as discussed below in connection with the "effects" element of section 96, the Tribunal is satisfied that prices likely would have been at least 10% lower in the Contestable Area in the absence of the Merger.

(iv) The Tribunal therefore finds that the Merger is more likely than not to maintain the ability of CCS to exercise materially greater market power than in the absence of the Merger, and that the Merger is likely to prevent competition substantially.

ISSUE 7 **WHEN THE EFFICIENCIES DEFENCE IS PLEADED, WHAT IS THE BURDEN OF PROOF ON THE COMMISSIONER AND ON THE RESPONDENT?**

230 CCS has alleged that the Commissioner failed to properly discharge her burden to prove the extent of the quantifiable effects of the Merger. CCS alleges that the Commissioner's failure to prove those effects in her case in chief has precluded CCS from being able to meet its overall burden to prove the elements of the efficiencies defence on a balance of probabilities. CCS asserts that the Commissioner's failure means that the effects should be zero and that the Application should therefore be dismissed.

231 In paragraph 48 of its response to the Commissioner's Application, CCS pleaded the efficiencies defence in the following terms:

> The Acquisition has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention of competition that will result from the Acquisition, and the gains in efficiency will not likely be attained if the requested order or orders are made by the Tribunal.

232 The burdens of proof under section 96 were established and applied over the course of the four decisions in *Propane* (*Propane 1*, at para. 48, rev'd on other grounds *2001 FCA 104*, *[2001] 3 F.C. 185* ("*Propane 2"*), leave to appeal to SCC refused, 28593 (September 13, 2001), redetermination, *The Commissioner of Competition v. Superior Propane Inc.*, *2002 Comp. Trib. 16*, *18 C.P.R. (4th) 417* ("*Propane 3*"), aff'd *2003 FCA 53*, *[2003] 3 F.C. 529* ("*Propane 4*")). "The effects of any prevention or lessening of competition" must be demonstrated by the Commissioner on balance of probabilities (*Propane 1*, above, at para. 402; *Propane 2*, above, at para. 177*, Propane 4,* at para. 17). Her burden is to prove (i) the extent of the *anti-competitive* effects in question where they are quantifiable, even if only roughly so (*Propane 4*, at paras. 35-38), and (ii) any non-quantifiable or qualitative *anti-competitive* effects of the merger. It also includes the burden to demonstrate the extent of any *socially adverse* effects that are likely to result from the merger, i.e., the proportion of the otherwise neutral wealth transfer that should be included in the trade-off assessment contemplated by section 96, as well as the weighting that should be given to those effects (*Propane 4*, above, at paras. 35-38, and 61-64). In this case, there being no socially adverse effects, the term "Effects" will be used to described quantifiable and non-quantifiable anti-competitive effects.

233 That said, the respondents bear the burden on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects of any prevention or lessening of competition likely to result from the merger (*Propane 2*, above, at para. 154).

234 There is no dispute about the fact that, in his expert report in chief, Dr. Baye only calculated that an average price decrease of at least 10% would be prevented by the Merger. This meant that CCS did not have a figure for the Effects and was obliged to serve its expert report on efficiencies with no ability to take a position about whether the number it calculated for its total efficiencies was greater than the Effects. As a result, CCS maintains that, as a matter of substantive and procedural fairness, it was effectively denied a right of response and the ability to properly

meet its own burden under section 96. It therefore asserts that the Tribunal should conclude that there are no quantified Effects as a result of the Merger.

235 Dr. Baye did eventually quantify the Effects but not until he wrote his reply report, which was only made available to CCS two weeks before the hearing. By then, the Tribunal's Scheduling Order did not permit CCS to bring a motion or file a further expert report. In addition, the Tribunal accepts that, in practical terms, there was insufficient time before the hearing to permit CCS to move to strike Dr. Baye's report or to seek leave to file a further report in response to the Commissioner's quantification of the Effects.

236 The Commissioner maintains that her substantive burden to quantify the Effects only arises once a respondent advances its affirmative defence by proving efficiencies. She submits that any other result would require her to respond to every bald assertion of efficiencies, regardless of whether a respondent actually relies on efficiencies at the hearing. She asserts in her final written argument that this "would be an incredible waste of resources, and one that is antithetical to the notion of responding to an affirmative defence".

237 In the Tribunal's view, the Commissioner's argument about resources does not justify her failure to meet her burden to prove the Effects as part of her case in chief. Once CCS pleaded section 96, the efficiencies defence became part of the fabric of the case and, if it had not been pursued by CCS, the Commissioner would have been entitled to costs fully compensating her for work done by her experts to calculate the Effects.

238 The Commissioner also defended her approach by stating that, until CCS served Dr. Kahwaty's report on efficiencies ("Efficiencies Report"), it was an open question whether it was going to pursue the efficiencies defence at all. In this regard, she noted that prior to serving that report, CCS advanced no facts or proof of efficiencies, and provided no guidance on the types of efficiencies that Dr. Kahwaty planned to identify and quantify. She also observed that the Tribunal's Revised Scheduling Order, dated August 19, 2011, indicated that CCS might not pursue the efficiencies defence.

239 The revised scheduling order required the "Corporate Respondents to serve expert reports*, if any*, on efficiencies and provide them to the Tribunal" on or before October 7, 2011 (our emphasis). However, since the phrase "if any" was proposed by the Commissioner and not by CCS, the Tribunal does not accept that it suggests that CCS had resiled from its pleading.

240 In addition, the Tribunal can find no basis in the record for concluding that CCS did not intend to mount the efficiencies defence. The Tribunal notes that the Commissioner asked questions about efficiencies during examination for discovery and asked, during a case management teleconference on August 15, 2011, that CCS be ordered to produce documents relevant to the issue. During that teleconference, the Presiding Judicial Member stated that efficiencies were at issue and that, if relevant documents existed, their production was required.

241 Given the pleading of section 96 and these developments, the Tribunal concludes that there was no reason to doubt that CCS would pursue an efficiencies defence.

242 The Commissioner further asserts that the legislation and the case law do not dictate how she must meet her burden to prove the extent of the Effects. She submits that she is not obliged in every case to lead evidence about demand elasticities and provide detailed calculations about the range of likely Effects. This is particularly so in a case such as this in which she asserts that the efficiencies are "plainly so minimal that it was an open question whether [the efficiencies defence would even be pursued]".

243 The Tribunal acknowledges that the legislation and the jurisprudence do not dictate how the Commissioner must meet her burden. However, as noted above, where it is possible to quantify the Effects of a merger, even if only in "rough" terms, the Commissioner has the onus to provide an estimate of such Effects (*Propane 4*, above, at paras. 35 - 38).

244 Indeed, where the necessary data can be obtained, the Commissioner will be expected in future cases to

provide estimates of market elasticity and the merged entity's own-price elasticity of demand in her case in chief. These estimates facilitate the calculation of the magnitude of the output reduction and price effects likely to result from the merger. They are also necessary in order to calculate the deadweight loss ("DWL") that will likely result from the output reduction and related price effects. DWL is the loss to the economy as a whole that results from the inefficient allocation of resources which occurs when (i) customers reduce their purchases of a product as its price rises, and shift their purchases to other products that they value less, and (ii) suppliers produce less of the product.

245 Given that there will often be shortcomings in the data used to estimate market elasticities and the merged entity's own-price elasticity of demand, prudence dictates that a range of plausible elasticities should be calculated, to assist the Tribunal to understand the sensitivity of the Commissioner's estimates to changes in those elasticities. The Tribunal will be open to making its assessment of the quantitative extent of the Effects on the basis of persuasively supported "rough estimates" of those Effects, but only if the data required to reliably estimate elasticities cannot reasonably be obtained. Such rough estimates may be derived from evidence with respect to the magnitude of the likely price effects of the merger, including statements or projections made in the internal documents of the respondent or its advisors (including its investment bankers); persuasive estimates by customers, other lay witnesses, or expert witnesses; and persuasive evidence from "natural experiments."

246 Although the Commissioner failed to meet her burden, in the unusual circumstances of this case, CCS was not prejudiced by that failure because, instead of doing the required independent analysis of elasticities, Dr. Baye relied on his assumed price decrease of at least 10% and on certain assumptions used by Dr. Kahwaty in calculating CCS' claimed market expansion efficiencies. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill at Babkirk would lead waste generators to dispose of approximately **[CONFIDENTIAL]** additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. Further, during the hearing. Dr. Kahwaty was able to effectively attack Dr. Baye's DWL calculations on various grounds, including his failure to base them on conventional calculations of elasticities when he could have obtained the data necessary to perform those calculations. In short, CCS was able to effectively assert the defence and argue that the efficiencies its expert presented were greater than the Effects (i.e. the DLW) calculated by Dr. Baye. For these reasons, the Tribunal declines to dismiss the Application.

247 There is a second reason why CCS' request is being denied. CCS was also required to show that the cognizable efficiencies would be likely to *offset* the Effects. This means that even if the Tribunal had accepted CCS' submission that a zero weighting should be given to the quantifiable Effects, it would not necessarily follow that the Tribunal would find that the *offset* element of section 96 has been established on a balance of probabilities.

248 This is so for two reasons. First, as noted in *Propane 3*, above, at para. 172, "it cannot be concluded that the Tribunal would find that efficiency gains (whether large or small) that marginally exceeded the effects (whether large or small) would necessarily offset those effects." This is because the loss of dynamic competition will always merit some non-trivial qualitative weighting in the trade-off assessment. Indeed, dynamic efficiencies and dynamic Effects can have a major impact on the trade-off assessment. Second, in this case, the Commissioner adduced evidence of *qualitative* Effects in Dr. Baye's expert report in chief. As well, CCS adduced evidence of qualitative efficiencies, such as improved service, reduced risk for customers and the environment, which put in play the issue of whether a substantial prevention of competition likely would adversely impact upon these matters.

249 Accordingly, the Commissioner's failure to meet her burden to quantify the Effects, even in rough terms, at the appropriate time is not a sufficient reason to conclude that CCS is relieved of its obligation to meet its burden to meet the "offset" element in section 96.

ISSUE 8 HAS CCS SUCCESSFULLY ESTABLISHED AN EFFICIENCIES DEFENCE?

What are the Claimed Efficiencies?

250 We now turn to summarizing the efficiencies claimed by CCS. In that regard, Dr. Kahwaty testified on behalf of CCS that the Merger would likely result in efficiencies that he grouped into the following five categories.

251 Transportation efficiencies: These were described as being productive efficiencies realized by those customers presently serviced at Silverberry, who have an aggregate of **[CONFIDENTIAL]** locations that are situated closer to the Babkirk Facility than to Silverberry. Once CCS opens the Babkirk as a Secure Landfill, those customers will realize significant transportation cost savings, thereby freeing up resources for other uses. Based on what he described as the "going rate" of approximately **[CONFIDENTIAL]** for trucking services, the number of loads shipped from each of the above-mentioned **[CONFIDENTIAL]** locations in 2010, and the time saved by tipping at Babkirk instead of Silverberry, Dr. Kahwaty estimated the annual aggregate transportation cost savings for the aforementioned customers to be **[CONFIDENTIAL]**. Using a lower trucking rate of **[CONFIDENTIAL]** per hour per load (or $5 per tonne per hour of transport), Dr. Kahwaty provided a second estimate of those annual transportation cost savings, which totaled **[CONFIDENTIAL]**. Dr. Kahwaty also calculated that his two estimates represented approximately **[CONFIDENTIAL]** and **[CONFIDENTIAL]** respectively of CCS' 2010 revenue derived from the **[CONFIDENTIAL]** customer locations in question.

252 Market expansion efficiencies: Dr. Kahwaty stated that, absent the opening of a Secure Landfill at Babkirk, a significant volume of existing Legacy Waste and newly generated Hazardous Waste, within the drawing area of the Babkirk Facility, would not have been transported to Silverberry due to the significant risk, and related financial liability, that would be associated with transporting such waste over the long distance to Silverberry. However, with the opening of a Secure Landfill at the Babkirk Site, CCS estimated that approximately **[CONFIDENTIAL]** tonnes per year of such waste ("Market Expansion Waste") likely would be transported for disposal at Babkirk. Dr. Kahwaty acknowledged that this estimate is "necessarily imprecise," and suggested that the incremental volume of Market Expansion Waste could substantially exceed CCS' estimate of **[CONFIDENTIAL]** tonnes per year. Based on the reported margin for Silverberry in 2009 of **[CONFIDENTIAL]** and a price of **[CONFIDENTIAL]** per tonne, Dr. Kahwaty estimated an increase in producer surplus from this incremental volume of **[CONFIDENTIAL]**. In addition, based on an estimated reduction in disposal costs of **[CONFIDENTIAL]** per tonne, Dr. Kahwaty estimated that customers would gain approximately **[CONFIDENTIAL]** per year in consumer surplus. This is only 50% of the product of multiplying **[CONFIDENTIAL]** by **[CONFIDENTIAL]**, because Dr. Kahwaty felt that customers do not gain the full reduction in the costs of disposal when they are induced to dispose of their waste by virtue of a lower overall cost of disposition. The sum of the estimated **[CONFIDENTIAL]** in producer surplus gains and the estimated **[CONFIDENTIAL]** in consumer gains, was a total of **[CONFIDENTIAL]** of annual market expansion efficiencies.

253 Overhead Efficiencies: Dr. Kahwaty estimated that the Merger would result in annual overhead savings of approximately **[CONFIDENTIAL]**. He stated that these savings likely would be achieved by virtue of the fact that CCS could draw upon its existing administrative staff (e.g., those persons who deal with legal, regulatory, marketing, engineering, financial and health & safety matters) in operating the Babkirk Facility. In the absence of the Merger, he stated that the Vendors likely would have had to incur expenses associated with these functions. In reaching his estimate of **[CONFIDENTIAL]**, Dr. Kahwaty used the cost reductions that CCS has achieved in operating Complete's Roll-off Bin Business as a proxy. In addition, he submitted that some "qualitative" credit should be given to this category of efficiencies, because Complete would otherwise need to expend resources developing administrative systems and to deal with some of the matters identified above.

254 Roll-off Bin Business Efficiencies: Dr. Kahwaty estimated that CCS's Merger of the Roll-off Bin Business has resulted in annual cost savings of approximately **[CONFIDENTIAL]**. These savings were described as having been achieved as a result of (i) the upgrading of its trucks to meet higher safety standards, (ii) investments in business development efforts, and (iii) the absorption of administrative functions, such as billing, into CCS' pre-existing corporate systems.

255 Qualitative efficiencies: Dr. Kahwaty listed the following qualitative efficiencies as being likely to result from the Merger:

a. the landfill services to be offered by CCS at the Babkirk Site will be of higher (and known) quality and involve less risk for customers due to CCS's knowledge and experience in the operation and management of hazardous waste landfills;

b. customers will benefit from being able to purchase bundled packages of services that may include, for example, loading, trucking and tipping services;

c. the landfill services to be offered by CCS at the Babkirk Site will reduce risks for customers due to CCS's substantial financial resources, which provide assurance to customers regarding the long-term management of the Babkirk Facility and the potential continuing liability for wastes disposed in that landfill;

d. CCS will have the capability and resources necessary to expand the Babkirk Facility as necessary and to meet special customer needs (e.g., rapid responses to increased disposal needs);

e. since landfilling is CCS' business and since the Vendors were not planning to operate a Secure Landfill, CCS will promote landfilling services to a greater extent than the Vendors would have done, once the Babkirk Site is operational, making trucking cost efficiencies available to more customers;

f. the provision of Secure Landfill services by CCS at the Babkirk Site will reduce risks for generators, trucking firms, and other road users related to the transportation of Hazardous Waste on roads over long distances;

g. increased competition in the Roll-off Bin Business will benefit roll-off customers and may reduce the extent of any DWL in the roll-off industry, which will increase the total surplus generated in the roll-off marketplace; and

h. increased site remediation from reduced trucking costs will benefit area residents, wildlife, and the overall environment, and will also further the government's policy of expanding contaminated site remediations.

256 Dr. Kahwaty also stated that some or all of the efficiencies identified above would likely be achieved sooner by CCS than by Complete or by any third-party who might acquire the Babkirk Facility pursuant to an order of the Tribunal.

257 In addition, Dr. Kahwaty stated that CCS should be given credit for some of the efficiencies that it has already achieved in respect of the Roll-off Bin Business.

258 Finally, Dr. Kahwaty provided reasoned estimates about the extent to which the above-mentioned trucking and market expansion efficiencies would increase under market growth scenarios of 1%, 2% and 4% compounded annually over the next 10 years. Based on this work, he suggested that these increased efficiencies ought to be considered by the Tribunal.

259 After providing his annual estimates of the quantifiable efficiencies, Dr. Kahwaty calculated the net present value of those efficiencies as of January 1, 2012 using three different discount rates: (i) a risk-free interest rate of 1%, which he described as being the annual yield on one to three year government of Canada marketable bonds over the 10 week period preceding the date of his report (October 7, 2011); (ii) an interest rate of 10%, which he described as being "roughly equivalent to rates prevailing in the oil and gas industry"; and (iii) an intermediate rate of 5.5%.

260 The Tribunal accepts the evidence of Mr. Harrington, the Commissioner's expert, that, in broad terms, the discount rate used in calculating the net present value of efficiencies typically does not matter, so long as the same discount rate is used to calculate the net present value of the Effects. That said, the Tribunal also accepts Mr. Harrington's evidence that, (i) as a general principle, the appropriate discount rate to use in discounting a set of future cash flows is a function of the risk of those cash flows being wrong, (ii) there is some uncertainty associated with the efficiencies identified and estimated by Dr. Kahwaty and CCS, and therefore (iii) the midpoint (5.5%) of the

three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is

likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture is unlikely to be in a position to operate a Secure Landfill facility at the Babkirk Site before mid-2013, having regard to the time required (i) for the Tribunal to render a decision in this proceeding, (ii) to effect the actual sale of the shares or assets of BLS (which it estimates to will require "at least six months, or more," inclusive of due diligence), (iii) to modify or prepare an operations plan for the landfill, (iv) for the MOE to approve the operations plan, and (v) for the purchaser to construct the landfill, bearing in mind that construction can only be undertaken between June and September.

270 In the Tribunal's view, claimed efficiencies that would not likely be achieved by a purchaser under the Order, but that would likely be achieved by CCS solely because of the types of delays identified immediately above and associated with the implementation of the Order, are not cognizable efficiencies under section 96. These will be described as "Order Implementation Efficiencies". In the case at bar, CCS and the Vendors completed the Merger after being advised that the Commissioner intended to apply to the Tribunal. To give the Respondents the benefit of Order Implementation Efficiencies in such circumstances, and thereby potentially preclude the Tribunal from issuing the Order in respect of their anticompetitive Merger, would be contrary to the purposes of the Act.

271 In any event, even if CCS were given full credit for the Order Implementation Efficiencies, those efficiencies are only likely to be between **[CONFIDENTIAL]** and **[CONFIDENTIAL]** (which represents one year of transportation cost savings) plus **[CONFIDENTIAL]** (which represents one year of annual market expansion efficiencies). As discussed below in connection with the Tribunal's treatment of the "offset" element of section 96, these efficiencies are not sufficient to change the Tribunal's overall determination with respect to section 96.

The Roll-off Bin Business Efficiencies

272 The divestiture of the shares or assets of BLS will not have any impact on the Roll-off Bin Business efficiencies claimed by CCS. Stated alternatively, those efficiencies will likely be attained even if the Order is made. Accordingly, those efficiencies cannot be considered in the trade off assessment contemplated by section 96.

273 CCS has also submitted that certain productive efficiencies have already been achieved as a result of (i) its upgrading and sale of trucks to meet higher safety standards and to operate more efficiently, and (ii) CCS having absorbed certain administrative functions into its pre-existing corporate functions. However, as Mr. Harrington testified on behalf of the Commissioner, these efficiencies would only be lost if CCS were required to divest the Roll-off Bin Business. Given that the Order does not include the Roll-off Bin Business, those efficiencies will not be affected by the Order as contemplated by subsection 96(1) of the Act. Accordingly, they are not cognizable. In any event, given the value of these efficiencies, which Dr. Kahwaty estimated to be approximately **[CONFIDENTIAL]**, the Tribunal's overall conclusion with respect to section 96, set forth below, would not change even if these efficiencies were given full value in the trade-off assessment.

274 More generally, if certain efficiencies have already been achieved, they cannot be considered to be a potential "cost" of making the order contemplated by section 96. Therefore, they cannot be considered in the assessment under section 96. In other words, it cannot be said that those efficiencies "would not likely be attained if the order were made," as required by subsection 96(1).

The Overhead Efficiencies

275 As has been noted, Dr. Kahwaty estimated that these efficiencies would likely total approximately **[CONFIDENTIAL]** per year. He arrived at this assessment by, among other things, using as a proxy the cost reductions that CCS has achieved in operating the Roll-off Bin Business. Those cost reductions amounted to approximately 21% of the overhead expenses that previously were incurred by Complete in operating the Roll-off Bin Business. Dr. Kahwaty applied this 21% to the overhead expenses incurred at Silverberry, to reach his estimate of approximately **[CONFIDENTIAL]** in annual overhead savings. Mr. Harrington took issue with this methodology, in part because the Roll-off Bin Business is different from the landfill business. In addition, he opined that if there is a divestiture, some of these savings, which he described as being equivalent to one-half of the annual cost of a full

time back-office employee, would likely be achieved by the purchaser. The Tribunal is persuaded by this reasoning and therefore accepts Mr. Harrington's conclusion that the annual overhead efficiencies which are cognizable under section 96 are reasonable but are probably somewhat less than the **[CONFIDENTIAL]** that CCS has claimed.

276 As a practical matter, given the conclusion that the Tribunal has reached with respect to the "offset" element of section 96, discussed below, the fact that a more precise estimate of the cognizable overhead efficiencies is not available does not affect the Tribunal's overall determination with respect to the efficiencies defence in section 96.

The Qualitative Efficiencies

277 As discussed above, Dr. Kahwaty identified eight types of qualitative efficiencies that he claimed would likely result from the Merger. The Tribunal is not persuaded that any of these efficiencies "would not likely be attained if the Order were made," as provided in subsection 96(1). Ultimately, the answer to that question is dependent upon the expertise, financial resources, and reputation of the purchaser under the Order. Given that the purchaser may well have the same expertise, financial resources and reputation as CCS, the Tribunal cannot give significant weight to these claimed efficiencies. Indeed, given that the purchaser will have to be approved by the Commissioner, the Tribunal is of the view that all, or virtually all, of these claimed efficiencies are likely to be achieved by that purchaser.

278 Regardless of the identity of the purchaser, some of the types of qualitative efficiencies identified by Dr. Kahwaty will be achieved, including those related to the Roll-off Bin Business, the reduction of risks related to the transportation of Hazardous Waste over long distances and the increased site remediation that will benefit residents, wildlife, and the overall environment. In fact, to the extent that the Merger is likely to substantially prevent competition, as the Tribunal has found, we conclude that it is entirely appropriate to take into account, in the trade-off assessment, the likelihood that there will be less site clean-up and tipping of Hazardous Waste in Secure Landfills than otherwise would have occurred if an Order were made. This will be described below when non-quantifiable effects are considered.

279 The Tribunal concludes that the only efficiencies claimed by CCS that are cognizable under section 96 are a maximum of **[CONFIDENTIAL]** in annual overhead efficiencies, having a net present value of approximately **[CONFIDENTIAL]**, using a discount rate of 5.5%.

280 If, contrary to the Tribunal's conclusion, the Order Implementation Efficiencies are also cognizable under section 96, then it would be appropriate to include in the trade-off assessment further amounts of approximately **[CONFIDENTIAL]** to **[CONFIDENTIAL]** (i.e., one year of transportation cost savings) plus **[CONFIDENTIAL]** (i.e., one year of annual market expansion efficiencies).

What are the Effects for the Purposes of Section 96 of the Act?

281 As CCS noted in its Final Argument, the total surplus approach remains the starting point in assessing the effects contemplated by section 96. Under that approach, the cognizable quantifiable efficiencies will be balanced against the DWL that is likely to result from a merger. In addition, the Tribunal considers any cognizable dynamic or other non-quantifiable efficiencies and *anti-competitive* Effects. Where there is evidence of important dynamic or other non-quantifiable efficiencies and anti-competitive effects, such evidence may be given substantial weight in the Tribunal's trade-off assessment.

282 After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., DWL) and non-quantifiable *anti-competitive* Effects of the merger, it will assess any evidence that has been tendered with respect to the other effects contemplated by section 96 and the purpose clause in section 1.1 of the Act. It is at this point that the Tribunal's assessment will proceed beyond the total surplus approach. In brief, at this stage of the Tribunal's assessment, it will determine whether there are likely to be any *socially adverse* effects associated with the merger. If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects that are likely to result from the merger. In a merger among sellers of products, that wealth transfer will be

from the merging parties' customers to the merged entity. Of course, to the extent that the merging parties' rivals may be likely to follow such price effects, the wealth transfer would need to be calculated across the sales or purchases of such rivals as well.

283 The Tribunal expects that in most cases, it will be readily apparent that the wealth transfer should be treated as neutral in its analysis, because the socio-economic profiles of consumers and the merged entity's shareholders will not be sufficiently different to warrant a conclusion that the wealth transfer is likely to lead to *socially adverse* Effects. For greater certainty, the cognizable social Effects under section 96 do not include broader social effects, such as those related to plant-closings and layoffs (*Propane 1*, at para. 444).

284 In these proceedings, the Commissioner adduced no evidence with respect to *socially adverse* effects. Indeed, in her Final Argument (at para. 208) she conceded that the Merger is not likely to result in any such effects, and that the wealth transfer should be treated as being neutral in this case. Accordingly, the discussion below will be confined to *anti-competitive* effects. In other words, in making its determination under section 96 in the case at bar, the Tribunal will adopt the total surplus approach.

Quantifiable Effects

285 Quantifiable *anti-competitive* Effects are generally limited to the DWL that is likely to result from a merger.

286 In this case, the DWL is the future loss to the economy as a whole that will likely result from the fact that purchasers of Secure Landfill services in the Contestable Area will purchase less of those services than they would have purchased had the Tipping Fees for such services declined due to the competition that would likely have materialized between CCS and Babkirk operated as a Full Service Secure Landfill.

287 The DWL that is likely to result from a merger is likely to be significantly greater when there is significant pre-existing market power than when the pre-merger situation is highly competitive (*Propane 3*, above, at para. 165). In the case at bar, as in *Propane*, the Commissioner did not adduce specific evidence of pre-existing market power, for example, with respect to the extent to which prevailing Tipping Fees exceed competitive levels. Therefore, the Tribunal is not in a position to quantify the impact that any such pre-existing market power likely would have on the extent of the DWL. Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects. Given the very limited nature of the cognizable efficiencies in this case, it has not been necessary for the Tribunal to attribute such a qualitative weighing to those Effects in making its determination under section 96.

288 As discussed above, CCS submitted that the Tribunal should conclude that there are no quantifiable Effects as a result of the Merger, because the Commissioner did not lead any evidence with respect to such Effects until she served Dr. Baye's reply report, on November 4, 2011. The Tribunal has rejected that position because CCS was not ultimately prejudiced in this regard. The Tribunal will therefore proceed to address the evidence adduced in Dr. Baye's reply report. As will be noted below, the Tribunal is satisfied that CCS would not have met its burden under section 96, even if the quantifiable Effects had been deemed to be zero.

289 At the outset of his reply report, Dr. Baye summarized a number of the conclusions set forth in his initial report, dated September 30, 2011. These included the following:

a. the Merger likely prevents the prices for the disposal of Hazardous Waste generated in NEBC from falling significantly for many customers;

b. the effects of the Merger are unlikely to be uniform across all customers in the relevant market; and

c. the average reduction in the Tipping Fees throughout NEBC is likely to be at least 10%, but the effects are likely to be significantly higher for customers generating Hazardous Waste in the vicinity

near Babkirk and Silverberry and lower for customers located near the southern and northern boundaries of NEBC.

290 The Tribunal is satisfied, on a balance of probabilities, that with the exception of the geographic extent of the Effects, the foregoing conclusions are supported by the weight of the evidence that it has found to be credible and persuasive. As to the geographic region over which the aforementioned Effects are likely to result from the Merger, the Tribunal finds that, at a minimum, such Effects are likely to extend throughout the Contestable Area identified by Dr. Kahwaty. Given the conclusions that the Tribunal has reached regarding the minimal nature of the efficiencies claimed by CCS, it is unnecessary to define the scope of the anti-competitive Effects with greater precision.

291 As Dr. Baye explicitly noted, his conclusions were based on a range of different sources of information and economic analyses, rather than on any specific source of information or economic methodology. Those sources included CCS' internal documents and a "natural experiment." The Tribunal has not placed weight on the economic models that are set forth in Dr. Baye's reports, for example, the tipping fee and DiD regressions presented at exhibits 20 and 26 of his initial Report, which are also briefly discussed in his reply report. In the Tribunal's view, some of the assumptions underlying those models are questionable. The same is true of some of the outcomes of those models, such as the prediction of greater adverse price effects for customers located closer to Northern Rockies than to Babkirk. In the Tribunal's view, those predictions of Dr. Baye's models are counterintuitive and are not supported by the weight of the other evidence adduced in these proceedings.

292 More generally, as noted above, Dr. Baye's models do not account for the opportunity cost that CCS would incur if it were to lower Tipping Fees to the 20 - 25% range necessary to attract business from customers located farthest away from Silverberry and Babkirk, respectively, as discussed at paragraphs six and seven of his reply report. The Tribunal is not persuaded that it would be in CCS' interest to reduce prices to that extent in the near future, and to thereby deplete its finite Secure Landfill capacity at Silverberry, assuming that CCS would likely be able to attract business at higher Tipping Fees further in the future to fill that capacity.

293 Notwithstanding the fact that the Tribunal has found the models at exhibits 20 and 26 to be unreliable, we are satisfied, on a balance of probabilities, that competition from an independently owned and operated Full Service Secure Landfill at the Babkirk Site likely would result in CCS reducing its prices by an average of at least 10% for customers in the geographic market described above. This conclusion is based on evidence from CCS' own internal documents, evidence given by **[CONFIDENTIAL]** of **[CONFIDENTIAL]** and the transactions data pertaining to the "natural experiment" at Willesden Green modelled in Dr. Baye's DiD analysis.

294 The internal CCS documents referenced above include:

a. a slide presentation, dated August 26, 2010, which is attached at Exhibit K to Mr. D. Wallace's witness statement, **[CONFIDENTIAL]**

b. an e-mail, dated July 15, 2010, sent by Trevor Barclay to Ryan Hotston and Lance Kile, **[CONFIDENTIAL]**

c. a document, entitled **[CONFIDENTIAL]**, containing several slides dated "3/9/2009/ **[CONFIDENTIAL]**

d. a financial analysis prepared by Dan Wallace, attached to an e-mail dated March 31, 2010, and at Exhibit C to his witness statement, **[CONFIDENTIAL]**

e. a document dated March 31, 2010, entitled **[CONFIDENTIAL]**, attached at Exhibit D to Dan Wallace's witness statement, **[CONFIDENTIAL]**

f. a document, entitled **[CONFIDENTIAL]**, dated September 15, 2009 and included at Tab 32 of the Parties' Admissions Brief, **[CONFIDENTIAL]**.

295 Turning to evidence from customers, there was, as mentioned earlier, an unusual paucity of such evidence in

this case. However, Mr. **[CONFIDENTIAL]**, Vice President, Operations, at **[CONFIDENTIAL]** testified that "competition, in our mind, provides a more competitive playing field in terms of your pricing setup" and that "in Northeast B.C. we currently don't have that same level of competition in this facet of our business."

296 Lastly, the transactions data from the "natural experiment" at Willesden Green, which is found in Dr. Baye's initial report, demonstrates that CCS reduced its prices significantly to seven customers after SES' entry at South Grande Prairie.

297 For all these reasons, we have concluded that, in the absence of the Merger, competition in the provision of Secure Landfill services at Silverberry and the Babkirk Site likely would have resulted in prices being, on average, at least 10% lower in the geographic market described above. This is a sufficient basis for concluding that the Merger likely will prevent competition substantially, particularly given that the Merger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition.

298 In his reply report, Dr. Baye opined that even if competition is only likely to be substantially prevented in the Contestable Area identified by Dr. Kahwaty, the welfare loss is likely to be significant. Specifically, Dr. Baye estimated that loss to be approximately **[CONFIDENTIAL]** annually. That estimate was based on an assumed price decrease of 10%, from **[CONFIDENTIAL]** to **[CONFIDENTIAL]** per tonne, and certain assumptions and estimates used by Dr. Kahwaty in calculating the market expansion efficiencies, discussed above. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill facility at Babkirk would likely lead customers to dispose of approximately **[CONFIDENTIAL]** additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. As discussed earlier in these reasons, that forecast increase in demand concerned Legacy Waste and future waste that would not otherwise be transported to Silverberry, due to (i) the level of the current disposal cost (Tipping Fees plus transportation cost) and (ii) the risk that would be associated with transporting Hazardous Waste to Silverberry. Dr. Kahwaty estimated that the total disposal costs of customers located in the Contestable Area that he identified likely would decline by approximately **[CONFIDENTIAL]** per tonne, due to the closer proximity of the Babkirk Facility, relative to Silverberry.

299 Based on the foregoing numbers used by Dr. Kahwaty to estimate the market expansion efficiencies, and the linear demand that was assumed by Dr. Kahwaty, Dr. Baye estimated that a 10% price reduction (from **[CONFIDENTIAL]** to **[CONFIDENTIAL]**) for customers in the Contestable Area would increase the volume of waste disposed of by those customers from **[CONFIDENTIAL]** tonnes to **[CONFIDENTIAL]** tonnes, annually. He further estimated CCS' unit costs to be approximately **[CONFIDENTIAL]**, based on the average 2010 price at Silverberry of **[CONFIDENTIAL]** across all substances, and the **[CONFIDENTIAL]** landfill margin reported for Silverberry in 2009, which was used by Dr. Kahwaty in estimating the market expansion efficiencies.

300 Given the foregoing estimates, Dr. Baye calculated the area under the demand curve for the Contestable Area to be (i) a rectangle that is approximately **[CONFIDENTIAL]** tonnes multiplied by **[CONFIDENTIAL]**, for a total of **[CONFIDENTIAL]**, plus (ii) a right triangle that is **[CONFIDENTIAL]** high and **[CONFIDENTIAL]** wide, for an area of **[CONFIDENTIAL]**. Summing (i) plus (ii) yielded a figure of **[CONFIDENTIAL]**. From this latter amount, Dr. Baye deducted CCS' unit cost of **[CONFIDENTIAL]** multiplied by **[CONFIDENTIAL]**, to arrive at an estimated welfare loss of **[CONFIDENTIAL]**.

301 The Tribunal is persuaded that, on a balance of probabilities, the approach adopted by Dr. Baye, and the numbers he used in reaching his estimate of the likely DWL, are reasonable for the purposes of the Tribunal's assessment of Effects under section 96 of the Act. In the Tribunal's view, the manner in which Dr. Baye proceeded in this regard is sound, and the inputs that he used are reliable and conservative. The fact that Dr. Baye relied on certain assumptions made by Dr. Kahwaty is not particularly important for the purposes of the Tribunal's assessment under section 96. What is important is that there is reliable evidence before the Tribunal that permitted the DWL to be estimated.

302 The Tribunal acknowledges Dr. Kahwaty's testimony that, to calculate the DWL, it is necessary to know the shape of the demand curve, and that, when prices are likely to differ across customers, it is necessary to have

customer-specific elasticity data. However, the Tribunal is persuaded that, in the absence of such information, a reliable "rough" estimate of the likely DWL can be obtained based on information such as that which was used by Dr. Baye in reaching his estimated annual welfare loss of approximately **[CONFIDENTIAL]**.

303 Accordingly, the Tribunal accepts Dr. Baye's estimate of **[CONFIDENTIAL]**, as being the minimum annual DWL.

304 Dr. Baye then speculated that, (i) if the average price decrease in that area was 21 percent, the annual DWL would be approximately **[CONFIDENTIAL]**, (ii) if prices across all Hazardous Waste tipped at Silverberry in 2010 decreased by 10%, the DWL would be approximately **[CONFIDENTIAL]**, and (iii) if prices across all such waste decreased by 21%, the DWL would be approximately **[CONFIDENTIAL]**. However, the Tribunal is not persuaded that these speculations about prices are reasonable.

Non-quantifiable Effects

305 The Tribunal is satisfied that the Merger likely would result in certain important qualitative or other non-quantifiable Effects.

306 In his initial report, Dr. Baye identified at least two important qualitative anti-competitive Effects of the Merger. First, at paragraph 157, he stated that lower Tipping Fees would induce waste generators to more actively clean up legacy sites in NEBC. At paragraph 91 of his report, he described this in terms of lower Tipping Fees inducing waste generators to substitute away from "delay," or bioremediation, towards disposal at a Secure Landfill. As Dr. Kahwaty noted at paragraph 96 of his Efficiencies Report, increased site remediation from lower disposal costs benefits "area residents, wildlife, and the overall environment."

307 Second, at paragraph 137(c) of his initial report, Dr. Baye stated that, to retain its waste volumes in the face of competition from an independently owned and operated Babkirk Facility, CCS "would have had an incentive to compete through 'value propositions' that, among other things, link prices on various services to provide customers with a lower total cost for waste services." Although the services in question were not further discussed by Dr. Baye, they were addressed in "read-in" evidence adduced by the Commissioner and cited by Dr. Baye (at footnote 93 of his initial report). The Tribunal is satisfied, on a balance of probabilities, that competition between CCS and an independently owned and operated Babkirk Facility would have led to important non-price benefits to waste generators in the form of various "value propositions" that include either existing services being provided at lower prices, or new or enhanced services being provided that likely would not otherwise be provided if the Order is not made.

Are the Cognizable Efficiencies Greater than and do they Offset the Effects?

308 Section 96 requires the Tribunal to determine whether the cognizable efficiencies "will be greater than, and will offset" the cognizable effects of any prevention or lessening of competition that will result or is likely to result from a merger.

309 The Tribunal considers that the terms "greater than" and "offset" each contemplate both quantifiable and non-quantifiable (i.e., qualitative) efficiencies. In the Tribunal's view, "greater than" connotes that the efficiencies must be of larger magnitude, or more extensive than, the effects referred to in section 96. This contemplates a balancing of commensurables, even if some of the efficiencies being balanced are not capable of accurate or rough quantification. By contrast, the term "offset" is broad enough to connote a balancing of incommensurables (e.g., apples and oranges) that requires the exercise of subjective judgment to determine whether the efficiencies compensate for the likely effects referred to in section 96.

310 In the case at bar, the Tribunal has found that the cognizable, quantifiable, efficiencies likely to result from the Merger will be a maximum of **[CONFIDENTIAL]** annually. Those are the overhead efficiencies estimated by Dr. Kahwaty. In addition, the Tribunal has found that CCS has not demonstrated, on a balance of probabilities, that the

qualitative efficiencies it has claimed are cognizable. In other words, it has not demonstrated that those efficiencies would not likely be attained if the Order were made.

311 On the other hand, the Tribunal has found that the quantifiable Effects are likely to be at least **[CONFIDENTIAL]** annually. That is the value of the minimum DWL associated with the Contestable Area.

312 Based on these findings, it is readily apparent that CCS has not demonstrated that the cognizable, *quantifiable*, efficiencies likely to be brought about by the Merger will likely be "greater than" the *quantifiable* Effects that are likely to result from the Merger. Using a 5.5% discount rate, CCS estimated that the present value of these (overhead) efficiencies to be approximately **[CONFIDENTIAL]**, in comparison with a present value of **[CONFIDENTIAL]** for the aforementioned Effects.

313 Given the Tribunal's conclusion that the Merger would result in a number of important qualitative or other non-quantifiable effects, and that it would not likely bring about significant qualitative, cognizable, efficiencies, it is also readily apparent that the combined quantitative and qualitative efficiencies are not likely to be "greater than" the combined quantitative and qualitative Effects.

314 In addition, the Tribunal is persuaded, on a balance of probabilities, that even if a zero weighting is given to the *quantifiable* Effects, as CCS submitted should be done, CCS has not satisfied the "offset" element of section 96. In short, the Tribunal is satisfied that the very minor *quantitative* efficiencies, (**[CONFIDENTIAL]** annually) that are cognizable, together with any qualitative or other non-quantifiable efficiencies that may be cognizable, would not "offset" the significant qualitative Effects that it has found are likely to result from the Merger.

315 This conclusion would remain the same even if the Tribunal were to accept and give full weight to the Order Implementation Efficiencies, which only amount to a maximum of **[CONFIDENTIAL]** (which represents one year of transportation cost savings) plus **[CONFIDENTIAL]** (which represents one year of annual market expansion efficiencies).

316 This is because, in the Tribunal's view, the qualitative Effects, when taken together merit substantial weight. That weight is greater than the weight attributable to the aggregate of the cognizable quantitative and qualitative efficiencies under any reasonable approach. In brief, those qualitative Effects are (i) reduced site clean-up and the benefits that such remediation would confer upon "area residents, wildlife, and the overall environment"; and, more importantly, (ii) reduced "value propositions" than would likely otherwise emerge in the relevant market, linking prices to various new or enhanced services.

317 Most importantly, in the absence of the Order, the Merger will maintain a monopolistic structure in the relevant market. In other words, the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that will defy prediction.

318 In summary, the Tribunal is satisfied that CCS has not met its burden to establish, on a balance of probabilities, the "greater than" or "offset" elements set forth in section 96.

ISSUE 9 WHAT IS THE APPROPRIATE REMEDY - DISSOLUTION OR DIVESTITURE?

319 An important question under this heading is whether SES is currently a willing purchaser for the Babkirk Site. Surprisingly, when Mr. Amirault of SES testified for the Commissioner, neither her counsel during questioning in chief nor counsel for the Vendors during cross-examination asked Mr. Amirault if SES is still interested in acquiring BLS.

320 The Commissioner's position is that, once she showed that dissolution was an effective and available remedy,

the burden of proof shifted to the Vendors to demonstrate that divestiture was an available, effective and less intrusive remedy. The Commissioner maintains that the Vendors were obliged to ask Mr. Amirault if SES is still interested and, because they failed to ask that question and because they failed to lead any evidence about other prospective purchasers, they have no basis to argue that divestiture will be an effective remedy.

321 The Tribunal does not accept the Commissioner's characterization of the onus. In the Tribunal's view, if the Commissioner proposes alternative remedies, as she did in this case, she bears the onus of showing that, although one may be preferable, each is available and effective. Accordingly, the Commissioner's counsel should have asked Mr. Amirault about SES' interest in purchasing the shares of BLS.

322 The Tribunal notes that, in her written final argument, the Commissioner asks the Tribunal not to infer that SES is an interested purchaser. However, in contrast, in final oral argument, counsel for the Commissioner suggested that SES is an interested buyer.

323 The Tribunal accepts the latter submission and has determined, for the following reasons, that SES is likely to make an offer to purchase the Babkirk Facility at some point during the divestiture process under the Order:

* SES has already decided to operate a Secure Landfill in NEBC. It tried unsuccessfully and at considerate expense to secure the Authorizations at its Heritage Site;
* Babkirk already has the necessary Authorizations and SES is confident that its plans to expand the permitted capacity at Babkirk and upgrade the cell design will be approved;
* SES has demonstrated an active and continuing interest in the Babkirk Facility since the Merger. Among other things, this is demonstrated by SES' lawyers' written submissions to the Commissioner and by the participation of its CEO, Mr. Amirault, as a witness in these proceedings.

324 We now turn to the proposed remedies.

325 The Commissioner wants the Babkirk Site operated as a competitive Full Service Secure Landfill and she believes that dissolution will produce this result more quickly than divestiture.

326 Her submission is that, once the Vendors again hold the shares of Complete and have repaid CCS the purchase price, they will be highly motivated to resell Complete or the shares of BLS because this will enable them to recover their funds as soon as possible. However, this submission assumes that the Vendors will immediately be offered a price they are prepared to accept. In the Tribunal's view, there is no basis for this assumption. The evidence is clear that the Vendors have never been willing to be pushed into a quick sale.

327 The Commissioner's submission also assumes that the Vendors will have an incentive to sell quickly because they will be short of funds as a result of having to repay CCS as soon as the shares of Complete are returned to them. This assumption is also questionable, in part because it appears that CCS has indemnified the Vendors against all claims arising from any investigation or actions by the Bureau with respect to the Merger. Given this background, it is possible that CCS may not insist on immediate payment.

328 Even if the Commissioner is correct and the Vendors are cash-strapped and anxious to resell BLS or Complete, the Tribunal still anticipates that they will want an attractive price. It is also important to remember that all five individual Vendors must agree to accept an offer and they will not necessarily be like-minded, in part because some are near retirement and others are in mid-career.

329 The Tribunal notes that two years will have passed since the Babkirk Facility was last for sale. This means that purchasers, other than SES, may show interest, especially given the increasing rate of gas production in the area northwest of Babkirk. Dr. Baye testified that he thought SES, Newalta and Clean Harbours were potential purchasers. As well, it is not unreasonable to think that an oil and gas producer may decide to own and operate a

Secure Landfill. The Tribunal heard evidence that **[CONFIDENTIAL]** is considering becoming a part-owner of the Secure Landfill at Peejay. If the Vendors receive multiple offers, protracted negotiations may follow.

330 Finally, if they do not receive an offer they consider attractive, the Vendors are free to change their minds and resurrect their plan to operate a bioremediation facility with an Incidental Secure Landfill. This would not result in the competition the Commissioner seeks because it will only be realized if the Babkirk Facility operates as a Full Service Secure Landfill.

331 There is also the question of whether a purchaser after dissolution will be an effective competitor. In the proposed order for dissolution found at the conclusion of the Commissioner's final argument, she does not seek the right to approve a purchaser and she only asks for notice of a future merger if it is "among the Respondents". In our view, this makes dissolution a less effective remedy.

332 Given all these observations, the Tribunal is concerned that dissolution may not be effective in that it may not lead to a prompt sale and a timely opening of the Babkirk Facility as a Secure Landfill.

333 It is also the case that dissolution is the more intrusive remedy.

334 Three of the Vendors testified about the financial hardship they would face if dissolution were ordered by the Tribunal. Ken Watson's share of the proceeds of the transaction was **[CONFIDENTIAL]**. He testified that if ordered to return the proceeds to CCS, **[CONFIDENTIAL]**, he expects to face significant financial hardship.

335 Randy Wolsey's share of the proceeds was approximately **[CONFIDENTIAL]**. He testified that almost half of the proceeds have been used to develop a property on which he is constructing a new family home. The balance has been invested in the purchase of various investment products. According to Mr. Wolsey, he expects to lose approximately **[CONFIDENTIAL]** if he is forced to make a quick sale on the residential property before the house under construction has been completed.

336 Karen Baker testified that if required to return her share of the proceeds, approximately **[CONFIDENTIAL]**, then her ability to continue to provide financial support to certain small business will be compromised. She also indicated that if the transactions were to be dissolved, she expects that the "work required to reverse the sale and calculate the adjustments required to account for changes in Complete's assets, working capital and lost opportunity costs, as well as the opportunity costs in time away from the other businesses in which [she is] involved, and cost to some of those businesses for replacement personnel to do the work that [she] should be doing, would cause [her] significant stress and emotional hardship."

337 The Commissioner asserts that, in the particular circumstances of this case, hardship is irrelevant, because she warned the Vendors that she would seek dissolution before they sold Complete to CCS. However, in the Tribunal's view it is the right of private parties to disagree with the Commissioner and make their case before the Tribunal. Accordingly, they are not estopped from raising issues of hardship.

338 The Tribunal is also of the view that dissolution is overbroad, since it involves Complete's other businesses and not just BLS.

339 In the spring of 2007, Complete acquired the assets of a municipal waste management business based in Dawson Creek, British Columbia. As noted earlier, those assets included contracts for the management of the Fort St. John and Bessborough municipal landfills and the Dawson Creek Transfer Station, the supply and hauling of roll-off bins, and the provision of rural refuse collections and transfer services. At the time of the Merger, those contracts and related equipment were transferred to CCS. Hazco has been responsible for this business since then.

340 Mr. Garry Smith, the president of Hazco, testified that Hazco has upgraded Complete's trucks and has sold some older equipment which it considered surplus. The two municipal landfill contracts have been extended and are now held directly by Hazco. Complete's employees are now employed by Hazco and there have been

personnel changes. At the hearing, Mrs. Baker testified about the impact of the sale of some of the assets. She stated:

> Now, that equipment was older equipment. It wouldn't have brought big money, but the point is it was sufficient for us to do the work that we wanted it to do. Well, now the oil and gas industry is hot, hot up there. Trying to get equipment back, we certainly wouldn't get that equipment back. Any decent used equipment, I have no idea. The prices would be through the roof. Would we buy new equipment? I don't know. So right now, we don't even have the equipment to go back to work.

341 To conclude, the Tribunal has decided that dissolution is intrusive, overbroad and will not necessarily lead to a timely opening of the Babkirk Facility as a Full Service Secure Landfill.

342 Turning to divestiture, the Tribunal finds that it is an available and effective remedy. If reasonable but tight timelines are imposed, it will not matter if, as the Commissioner alleges, SES and CCS are reluctant to negotiate because of their outstanding litigation. In the end, if they cannot agree, a trustee will sell the shares or assets of BLS, either to SES or another purchaser approved by the Commissioner. In other words, divestiture will be effective.

343 A divestiture with tight timelines has other advantages. The Commissioner will have the right to pre-approve the purchaser, the person responsible for effecting the divestiture will ultimately be CCS or a professional trustee, rather than five individuals, the timing will be certain, a sale will ultimately occur and the approved purchaser will compete with Silverberry on a Full Service basis.

344 For all these reasons, the Tribunal will order CCS to divest the shares or assets of BLS.

H. COSTS

345 The Commissioner chose dissolution as her preferred remedy when she commenced the Application. She made this choice because she believed that at the time of the Merger, the Vendors were about to construct and operate a Full Service Secure Landfill. For this reason she concluded that the most timely way to introduce competition was to return Babkirk to the Vendors.

346 However, for the reasons given above, the Tribunal has concluded that the Vendors did not intend to operate a Full Service Secure Landfill. This means that the Commissioner has failed to prove the premise which caused her to name the individual Vendors as parties to the Application. In essence she failed to prove her case against them and for this reasons she is liable for their costs.

347 However, during the Vendors' motion for summary disposition which was heard two weeks before the hearing, they indicated that, if the motion was successful and they were removed as parties, four of them would nevertheless attend the hearing to give evidence. The Tribunal assumes that, had done so, they would have been represented by one counsel. Accordingly, the Commissioner is to pay their costs less the legal fees which would have been incurred had they appeared as witnesses.

I. FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

348 CCS is to divest the shares or assets of BLS on or before December 28, 2012 failing which a trustee is to effect a sale on or before March 31, 2013. If possible, the terms for this process are to be agreed between the Commissioner and CCS and are to be submitted to the Tribunal on or before June 22, 2012. If the agreed terms are accepted by the Tribunal, they will be incorporated in a further order to be called the Divestiture Procedure Order. If the Commissioner and CCS cannot agree to terms, each party is to submit a proposed Divestiture Procedure Order on or before June 29, 2012. If necessary, the Tribunal will hear submissions about each party's proposal in early July and then make the Divestiture Procedure Order.

349 CCS is to pay the Commissioner's costs and, because dissolution was not ordered, the Commissioner is to pay the Vendors' costs less the fees they would have paid for legal representation if they had attended as non-parties to give their evidence. The Commissioner is to prepare a bill of costs to be submitted to CCS and the Vendors are to submit a bill of costs to the Commissioner both on or before August 31, 2012. Both are to be prepared in accordance with Federal Court Tariff B at the mid-point of column 3. If by September 14, 2011 no agreement is reached about lump sums to be paid, the Tribunal will hear submissions and fix the awards of costs.

DATED at Ottawa, this 29th day of May, 2012.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Sandra J. Simpson J. (Chairperson)

(s) Paul Crampton C.J.

(s) Dr. Wiktor Askanas

J. THE SCHEDULES

350 The schedules appear on the following pages:

Schedule A: Map Showing Secure Landfills (based on Exhibit 4-A to Dr. Baye's Expert Report)

Source: CCS, SES, and Newalta company websites.

This map may be printed in colour.

SCHEDULE "B"

THE EVIDENCE

Witnesses who gave oral testimony

(in alphabetical order)

For the Commissioner of Competition

* **Rene Amirault**

  President & CEO of Secure Energy Services Inc.

* **Robert Andrews**

  Section Head-Environmental Management, Government Unit in the British Columbia Ministry of the Environment.

* **Michael Baye**

  Expert Economist - Special Consultant at National Economic Research Associates, Inc. and the Bert Elwert Professor of Business Economics and Public Policy at the Indiana University Kelley School of Business.

* **Chris Hamilton**

  Project Assessment Director at the British Columbia Environmental Assessment Office.

* **Andrew Harrington**

  Expert on Efficiencies - Managing director of the Toronto office of Duff & Phelps.

* **[CONFIDENTIAL]**

  Contracting and Procurement Analyst for the **[CONFIDENTIAL]**.

* **[CONFIDENTIAL]**

  Vice-President, Operations at **[CONFIDENTIAL]**.

* **Mark Polet**

  Associate at Klohn Crippen Berger Ltd. ("KCB"). KCB is a private, specialized engineering and environmental consulting firm with its head office in Vancouver.

* **Del Reinheimer**

  Environmental Management Officer in the Environmental Protection Division at the British Columbia Ministry of the Environment.

* **Devin Scheck**

  Director, Waste Management & Reclamation at the British Columbia Oil and Gas Commission.

For the Vendors

* **Karen Baker**

  One of the founding shareholders of Complete Environmental Inc.

* **Ronald Baker**

  One of the founding shareholders of Complete Environmental Inc.

* **Kenneth Watson**

  One of the founding shareholders of Complete Environmental Inc.

* **Randy Wolsey**

One of the founding shareholders of Complete Environmental Inc.

For the Corporate Respondents

* **Trevor Barclay**

  Landfill Manager of the Northern Rockies Secure Landfill.

* **James Coughlan**

  Director of Sales and Marketing of CCS Corporation

* **Henry Kahwaty**

  Expert economist - Director with Berkeley Research Group, LLC.

* **Richard Lane**

  Vice-President of CCS Midstream Services, a division of CCS Corporation.

* **Pete Marshall**

  Principal of Adelantar Consulting, an environmental consultancy based in Edmonton, Alberta.

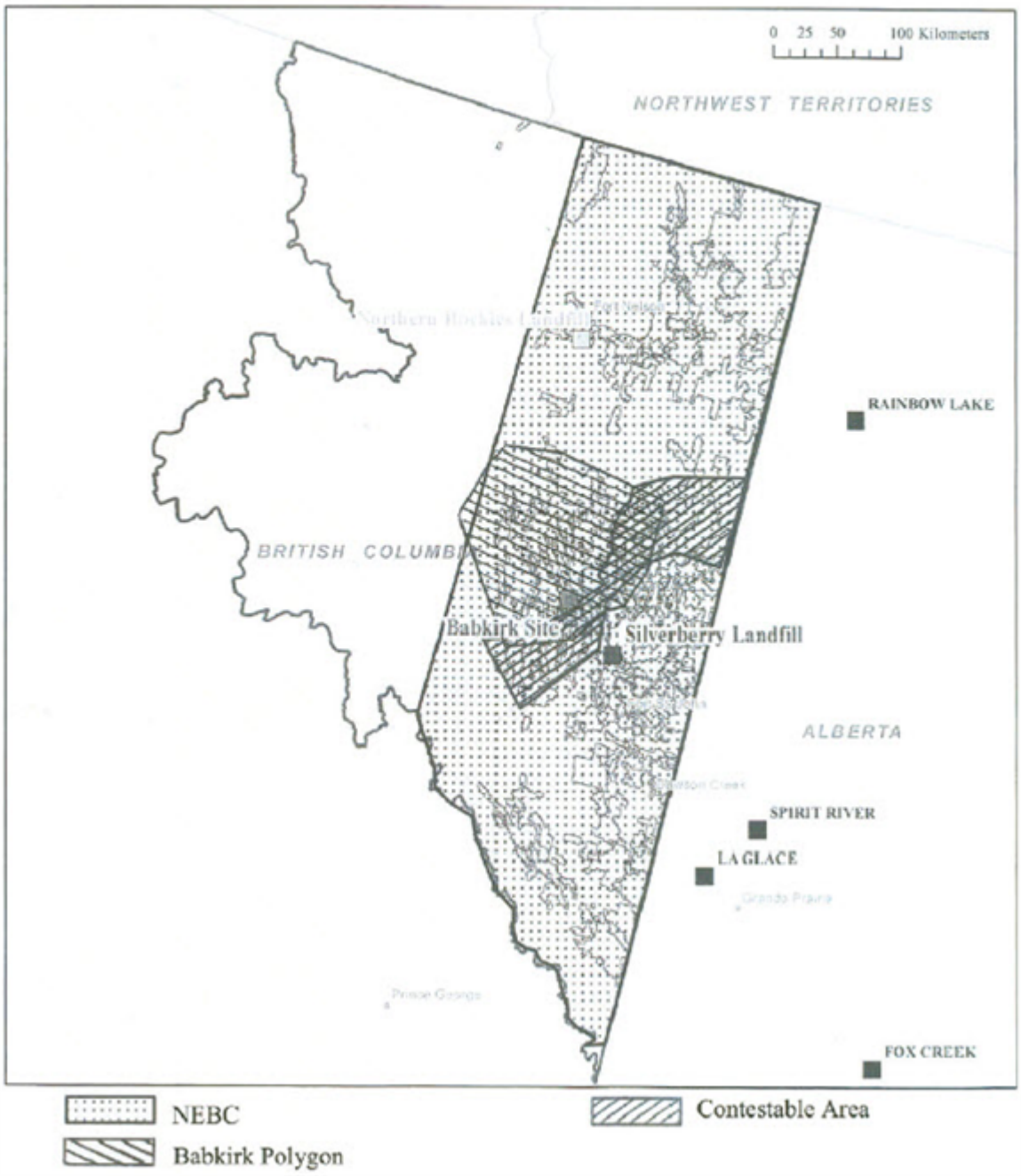
* **Daniel Wallace**

  Manager, Business Development of CCS Corporation's Midstream Services division

Other Evidence

* The witness statements from those who testified.
* Read-ins from Examinations for Discovery of Karen Baker and Kenneth Watson for the Vendors, Daniel Wallace for the Corporate Respondents and Trevor MacKay for the Commissioner of Competition
* The statement of agreed facts.
* The witness statements of **Robert Coutts**, President of SkyBase Geomatic Solutions Inc. and **Garry Smith**, President of Hazco Waste Management (owned by CCS). On consent these witnesses were not called to give oral testimony.
* A Joint list of agreed documents.
* The exhibits marked during the hearing.

Schedule C: Map of NEBC, the Contestable Area and the Babkirk Polygon



K. CONCURRING REASONS BY P. CRAMPTON C.J.

351 Although I participated in the writing of, and signed, the Panel's decision in this case, I would like to comment on certain additional matters.

A. IS CCS'S ACQUISITION OF COMPLETE A MERGER?

352 At paragraph 56 of the Panel's reasons, it is noted that it was not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be a business for the purposes of section 91 of

the Act. That said, the conclusion reached by the Chairperson on this point was articulated at paragraph 57. That conclusion was stated as follows:

> "[A] business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste."

353 I respectfully disagree. In my view, the term "business", as contemplated by section 91 of the Act, is not, as the Vendors maintained, confined to a business that competes with a business of an acquiring party. There is no such limitation in section 91 or in the definition of the term "business" that is set forth in subsection 2(1) of the Act.

354 The Vendors attempted to support their position by noting that section 92 of the Act requires that a "merger" prevent or lessen, or be likely to prevent or lessen, competition substantially. However, it is not necessary for a merger to involve two or more competing businesses to have the potential to prevent or lessen competition substantially. For example, the inclusion of the terms "supplier" and "customer" in section 91 reflects Parliament's implicit recognition that a vertical merger may have such an effect. The words "or other person" in section 91 reflect that Parliament also did not wish to exclude the possibility that other types of non-horizontal mergers may also have such an effect.

355 Considering the foregoing, I am not persuaded that the Vendors' position is assisted by reading the words of section 91 "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, *[1998] 1 S.C.R. 27*, at 41; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, *2011 SCC 53*, at para. 33 ("*Mowat*")). In the absence of any apparent ambiguity, one must adopt an interpretation of section 91 "which respects the words chosen by Parliament" (*Mowat*, above). The principle that the Act be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" also supports the view that section 91 ought not be read in the limited manner suggested by the Vendors (*Interpretation Act*, *R.S.C. 1985, c. I-21, s. 12*).

356 Indeed, if anything, a reading of section 91 in a manner that is harmonious with the scheme and object of the Act and the intention of Parliament arguably further supports interpreting section 91 in a way that does not require the type of assessment of competitive effects that is contemplated by the interpretation advanced by the Vendors. That is to say, when viewed in the context of the scheme and object of the Act as a whole, it is arguable that section 91 was intended by Parliament to be a gating provision, in respect of which an assessment ordinarily is to be made relatively early on in the evaluation contemplated by sections 92 and 93.

357 For example, all but one of the assessment factors in the non-exhaustive list that is set forth in section 93 refer to the "merger or proposed merger" in respect of which an application under section 92 has been made. In my view, this suggests that the merger or proposed merger in question should be identified before the assessment contemplated by sections 92 and 93 is conducted.

358 If an agreement, arrangement or practice cannot properly be characterized as a merger, it will fall to be investigated under another provision of the Act, such as section 45, section 79, or section 90.1, each of which has a substantive framework which differs in important respects from the framework set forth in section 92. Indeed, in the case of agreements or arrangements that may be investigated under section 45, which is a criminal provision, there are important procedural implications associated with the decision to pursue a matter under that section, versus under section 90.1, 79 or 92. I recognize that there may be cases in which it may be appropriate to assess a matter under section 92 as well as under one or more of the other provisions mentioned immediately above, for a period of time before an election is made under section 98, 45.1, 79(7) or 90.1(10). However, the scheme of the Act and the interests of administrative efficiency arguably support the view that a determination as to whether a matter ought to be investigated as a merger, rather than a type of conduct addressed elsewhere in the Act, ordinarily should be

made before the central substantive determinations under the applicable section of the Act are made. Among other things, such substantive determinations often take several months, and sometimes take much longer, to make.

359 In summary, for all of the foregoing reasons, I have concluded that the term "business" in section 91 is sufficiently broad to include any business in respect of which there is an acquisition or establishment of control or a significant interest, as contemplated therein. In the case at bar, this would include Complete's Roll-off Bin Business, which was fully operational at the time of Complete's acquisition by CCS. It would also include Complete's management of municipal dumps.

B. MARKET DEFINITION

360 Market definition has traditionally been a central part of merger analysis in Canada and abroad for several reasons. These include (i) helping to focus the assessment on products and locations that are close substitutes for the products and locations of the merging parties, (ii) helping to focus the assessment on the central issue of market power, (iii) helping to identify the merging parties' competitors, (iv) helping to understand the basis for existing levels of price and non-price competition, and (v) facilitating the calculation of market shares and concentration levels. In turn, changes in market shares and concentration levels can be very helpful, albeit not determinative, in understanding the likely competitive effects of mergers and in assisting enforcement agencies to triage cases and to provide guidance to the public.

361 In recent years, developments in antitrust economics have reached the point that the United States Department of Justice and Federal Trade Commission have begun to embrace approaches that "need not rely on market definition" (*Horizontal Merger Guidelines* (August 19, 2010), at s. 6.1). Likewise, the MEGs, at paragraph 3.1, have been amended to stipulate that market definition is not necessarily a required step in the Commissioner's assessment of a merger.

362 These developments can be accommodated within the existing framework of the Act and the Tribunal's jurisprudence.

363 In discussing market definition, the Panel noted, at paragraph 92 of its reasons, that the Tribunal has in the past cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. The Tribunal has also previously noted that the Act does not require that a relevant market be defined in assessing whether competition is likely to be prevented or lessened substantially (*Propane 1*, above, at para. 56). The logical implication is that defining a relevant market is not a necessary step in assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. Accordingly, it will be open to the Tribunal, in an appropriate case, to make this assessment without defining a relevant market.

364 That said, at this point in time, it is anticipated that such cases will be exceptional. Indeed, failing to define a relevant market may make it very difficult to calculate, or even to reasonably estimate, the actual or likely DWL associated with a merger, for the purposes of the efficiencies defence in section 96 of the Act.

C. THE ANALYTICAL FRAMEWORK IN A "PREVENT" CASE

365 At the outset of the Commissioner's final oral argument, her counsel urged the Tribunal to clarify the analytical approach applicable to three areas, namely, (i) the assessment of whether a merger prevents, or is likely to prevent, competition substantially, (ii) the efficiencies defence, and (iii) the circumstances in which the Tribunal will entertain the remedy of dissolution, and what factors will be taken into account in determining the appropriate remedy in any particular case.

366 These topics are all addressed to some extent in the Panel's decision. I would simply like to add some additional comments, particularly with respect to the analytical framework applicable to the Tribunal's assessment of whether a merger prevents, or is likely to prevent, competition substantially.

367 The Tribunal's general focus in assessing cases brought under the "substantial prevention of competition" and "substantial lessening of competition" branches of section 92 is essentially the same. In brief, that focus is upon whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger. The same is true with respect to other sections of the Act that contain these words.

368 In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur.

369 In making its assessment in the latter context, and with respect to a proposed merger, the Tribunal compares (i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist if the merger did not proceed. Scenario (ii) typically is referred to as the "but for", or "counterfactual", scenario. In the case of a completed merger, that "but for" scenario is the market situation that would have been most likely to emerge had the merger not occurred.

370 When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal generally will conclude that the merger is not likely to prevent or lessen competition at all, let alone substantially. With respect to allegations that competition is likely to be *lessened*, this conclusion generally will flow from a finding that the merger is not likely to enable the merged entity to *enhance existing, or to create new,* market power. With respect to allegations that competition is likely to be *prevented*, this conclusion generally will flow from a finding that the merger in question is not likely to enable the merged entity to *maintain* greater existing market power than in the absence of the merger. Once again, the foregoing also applies with respect to other sections of the Act that contain the "prevent or lessen competition substantially" test.

371 With respect to sellers, market power is the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time. With respect to purchasers, market power is the ability to profitably depress prices below the competitive level, or to reduce levels of non-price competition, for such a period of time.

372 In assessing whether market power is likely to be created, enhanced or maintained by a merger or a reviewable trade practice, the Tribunal assesses the intensity of competition, as reflected in its price and non-price dimensions. Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy's international competitiveness and the average standard of living of people in the economy.

373 In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price competition, the Tribunal focuses upon whether levels of service, quality, innovation, or other important non-price dimensions of competition are likely to be lower than in the absence of the merger. This focus ensures that the assessment of the intensity of price and non-price dimensions of competition is *relative*, rather than *absolute*, in nature (*Canada Pipe*, above, at paras. 36 - 38). In short, the assessment of levels of price and non-price competition is made relative to the levels of price and non-price competition that likely would exist "but for" the merger. The same approach is taken with respect to non-merger matters that require an assessment of whether competition is likely to be prevented or lessened substantially.

374 Competition may be said to be *prevented* when future competition is hindered or impeded from developing. Common examples of such prevention of competition in the merger context include (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.

375 In determining whether a prevention or lessening of competition is likely to be *substantial*, the Tribunal typically will assess the likely magnitude, scope and duration of any adverse effects on prices or on non-price levels of competition that it may find are likely to result from the creation, enhancement or maintenance of the merged entity's market power. That is to say, the Tribunal assesses the likely degree of such price and non-price effects, the extent of sales within the relevant market in respect of which such effects are likely to be manifested, and the period of time over which such effects are likely to be sustained.

376 With respect to magnitude or degree, the Tribunal has previously defined substantiality in terms of whether customers are "likely to be faced with *significantly* higher prices or *significantly* less choice over a *significant* period of time than they would be likely to experience in the absence of the acquisitions" (*Southam,* above, at 285, emphasis added). However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as the hypothetical monopolist that was conceptualized for the purposes of market definition.

377 Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. As a practical matter, in the case at bar, this distinction between "material" and "significant" is of little significance, because the Panel has found that prices are likely to be significantly (i.e., at least 10%) higher than they would likely have been in the absence of the Merger.

378 Turning to the scope dimension of "substantiality", the Tribunal will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to impose the above-mentioned effects in a material part of the relevant market, or in a respect of a material volume of sales.

379 With respect to the duration dimension of "substantiality", the Tribunal typically will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to sustain the above-mentioned effects for approximately two years or more, relative to the "but for" scenario. This explains why the Tribunal typically assesses future entry and the expansion of potential rivals to the merged entity by reference to a benchmark of approximately two years.

380 When, as in this case, the merger has already occurred and the Commissioner alleges that the merger is likely to prevent competition substantially, the Tribunal's assessment of the duration dimension of "substantiality" will focus on two things. First, the Tribunal will assess whether the entry or expansion that was prevented or forestalled by the merger likely would have been sufficiently timely, and on a sufficient scale, to have resulted in a material reduction of prices, or a material increase in one or more non-price dimensions of competition, had the merger not occurred. If so, the Tribunal will assess whether the entry or expansion of third parties likely will achieve this result, notwithstanding the fact that the merger has occurred.

381 Before assessing whether a likely prevention of future competition would be "substantial," the Tribunal also will assess whether that future competition likely would have materialized "but for" the merger in question. In this

regard, the Tribunal will assess whether such competition likely would have developed within a reasonable period of time.

382 What constitutes a reasonable period of time will vary from case to case and will depend on the business under consideration. In situations where steps towards entry or expansion were being taken by the firm whose entry or expansion was prevented or forestalled by the merger, a reasonable period of time would be somewhere in the range of time that typically is required to complete the remaining steps to enter or expand on the scale described above. Similarly, in situations where the entry or expansion was simply in the planning stage, a reasonable period of time would be somewhere in the range of time that typically is required to complete the plans in question and then to complete the steps required to enter or expand on the scale described above. In situations where entry on such a scale cannot occur for several years because, for example, a new blockbuster drug is still in clinical trials, a reasonable period of time would be approximately the period of time that it typically would take for such trials to be completed, relevant regulatory approvals obtained, and commercial quantities of the drug produced and sold. In situations where entry on the scale described above cannot occur for several years because of long term contracts between customers and suppliers, a reasonable period of time would be approximately one year after a volume of business that is sufficient to permit entry or expansion on that scale becomes available.

383 In all cases, the Tribunal must be satisfied that the future competition that is alleged to be prevented by the merger likely would have materialized within a reasonable period of time. If so, the Tribunal will assess whether the prevention of that competition likely would enable the merged entity to exercise materially greater market power than in the absence of the merger, for a period of approximately two years or more, subsequent to that time.

384 Notwithstanding the foregoing, it is important to underscore that the magnitude, scope and duration dimensions of "substantiality" are interrelated. This means that where the merged entity is likely to have the ability to prevent a particularly large price decrease that likely would occur "but for" the merger, the volume of sales in respect of which the price decrease would have had to be experienced before it will be found to be "material" may be less than would otherwise be the case. The same is true with respect to the period of time in respect of which the likely adverse price effects must be experienced - it may be less than the two year period that typically is used. Likewise, where the volume of sales in respect of which a price decrease is likely to occur is particularly large, (i) the degree of price decrease required to meet the "materiality" threshold may be less than would otherwise be the case, and (ii) the period of time required for a prevention of competition to be considered to be "substantial" may be less than two years.

385 In conducting its assessment of whether a merger is likely to prevent competition substantially, the Tribunal also assesses whether other firms likely would enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion likely would occur even if the merger proceeds, it is unlikely to conclude that the merger is likely to prevent competition substantially.

386 In summary, to demonstrate that a merger is likely to prevent competition substantially, the Commissioner must establish, on a balance of probabilities, that "but for" the merger, one of the merging parties likely would have entered or expanded within the relevant market within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market, for approximately two years. Alternatively, the Commissioner must establish a similar likely effect on prices or on levels of non-price dimensions of competition as a result of the development of another type of future competition that likely would have occurred "but for" the merger.

D. WHEN EFFICIENCIES CAN BE CONSIDERED

387 The Tribunal's decision in *Propane 3*, above, has been interpreted as suggesting that cost reductions and other efficiencies can never be considered prior to the triggering of the defence set forth in section 96. This appears to be a misreading of *Propane 3*. The source of this misunderstanding appears to be found in paragraph 137 of that decision. The focus of the discussion in that paragraph was on the differences between the Canadian and American

approaches to efficiencies, and, specifically, whether section 96 requires the efficiencies likely to result from a merger to be so great as to ensure that there are no adverse price effects of the merger.

388 There may well be situations in which any cost reductions or other efficiencies likely to be attained through a merger will increase rivalry, and thereby increase competition, in certain ways. These include: (i) by enabling the merged entity to better compete with its rivals, for example, by assisting two smaller rivals to achieve economies of scale or scope enjoyed by one or more larger rivals, (ii) by increasing the merged entity's incentive to expand production and to reduce prices, thereby reducing its incentive to coordinate with other firms in the market post-merger, and (iii) by leading to the introduction of new or better products or processes.

389 There is no "double counting" of such efficiencies when it is determined that the merger in question is likely to prevent or lessen competition substantially and a trade-off assessment is then conducted under section 96. This is because, in that assessment, such efficiencies would only be considered on the "efficiencies" side of the balancing process contemplated by section 96. They would not directly or indirectly be considered on the "effects" side of the balancing process, because they would not be part of any cognizable (i) quantitative effects (e.g., the DWL or any portion of the wealth transfer that may be established to represent socially adverse effects), or (ii) qualitative effects (e.g., a reduction in dynamic competition, service or quality). Moreover, at the section 92 stage of the analysis, they typically would not be found to be a source of any new, increased or maintained market power that must be identified in order to conclude that the merger is likely to prevent or lessen competition substantially.

E. THE EFFICIENCIES DEFENCE

390 The analytical framework applicable to the assessment of the efficiencies defence has been set forth in significant detail in the Panel's decision. I simply wish to make a few additional observations.

(i) Conceptual framework

391 In broad terms, section 96 contemplates a balancing of (i) the "cost" to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92 (the "Section 92 Order"), and (ii) the "cost" to the economy of not making the Section 92 Order. The former cost is the aggregate of the lost efficiencies that otherwise would likely be attained as a result of the merger. The latter cost is the aggregate of the effects of any prevention or lessening of competition likely to result from the merger, if the Section 92 Order is not made.

392 Section 96 achieves this balancing of "costs" by (i) confining efficiencies that are cognizable in the trade-off assessment to those that "would not likely be attained if the [Section 92 Order] were made", as contemplated by subsection 96(1), and (ii) confining the effects that may be considered in the trade-off assessment to "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger".

393 In short, the efficiencies that are eliminated by this language in subsection 96(1), which is referred to at paragraph 264 of the Panel's decision as the fifth "screen" established by section 96, are not considered in the trade-off assessment because they would not represent a "cost" to society associated with making the Section 92 Order. That is to say, the efficiencies excluded by this screen either would likely be achieved through alternative means in any event, or they would be unaffected by the Section 92 Order. This could occur, for example, because they would be attained in one or more markets or parts of the merged entity's operations that would be unaffected by the Section 92 Order. It is in this sense that the assessment contemplated by section 96 is heavily dependent on the nature of the Section 92 Order.

394 That said, to the extent that there are efficiencies in other markets that are so inextricably linked to the cognizable efficiencies in the relevant market(s) that they would not likely be attained if the Section 92 Order were made, they are cognizable under section 96 and will be included in the trade-off assessment.

395 In assessing whether efficiencies are likely to be achieved through alternative means, the Tribunal will assess the realities of the market(s) concerned, and will not exclude efficiencies from its analysis on the basis of speculation that the efficiencies could *possibly* be achieved through such alternative means.

396 It bears emphasizing that, under section 96, the relevant counterfactual is the scenario in which the Section 92 Order is made. This is not necessarily the scenario in which the merger does not occur.

(ii) Socially adverse effects

397 At paragraph 284 of the Panel's decision, it was observed that the Commissioner adduced no evidence with respect to what the Tribunal in the past has characterized as being *socially adverse* effects. The Panel also observed that the Commissioner conceded that the merger is not likely to result in any such effects. Accordingly, the Panel confined its assessment to the *anti-competitive* effects claimed by the Commissioner.

398 However, given that the Commissioner requested, in her final oral submissions, that the Panel clarify the analytical approach applicable to the efficiencies defence, the following observations will be provided with respect to the potential role of socially adverse effects in the trade-off analysis contemplated by section 96, in future cases.

399 At paragraph 205 of its final argument, CCS characterized the approach established by the Federal Court of Appeal in *Propane 2*, above, as being the "balancing weights approach." This is the same terminology that was used by Dr. Baye at footnote 14 of his reply report, where he referred to the approach established in *Propane 3*, above, and *Propane 4*, above. However, as the Tribunal noted in *Propane 3*, at para. 336, balancing weights "is incomplete [as an approach] and useful only as a tool to assist in its broader inquiry" under section 96. With this in mind, the Tribunal characterized that broader inquiry mandated by *Propane 2* in terms of the "socially adverse effects" approach. However, on reflection, the term "weighted surplus" approach would seem to be preferable.

400 As noted at paragraphs 281 - 283 of the Panel's decision, the total surplus approach remains the starting point for assessing the effects contemplated by the efficiencies defence set forth in section 96 of the Act. After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., the DWL) and non-quantifiable anti-competitive effects of the merger in question, it will assess any evidence that has been tendered with respect to socially adverse effects. In other words, if the Commissioner alleges that the merger is likely to give rise to socially adverse effects, the Tribunal will determine how to treat the wealth transfer that is likely to be associated with any adverse price effects of the merger. The wealth transfer is briefly discussed at paragraph 282 of the Panel's decision.

401 As the Tribunal observed in *Propane 3*, above, at para. 372, "demonstrating significant adverse redistributional effects in merger review will, in most instances, not be an easy task." Among other things, determining how to treat the wealth transfer will require "a value judgment and will depend on the characteristics of [the affected] consumers and shareholders" (*Propane 3*, above, at para. 329). It will "rarely [be] so clear where or how the redistributive effects are experienced" (*Propane 3*, above, at para. 329). In general, the exercise "will involve multiple social decisions" and "[f]airness and equity [will] require complete data on socio-economic profiles on [*sic*] consumers and shareholders of producers to know whether the redistributive effects are socially neutral, positive or adverse" (*Propane 3*, above, at paras. 329 and 333).

402 Where it is determined that the merger likely will result in a socially adverse transfer of wealth from one or more identified lower income group(s) to higher income shareholders of the merged entity, a subjective decision must be made as to how to weigh the relevant part(s) of the wealth transfer. (If the entire wealth transfer will involve a socially adverse transfer, then it would be necessary to decide how to weigh the full transfer.) If the income effect on some purchaser groups would be more severe than on others, different weightings among the groups may be required.

403 It is at this point in the assessment that the balancing weights tool can be of some assistance. As proposed by Professor Peter Townley, one of the Commissioner's experts in *Propane*, above, this tool simply involves determining the weight that would have to be given to the aggregate reduction in consumer surplus (*i.e.*, the sum of the deadweight loss, including any deadweight loss attributable to pre-existing market power, plus the wealth transfer) in order for it to equal the increased producer surplus that would likely result from the merger (*i.e.*, the sum of the efficiency gains and the wealth transfer). (See the Affidavit of Peter G.C. Townley, submitted in *Propane*, above, (available at http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0115_38LES-1112005-8602.pdf).)

404 For example, in *Propane*, the aggregate reduction in consumer surplus was estimated to be $43.5 million, *i.e.*, the estimated $40.5 million wealth transfer plus the estimated $3 million DWL. By comparison, the aggregate increase in producer surplus was estimated to be $69.7 million, *i.e.*, the sum of the efficiency gains accepted by the Tribunal, namely $29.2 million, plus the wealth transfer of $40.5 million. The balancing weight was therefore represented by *w* in the following formula: 1(69.7) - *w* ($43.5) = 0. Solving for *w* yielded a value of 1.6, which was the weight at which the consumer losses and the producer gains just balanced. (See *Propane 3*, above, at paras. 102-104.) Accordingly, for consumer losses to outweigh producer gains, they would have had to be given a weight of greater than 1.6, assuming that producer gains were given a weight of 1.

405 Professor Townley's helpful insight was that members of the Tribunal often would be in a position to subjectively determine, even in the absence of substantial information, whether there was any reasonable basis for believing that a weighting greater than the balancing weight ought to be applied to the socially adverse portion(s) of the wealth transfer. If not, then notwithstanding an insufficiency of the information required to accurately calculate a full set of distributional weights, it could be concluded that the efficiencies likely to result from the merger would outweigh the adverse effects on consumer surplus. Unfortunately, there was not sufficient information adduced in *Propane* to permit the Tribunal to assess whether the estimated balancing weight of 1.6 was reasonable, given the socio-economic differences between and among consumers and shareholders (*Propane 3*, above, at para. 338).

406 Where the balancing weights tool does not facilitate a determination of the weights to be assigned to any identified socially adverse effects, other evidence may be relied upon to assist in this regard. For example, in *Propane 3*, the Tribunal relied upon Statistics Canada's report entitled *Family Expenditure in Canada, 1996*, which suggested that only 4.7% of purchasers of bottled propane were from the lowest-income quintile, while 29.1% were from the highest-income quintile. The Tribunal ultimately determined that the redistributive effects of the merger on customers in the lowest-income quintile would be socially adverse, and included in its trade-off analysis an estimate of $2.6 million to reflect those adverse effects. Although it found that it had no basis upon which to determine whether the DWL should be weighted equally with adverse redistribution effects, the Tribunal ultimately concluded that, even if the $2.6 million in adverse distribution effects were weighted twice as heavily as the $3 million reduction in DWL and a further $3 million to represent the adverse qualitative effects of the merger, the combined adverse impact on consumer surplus would not exceed $11.2 million (*Propane 3*, above, at para. 371). Since that estimate was still far below the recognized efficiency gains of $29.2 million, it concluded that the defence in section 96 had been met. This conclusion was upheld on appeal.

(iii) Non-quantifiable/qualitative effects

407 The Panel's assessment of the non-quantifiable effects that were considered in the section 96 trade-off assessment in this case is set forth at paragraphs 305-307 of its reasons.

408 I simply wish to add that where there is not sufficient evidence to quantify, even roughly, effects that ordinarily would be quantifiable, it will remain open to the Tribunal to accord *qualitative* weight to such effects. For example, in the case at bar, it would have been open to accord qualitative weight to the anti-competitive effects of the Merger expected to occur outside the Contestable Area, given that the evidence established that such effects were likely, but could not be calculated due to shortcomings in the evidence. As it turned out, it was unnecessary for the Panel to give those effects any weighting whatsoever.

409 Similarly, had the Panel not accepted the Commissioner's evidence with respect to the quantitative magnitude of the DWL, such that there was then no evidence on this specific matter, it would have been open to the Panel to accord qualitative weight to the fact that there would have been *some* significant DWL associated with the adverse price effects which it determined were likely to result from the Merger. The same will be true in other cases in which either it is not possible to reliably quantify the likely DWL, even in rough terms, or the Commissioner fails to adduce reliable evidence regarding the extent of the likely DWL, at the appropriate time.

DATED at Ottawa, this 29th day of May, 2012.

(s) Paul Crampton C.J.

CT-2019-005

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

PARRISH & HEIMBECKER, LIMITED

Respondent

COMMISSIONER'S BOOK OF AUTHORITIES IN SUPPORT OF THE COMMISSIONER'S MOTION TO DESIGNATE THE IDENTITES OF THE COMMISSIONER'S FARMER WITNESSES AS CONFIDENTIAL

Attorney General of Canada
Department of Justice Canada
Competition Bureau Legal Services
50 Victoria Street
Gatineau, QC K1A 0C9
Fax: (819) 953-9267

Jonathan Hood
Tel: (416) 954-5925
Jonathan.Hood@canada.ca

Ellé Nekiar
Tel: (819) 994-4050
Elle.nekiar@canada.ca

Counsel to the Commissioner of Competition