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IN THE COURT OF APPEAL

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC

(Applicant) Respondent

– and –

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP

(Respondents) Appellants

MOTION BRIEF OF THE APPELLANTS
(VOLUME I of II)

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II. INTRODUCTION AND BACKGROUND

THE FACTS

The Order Below and this Motion

1. On November 19, 2020, the Honourable Mr. Justice Edmond, sitting as a judge of the Court of Queen's Bench (the **"Court Below"**) made an order (the **"Order"**) which, in part, approved the sale of the property located at 1771 Inkster Boulevard, Winnipeg, Manitoba (the "**Inkster Property**"), and declared that the interests of the owner in the Inkster Property would vest in the purchaser, free of encumbrances, upon the closing of the sale. The owner is the appellant Nygard Properties Limited ("**NPL**"). The Inkster Property was to be sold by Richter Advisory Group, in its capacity as the receiver of the appellants (the "**Receiver**"). (This transaction is hereinafter the "**Sale**").

2. The making of the Order had been opposed by the respondents to the application below, and has been appealed by them to this Court. The Receiver has brought the within Chambers motion for a declaration that the appellants require leave to appeal pursuant to section 193 of the *Bankruptcy and Insolvency Act,* R.S.C., C.B-3, as am. (the "***BIA***"), and for an order cancelling the stay of proceedings imposed by section 195 of the *BIA*, so as

to allow it to complete the Sale in advance of the hearing of the appeal. The Receiver proposes to argue only the issue of the stay on December 17, 2020, and so this brief will speak to that issue alone.

3. Lifting the stay will render the appeal moot. This is the Receiver's goal. The substance of the appeal is the assertion that the Receiver is without legal authority to sell the Inkster Property, or any other asset of the appellants. To permit the sale before the disposition of the appeal would be, in effect, to dismiss the appeal without argument.

The Application Below

The Lender has Been Paid in Full

4. The applicant White Oak Commercial Finance, LLC, (the "**Lender**"), brought the receivership application below in order to ensure that it would be repaid its secured advances to the appellants Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., and Nygard NY Retail, LLC (the "**Borrowers**"). In the affidavit of Robert L. Dean, the Lender's representative, Dean swore that the Nygård Group:

> *is in urgent need of court supervision with the assistance of a court officer. Accordingly, White Oak, through its counsel, delivered the Demand and Section 244 Notice on February 26, 2020. To date,* ***the amounts owing to White Oak have not been repaid.***

> *121. It is critical that Richter be appointed as Receiver as expeditiously as possible so that it can take immediate steps to preserve and maintain the property of the Nygård Group, which will include the implementation of a process to: (i) identify a liquidator and liquidate the assets, (ii) consider other options for the business* ***that would see the Lender paid in full in the short term****, and (iii) engage a broker to sell the Nygård Group's real estate assets.*[1]

5. The order appointing the Receiver was made by the Court Below on March 18, 2020 (the "**Appointment Order**"). With respect to NPL and the appellant Nygard Enterprises Ltd., ("**NEL**"), the Court Below in its General Order dated April 29, 2020 (the "**General Order**"), limited the scope of the Receiver's appointment to:

> ***only*** *such property, undertakings and assets of NEL and NPL in which the Applicants have an interest pursuant to the Credit Agreement … and the Loan Documents (as defined in the Credit Agreement).*[2]

6. The Lender has achieved its goal: it has been paid in full. In its Ninth Report, the Receiver stated:

> *Over the course of these Receivership Proceedings, proceeds to date have been generated from realizations on assets of NIP, NPL, and Nygard Inc. Overall, the Receiver presently estimates that* ***sufficient proceeds have been generated to date to repay the Lender*** *(subject to certain Lender claims still under consideration), the Receiver's Charge (to date),* ***the Landlords' Charge and to fund the***

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[1] Tab 22, Affidavit of Robert L. Dean affirmed March 9, 2020 (the "**Dean Affidavit**"), at paragraphs 120 and 121

[2] Tab 23, General Order dated April 29, 2020 at paragraph 2, emphasis added

> ***payment of Potential Priority Claims, with perhaps some "excess" remaining.***[3]

7. The Receiver is not simply in funds to pay the Lender: it has done so. The Interim Statement of Receipts and Disbursements which forms part of the Ninth Report shows a "Distribution to Lender" of $66,077,000,[4] and the Receiver has confirmed that:

> *proceeds from the Property, totaling approximately $66.1 million, were distributed to the Lender. The Receiver notes that on September 11, 2020, the Lender returned approximately $1.0 million to the Receiver relating to excess funds held by the Lender…"*[5]

8. With respect to the "*certain Lender claims*" referred to by the Receiver, in its Seventh Report dated September 10, 2020, the Receiver confirmed that subject to a US $700,000 claim by the Lender stemming from foreign exchange rating consistencies, and a USD$1,000,000 overpayment by the Receiver to the Lender (the net outcome of which would be a US $300,000 *overpayment* to the Lender), all amounts owing to the Lender under the Credit Agreement and/or the Receiver's term sheet had been paid in full.[6]

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[3] Affidavit of Adam Sherman (the **"Sherman Affidavit"**), Exhibit 9, Richter Advisory Group Inc. Ninth Report of the Receiver, (the "**Ninth Report**"), at paragraph 115, page 35, emphasis added
[4] *Ibid* at page 49
[5] *Ibid* at paragraph 161(d), page 50
[6] Tab 24, Richter Advisory Group Inc. Seventh Report of the Receiver, at paragraphs 41-44

9. The Receiver currently has more than $9.1 million in proceeds from the sale of the appellants' assets as "cash on hand".[7] The Lenders have been paid; the Landlords will be paid; the Receiver and its counsel will be paid; and there will be an excess.[8]

10. That the Lender has been paid in full is the most important fact before this Court. The Receiver's brief does not mention it. Nowhere in the material filed with this Court or with the Court Below does the Receiver acknowledge that the satisfaction of the debt owed to the Lender (and the debt owed to the Landlords, and the debt owed to the Receiver, etc.) has any legal or practical consequences. Instead, the Receiver's argument proceeds as if repayment *had not* occurred, as if nothing material has changed since the making of the Appointment and General Orders.

NPL Has Satisfied its Guarantee

11. The appellant NPL was subject to the Appointment and General Orders because it was a limited guarantor of the debt owed by the borrower companies to the Lender. As observed by the Court Below,[9] NPL's

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[7] Sherman Affidavit, Exhibit 9, Ninth Report, page 49
[8] *Ibid* at paragraph 115, page 35
[9] Tab 25, Reasons of the Court of Queen's Bench dated June 2, 2020, T8, lines 9-17

guarantee of the Borrowers' indebtedness was limited to a "*realized value after all costs and expenses, including enforcement costs, of US $20 million*".[10]

12. NPL satisfied its guarantee. The Receiver has sold real property owned by NPL on Niagara Street in Toronto,[11] (further to a charge/mortgage registered on title to that property in favour of the Lender)[12], and also sold real property owned by NPL located on Notre Dame Avenue in Winnipeg,[13] (further to a debenture granted by NPL in favour of the Lender.)[14] The aggregate proceeds of these sales were approximately $19.6 million,[15] which sum has been paid to the Lender.[16] NPL need pay no more, because the Lender has been satisfied in full.[17]

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[10]Sherman Affidavit, Exhibit 9, Ninth Report, paragraph 129(a), pages 39-40
[11]*Ibid* at paragraph 11, page 3; Tab 27, Order of the Court of Queen's Bench dated August 10, 2020
[12] Tab 22, Dean Affidavit, at paragraph 49(d), page 24, and Exhibit "H"
[13]Sherman Affidavit, Exhibit 9, Ninth Report, paragraph 9, page 3; Tab 26, Order of the Court of Queen's Bench dated June 30, 2020
[14] Tab 22, Dean Affidavit, at paragraph 49(e), pages 24-25, and Exhibit "I"
[15]Sherman Affidavit, Exhibit 11, First Pre-Filing Report of Albert Gelman Inc. in its capacity as Proposed Licensed Insolvency Trustee in the Notices of Intention to Make a Proposal (dated November 5, 2020) (the "**AGI Report**") at paragraph 25(b), pages 5-6; the Receiver puts the net proceeds at $19.4 million (Sherman Affidavit, Exhibit 9, Ninth Report, paragraph 132, page 40)
[16]Sherman Affidavit, Exhibit 9, Ninth Report at paragraph 113, page 34 and paragraph 161(d), page 50; Sherman Affidavit, Exhibit 11, AGI Report at paragraph 97, page 18
[17]Sherman Affidavit, Exhibit 9, Ninth Report at paragraph 161(d), page 50

13. That the owner of the Inkster Property has satisfied its obligations to the Lender is the second-most important fact before this Court. The Receiver's material does not mention it.

The Proposed Sale

14. The Inkster Property is extremely valuable. The exact price for which it is to be sold pursuant to the Order is under seal of the Court Below, and so cannot be stated publicly. However, that price is known to the Court Below, this Honourable Court, the Receiver, and the appellants. It would not breach the sealing order to acknowledge that that sale price is several million dollars.

15. The Receiver and the proposed purchaser, Eighth Avenue Acquisitions Ltd., (the "**Purchaser**") entered into the agreement of purchase and sale with respect to the Inkster Property on May 21, 2020.[18] The Receiver and the Purchaser have agreed on a number of extensions of the closing date,[19] including one very recently, to allow the Court Below time to deliberate and make its Order.

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[18] Sherman Affidavit, Exhibit 9, Ninth Report at paragraph 69(e), page 22
[19] *Ibid* at paragraph 79, page 24, and paragraph 83, page 26

16. There is no evidence that another extension is not acceptable to the Purchaser. Under cross-examination, the Receiver's affiant on this motion testified that after the Order was appealed, the Receiver discussed another extension with the Purchaser. These discussions included no talk about a possible risk to the transaction, or even a variance in its terms. The Receiver does not know the Purchaser's plans for the Inkster Property. In short, the Receiver has no evidence that the closing is urgent.

17. The Receiver has been clear that the purpose of the Sale is to create a fund from which the unsecured creditors of the appellants Nygard Inc. and Nygard International Partnership ("**NIP**") would be paid. Stated differently, the Order below allows the Receiver to liquidate NPL's sole remaining asset of substance so as to satisfy the unsecured creditors of *other companies*, the debts of which NPL has not guaranteed.[20]

> ***[I]f assets and liabilities of each Debtor are treated separately] remaining assets of NPL would not be available to pay (e.g.) employees of NIP who have unsecured claims*** *for unpaid employment amounts,* ***but would only be available to pay unsecured creditors, if any, of NPL****. [...] In the result,* ***overwhelmingly the unsecured creditors affected by these proceedings...will have debts owed "directly" to them by NIP or Nygard Inc.***[21]

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[20] Sherman Affidavit, Exhibit 11, AGI Report at paragraphs 92-96, "Liabilities"
[21] Sherman Affidavit, Exhibit 9, Ninth Report at paragraph 120, page 36, emphasis added

> *[...]*
> *[T]he sale of the Inkster Property is expected to contribute to the accumulation in the receivership of proceeds in excess of the amounts required to satisfy obligations ranking in priority to the claims of unsecured creditors, and therefore contribute to the accumulation of a pool (the "Unsecured Funds") of funds that may be* ***available to unsecured creditors of the Nygard Group on a consolidated or other basis.***[22]

18. The Receiver's brief on this motion chooses not to identify the proposed beneficiaries of the Sale, instead referring to unnamed "*stakeholders*" or "*interested parties*".[23] The only relevant stakeholders and interested parties are NPL's shareholders; it does not have arm's-length creditors.

The Appeal

19. For the purposes of the within motion, the appeal to this Court is an argument that the Court Below erred by allowing the Receiver to sell the Inkster Property, and by vesting out NPL's interest therein:

(i) when the Lender has been paid in full and thus no longer has "*an interest*" in the Inkster Property[24];

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[22] *Ibid* at paragraph 184, page 54, emphasis added
[23] Motion Brief of the Receiver (Cancelling of Stay) ("**Receiver's Brief**") at paragraphs 34 and 38
[24] Tab 23, General Order dated April 29, 2020 at paragraph 2; Tab 1, *The Law of Guarantee* at §10.49, page 728; Tab 2, *Act*, section 2

(ii) when NPL has satisfied its guarantee, and is therefore entitled to the Lender's security and to stand in the Lender's place relative to the other respondents, to the extent of US $20 million, pursuant to section 2 of the *Mercantile Law Amendment Act*, C.C.S.M. c. M120, (the "***Act***");

(iii) in order to benefit NIP's creditors:

a. when NPL has not guaranteed NIP's debts; and
b. when the Court Below had previously found that NPL's assets could be sold only for the benefit of NPL's creditors[25];

(iv) and over NPL's objections.

20. Stated differently, the appellants will argue that the Court Below erred by not discharging the Receiver after the satisfaction of the Lender, and by clothing the Receiver with the authority to sell the Inkster Property despite the apparent end of its mandate.

III. STATEMENT OF ISSUE

21. The issue before this Honourable Court is whether the stay imposed by section 195 of the *BIA* should be cancelled to allow the sale of the Inkster Property to close on January 18, 2021.

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[25] Tab 25, Reasons of the Court of Queen's Bench dated June 2, 2020, lines 9-17, emphasis added

IV. ARGUMENT

THE LAW

The Stay Should Not Be Cancelled

The Receiver is Attempting to Render the Appeal Moot

22. The Receiver has requested an order cancelling the stay imposed by section 195 of the *BIA*. The stay prevents the Receiver from closing the sale of the Inkster Property. The stay should not be cancelled because to do so would render the appeal moot.

23. NPL's basic argument is and was that the Receiver does not have the authority to sell the Inkster Property, which belongs to NPL, for the proposed benefit of NIP's unsecured creditors, at a time when NPL is not indebted to the Lender, has not guaranteed NIP's unsecured debts, and does not wish to have its property sold. The Receiver's basic argument is and was that the Inkster Property should be sold now, with the Court determining entitlement to the proceeds at a future time.[26]

[26] Receiver's Brief at paragraphs 25, 37(f) and 40-41

24. If NPL wishes to have its property, and the Receiver wishes to reduce that property to a fund, then lifting the stay to enable the Receiver to reduce the Property to a fund before the hearing of the appeal gives the Receiver exactly what it wants. Its victory would be accomplished, and the appeal (if it proceeded) would simply become a dispute about entitlement to the proceeds, which the Receiver had planned for in any event.

25. The Court of Appeal for Alberta recently dismissed an application for the lifting of a stay in precisely these circumstances and for precisely these reasons. In *Servus Credit,* 2019 ABCA 269, the appellant sought leave to appeal, if necessary, an approval and vesting order in favour of a receiver. The receiver sought an order lifting the stay to permit the sale approved by the order under appeal. Watson J.A. dismissed the motion to lift the stay as follows.

> *[40] [There was no elaborate discussion of the cross-motion for a stay or suspension of the statutory stay arising under the BIA. Without detailed reasons I concluded that* ***the cross-motion would contradict the main application and render the appeal moot.*** *Accordingly, it was clear to the parties that the statutory stay was engaged in light of the leave grant. As such, the cross-motion was dismissed.]*[27]

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[27] Emphasis added

26. The Court of Appeal for Ontario has reached the same result on similar facts. In *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 638[28], a judge had approved a receiver's sale of a large commercial property, on which a Home Depot stood. Home Depot, the leaseholder on the property, appealed the decision. A dispute arose concerning whether the approval and vesting order was automatically stayed. Weiler J.A. held in part:

> *14 I do not find it necessary to decide whether or not an automatic stay exists as* ***I intend to make an order preserving the status quo until the appeals are heard****. Home Depot's appeal raises some issues of first impression for this court.* ***If a stay is not granted, Home Depot will suffer irreparable harm as its appeal of the March order will become moot****. […][29]*

27. Lastly, in *Aulakh v. Nahal,* 2016 BCCA 516, (not a section 195 case, but an application for a stay pending appeal), Groberman, J.A. held that the sale of the real property at issue would render the appeal "*nugatory*", and that such would constitute irreparable harm to the appellant.[30]

28. The result should be the same here.

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[28] Tab 5
[29] Emphasis added
[30] Tab 6, 2016 BCCA 516, at paragraph 10

The Test

29. Section 195 states that the court of appeal or a judge of that court may vary or cancel the stay if it appears that the appeal is not being prosecuted diligently, or for such other reason as the court of appeal or a judge thereof deems proper.

30. It is settled law that the party seeking cancellation of the stay, in this case the Receiver, bears the burden of establishing "*compelling grounds for judicial intervention*".[31]

31. The analysis on applications to cancel the stay is based[32] on the tripartite test outlined by the Supreme Court in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*,[33] and *RJR-MacDonald Inc. v. Canada (Attorney General)*.[34] This test involves a consideration of whether there is a serious issue to be appealed, whether the applicants would suffer irreparable harm if the stay is not lifted, and

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[31] Tab 7, *Yewdale v. Campbell, Saunders Ltd.* (1994), 9 B.C.L.R. (3d) 253 (B.C.C.A.) ("***Yewdale***"), at paragraphs 14-15; Tab 8, *Dugas, Re* (2003), 261 N.B.R. (2d) 99 (N.B.C.A.) ("***Dugas***"), at paragraph 14; Tab 9, *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121 ("***After Eight***"),at paragraph 5; Tab 10, *Dynamic Transport Inc., Re*, (2016) 274 A.C.W.S. (3d) 713 (NBCA) at paragraphs 34-36

[32] Tab 11, *Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.*, 2012 MBCA 115 ("***Paletta***"), at paragraph 15

[33] Tab 12, [1987] 1 S.C.R. 110 (S.C.C.) ("***Metropolitan***")

[34] Tab 13, [1994] 1 S.C.R. 311 (S.C.C.) ("***RJR***")

whether the applicants would suffer greater harm than the respondents if the stay is not lifted.[35] In practice, Courts of Appeal across Canada have focused on the relative prejudice to the parties and the interests of justice generally.[36]

32. The Receiver cites *Paletta* for the proposition that the first branch of the test concerns the "*merits of the appeal*".[37] *Paletta*, a decision of this Court, does not support the Receiver's claim. The cases cited by Scott C.J.M. are *Metropolitan* and *RJR*,[38] which direct Courts to perform "*an extremely limited review of the case on the merits*"[39] under the rubric of "*serious triable issue*".

Serious Triable Issue

33. The Supreme Court has held that this threshold is a low one.

> *55. Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.*[40]

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[35] Tab 9, *After Eight*, at paragraph 5
[36] Tab 14, *Toronto Dominion Bank v. Amex Bank of Canada* (1996), 181 A.R. 279 (A.C.A.) at paragraphs 7-11; Tab 7, *Yewdale*, (1994 BCCA), at paras. 21-27; Tab 8, *Dugas (2003 NBCA)*, at paras. 14-15; Tab 15, *RBI Plastique Inc. v. Sport Maska Inc.*, [2005] N.B.J. No. 542 (N.B. C.A.) at para. 4; Tab 16, *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41 (Alta. C.A.) at paras. 17-20; Tab 11, *Paletta*, (2012 MBCA), at paragraphs 9-14; Tab 17, *Bodanis,* (2020 ONCA), at paragraph 11;.
[37] Receiver's Brief, at paragraph 14
[38] Tab 11, *Paletta*, at paragraph 15
[39] Tab 13, *RJR*, at paragraph 83
[40] *Ibid* at paragraph 55

34. The Receiver cannot show that NPL's appeal is frivolous, and has not attempted to do so. This is because NPL's argument against having its Inkster Property sold by the Receiver for the benefit of NPI's unsecured creditors is, at the bare minimum, good and arguable. Although the Court Below held that the Lender had been paid during the course of the receivership, *it did not ascribe any legal or practical significance to that fact*, instead falling back upon the Appointment Order, which had been made at a time when NPL was indebted to the Lender for $20 million, and the Lender was owed millions more than that. The complete reasons of the Court Below concerning the Receiver's authority to sell the Inkster Property are as follows.

> *a) The Receiver is Court-appointed, and the duties and role of a Court-appointed Receiver must be distinguished from a privately appointed Receiver. A Court-appointed Receiver is charged with the duty to account for all receipts and disbursements and must continue to act in that capacity until discharged by the Court. A Court-appointed Receiver acts as a Court officer for the benefit of all stakeholders. The Receiver is a fiduciary for any surplus funds received which may be payable to other creditors and the debtors. [citations omitted]*
>
> *b) I am satisfied the Receiver has successfully managed the liquidation process* ***to substantially pay the debt owing to the Lenders. I disagree with the submission advanced by the respondents that the Receiver has become a trespasser and continuing to liquidate real property is wrongful and inappropriate****;*
>
> *c) NPL is a limited recourse guarantor pursuant to the Credit Agreement. NIP, the entity that carried on the fashion clothing business*

> *is also a guarantor pursuant to the Credit Agreement. Both entities may have rights to subrogation to the extent of their payments to the Lenders were made on behalf of the borrowers, as defined in the Credit Agreement;*
>
> *d)* ***Pursuant to the receivership order, the Receiver is authorized to market and sell the Inkster Property to satisfy the Lenders' debt, the Receiver's borrowing charge, the landlord's charge and other creditors claims including the claims that may be advanced by the debtors such as NPL and NIP****. The Receiver is fulfilling its duties as a Court-appointed officer. The Receiver is neither a trespasser nor is its conduct wrongful or illegal in the circumstances;*[41]

35. It is not frivolous and vexatious for the appellants to argue that the Court Below erred in holding i) that a receiver should continue to "*liquidate*" private property after payment of the applicant lender and satisfaction of the costs of receivership, solely because it has been appointed by the Court,[42] and ii) that the Sale was justified in order to satisfy debts which had already been satisfied, (*"the Lenders' debt, the Receiver's borrowing charge, the landlord's charge"),* or respecting which the necessary predicate order for consolidation of the appellants' estates had not been made (*"other creditors claims including the claims that may be advanced by the debtors such as NPL and NIP").* Stated differently, the Court Below appears to have erred in law and in fact respecting the essential matters before it.

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[41] Sherman Affidavit, Exhibit 15, Reasons for Judgment (Excerpt) of the Court Below dated November 19, 2020 (the "**Reasons of the Court Below**") at pages T5 to T6, emphasis added
[42] *Ibid* at pages T11 and T5

36. Rather than argue the *RJR* test, the Receiver's submission on the merits proceeds from bare assertions about the standard of review. The key assertion is that "*all the issues raised in the appeal represented an exercise of judicial discretion*" by the Court Below.[43] The Receiver doesn't provide a case to support this proposition of law, or subsidiary assertions such as "*the timing of the discharge of a Court-appointed receiver...is also a matter generally within the discretion of the Court*"[44], or "*the decision of a receivership judge with respect to whether an asset is collateral under a receivership order...is a discretionary decision.*"[45] The Receiver's clear hope is that it can persuade this Court not to look closely at the Reasons of the Court Below. Such is not typically the case when an appeal is frivolous and vexatious.

37. Further, the Receiver's assertions about the standard of review are clearly wrong. Whether a receiver should be discharged once the secured lender has been paid is not, for example, a matter of judicial discretion. It is a matter of law, even when the receiver has been appointed by the Court.

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[43] Receiver's Brief at paragraph 16
[44] Receiver's Brief at paragraph 21
[45] Receiver's Brief at paragraph 25

The leading Canadian text on receiverships, *Bennett on Receiverships*, is clear on this point:

> ***[I]f the receiver has successfully managed a debtor's business to the extent of retiring the debt of the security holder, the receiver ought not to continue operating the business. The receiver will be without authority and therefore, notwithstanding its good intentions, the receiver may become a trespasser and liable for damages****. The receiver remains accountable and becomes a fiduciary until a time when the receiver returns the business to the debtor.*[46]

38. To the same effect is the leading text in the United Kingdom, *Kerr & Hunter on Receivers and Administrators*:

> ***12-4 On satisfaction of encumbrance****. A receiver is generally continued until judgments in the action which he has been appointed; but,* ***if the right of the claimant ceases before that time, the receiver will be discharged at once.***[47]

39. The Court Below did not engage with this authority beyond stating that he "*disagree[s]*" with it (and so would not discharge the Receiver), because of the terms of the Appointment Order.[48] This decision, and the failure to provide a cogent analysis in support of it, is reviewable on a correctness standard.

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[46] Tab 18, Frank Bennett, *Bennett on Receiverships*, Third Edition, 2011, at page 605, citations omitted, emphasis added

[47] Tab 19, Muir Hunter Q. C., *Kerr and Hunter on Receivers and Administrators*, Eighteenth Edition, 2005, at page 260, emphasis added

[48] Sherman Affidavit, Exhibit 15, Reasons of the Court Below, at page T6

40. The same is true with respect to the decision to approve the sale of the Inkster Property. NPL, the property's owner, should no longer be a respondent in the receivership, as it has satisfied its debt to the Lender. Indeed, pursuant to section 2 of the *Act*, it is entitled to the Lender's security and to stand in the Lender's place relative to the other respondents, to the extent of US $20 million. In *8640025 Canada Inc. (Re)*, 2017 BCCA 303, a unanimous panel of the British Columbia Court of Appeal set aside an order approving the sale, by a CCAA monitor, of certain assets belonging to a number of companies forming part of a complex corporate group. Some of the assets appeared to belong to entities outside the CCAA process. The Monitor had argued, and the Court below had accepted, that those assets were appropriate for sale for a variety of reasons, among them that they were subject to the lender's security. The approval of the sale seems to have been reviewed on a correctness standard. The dispositive passage is as follows.

> *54 With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the CCAA process unless the subsidiaries have been brought within that process as debtor companies, which they have not.*

41. The decision below should have been to the same effect.

Irreparable Harm

42. In *RJR,* irreparable harm is defined as "*harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other*".[49] NPL will suffer two kinds of irreparable harm if the stay is cancelled. Firstly, its appeal would be rendered moot. As set out above, this fact alone should lead to the dismissal of the Receiver's motion.

43. Secondly, the sale of the Inkster Property would deny NPL its sole remaining substantial asset, which it has owned outright for more than 30 years. The property is unique, (as the Receiver has explained to the Court Below),[50] and its wrongful sale could not be compensated for by payment.

44. The Receiver's Brief asserts that *"[w]here the stay of a sale approval and vesting order jeopardizes the closing of the sale and may result in the deal being lost, the stay may be cancelled to prevent irreparable harm to the Receiver and interested stakeholders*".[51] The reality of the situation is as follows.

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[49] Tab 13, *RJR*, at paragraph 64
[50] Sherman Affidavit, Exhibit 9, Ninth Report, at paragraphs 66 and 95
[51] Receiver's Brief at paragraph 34; see also paragraphs 38-39

(a) There is no evidence, beyond the Receiver's bald speculation, that the Sale is in danger of being lost. The closing has been postponed multiple times since May 2020, and the Purchaser has not testified respecting its intent.

(b) None of the three cases cited by the Receiver as support for its assertion is relevant to the case before this Court. This is so most fundamentally because they do not concern circumstances in which an applicant creditor in a receivership had been paid in full, and in which there was, therefore, a direct challenge to the receiver's legal authority to complete a sale. In fact, only one of the three cases concerned a receiver's sale of assets *at all*. None of the cases contain the "*irreparable harm*" language used by the Receiver in its brief.

i. *Paletta*, (2012 MBCA – In Chambers) This case concerned a sale by a receiver. The appeal was based wholly upon complaints about the procedure followed by the receiver in arriving at the relevant purchase agreement.[52] The within appeal, by contrast, does not challenge the Receiver's plan for marketing the Inkster Property: it challenges the Receiver's legal authority to complete the sale. Further, *Paletta* does not hold that a receiver may suffer irreparable harm if a sale does not close (indeed, one wonders how a Court officer could suffer such harm in such circumstances). The Court's one mention of irreparable harm clearly refers to

[52] Tab 11, *Paletta*, at paragraphs 11 and 14

harm potentially suffered by the applicant secured creditors,[53] which were owed millions and which did not wish to maintain the relevant (empty) property over the winter.[54] In other words, the "*interested stakeholders*" were unpaid creditors secured on the real property, not the unsecured creditors of another company that did not have an interest of any sort in the land.

ii. *Re Plaza Mining Corp.*, (1983 BCCA – In Chambers)[55] This case bears no similarity, in fact or in law, with the one before this Honourable Court. This was an application for a stay pending appeal in a bankruptcy, not a receivership.[56] The sale process was being conducted by a trustee in bankruptcy, not a receiver.[57] The relevant sale had been approved by a motion judge who "*stressed that it was a bankruptcy, and a decision should be made now, that all parties had been involved for some time, and the proceedings had gone on long enough.*"[58] The party moving for a stay was one of the unsuccessful bidders, and its argument was wholly procedural: "*that the judge erred in refusing adjournment applications for the purposes of allowing the parties to prepare appropriate offers and for the purpose of giving directions so that the best possible price could be obtained for the assets*".[59] There was affidavit evidence from the purchaser before the Court, which affidavit stressed that

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[53] *Ibid*, at paragraph 9
[54] *Ibid*, at paragraph 9
[55] Tab 21, [1983] B.C.J. No. 1179, (BCCA – In Chambers)
[56] *Ibid*, at paragraph 3
[57] *Ibid*, at paragraph 4 and 13
[58] *Ibid*, at paragraph 9
[59] *Ibid*, at paragraph 7

the relevant offer was conditional upon acceptance before the onset of winter, when mining the property would become impossible.[60] The phrase "*irreparable harm*" is not used in the case. In dismissing the application for a stay, MacDonald J.A. emphasized "*the duty of the trustee to liquidate the assets of the estate in an expeditious manner…[and that] [c]arrying on now would in my view cause unnecessary expense for an unlimited time with the prospect of a continually worsening situation*".

It should not have to be said, but the Receiver is a receiver, not a trustee in bankruptcy liquidating a mining property in a rush before winter. It does not have the broad powers and duties of a trustee; it absolutely does not have the extraordinary authority to liquidate the assets of each of the appellants, consolidate the proceeds, and then use those proceeds to ensure that NIP's unsecured creditors are paid with those proceeds. The Receiver's authority over the assets of the Respondents is derived *solely* from the orders appointing and affecting it. Those orders are predicated upon the enforceability of the security of the Lender which applied for the appointment of the Receiver. The debt secured has been paid; the Lender's' rights are spent. The situation is not "*worsening*"; from the perspective of NPL's one-time creditor, the Lender, it has become extraordinarily positive.

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[60] *Ibid*, at paragraph 18(4)

iii. *Re Bodanis* (2020 – ONCA In Chambers) This was an appeal from the granting of two bankruptcy orders against individuals, not from an order approving a receiver's sale of assets.[61] The phrase "*irreparable harm*" is not used in the case. The only time real property is mentioned by Nordheimer J.A. is when he observed that the home of the bankrupts was already subject to mortgage proceedings (by a bank that was not party to the bankruptcy).[62] Save for its reference to the test for the lifting of the section 195 stay,[63] the case is wholly irrelevant to the one before this Court.

45. The appellants are not aware of any case in which a Canadian Court of Appeal has lifted the section 195 stay of proceedings to allow the sale of property when the property's owner is not indebted to the proposed beneficiaries of the sale.

Balance of Convenience

46. The balance of convenience clearly favours NPL. If NPL is correct and thus successful on the appeal, then it is entitled to the immediate possession and control of the Inkster Property. The cancellation of the stay would render those rights of possession, ownership and control nugatory, no matter the

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[61] Tab 17, *Bodanis*, at paragraph 2
[62] *Ibid*, at paragraph 13
[63] *Ibid* paragraph 11

result of the appeal. If the Receiver is correct, then the only prejudice it would suffer as a result of the maintenance of the stay would be another in a series of easily-arranged extensions of the closing on the sale of the Inkster Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of December, 2020

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(1)

THE LAW OF GUARANTEE

THIRD EDITION

Kevin McGuinness

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security interests in an imprudent (or improvident) manner,[172] then the surety is entitled to be credited with what ought to have been realized had the creditor followed a more prudent course.[173] If the secured creditor calls upon the surety to pay the guaranteed debt, and the surety does so pay, then the secured creditor must deliver its security interest to the surety upon payment. This right arises by virtue of subrogation.

§10.49 The rights of a surety with respect to the security held by the creditor qualifies the general rule that payment of a secured debt by the debtor who granted the security interest will normally[174] discharge the security interest that has been granted. This result grows out of the principle that a mortgage (or other security interest) is granted for a specific purpose, and upon the satisfaction of that purpose, the rights conferred under the mortgage are spent. However, it does not follow that the payment of the amount owing by some third party results in a corresponding evaporation of the security interest. Such a contractual right is granted to secure the performance of the principal debtor. The payment by the surety to the creditor no more constitutes the performance of the principal debtor than the purchase of the security agreement by a third party would constitute such performance. The principal remains obliged to perform, and therefore the security interest continues in respect of such performance.[175] The arrangements as between the surety and the creditor are immaterial to the relationship between the creditor and principal, and to any security interest that the creditor has granted.

(3) Realization of Security and Improvident Realization

§10.50 A secured creditor owes a duty to the principal and any guarantors to take reasonable precautions to obtain the true market value of the charged property on the date the creditor decides to sell the property.[176] There is also a duty to

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and has credited the full value thereof on the guaranteed debt, the surety is in no way prejudiced."

172 *Duca Financial Services Credit Union Ltd. v. Bozzo*, [2006] O.J. No. 4339 at para. 14 (Ont. C.A.), *per* Blair J.A.: "... a guarantor is entitled, from the moment of his or her guarantee, to call for the benefit of all securities held in respect of the guaranteed debt, if needed, and that a creditor has a general obligation to protect and preserve the security and to be in a position to return or reassign the security to the debtor or surety on repayment of the debt. ... Should the mortgaged property be disposed of by power of sale, the mortgagee's obligation is to account for the proceeds of sale."

173 *A defence based upon this line of attack is rarely successful. See, generally, on this point: Royal Bank of Canada v. 2021847 Ontario Ltd.*, [2007] O.J. No. 4994 (Ont. S.C.J.), aff'd [2008] O.J. No. 3511 (Ont. C.A.); contrast however *Crawford v. New Brunswick (Agricultural Development Board)*, [1997] N.B.J. No. 368, 192 N.B.R. (2d) 68 (N.B.C.A.), *per* Bastarache J.A.

174 There are exceptions, as for instance, in the case of a security interest securing a revolving line of credit.

175 Compare *Standard Trust Co. v. Bank of Nova Scotia*, [2006] N.J. No. 345, 262 Nfld. & P.E.I.R. 319 (Nfld. C.A.).

176 *Bank of Nova Scotia v. Barnard*, [1984] O.J. No. 3218, 46 O.R. (2d) 409 (Ont. H.C.J.); *Royal Bank of Canada v. Cramer*, [1990] O.J. No. 827, 73 O.R. (2d) 677 (Ont. H.C.J.).

The Mercantile Law Amendment Act, CCSM c M120

2 Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, is entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty, or other security is or is not deemed at law to have been satisfied by the payment of the debt or performance of the duty; and that person is entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as in the case may be, indemnification for the advances made and loss sustained by the person who has so paid the debt or performed the duty, and the payment or performance so made by the surety is not pleadable in bar of any such action or other proceeding by him.

***Bankruptcy and Insolvency Act*, RSC, 1985, c B-3**

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

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

(4)

In the Court of Appeal of Alberta

Citation: 1905393 Alberta Ltd v Servus Credit Union Ltd, 2019 ABCA 269

Date: 20190705
Docket: 1903-0134-AC
Registry: Edmonton

Between:

1905393 Alberta Ltd.

Applicant/Respondent by Cross-Application
(Appellant)
(Defendant)

- and -

David Podollan and Stellar One Holdings Ltd.

Applicants/Respondents by Cross-Application
(Appellants)
(Not Parties)

- and -

PricewaterhouseCoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd.

Respondent/Applicant by Cross-Application
(Respondent)
(Not Party)

- and -

Servus Credit Union Ltd.

Respondent/Respondent by Cross-Application
(Respondent)
(Plaintiff)

- and -

Ducor Properties Ltd., Northern Electric Ltd., and Fancy Doors & Mouldings Ltd.

Respondents/Respondents by Cross-Application
(Respondents)
(Not Parties)

Oral Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Permission to Appeal and Application for Stay
Cross-Application for Order Lifting Stay

Oral Reasons for Decision of
The Honourable Mr. Justice Jack Watson

[1] This an application by the appellants for an Order confirming or issuing a stay in respect of the Approval and Vesting Order granted by Topolniski J on May 21, 2019 dealing with a matter under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "*BIA*") and for which a formal order was immediately taken out at the time and then filed[1].

[2] By cross application, the Receiver seeks an order denying or lifting a stay in respect of the Approval and Vesting Order. The aspect of the formal order being immediately taken out and filed raises an interesting question concerning whether or not - as I raised at the outset of the hearing - Topolniski J would have jurisdiction under s 187(5) of the *BIA* to reconsider the decision. That section states that "every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction".

[3] Certainly the entry of the formal order would appear to oust the application of R 9.13 of the *Alberta Rules of Court*, Alta Reg 124/2010 because the formal order's entry would then make it within only a very narrow type of situation under the *Rules* for her to reconsider her decision. That said, the *BIA* appears to be more generous than that in relation to a Court's ability to reconsider the case.

[4] As I pointed out at the beginning, I am very indebted to the very capable presentations which have been made concerning s 187(5) of the *BIA* and the frankness of all counsel that no one is asking for that possible remedy in this case. Accordingly, I will act upon that indication of counsel.

[5] It does appear to me that counsel have put forward as best as they can the positions that they take relative to the substantive issue before me which is whether or not there is an appeal as of right on the part of the appellants to this Court under s 193 or whether or not there should be leave granted for an appeal to this Court on behalf of the appellants (and then the cross-motion and collateral remedy as was discussed at the end of the debate).

[6] Before getting into the further reasons on this point I should therefore just say that I am not going to make any suggestion or refer back or purport to refer this matter back to Topolniski J. It seems to me that I could not have commanded her to do anything anyway in relation to it. The effect of doing so would probably itself hinder the progress of this particular matter within

[1] These oral reasons have been edited somewhat, largely by adding citations. Counsel on the motions were informed that they would be.

the meaning of the test which has relevance to my decision and which will be referred to in my reasons later.

[7] Going back to the substance of the motions before me today, I noted during the course of debate with counsel that the parties who appeared before Topolniski J as defined by the transcript were Servus Credit Union Ltd. ("Servus") and 1905393 Alberta Ltd. ("190"). However, the notice of appeal which was purportedly done as of right and then on the applications which followed, the appellants are 190, Mr. Podollan himself and Stellar One Holdings Ltd.

[8] During the course of the debate, it occurred to me to wonder whether or not it is possible to expand the scope of appellants. It does appear - and again notably this was placed before me by counsel - that the right of appeal under s 193 of the *Bankruptcy and Insolvency Act* does appear to be not limited to any lower level parties, strictly speaking, who appeared at the hearing before the Court of Queen's Bench judge.

[9] To clarify, I am not making a legal statement on who is entitled to appeal under the terms of the *BIA*. But I am saying that, for the purposes of the present case, it does appear that there is no serious objection to the capacity of an 'interested party' to appeal from a decision made under that statute by virtue of the broad language which is contained in s 193 of the *Bankruptcy and Insolvency Act*.

[10] It is interesting to note, in that context, some other things which were discussed as to who had a right to appeal as well. Counsel for Fancy Doors suggested that they did have an independent right to appeal but that they proposed to, in a sense, tag along with the 190 appeal in this case. So in that sense, it does not fall to me or make it necessary for me to determine whether or not Fancy Doors' view on that point is correct. Suffice to say, though, there is no apparent objection to the appeal being brought by 190 and Mr. Podollan and by Stellar One Holdings Ltd.

[11] So I will say no more about it except to point out that all three of them, therefore, would have to meet the criteria under s 193 either for an appeal as of right or an appeal by leave in order to be here. Because in theory, if not necessarily in practice, a court in a position such as I am in now could say 'yes' to one and 'no' to another. But no one is asking me to do that so I will proceed 'in the round', as the English would say, in connection with the case in front of me.

[12] Once again before getting into the merits of the matter, I should also observe that there was a fairly continuous flow of material arriving in the course of the lead up to this hearing today. In that sense, I said in the opening comments that I have no criticism of anyone. I faced a predicament though as it arrived in the Court as to whether I should even accept the material and read it. I did accept and read it. But that does not mean I accepted the material as admissible. But it does mean I accepted it as in front of me and I had to do something with it.

[13] I should emphasize, however, that the proposed new evidence has, in a sense, come before this Court without a proper new evidence motion. Accordingly, that I must be acutely conscious of the need to ensure that - to the extent any such evidence should be admissible - the admissibility is subject to relevance. That is to say that, if admissible, the new material may only be admissible for one purpose but not for every purpose. When evidence is brought into a courtroom the evidence is related to the particular matter that is engaged at that time and not some other collateral considerations or, for that matter, to considerations which could have the effect themselves of reconstructing the record.

[14] The difficulty that exists for our Court as a court of appellate jurisdiction is that we do not retry cases. We are not supposed to take a second look at the facts of the case. Consequently new evidence that is presented to the Court must only be treated – apart from being within the limitations of the new evidence Rules – as related to the issues for which it is properly presented.

[15] In that respect, it does appear to me that the new evidence that has been received cannot be accepted on the subject matter of whether or not the actions of the Receiver or Colliers were in some sense improper, incorrect or unreasonable. Whether leave should be granted under this section 193 must be based upon the record of the ruling under review.

[16] However, that said, the proposed new evidence that has been presented to me is to some limited extent potentially relevant on the question of the counter-action application for a stay of the statutory stay under s 195 of the *BIA*. It provides:

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

[17] So to the very limited extent that evidence has some bearing on what I have to decide today it is that: namely, my consideration of it will be limited only to the question of whether or not I should grant the application for a stay of the automatic stay under the *BIA* - presuming that I would grant leave to appeal or declare that the appellant has an appeal as of right that has been taken properly.

[18] I turn now to the substantive questions of whether or not there is a basis for either recognizing or declaring that there is a proper appeal as of right in front of me by the three parties mentioned before, or whether or not leave should be granted to all of them, rather than to any one of them in particular.

[19] The first point I should address then is whether or not there is an appeal as of right. I cannot make a declaration sitting as a single judge whether there is an appeal as of right in connection with this case because obviously it would not be considered an 'incidental ruling' to the operation of the Court of Appeal itself. Rule 14.37(1) provides:

> Single appeal judges
>
> 14.37(1) Unless an enactment or these rules otherwise require, a single appeal judge may hear and decide any application incidental to an appeal, including those that could have been decided by a case management officer.
>
> (2) For greater certainty, a single appeal judge may
>
> (a) grant permission to appeal, unless an enactment requires that an application for permission to appeal must be heard by a panel of the Court of Appeal,
>
> (b) declare an appeal to be struck, dismissed or abandoned for failure to comply with a mandatory rule, prior order or direction of the Court of Appeal,
>
> (c) when a notice of appeal or an application for permission to appeal is not filed within the time limit, strike the appeal or application or extend the time to appeal or to seek permission to appeal,
>
> (d) dismiss an appeal if it has not been significantly advanced in over 6 months and significant prejudice has resulted to a party,
>
> (e) grant permission to intervene, and
>
> (f) refer any application to a panel of the Court of Appeal.

[20] However, I am required to make some sort of an observation, although I should show some self-discipline and not try to provide the definitive statement on this subject.

[21] There are two sub-sections of s 193 of the *Bankruptcy and Insolvency Act* which the appellants argue provide the basis upon which there is an appeal as of right. One section is s 193(a) concerning future rights and the other is s 193 (c) concerning an amount at stake in the amount of ten thousand dollars or more. Section 193 of the *BIA* reads:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

[22] First, dealing with the question of future rights under s 193(a). During the course of the debate of that point, I pointed out that if the appellant's reasoning was correct, a similar proposition would be engaged for s 193(a) as for s 193(c), namely, that the identity of a party who was actually applying for the leave would be almost a surplus issue.

[23] That is because as long as somebody would have an interest over ten thousand dollars or somebody would have a future right involved it would be - theoretically the way the argument seems to go - possible to grant leave to the particular appellant before the Court.

[24] I have considerable doubt whether there is an appeal as a right on the basis of the appellants having future rights at stake. As I said, however, I cannot say one way or the other because I am only a single judge. I do think it is very much on the borderline as arguable. However, having said that, I do have to step back a moment and recognize the fact that the weight of cases made in support of that point are, by and large Ontario cases, although we could reach farther back into the mists of another generation to find some Alberta authority on this.

[25] There is something to be said for the appellants' argument (in support of their contention that they have an appeal as of right) that Parliament, when they enacted the leave permission in s 193(e), did not repeal any of the *other* sections for which leave is not required. The Parliament of Canada when enacting legislation can be taken to understand its own statute book and the common law and, if it intended therefore by virtue by creating a leave option to eliminate or narrow down the other statutory as of right provisions, it could have done so in a less mysterious way. See ***R v W(DL)***, 2016 SCC 22, at paras 20-22, [2016] 1 SCR 402 as well as ***Rawluk v Rawluk***, [1990] 1 SCR 70 citing ***Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co. Ltd.***, [1956] SCR 610. See also: ***Sekhar v United States***, 570 US (June 26, 2013; USSC No 12-357); ***Hui v Castaneda***, 559 U.S. _____ (May 3, 2010, USSC No. 08–1529); ***Commissioner of Police v Eaton***, [2013] HCA 2; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: Lexis Nexis, 2008), pages 653-659; Pierre-André Coté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto, ON: Carswell, 2011), pages 112-113.

[26] Also I have some doubt in my mind about the validity of the proposition that the 'as of right' provisions in s 193(a) - 193(d) of the *BIA* are to be narrowly construed as suggested in several Ontario cases and whether those are strictly correct. In that regard, I am referring to ***Re Stelco Inc*** (2005), 8 CBR (5th) 150, ***2403177 Ontario Inc v Bending Lake Iron Group Ltd***, 2016 ONCA 225, ***Re Enroute Imports Inc***, 2016 ONCA 247, ***Downing Street Financial Inc v Harmony Village-Sheppard Inc***, 2017 ONCA 611, and ***B&M Handelman Investments Ltd v Drotos***, 2018 ONCA 581. Although I find some of the appellants' arguments as to how those provisions apply a little bit questionable, I similarly find the respondents' arguments against the appeal as of right also be questionable. Compare: ***Trimor Mortgage Investment Corporation v. Fox*** 2015 ABCA 44, 26 Alta LR (6th) 291.

[27] The net effect is, therefore, on balance the appellants have made a sufficiently arguable point where I should grant leave to appeal to this Court on whether or not they have an appeal as of right because the question of whether or not they have an appeal as of right is itself a question of importance to the profession.

[28] That issue does raise the Receiver's valid concerns about whether the as of right provisions undermine the role of the Receivers or the integrity of the process generally. But those arguments are not in my view sufficiently compelling to deny granting leave on the question of whether the appellants have a statutory appeal as of right.

[29] I pause to add that concerns about the integrity of the process has been high in my mind because it is of some concern to give respect, as pointed out by one counsel, towards the decision making process of judges in the commercial court. But I do have to say that Topolniski J's reasons may seem arguably deficient as regards the denial of an adjournment. She also, for example, refers to ***River Rentals Group Ltd v Hutterian Brethren Church of Codesa***, 2010 ABCA 16, 469 A.R. 333 and ***Royal Bank of Canada v Soundair*** **Corp** (1991) 7 CBR (3d) 1 only briefly when discussing the duties of a Judge when reviewing a Receiver's sale process, following which she then gives her decision. This is not intended as a criticism but it does seem to me that under those circumstances there is some basis for at least leave to be granted to argue whether leave to appeal as of right arises in this instance.

[30] Now, as far as leave on the other questions which do arise in this instance, I should explain the other questions that do arise. Counsel are not bound by my statements incidentally and in fact the panel of this Court would not be bound by my statements of any analytical point on the questions either.

[31] However, one such question unrelated to whether there is a statutory right of appeal would be what is the applicable standard of review in relation to an appeal from a decision of a commercial court judge in these circumstances having regard to the test in ***Soundair*** and ***River Rentals***. That issue arose during the course of the debate with counsel today. I do think there should be a hearing by a panel of the Court as to what extent and to what degree this Court is in

a position to interfere with a determination by a commercial court judge on whether or not the ***Soundair*** test and ***River Rentals*** test has been met in these circumstances.

[32] The net effect of that then is that there is also leave granted on the standard of review that would be applicable to this Court reviewing a decision by a Court of Queen's Bench judge in the context such as arose here.

[33] Furthermore, a necessary ancillary question is the test of reviewing the decision made by the Receiver, in a sense, penetrating past those cases and more into ***River Rentals*** than Tolpolniski J's decision got. In clarifying on that, one of the questions this Court may end up considering is whether or not unreasonableness is an element of the test for determining whether or not a Receiver has done the right thing.

[34] Unreasonableness is a pretty elastic standard and this Court may decide that is not an adequate test and that something stronger rising to a level of lack of correctness may be required.

[35] A further topic that this Court may decide to determine is whether or not there is procedural unfairness in the way in which the Receiver proceeded in this case, viz: procedural, or for a lack of a better word, administrative unfairness in how the process unfolded.

[36] A final question arises because of the circumstances of the case. That is the question of the introduction of new evidence in connection with reviews of Queen Bench's judge's decisions as here and for that matter the review of the decision of the Receiver. While I myself would be relatively reluctant about taking new evidence in relation to a matter of that sort, it would be a proper question for this Court to decide whether or not new evidence should be admitted.

[37] I want to reiterate that I was not moved by the supplementary evidence that kept coming in when making my decision. I can ignore all that but still say that upon the strength of any case that has the contours that this one does: would new evidence be admissible in a court in a determination as to whether to review either the decision of a Court of Queen's Bench judge or the decision of the Receiver as reviewed by the Court of Queen's Bench judge?

[38] To put those comments back into the framework of the proper test, the application for leave to appeal under s 193(e) of the *Bankruptcy and Insolvency Act* involves consideration of several points: see ***Fantasy Construction Ltd. (Re)***, at paras 10 to 16, 417 A.R. 255 (four points) and ***2003945 Alberta Ltd v 1951584 Ontario Inc***, 2018 ABCA 48 at para 41, 57 CBR (6th) 272 (five points). I should address them:

> 1. Is the point of appeal of significance to the factors in practice? I think it is and for the reasons I have mentioned.

2. Is the point of significance to the action itself? It goes without saying, there are a lot of parties with a lot of money on the table here. But it includes also at least one of the appellants.

3. Is the appeal *prima facie* meritorious? As I have attempted to explain on the issue on whether there is an appeal as a right, I have difficulty with both sides of the debate. But that makes it *prima facie* meritorious if a single judge, in fact, has difficulty sorting that out, at least there is some argument that it is an arguable case.

4. Will the appeal unduly hinder the progress of the action or the insolvency proceedings (emphasizing the latter, of course)? It does seem to me that it will hinder them because obviously it slows them down and of course the grant of leave terminates the effect of the sale date. Will it unduly do so? I do not think so. This Court will act upon this as promptly as we can and perhaps the optimism expressed by counsel about the improvements in the Alberta economy will in fact develop.

5 Does the judgment appear to be contrary to law on abusive or unfair process or involve obvious error causing prejudice which there is no other remedy? I am satisfied that this aspect is comparable to the irreparable harm test that particular provision that I refer to and I do believe that in fact either failure to grant leave in this instance or likewise the cross-motion would render the appeal moot and that is the same sort of irreparable harm that I have been talking about. In other words, that there would be no other remedy for the appellants, this would all be over and they would be out of their property.

One might compare the Alberta cases with the more abbreviated test in ***Romspen Investment Corp v Courtice Auto Wreckers Ltd***, 2017 ONCA 301 at para 25, 47 CBR 6th 1.

[39] In the end result, leave to appeal is granted on the question of whether or not there is an appeal as of right. Leave to appeal is granted on the various points to which I referred, namely, the standard of review of the Queen's Bench judge and of the review of the Receiver's decision and as to what elements each review should have, and on the test of admission of new evidence on either form of appeal.

[40] [There was no elaborate discussion of the cross-motion for a stay or suspension of the statutory stay arising under the *BIA*. Without detailed reasons I concluded that the cross-motion would contradict the main application and render the appeal moot. Accordingly, it was clear to

the parties that the statutory stay was engaged in light of the leave grant. As such, the cross-motion was dismissed. This led to a further discussion of security for costs as follows.][2]

[41] [After submissions of counsel]. There will also be an order for security for costs on appeal in favour of the respondent Servus Credit Union Ltd in the amount of $50,000 and for the respondent Receiver (PricewaterhouseCoopers Inc) in the amount of $50,000 that will be deposited with the Court by June 21, 2019 by the appellants.[3]

Application heard on June 6, 2019

Reasons filed at Edmonton, Alberta
this 5th day of July, 2019

Watson J.A.

[2] This paragraph was not part of the oral reasons and is inserted for clarity and completeness.

[3] This paragraph summarizes the result on security for costs.

Appearances:

C. Young/D.R. Peskett
for the Applicants 1905393 Alberta Ltd., David Podollan and Stellar One Holdings Ltd.

D.M. Nowak/J.M. Lee
for the Respondent PricewaterhouseCoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd.

C.P. Russell, Q.C.
for the Respondent Servus Credit Union Ltd

S.A. Wanke
for the Respondent Ducor Properties Ltd.

D.R. Pekskett as Agent for S.T. Fitzgerald (no appearance)
for the Respondent Northern Electric Ltd.

A. Sturmay (Student-at-Law)
for the Respondent Fancy Doors & Mouldings Ltd.

(5)

CITATION: Romspen Investment Corporation v. Woods Property Development Inc., 2011 ONCA 638
DATE: 20111012
DOCKET: M40540 & M40558 (C54375)

COURT OF APPEAL FOR ONTARIO

Weiler J.A. (In Chambers)

In the Matter of Section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as Amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43, as Amended

BETWEEN

Romspen Investment Corporation

Respondent in Appeal (Applicant)/Responding Party

and

Woods Property Development Inc. and TDCI Holdings Inc.

(Respondents)

John J. Chapman and Craig A. Mills, for the moving party, Home Depot of Canada Inc.

David P. Preger, for the responding party, Romspen Investment Corporation

Harvin D. Pitch, for the Receiver, SF Partners Inc.

Heard: October 7, 2011

On appeal from the order of Justice Herman J. Wilton-Siegel of the Superior Court of Justice, dated September 28, 2011 and on a motion and cross-motion for directions.

Weiler J.A.:

[1] Home Depot moves for directions as to whether an automatic stay exists of Justice Wilton-Siegel's order made September 28, 2011. That order approved the sale and vesting of title respecting 20 High Street, Collingwood, Ontario, in 2204604 Ontario Inc. (220 Ontario) free and clear of Home Depot's interests. If that order is not automatically stayed, Home Depot seeks an order staying the operation of the vesting order until its appeal is heard.

[2] The factual matrix of the motion is as follows. In 2006, Home Depot built a $14 million dollar store on an 8.67 acre parcel of land that is part of a larger 40 acre property in Collingwood owned by Woods Property Developments (Woods) and on which Romspen Investment Corporation (Romspen) held the first mortgage. Home Depot has a ground lease permitting it to build the store at its own expense and a purchase agreement with Woods conditional upon severance of the 8.67 acre parcel. No severance was obtained by the time of the events that follow.

[3] Woods went into default on its mortgage to Romspen. SF Partners became the court appointed receiver over the property with a view to marketing and selling the property. After approximately ten months, SF Partners accepted an offer from 220 Ontario to purchase the property for $14.1 million. 220 Ontario is owned and controlled by Romspen. The purchase price is a partial reduction of the indebtedness owing to Romspen under its mortgage plus cash to pay the outstanding receivership fees, realty

taxes, etc. on closing. The purchase agreement is conditional upon the receiver delivering the property free and clear any claims of Home Depot unless arrangements are reached on terms satisfactory to 220 Ontario in its sole discretion. No arrangements were ever reached.

[4] In October 2009 SF Partners moved for court approval of the sale and an order vesting title to the property in 220 Ontario.

[5] Home Depot took the position that SF Partners could not sell the property on which the store is located "free and clear" of its interest. On March 17, 2011, (the March order) Wilton-Siegel J. held that SF Partners could do so. He held that Home Depot is entitled to an equitable lien against the property but that that lien is subordinate to the mortgage given by Woods to Rompsen. However, Wilton-Siegel J. refused to approve the sale to 220 Ontario and ordered a further marketing and sale process.

[6] Home Depot appealed and SF Partners cross-appealed the March order. The appeals are scheduled for hearing on November 14, 2011.

[7] SF Partners again marketed the property but no other offers were received.

[8] An issue arose between the parties as to whether Wilton-Siegel J.'s order was automatically stayed pending appeal. SF Partners moved for directions before this court and Blair J.A. held that it was not necessary to rule on this issue pending the hearing of sale agreement approval motion. He observed, however:

> Whatever the merits of the appeal, I am satisfied that Romspen will suffer irreparable harm if a stay is imposed at this time. Its debt is increasing by $4200 per day and it has no recourse against Home Depot for those amounts and Woods is insolvent. There is no credible evidence in the materials that any better sale is realistically likely to emerge. Home Depot says it will suffer if an Order is made, "vesting it out" of the property. But it seems to me it is the author of its own misfortune in that it proceeded with its construction without obtaining the necessary protective assurances from the mortgagee. In fact, the mortgagee explicitly said "No". In addition, it may be that Home Depot (as the holder of an equitable interest in the land) can exercise its right to redeem in order to protect its outlet and interests. For these reasons, the balance of convenience also favours permitting the sale approval motion to proceed. Whether, if approval is granted and a vesting order made, a stay pending the disposition of the appeal on November 14, 2011 should be imposed, is a matter to be determined, if these events occur.

[9] On September 28, 2011 Justice Wilton-Siegel approved the sale agreement and ordered that the property be vested in 220 Ontario free and clear of any interests and claims of Home Depot.

[10] Home Depot is also appealing the September order. It then brought this motion for directions before me and asks that this appeal also be heard on November 14, 2011.

[11] SF Partners opposes Home Depot's request for a stay of the vesting order. At present the interest on the outstanding amount due under the Romspen mortgage is in excess of $7,550. Per day. The daily interest accruing on the net sale proceeds exceeds $4,200.

[12] Romspen opposes the request for a stay. Landex, a joint venture partner with Romspen to redevelop the property has indicated that it is not prepared to wait indefinitely to proceed. Romspen is concerned about losing a valuable investment opportunity.

[13] The town of Collingwood has, however, refused to accommodate Romspen's development efforts because of the outstanding existing litigation between SF Partners and Home Depot. Home Depot currently employs 120 persons.

[14] I do not find it necessary to decide whether or not an automatic stay exists as I intend to make an order preserving the status quo until the appeals are heard. Home Depot's appeal raises some issues of first impression for this court. If a stay is not granted, Home Depot will suffer irreparable harm as its appeal of the March order will become moot. While the granting of a stay will cause some prejudice to Romspen, the terms of the limited order I propose to make will go a long way towards relieving that prejudice. In any event, given the town of Collingwood's stand, it appears that Romspen would not be able to proceed with its development plans until the litigation is resolved.

[15] The appellant, Home Depot, has deposited approximately one million dollars with Miller Thomson which is being held in its trust account. The amount is equivalent to the amount that Home Depot owes as rent under its lease agreement. Home Depot shall continue to pay the same monthly amount into Miller Thomson's trust account.

Home Depot shall not remove or cause any of the money in the trust account to be removed without seeking the approval of this court.

[16] I appreciate that there are considerable ongoing daily expenses that Romspen would not be able to recover in the event that Home Depot loses on appeal. These include Home Depot's share of property taxes and the ongoing costs of the receivership. As well, Romspen asks this court to consider the loss of notional interest to it and the loss of its opportunity to deal with the property in the interim. To alleviate the prejudice to Romspen that my order creates, I order Home Depot to deposit a letter of credit with the court in the amount of $100,000 on or before October 18, 2011. In the event that Home Depot is entirely unsuccessful in its appeal this amount will be considered to be costs thrown away by Home Depot.

[17] The appeals of the March and September orders are ordered to be heard together at the same time on November 14, 2011.

[18] The court offered to facilitate a pre-hearing appellate conference of counsel and all counsel have agreed to participate in that process with a view to resolving the appeal. In the event the issues cannot be resolved, it will be for counsel to work out the timing of filing of appeal books, facta, etc. in relation to the September order.

[19] This order is in effect until the appeals are heard on November 14, 2011 or further order by the court before that date. If the appeals go ahead, it will be for the panel

hearing the appeals to decide whether or not to continue this order or to vary its terms pending its decision on the issues under appeal.

[20] The costs of the motion and cross-motion on a partial indemnity basis are as follows: Home Depot $10,329.78; Romspen $12,678.82; the Receiver $12,291.63. Those costs are reserved to the panel hearing the appeal.

"Karen M. Weiler J.A."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aulakh v. Nahal,*
2016 BCCA 516

Date: 20160805
Docket: CA43811

Between:

Rajinderpal Singh Aulakh

Appellant
(Plaintiff)

And

**Harbhajan Singh Nahal, Manjit Kaur Nahal,
Sandra Li, and Pan Pacific Platinum Real Estate Services Inc.
doing business as New Coast Realty**

Respondents
(Defendants)

And

Ranjit Kaur Aulakh, Inderjit Singh Aulakh and Harpreet Kaur Aulakh

Defendants by Counterclaim

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia, dated July 22, 2016 (*Aulakh v. Nahal*, 2016 BCSC 1362, Vancouver Registry No. S143946)

Oral Reasons for Judgment

Counsel for the Appellant:	B.B. Olthuis
Counsel for the Respondents, H.S. Nahal and M.K. Nahal:	S.K. Sheena-Nakai L.J. Marriner
Counsel for the Respondents, S. Li and New Coast Realty	D.J. Marks
Place and Date of Hearing:	Vancouver, British Columbia August 5, 2016
Place and Date of Judgment:	Vancouver, British Columbia August 5, 2016

Summary:

The appellant claimed the respondents wrongly refused to proceed with the sale of residential property. He advanced a claim for specific performance, which the chambers judge struck, ordering, as well, the cancellation of a certificate of pending litigation. On application: Stay of the order granted, appeal ordered expedited. The judge arguably erred in law in requiring a claim for specific performance to be supported by evidence that the property was uniquely suited to the plaintiff's personal needs, as opposed to the needs of his family. Further, it was arguable that she misapprehended certain evidence and reversed the onus of proof. Given the appellant's assurance that he would allow the respondents to re-finance their property, the balance of convenience favoured a stay. The balance of convenience might shift if the appeal were delayed, however, so the stay was time-limited, subject to the appellant's ability to apply for an extension.

[1] **GROBERMAN J.A.**: This is an application for a stay of an order of a judge in Supreme Court striking a claim for specific performance. There is, as well, an application to expedite the appeal, which I will deal with after giving reasons on the stay application.

[2] It is common ground that the test on the stay application is that set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The first question is whether the appeal has some merit in the sense that it could be successful. I then have to look at whether irreparable harm might occur if the appellant is not granted a stay, but is ultimately successful on the appeal. Finally, I must balance the inconvenience of the parties.

[3] The main question argued on this application is that of whether the appeal is meritorious. It is clear that the chambers judge understood the test that she was required to apply. She referred to it early in her judgment: was it plain and obvious that the claim for specific performance could not succeed?

[4] The appellant argues that the chambers judge made errors of law in applying the test. He points to paras. 27 and 28 of the reasons for judgment, where the judge seems to say that in order to succeed in a claim for specific performance, the plaintiff must demonstrate that his personal needs (and not just the needs of those for whom he is acquiring the property) would be uniquely satisfied by the property. It is at least arguable that that is an error of law. It may well be that the needs of the Aulakh

household, as opposed to simply the needs of the person whose name would go on title, were valid considerations.

[5] The other question considered by the judge was whether the property is unique. The appellant contended that the property is unique in that it has a coach house that is a separate living residence. There is some issue as to the legality of that coach house as a residence, but that question cannot, and need not, be determined on this application.

[6] The judge said:

> [41] ... Furthermore, it is also only one aspect of difference and its significance is not attested to or supported in the material. The material does not support the conclusion this aspect alone would make it plain and obvious that the property is unique and therefore a claim for specific performance would be a possibility.

[7] It seems to me that there are two arguable errors in this paragraph. The first is the reference to the material not attesting to the significance of the coach house. While there is not a great deal in the affidavit material referring to the coach house, there is at least one paragraph attesting to its importance from the standpoint of privacy of the family.

[8] The second arguable error is in the judge's statement that "the material does not support the conclusion that this aspect alone would make it plain and obvious that the property is unique". In that statement, the judge appears to have reversed the onus of proof. It was up to the applicant before her to show that it was plain and obvious that a claim for specific performance could not succeed – therefore, the onus was on the applicant to show that the property could not be shown to be unique. While, as I indicated during argument, I am prepared to assume that the judge simply misspoke herself, it is not at all clear what she meant to say.

[9] While I make no comment on the strength of the appeal, it is apparent to me that it has some merit, and that is sufficient to meet the first aspect of the *RJR-MacDonald* test.

[10] With respect to irreparable harm, it is apparent to me that if a claim for specific performance is viable, then the striking of that claim would amount to irreparable harm to the appellant. Further, any sale of the property after removal of the Certificate of Pending Litigation ("CPL") would render the appeal nugatory. I am convinced that, in the circumstances of this case that, too, is an irreparable harm.

[11] On the balance of inconvenience, I have evidence before me that the Nahal respondents have financial difficulties and have suffered hardship in the course of the last year. They feel an exigent need to engage in some refinancing in order to manage financially until this matter goes to trial.

[12] Mr. Olthuis has told the Court that the appellant is prepared to lift the CPL for a period of time if there is an undertaking that the property will not be sold, in order that refinancing may occur. The details of the lifting and refinancing have not been canvassed before me, but it does seem that refinancing will be possible. I am prepared, in the circumstances, to find the balance of inconvenience favours the appellant.

[13] The mechanisms that would be followed in refinancing have not been fully canvassed, so I do not make the temporary lifting of the CPL a condition of the stay. I am granting the stay, however, on the assurance that the appellant will facilitate the refinancing by temporarily removing the CPL. If there are any difficulties with such a temporary removal of the CPL, the matter can be brought back before me. The parties can, if necessary, make a request to the Registry that I make myself available should any further application be needed with respect to the temporary lifting of the CPL for refinancing.

[14] In conclusion, I am of the view that: the merits of the appeal are such that it is arguable; the appellant may suffer irreparable harm if the stay is not granted; and the balance of convenience favours the granting of the stay. I am therefore granting a stay pending appeal.

[15] I am going to time-limit the stay. It is my view that the appeal should be heard quickly and that the balance of inconvenience may change if that does not occur. Unless extended by a judge in chambers, the stay will expire at the conclusion of the hearing of the appeal or on October 15, 2016, whichever occurs first.

[16] That leaves the expediting of the appeal, which I understand is largely uncontroversial. As I understand it, time to hear the appeal was available September 6, 2016, but that is not a date on which counsel for the main respondents is available. I am, therefore, not going to set that as the date for appeal. There are no other early dates currently available, but if an order is made to expedite the hearing, the matter can be put on a standby list. I am ordering that the hearing be expedited.

[discussion with counsel re. filing dates]

[17] **GROBERMAN J.A.**: I am directing that the appeal record and the appellant's factum and appeal book (if any) are to be filed no later than the close of business on Friday, August 12, 2016. I need not make an order as to service of the factum. I take it that will be accomplished either on that date or through some accommodation of counsel.

[18] The main respondents' factum will be due at the close of business on September 9, 2016.

[19] The remaining respondents' factums will also be due at the close of business on September 9.

[20] Any reply factum must be filed by September 14, 2016.

[21] I am directing that the Registry, in consultation with counsel, find the earliest practical date for the hearing of this appeal. I anticipate that one half-day or less will be necessary.

[22] In the event that an appeal date becomes available prior to the dates for filing of some of the factums, I would ask the Registry to work with counsel to secure the

earliest possible date notwithstanding that it may be a date prior to the deadlines for the filing of the factums.

"The Honourable Mr. Justice Groberman"

No. CA019632
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

MURIEL AGNES YEWDALE, A BANKRUPT

APPLICANT
(APPELLANT)

AND:

CAMPBELL, SAUNDERS LTD., TRUSTEE IN BANKRUPTCY

RESPONDENT
(RESPONDENT)

Before: The Honourable Madam Justice Prowse
(In Chambers)

H. Ferris	Counsel for the Respondent Campbell Saunders Ltd.
D. W. Donohoe	Counsel for the Appellant Mrs. Yewdale
A. Wade	Counsel for Mr. Darren Gervais
Place and Date of Hearing:	Vancouver, British Columbia December 8, 1994
Place and Date of Judgment:	Vancouver, British Columbia December 15, 1994

Written Reasons by:
The Honourable Madam Justice Prowse
(IN CHAMBERS)

Court of Appeal for British Columbia

No. CA019632
Vancouver Registry

MURIEL AGNES YEWDALE, A BANKRUPT

v.

CAMPBELL, SAUNDERS LTD., TRUSTEE IN BANKRUPTCY

Reasons for Judgment of The Honourable Madam Justice Prowse: (In Chambers)

NATURE OF APPLICATION

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

BACKGROUND

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

3 In September, 1993, judgment was awarded against Mrs. Yewdale in the amount of approximately 4.3 million dollars as a result of a motor vehicle accident which left Mr. Gervais, a young man in his early twenties, with devastating injuries. The limits on Mrs. Yewdale's insurance was 1 million dollars, leaving her personally liable for the balance of approximately 3.3 million dollars.

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

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

5 Following Mrs. Yewdale's assignment into bankruptcy, the Trustee arranged to have the property subdivided into 6 lots,

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

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

> She [Mrs. Yewdale] voluntarily made an assignment into bankruptcy. Upon doing that, she lost any entitlement to deal with her property. It became vested in the trustee for the benefit of her creditors. He now has every right to sell the land and distribute the proceeds to them.
>
> As to the proposed sale, it appears from the material that the trustee has taken all reasonable steps in trying to get the best possible price. His conduct may fall short of perfection but the law does not impose a standard of perfection upon him. He need only act reasonably, which he did. The trustee contends the proposed sale price is beyond his original expectations. If he is forced to wait until the outcome of the appeal from the award of damages, the value of the property may increase, stay the same, or fall. The creditors should not be the ones who bear the risk of eventually receiving a lower offer.
>
> A court should not interfere with the way the trustee conducts his duties absent any evidence of fraud or gross misbehaviour on his part. Generally speaking, it is for the inspectors, not the court, to supervise the

> way he carries out his business responsibilities. Apparently, there are no inspectors at the present time. However, the judgment creditor who could be appointed an inspector is in favour of the sale.

7 On May 25, 1993, Mrs. Yewdale filed an appeal from the order of Mr. Justice Bouck, thus triggering the automatic statutory stay under s. 195 of the Act. On June 8, 1993, the Trustee applied before the Chief Justice to cancel the stay. This application was dismissed, with liberty to renew upon judgment being rendered in this Court on the liability appeal.

8 On October 18, 1994, this Court dismissed Mrs. Yewdale's liability appeal. In the meantime, the original Shuang offer had collapsed. Jubilee's back-up offer, however, was still outstanding in the amount of 2.5 million dollars and Shuang presented a new offer for $2,538,000. The Trustee preferred the Jubilee offer which contained terms more favourable to Mrs. Yewdale. I am advised by counsel for the Trustee that those terms provide that: Mrs. Yewdale can rent the lot including her home for a period of up to 5 years; that the first six months of that term will be rent free; that the rent for months 7-24 of the term will be $1,500 per month, and $2,000 per month thereafter; and that Mrs. Yewdale will have an option to purchase the subdivided lot on which her home is built at any time within the 5 year period at market value as of the date of exercise of the option. These terms are included in a letter dated November 18, 1994 from counsel for Jubilee to counsel

for the Trustee which is incorporated by reference into Mr. Justice Edwards' order.

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

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

SUBMISSIONS OF COUNSEL

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

(1) The appeal is without merit;

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

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

12 Counsel for Mrs. Yewdale refutes these assertions. He also emphasizes the fact that, as a result of legal proceedings taken by Mrs. Yewdale against I.C.B.C. and her former solicitors with

respect to Mr. Gervais' action against her, there is a reasonable prospect that she may realize sufficient monies to enable her to pay the full amount of the judgment against her without resort to the sale of her property. These actions are set for trial on a peremptory basis for three weeks in February, 1995. Counsel for Mrs. Yewdale also submits that she will suffer hardship if she is forced to vacate her home at her age and in her state of declining health.

ANALYSIS

Section 195 of the Act

13 Section 195 of the Act provides as follows:

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

14 Section 195 imposes a statutory stay on the order from which the appeal is taken upon the filing of a Notice of Appeal. It also places the onus on the person opposed to the stay to establish grounds for its cancellation. The Court of Appeal, or a justice thereof, is given a broad discretion pursuant to the section to cancel the stay for such reason as it deems proper.

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

The Merits of the Appeal

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

17 In addressing the merits of the appeal, counsel for Mrs. Yewdale submits that the method of marketing the property in this

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

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

18 I note that the real estate agent who swore the key affidavit on Mrs. Yewdale's behalf is Mrs. Yewdale's niece and that the comparables which she has employed are properties fronting Deer

Lake, whereas the property in question here is near Deer Lake, but not fronting on the water. The second affidavit upon which counsel for Mrs. Yewdale relies appends an incomplete appraisal obviously requested shortly before the hearing before Edwards J. and prepared in haste.

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

20 On the basis of the materials which were before Edwards J. when he made his order, and bearing in mind the role of the Trustee in realizing upon the property of the bankrupt, I conclude that it is extremely unlikely that a panel of this Court would interfere with his decision. On that basis alone, I would be prepared to grant the application and cancel the stay of Mr. Justice Edwards' order. I propose, however, to go on to deal with the issue of relative prejudice.

Relative Prejudice

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

the result that the value of the judgment is declining on a daily basis.

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

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

24 Even if Mrs. Yewdale succeeds in her actions against I.C.B.C. and her former lawyers, I view it as probable that the result will be appealed given the relatively untried nature of the issues and

the amount of money involved. This will result in further substantial delays in Mr. Gervais realizing on his judgment.

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

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

27 Because of the view I have taken of the merits of the appeal and the relative prejudice to the bankrupt and the creditor if the stay is cancelled, it is unnecessary for me to discuss the question of whether the various steps taken by Mrs. Yewdale in these proceedings amount to an abuse of the bankruptcy process. Because of the nature of that allegation however, I think it appropriate to

state that I am not persuaded that the steps taken by Mrs. Yewdale in pursuing her various rights to appeal amount to an abuse of the bankruptcy process. To the extent that the provision for an automatic stay upon the filing of a Notice of Appeal thwarts the early and orderly distribution of the bankrupt's estate, that is a natural consequence of the legislation itself.

CONCLUSION

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

"The Honourable Madam Justice Prowse"

(8)

85/03/CA

IN THE COURT OF APPEAL OF NEW BRUNSWICK

Drapeau, C.J.N.B.

B E T W E E N:

CYRENUS JOSEPH DUGAS	)	Brigitte Sivret, Esqe.
	)	for the Appellant
APPELLANT	)	
	)	
- and -	)	
	)	
PRICEWATERHOUSECOOPERS INC.	)	Peter T. Zed, Q.C.,
	)	for the Respondent
RESPONDENT	)	

DATE OF HEARING: June 5, 2003

DATE OF DECISION: June 6, 2003

Decision on Motion for an order cancelling a stay under s. 195 of the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 and requiring security for costs under Rule 58.10 of the Rules of Court

[1] The Respondent Trustee in bankruptcy seeks an order cancelling the stay of proceedings that arose by virtue of s. 195 of the ***Bankruptcy & Insolvency Act*** upon the Appellant bankrupt's appeal of a May 27, 2003 decision of Justice Réginald Léger of the Court of Queen's Bench. The Trustee submits the order is warranted because the appeal lacks merit,

irreparable harm will otherwise be inflicted upon the creditors in bankruptcy and the balance of convenience tips the scales in favor of its issuance. The Trustee seeks, as well, an order requiring the appellant, Cyrenus Joseph Dugas, to post security for costs under Rule 58.10 of the ***Rules of Court***.

The Background

[2] On August 23, 2002, a consent judgment for the sum of $2,100,000 was entered against Mr. Dugas. He paid $50,000 of that sum upon the signing of the consent judgment but has not made any further payments in satisfaction of the judgment debt.

[3] On October 28, 2002, Mr. Dugas made an assignment in bankruptcy for the general benefit of creditors.

[4] It would appear that Mr. Dugas' only significant asset is a crab-fishing license number 23622. On March 11, 2003, the Trustee filed a Notice of Motion in the Court of Queen's Bench seeking the following relief under Sections 67(1) and 68 of the ***Act***:

> (a) That the revenue derived from the fishing activities of the Appellant in the 2003 fishing season are the property of the Appellant and therefore divisible among his creditors, subject to the provisions of Sections 67 and 68 of the **Bankruptcy and Insolvency Act**, *supra*;
>
> (b) That all revenue, derived from the fishing activities of the Appellant be paid directly to the Respondent who shall fix the amount to be

paid to the Estate of the Appellant in accordance with Section 68 of the **Bankruptcy and Insolvency Act**, *supra*;

(c) That the Respondent be authorized to pay, from the revenues received, all reasonable expenses of the fishing activities;

(d) That the balance of funds be paid by the Respondent to the creditors in respect of the outstanding debt of the Appellant; and

(e) That, in the alternative, if the issues of the amount to be determined pursuant to Section 68 of the **Bankruptcy and Insolvency Act**, *supra*, and/or the reasonable expenses of the fishing activities of the Appellant cannot be determined, that the revenues from fishing activities from the 2003 fishing season be paid into Court pending resolution of those issues.

[5] Sections 67(1) and 68 of the ***Act*** read as follows:

PART IV
PROPERTY OF THE BANKRUPT

67.(1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

...

68.(1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) For the purposes of this section,

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(*b*) and *(b.1)*, all revenues of a bankrupt of whatever nature or source; and

(*b*) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(*b*) and (*b*.1).

(3) The trustee shall

(*a*) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(*b*) inform the official receiver in writing of the amount fixed under paragraph (*a*); and

(*c*) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

(4) The trustee may, at any time, amend an amount fixed under subsection (3) to take into account

(*a*) material changes that have occurred in the personal or family situation of the bankrupt; or

(*b*) a recommendation made by the official receiver under subsection (5).

(5) Where the official receiver determines that the amount required to be paid by the bankrupt under subsection (3) or (4) is substantially not in accordance with the applicable standards established under subsection (1), the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.

(6) Where the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (3) or (4), the trustee shall, forthwith, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.

(7) On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.

(8) A mediation shall be in accordance with prescribed procedures.

(9) Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).

(10) Where

(*a*) the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(*b*) the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(*c*) the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

(11) The court may fix an amount that is fair and reasonable

(*a*) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or

(*b*) as payment for or commission in respect of any services being performed by a bankrupt for a person,

where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.

(12) On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the personal or family situation of the bankrupt.

(13) An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,

(*a*) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and

(*b*) if the person fails to comply with the terms of the order, the court may, on the application of

> the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.
>
> (14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

[6] In the decision under appeal, Justice Léger directed that:

> ... all revenues arising from the Bankrupt's Cyrenus Joseph Dugas crab fishing license # 23622 for the year 2003 be paid directly to the Trustee.
>
> ... the Trustee pay immediately all reasonable *bona fide* arm's length expenses arising out of the ordinary course of the fishing activities including salaries.
>
> ... the motion resume on the 2nd of July 2003 at 1:30 in Bathurst, NB or such other date as the parties may agree in order to determine all unresolved issues relating to the 2003 crab fishing activities including reasonable expenses.

[7] Mr. Dugas' grounds of appeal are as follows:

> 1. Le juge de la motion a erré en droit et a outrepassé sa compétence en acceptant d'entendre la motion de l'intimé sans que la procédure exigée par l'article 68 de la *Loi sur la faillite et de l'insolvabilité* soit, au préalable, respectée;
>
> 2. Le juge de la motion a erré en droit en concluant que le permis de pêche du crabe des neiges 2003 du failli est un bien en vertu des dispositions de la *Loi sur la faillite et de l'insolvabilité*, notamment les articles 2 et 7;
>
> 3. Le juge de la motion a erré en droit en concluant que les revenues de l'entreprise reliés au permis de pêche du crabe des neiges 2003 du failli est un

bien en vertu des dispositions de la *Loi sur la faillite et de l'insolvabilité*, notamment les articles 2 et 7;

4. Le juge de la motion a erré en droit et a outrepassé sa compétence en ordonnant que le syndic gère les revenues et les dépenses associés au permis de pêche du crabe des neiges 2003 du failli.

Analysis and Decision

[8] Rule 58.10 deals with security for costs on appeal. Clause (b) of Rule 58.10 (1) invests the Motions judge with a very wide discretion. Indeed, under that clause, the judge may make an order requiring the appellant to post security for costs whenever the judge is satisfied that "such security ought to be provided." Rule 58.10(2) provides that unless the Court of Appeal orders otherwise, an appellant who fails to comply with an order for security for costs is deemed to have abandoned his or her appeal with costs to the respondent.

[9] In my view, an order for security for costs should only be issued when it is required in the interests of justice. It goes without saying that a key consideration in the exercise of the judicial discretion recognized by Rule 58.10(1)(b) is the apparent strength of the grounds of appeal. An appellant's financial means or lack thereof may also come into play. On that score, I note that judges have shown a great deal of reticence in granting orders for security for costs where the impecuniosity of the appellant is such that the likely consequence of the order will be a deemed abandonment of

an apparently meritorious appeal. That said, an appellant's impecuniosity would not necessarily preclude an order under Rule 58.10(1)(b) if the appeal appears to have a very poor chance of success or is vexatious.

[10] In the case at hand, the appeal is neither frivolous nor vexatious. Mr. Dugas' grounds of appeal pose a serious challenge to Justice Léger's jurisdiction to make the impugned order on an application for relief under sections 67(1) and 68. They also pose a serious challenge to the Motions judge's conclusion that the revenues generated through Mr. Dugas' crab-fishing license are available for distribution among the creditors in bankruptcy. Mr. Dugas submits that the conclusion in question is at odds with Justice Léger's acceptance of the proposition that the license itself, being exempt from seizure, is not divisible property for the purposes of Section 67(1).

[11] Moreover, Mr. Dugas resides in the jurisdiction and is gainfully employed.

[12] I am not satisfied that security for costs ought to be provided. Accordingly, I dismiss the Trustee's motion for an order under Rule 58.10. I now turn to the motion for an order lifting the stay imposed by s. 195 of the ***Act***.

[13] Under s. 195, all proceedings under an order or judgment appealed from are stayed until the disposition of the appeal. Section 195 goes on to provide that a judge of the

Court of Appeal may cancel the stay for any reason deemed proper.

[14] It is settled law that the party seeking cancellation of the stay bears the burden of establishing compelling grounds for judicial intervention. See ***Yewdale v. Campbell, Saunders Ltd.*** (1994), 9 B.C.L.R. (3d) 253 (B.C.C.A.), per Prowse J.A., at paras. 14-15. In my judgment, the Trustee has discharged that burden in the case at hand. While I am of the view that Mr. Dugas' appeal poses a serious challenge to Justice Léger's decision, all other relevant considerations militate strongly in favor of lifting the stay. Chief among those considerations is the relative prejudice to the creditors and the bankrupt if the stay is allowed to remain effective.

[15] Indeed, it seems to me that lifting the stay is eminently fair to all interested parties, having particular regard to the following representations found in the Trustee's pre-motion brief:

> ... Rules 34 to 53 of the **Bankruptcy Rules** provide a code of ethics that must be followed by the Trustee. The Respondent Trustee has a duty in the circumstances to act reasonably for the good of the estate: see **Yewdale v. Campbell, Saunders Ltd.**, *supra*, at par. 16. The Respondent as Trustee owes a duty of fairness to all parties involved, including the Appellant bankrupt. As such, there is an obligation on the Respondent to administer the Appellant's income stream from the crab fishery in accordance with the code of ethics to which the Respondent is subject and in a manner that is reasonable and fair to both the Appellant and his creditors.
>
> Further, the Respondent is also an officer of the Court in its capacity as Trustee. ...

Disposition

[16] The motion for an order under Rule 58.10(Security for Costs on Appeal) is dismissed. The motion for an order cancelling the stay arising from the operation of s. 195 of the ***Act*** is allowed. There will be no order of costs on the motion.

J. ERNEST DRAPEAU, C.J.N.B.
Court of Appeal of New Brunswick

(9)

In the Court of Appeal of Alberta

Citation: After Eight Interiors Inc. v. Glenwood Homes Inc., 2006 ABCA 121

Date: 20060411
Docket: 0601-0086-AC
Registry: Calgary

Between:

After Eight Interiors Inc. and Gary Moore

Appellants (Respondents)

- and -

Glenwood Homes Inc. and Alger and Associates Inc.

Respondents (Applicants)

Oral Reasons for Decision of
The Honourable Madam Justice Adelle Fruman
(In Chambers)

Application to cancel automatic stays
Application arising from the Orders by
The Honourable Madam Justice B.E.C. Romaine

Orders dated the 21st day of March, 2006
(Docket: BK 25-092664)

Oral Reasons for Decision of
The Honourable Madam Justice Fruman
(In Chambers)

Fruman J.A.:

[1] The applicant, Alger & Associates Inc., is the interim receiver of Glenwood Homes Inc. Alger was appointed on December 7, 2005, under s. 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The bankruptcy proceedings have been stayed in relation to creditors on a number of occasions, to permit Glenwood to present a proposal. The current stay is in effect until May 5, 2006, and may be extended until May 18, 2006. Glenwood will be required to lodge a proposal before May 18, 2006, or it will be deemed to have made an assignment in bankruptcy.

[2] Two Glenwood transactions, worth approximately $1,000,000 in total, are being challenged by Alger as fraudulent preferences. If these challenges are successful, the value of Glenwood's assets would be increased and the terms of its proposal to creditors could be sweetened. The bankruptcy judge has set a strict timetable for proceeding with the challenges, culminating in a hearing scheduled for May 3 - 5, 2006. The outcome of the challenges would therefore be known before the May 18, 2006 deadline, and could be taken into account in fashioning Glenwood's proposal to creditors.

[3] The respondents in this application, After Eight Interiors Inc. and Gary Moore, are creditors of Glenwood and also are parties to the transactions being challenged. On March 10, 2006, they raised a preliminary objection before the bankruptcy judge, arguing that Alger did not have authority as interim receiver, or under s. 47.1 of the *BIA,* to challenge the transactions as fraudulent preferences. The judge dismissed the preliminary objection on March 21, 2006. Her reasons are reserved and have not yet been issued. On March 31, 2006, After Eight and Moore appealed her decision on the preliminary objection, and a second order, to this Court.

[4] Section 195 of the *BIA* imposes an automatic stay of certain orders on filing a notice of appeal. In this case, the effect of s. 195 is to stay all proceedings to challenge the fraudulent transactions until such time as the appeal of the preliminary objection is heard. However, s. 195 permits a Court of Appeal judge to "vary or cancel the stay ... if it appears that the appeal is not prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper." Alger now applies for an order lifting the stay.

[5] The applicant seeking a cancellation of a s. 195 stay bears the burden of establishing compelling reasons supporting a cancellation: ***Yewdale v. Campbell, Saunders Ltd.*** (1994), 9 B.C.L.R. (3d) 253 (C.A.) at paras. 14-15; ***Re Dugas*** (2003), 261 N.B.R. (2d) 99 (C.A.) at para. 14. In the normal course, some variation of the tripartite test outlined by the Supreme Court in ***Manitoba (A.G.) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110 and ***RJR-MacDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311 is applied on stay applications. This test would involve a consideration of whether there is a serious issue to be appealed, whether the applicants would suffer irreparable

harm if the stay is not lifted and whether the applicants would suffer greater harm than the respondents if the stay is not lifted.

[6] However, in ***Amex Bank of Canada v. Toronto Dominion Bank*** (1996), 181 A.R. 279 (C.A.) at paras. 7-11, Hunt J.A. noted that, while all or part of the tripartite test may be relevant, the discretion granted by s. 195 is broader. Accordingly, a contextual approach is appropriate, meriting consideration of all the facts of the case. Consistent with this approach, courts considering applications to cancel a s. 195 stay have focused on relative prejudice to the parties and the interests of justice generally: ***Yewdale***, *supra* at paras. 21-27; ***Re Dugas***, *supra* at paras. 14-15; ***RBI Plastic Inc. v. Sport Maska Inc.***, [2005] N.B.J. No. 542 (C.A.) at para. 4; ***Marmot Concrete Equipment Ltd. v. Whissell*** (1996), 40 Alta. L.R. (3d) 231; ***Kubota Canada Ltd. v. Case Credit Ltd.***, 2004 ABCA 41 at paras. 17-20.

[7] In this case, it is difficult to evaluate the merits of the appeal in a meaningful way, as the reasons for judgment have been reserved. However, this is not an impediment to lifting the stay because other considerations may predominate.

[8] Alger contends that Glenwood's creditors would suffer irreparable harm if the stay is not lifted and the determination of the fraudulent preference challenges does not proceed. Whether or not the transactions are set aside, a decision will have a significant and material impact on the terms of the proposal Glenwood must make to its creditors by May 18, 2006. With a stay in place, the challenges cannot be decided, a proposal cannot be made before the May 18, 2006 deadline, and Glenwood will be deemed to have made an assignment in bankruptcy. Creditors, and particularly unsecured creditors, will be prejudiced. While it is possible that the fraudulent preferences could be challenged in the bankruptcy proceedings, there is no guarantee that the trustee or an individual creditor would do so, and no assurance that unsecured creditors would share in the proceeds, should the challenges be successful.

[9] After Eight and Moore note that a pronouncement on their preliminary objection concerning the interim receiver's jurisdiction to mount the challenges is of significant importance. They contend that lifting the stay and allowing a determination of the fraudulent preferences to proceed would render any appeal judgment on the preliminary objection nugatory. However, lifting the stay will not diminish the significance of a judgment. After Eight's and Moore's appeal would not be delayed or hampered, nor would an appeal judgment on that issue be hollow. If they are successful on appeal, the bankruptcy judge's determination of the fraudulent preferences would be set aside. While After Eight and Moore would incur unnecessary costs defending the fraudulent preference challenges, these are quantifiable, monetary costs, and their recovery could be ordered. Moreover, there is actually a possibility of economy, as appeals from the dismissal of the preliminary objection and from the decision on the fraudulent preferences (should the decision be appealed), could be consolidated, heard at the same time and based on one set of appeal documents.

[10] After Eight and Moore also suggest that, instead of proceeding with the challenges at this time, Glenwood could make a conditional proposal to creditors, setting out different allocations depending on whether the challenges are or are not successful. The difficulty is that the challenges are not an all or nothing proposition; all, part of, or none of either transaction could be set aside, making for a myriad of financial possibilities and introducing unnecessary complexity into the proposal. Additionally, creditors would be placed in a position of uncertainty because they might support the proposal if the transactions were set aside, but be willing to assign the company into bankruptcy if they were not. In this case, given the value of the transactions compared to the value of Glenwood's other assets, this would be prejudicial to creditors.

[11] After Eight and Moore also assert that it is unfair to use Glenwood's assets to fund litigation that has not been approved by a majority of creditors, which is the way litigation would be handled in bankruptcy proceedings. However, the interim receivership process is court-supervised, and After Eight and Moore have already complained about this use of funds to the bankruptcy judge. They contested an interim payment of costs to the receiver on that basis, and have appealed the bankruptcy judge's order for an interim payment that includes costs incurred in connection with challenging the alleged fraudulent transactions. That issue will be dealt with in due course by the Court of Appeal and there is no immediate prejudice to After Eight and Moore.

[12] I conclude that Glenwood's creditors would suffer irreparable harm if the stay is not lifted, the balance of convenience favours lifting the stay and such an order is in the interests of justice. Accordingly, I order that the stay of the fraudulent preference proceedings be cancelled. I note that After Eight and Moore consent to lifting the stay on the other orders they have appealed, namely the May 8, 2006 extension order and the payment out of $300,000, and the stays of those proceedings are also cancelled.

Application heard on April 6, 2006

Reasons filed at Calgary, Alberta
this 11th day of April, 2006

Fruman J.A.

Appearances:

R.J. Gilborn, Q.C.
M.G. Damm
for the Applicants

D.G. Kearl
C.L. Jackson, Student-at-Law
for the Respondents

(10)

COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

61-16-CA
62-16-CA

IN THE MATTER of a Proposal of DYNAMIC TRANSPORT INC. and IN THE MATTER of a proposal of DYNAMIC TRANSPORT CORP., business corporations duly registered under the laws of the Province of New Brunswick carrying on business at 197 de L'Anse Street, Eel River Crossing, New Brunswick

DANS L'AFFAIRE d'une proposition de DYNAMIC TRANSPORT INC. et DANS L'AFFAIRE d'une proposition de DYNAMIC TRANSPORT CORP., corporations commerciales dûment enregistrées sous le régime des lois de la Province du Nouveau-Brunswick exerçant leur activité depuis le 197, rue de l'Anse, à Eel River Crossing, au Nouveau-Brunswick

- and -

- et -

IN THE MATTER of an Application pursuant to Section 195 of the *Bankruptcy and Insolvency Act* by PENSKE TRUCK LEASING CANADA INC. for an Order, *inter alia*, cancelling, varying or confirming the inexistence of a stay of proceedings under Section 69 of the Act

DANS L'AFFAIRE d'une demande de LOCATION DE CAMIONS PENSKE CANADA INC. sollicitant, sur le fondement de l'art. 195 de la *Loi sur la faillite et l'insolvabilité*, une ordonnance qui porterait, entre autres, annulation ou modification d'une suspension des procédures prévue par l'art. 69 de la *Loi*, ou confirmation de l'inexistence de cette suspension

-and-

- et -

IN THE MATTER of an Application pursuant to Section 195 of the *Bankruptcy and Insolvency Act* by DAIMLER TRUCK FINANCIAL, a business unit of MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION for an Order, *inter alia*, cancelling, varying or confirming the inexistence of a stay of proceedings under Section 69 of the Act

DANS L'AFFAIRE d'une demande de DAIMLER TRUCK FINANCIAL, entité commerciale de LA CORPORATION DE SERVICES FINANCIERS MERCEDES-BENZ CANADA, sollicitant, sur le fondement de l'art. 195 de la *Loi sur la faillite et l'insolvabilité*, une ordonnance qui porterait, entre autres, annulation ou modification d'une suspension des procédures prévue par l'art. 69 de la *Loi*, ou confirmation de l'inexistence de cette suspension

-and-

- et -

IN THE MATTER of an Application pursuant to Section 195 of the *Bankruptcy and Insolvency Act* (the "Act") by LAURENTIAN BANK OF CANADA and LBEL INC. for an Order, *inter alia*, cancelling, varying or confirming that the stay of proceedings under Section 69 of the Act no longer exists

DANS L'AFFAIRE d'une demande de BANQUE LAURENTIENNE DU CANADA et de LBEL INC. sollicitant, sur le fondement de l'art. 195 de la *Loi sur la faillite et l'insolvabilité*, une ordonnance qui, entre autres, annulerait ou modifierait la suspension des procédures prévue par l'art. 69 de la *Loi*, ou confirmerait que cette suspension n'existe plus

Motions heard by:
The Honourable Justice French

Date of hearing:
October 28, 2016

Date of decision:
October 31, 2016

Reasons delivered:
November 29, 2016

Official bilingual version :
January 25, 2017

Counsel at hearing:

For Dynamic Transport Inc. and
Dynamic Transport Corp.:
George Cooper

For Penske Truck Leasing Canada Inc.:
Michael J. Bray, Q.C.

For Daimler Truck Financial :
Gary Makila

For Laurentian Bank of Canada and LBEL Inc.:
Hugh Cameron

Motions entendues par :
l'honorable juge French

Date de l'audience :
le 13 octobre 2016

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le 31 octobre 2016

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Avocats à l'audience :

Pour Dynamic Transport Inc. et
Dynamic Transport Corp. :
George Cooper

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Michael J. Bray, c.r.

Pour Daimler Truck Financial :
Gary Makila

Pour Banque Laurentienne du Canada et LBEL Inc. :
Hugh Cameron

DECISION

I. Introduction

[1] Dynamic Transport Inc. and Dynamic Transport Corp. appeal the decision which denied their application for an extension of time to file a proposal pursuant to s. 50.4(9) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The decision was delivered orally by a Court of Queen's Bench judge on August 31, 2016 and Notices of Appeal were filed on September 1, 2016. The Corporations each filed a Notice of Intention to make a proposal on July 13, 2016 and their motions for an extension of time were filed August 12, 2016, within the initial 30 day period to file a proposal.

[2] Had the judge's decision been the end of things, the Corporations would have been deemed to have made an assignment in bankruptcy, as a consequence of having failed to file a proposal with the official receiver within the 30 day period for doing so (or within an extension thereof), pursuant to s. 50.4(8)(a). Additionally, the stay of proceeding that arose under s. 69, when the Corporations initially filed their Notices of Intention, would have ended as a consequence of the resulting bankruptcy, pursuant to s. 69(1). However, the Corporations maintain that the stay of proceedings, which arose automatically under s. 195 when they filed their appeals, meant that, pending appeal, they were not deemed to have made an assignment in bankruptcy and the s. 69 stay did not end but rather continued.

[3] Three respondents in the appeal, all lessors of equipment, Penske Truck Leasing Canada Inc., Daimler Truck Financial, a business unit of Mercedes-Benz Financial Services Canada and Laurentian Bank of Canada (and LBEL Inc.), filed Notices of Motion dated October 13, 13 and 19, 2016 respectively. There is some variation in the relief sought by the moving parties but I would paraphrase the relief requested from this Court as follows:

1. a declaration that the filing of the Notices of Appeal by the Corporations did not, pursuant to s. 195, (a)

continue the stay, which arose pursuant to s. 69, nor (b) limit the rights of the Corporations' creditors under s. 65.1;

2. alternatively, an order lifting the stay as against all creditors (and in the further alternative, an order lifting the stay as against the moving parties), pursuant to s. 195; and

3. an order expediting the hearing of the appeal, pursuant to Rule 62.18 of the Rules of Court.

[4] The extent of the stay arising under s. 195 and the authority of this Court, or a single judge thereof, to vary or cancel the stay is prescribed by the section as follows:

195. [...] all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay [...] if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.	**195** [...] toutes les procédures exercées en vertu d'une ordonnance ou d'un jugement dont il est appelé sont suspendues jusqu'à ce qu'il soit disposé de l'appel; mais la Cour d'appel, ou un juge de ce tribunal, peut modifier ou annuler la suspension [...] s'il apparaît que l'appel n'est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable.

[5] The Corporations consent to the request for an order expediting the hearing of the appeal. Rule 62.18 allows the Court, or judge thereof, to order, "in special circumstances and in consultation with the Chief Justice", an early hearing of an appeal and to give any necessary directions. Following the October 28, 2016 hearing, the parties were advised on Monday, October 31, 2016 that: (i) the hearing of the appeals were ordered to be held on November 30, 2016: and (ii) the stay was terminated in relation to the equipment of Penske Truck Leasing Canada Inc. for which the lease terms had expired. Directions were given respecting perfecting the appeals and filing of submissions. These are the reasons for those decisions.

[6] There would typically be little need to expand upon the "special circumstances" that warrant an order for an early hearing of the appeal. However, the circumstances in this case flow from the compressed time periods that are integral to the

scheme of the *Act* respecting proposals and they are also background to the other relief requested by the moving parties. For this reason, and before addressing the other relief sought by the moving parties, I will briefly address the relevant provisions of the *Act* respecting proposals, as well as the related submissions by the parties.

[7] The provisions which address an insolvent making a proposal to its creditors, under Division I of Part III of the *Act*, establish rights and obligations that seek to balance the interests of all those affected by the process. An insolvent's opportunity to make a proposal to its creditors, following the filing of a Notice of Intention to make a proposal, is facilitated by the stay of proceedings that arises under s. 69 on the filing of the notice (and, as also relevant to this case, it is likewise facilitated by the limitation of certain rights against the insolvent person, under s. 65.1). However, the insolvent also has obligations, which include the filing of a cash flow statement (along with the related reports of the insolvent and his trustee) within 10 days and the filing of a proposal within 30 days (or within an extension granted by the court). Failure to meet these obligations will result in the insolvent being deemed to have made an assignment in bankruptcy (s. 50.4(8)(a)) and, on bankruptcy, the s. 69 stay ends. The 30 day period for making a proposal may be extended by the court for a period of up to 45 days, with further extensions of up to 45 days, but only to a maximum of five months. On each application for an extension, the insolvent is required to satisfy the court that it is acting in good faith and with due diligence, it would likely be able to make a viable proposal and no creditor would be materially prejudiced if the extension were granted. From the filing of the Notice of Intention, the insolvent is to have a trustee, which has its own independent obligations under the *Act,* including, to monitor and report on the insolvent's business and financial affairs. The *Act* also provides creditors with the right to apply to the court for an order terminating the time for the insolvent to make a proposal or, if affected by the stay of proceedings, to apply to the court for an order terminating the stay as against the creditor.

[8] As the moving parties point out, absent an early hearing of the appeal, it is likely the Corporations' appeal would <u>not</u> be heard until <u>after</u> the maximum possible time

under the *Act* for making a proposal has passed. There was no dispute that the *Act* would not permit extensions beyond January 12, 2017, being five months from August 12, 2016. The Corporations' dismissed motion for an extension was filed on August 12, the end of the initial 30 day period. Had the request been granted, the time to make a proposal would have been extended by up to 45 days – a maximum of September 27. Since filing their appeals, the Corporations have filed new motions requesting a second extension but, for some reason, those motions have not been scheduled to be heard. It may be that confusion regarding the Corporations' status and obligations pending appeal played a role. In any event, at the time of the hearing of these motions, the appeal had not been perfected and it seems all parties had accepted that the time to perfect is late November - being 30 days after the transcript of the August 26 hearing was filed (which occurred a few days prior to the October 28 hearing). As a result, without an order for the early hearing of the appeal, I agree that it is likely the appeal would not be heard until the maximum permissible time for the Corporations to file a proposal had passed.

[9] The ordinary course of business approach to the appeals, until the motions of the three moving parties, seemed consistent with the submissions that the Corporations were content to take the benefit of a stay pending appeal and, in the meantime, avoid any of the obligations imposed on an insolvent under the *Act*. One of the moving parties described the inequity resulting from the Corporations' appeal in these words: "It is inequitable that a debtor be permitted to use the filing of an appeal of a refusal to grant an extension in order to maintain a Stay of Proceedings for a period substantially longer than that which would have been granted were the debtor to have been successful in the first instance". Another submits: "In short, DTI appears to take advantage of the protections offered under the BIA, without following any of the requirements or restrictions placed on DTI by the same legislation".

[10] Despite assertions of inequity as a consequence of a stay pending the appeals, the moving parties do not submit the Corporations' appeal is "not being prosecuted diligently" (being the only specifically identified basis in s. 195 for terminating or varying a stay). When asked about the lack of urgency in proceeding with

the appeal, counsel for the Corporations explained that they had been prepared to move quickly on the appeal, and perfect without a transcript of the hearing since there was no *viva voce* evidence, but the moving parties, or some of them, required a transcript for the appeal. This explanation was not disputed.

[11] It is abundantly clear that the circumstances warrant an early hearing. In fact, it is difficult to imagine in a situation such as the present where it would not be appropriate to request an early hearing of an appeal, either with or shortly after the filing of the Notice of Appeal. At the hearing, counsel on both sides of this matter referred to Justice Farley's common reference to bankruptcy proceedings as being "real time litigation". This observation recognizes much more than the reality that parties are frequently required to prepare for and respond to proceedings, affidavits etc. with little notice. It recognizes that while litigation involving the insolvent proceeds, the insolvent and many other persons who are affected by the litigation often continue to deal with one another on an ongoing basis. It also recognizes that to achieve the objectives of the *Act*, to maintain the balance sought to be achieved by the rights conferred and obligations imposed, all involved in the litigation, including courts, must move quickly. Capturing the interdependence of issues in circumstances of insolvency and the desirability of litigation being pursued and heard on a timely basis, including appeals, in order to provide clarity and certainty in relation to ongoing matters, Farley J. said in *Canada v. Curragh Inc.*, [1994] O.J. No. 1452 (Ont. Ct. J.) (QL):

> I would observe the following: I dealt with *Westlake, supra*, in my April 3, 1994 decision. I would reiterate that if the parties interested in this matter felt that they needed a rather speedy determination of whether I was right or wrong in this decision (I would certainly welcome the views of the Court of Appeal particularly since we are dealing in "uncharted waters") I would have thought it helpful to have perfected the appeal and obtained an expedited hearing date. I would observe that the Court of Appeal has been extremely co-operative in dealing with appeals from the Commercial List within a very tight time frame where the litigation is truly "real time litigation". [para. 5]

[12] The circumstances of the parties were not fixed at the time the Notices of Appeal were filed on August 31 nor are ongoing rights and obligations under the *Act* stayed by s. 195. It is evident from the claims and submissions made by the moving parties that, but for the appeal, some of such claims could and likely would have been advanced in the Court of Queen's Bench, sitting in bankruptcy. Such rights and obligations ought not to be frustrated by a lack of clarity or delay. Time truly is of the essence.

[13] Quite simply, in the present case, had a request for an early hearing been made, it may have been possible for there to have been a disposition and a clear path forward, prior to the expiry of the initial period of extension requested by the Corporations. Had that been the case, regardless of the outcome of the appeal, the result would have been more consistent with the scheme of the proposal provisions of the *Act*.

[14] What follows are my reasons for not ordering the other relief requested by the parties (except in relation to equipment where the lease terms had expired).

II. Request for a Declaration/Order that s. 195 does not: Continue the Stay of Proceedings, under s. 69 or Limit the Rights of Creditors, under s. 65.1

A. *Declaration that s. 195 does not continue the Stay of Proceedings under s. 69*

[15] I will not grant the moving parties request for a declaration or order that the s. 69 stay ended on August 31, 2016 and did not continue as a consequence of the appeal, pursuant to s. 195. The making of such a declaration ought only to be made by a panel of this Court since it is inconsistent with the implicit acceptance of this Court that an appeal, of a decision which terminates or denies a request for an extension of the time to file a proposal, stays the otherwise resulting deemed assignment in bankruptcy of the insolvent and the consequential termination of the s. 69 stay, pursuant to s. 195 (see: *Doaktown Lumber Ltd. v. BNY Financial Corp. Canada* (1996), 174 N.B.R. (2d) 297, [1996] N.B.J. No. 110 (C.A.)(QL) and, for an explicit determination to that effect, see:

Russell J. of the Court of Queen's Bench in the same matter, *Doaktown Lumber Ltd., Re* (1995), 169 N.B.R. (2d) 213, [1995] N.B.J. No. 488 (QL)).

[16] In *Doaktown Lumber*, the company made its initial application for an extension of the time to file a proposal, pursuant to s. 50.4(9). At the conclusion of the hearing, Doaktown Lumber's largest creditor, BNY Financial Corp., made an oral motion for the termination of the time to file a proposal, pursuant to s. 50.4(11), on the basis that it would not support any proposal that might be made by Doaktown Lumber. Turnbull J. allowed BNY's motion and effectively dismissed Doaktown Lumber's motion to extend time.

[17] Doaktown Lumber appealed to this Court. It claimed the s. 69 stay of proceedings, which existed prior to the motion judge's decision, continued pending appeal, pursuant to s. 195. By motion, BNY sought leave of this Court to obtain an order that there was no stay resulting from the appeal or, alternatively, an order terminating the stay, pursuant to s. 195. Ayles J.A. denied BNY's motion to cancel the stay and, after considering the criteria under s. 195 for cancelling or varying the stay, he imposed conditions on its continuation. While there was no express rejection of BNY's submission that s. 195 stay did not result in the continuation of the s. 69 stay, this is implicit from the decision.

[18] While the hearing of appeal was pending, Doaktown Lumber applied to the Court of Queen's Bench to request a second 45 day extension of time to file a proposal. Presumably, this was done on the assumption that if it was successful in the Court of Appeal the best it could achieve was a first extension (that is, the extension that had been denied) and the appeal did not relieve Doaktown Lumber from the ongoing obligation to meet the requirements of the *Act*. However, the motion judge concluded he did not have jurisdiction to consider the request for a second extension while an appeal was pending in connection with the first extension. At this hearing, BNY again asserted that there was no stay under s. 195. Russell J. expressly rejected this submission, concluding:

> The effect of the Notice of Appeal coupled with section 195 of the *Act* is, in my view, to place the applicant in the same position it was immediately before Turnbull, J.'s, decision was rendered on September 8th. To conclude otherwise would be to render the Court of Appeal powerless or ineffective to remedy an inappropriate decision by a motions judge. I say that without commenting on the merits of each side's position or the validity of the September 8th decision.
>
> Accordingly, the matter of an extension being before the Court of Appeal, I conclude this Court does not have jurisdiction to hear this motion. [paras. 15-16]

[19] Later, at the hearing of its appeal, Doaktown Lumber advised that since filing the appeal it had made a proposal which had been accepted by its creditors, including by BNY. This Court was also advised, by BNY, that it consented to Doaktown Lumber's appeal. In allowing the appeal, the following reference is made to Ayles J.A.'s earlier decision to deny BNY's request to cancel the stay:

> Section 195 of the *Act* provides for the stay of all proceedings under an order or judgment that is appealed to this Court. That section does provide, however, that the Court of Appeal or a judge thereof may:
>
> > ...vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.
>
> On September 21, 1995 a judge of this Court, Ayles, J.A., refused a motion by BNY to cancel the stay of proceedings that became effective when Doaktown appealed the decision of the motions judge [....] [paras. 3-4]

[20] Also worth noting is that this Court exercised the authority under the *Act* to extend the time for filing a proposal by the full five month period permitted by the *Act*. The Court said:

> [...] In allowing the appeal, however, there is a revival of the issue of whether Doaktown's Trustee should be granted an extension of time to file a Proposal in order to avoid the consequences of a deemed assignment under s. 50.4(8) of the *Act* [...] [para. 9]
>
> [...]
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> Accordingly, in the circumstances of this case, I would find that this court has the power to grant extensions of time in accordance with s. 50.4(9) that do not exceed "in the aggregate five months after the expiration of the 30 day period..." [para. 13]

[21] Implicit in *Doaktown Lumber* is the recognition that the appeal of a decision terminating the time to file a proposal (and effectively dismissing a request to extend time) stays, by virtue of s. 195, both a deemed assignment in bankruptcy pursuant to s. 50.4(8) and the termination of an existing s. 69 stay.

[22] The moving parties submit that *Doaktown Lumber* should not be followed. They submit that s. 195 does not operate to continue the *status quo* – it does not continue the s. 69 stay that arose when the Corporations initially filed their Notices of Intention. They rely on *Caslexa Construction Inc. (Re),* [1996] O.J. No. 1502 (C.A.) (QL). In this case, a petition in bankruptcy had been filed against Caslexa. The petition was scheduled to be heard on April 29, 1996. By motion, Caslexa sought a stay of the hearing. Its request was denied on April 16 and it filed an appeal of that decision on April 24. On April 25, creditors filed a motion asking for an order cancelling the stay, pursuant to s. 195 or, in the alternative, for declaration that s. 195 did not operate to stay the hearing of the petition. Austin J.A. reasoned that, since the court had refused Caslexa's request for a stay, there were no "proceedings" under the order appealed and "nothing upon which the stay mandated under s. 195 could operate" and thus, no stay. It was decided, in the alternative, that if this interpretation was wrong, the stay was cancelled.

[23] The moving parties made different submissions on what, if anything, was stayed by s. 195. The result is different submissions on the status of the Corporations as

of August 31, 2016. Two moving parties acknowledge s. 195 can reasonably be seen as staying or postponing the Corporations' deemed assignment in bankruptcy (pursuant to s. 50.4(8)), but they submit that it does not prevent the termination of the s. 69 stay. The other moving party submits that s. 195 does not stay the deemed assignment in bankruptcy, and thus the Corporations are bankrupt, notwithstanding the appeal. This distinction is interesting since s. 69(1) provides that the stay terminates on the filing of a proposal or "the bankruptcy of the insolvent person". Thus, a stay of the bankruptcy would avoid the consequential termination of the stay under s. 69(1). Also, it is difficult to imagine how such an interpretation of s. 195, where the deemed assignment is stayed but the termination of the s. 69 is not, would achieve the objective of a stay on appeal that, in practical terms, is not illusory.

[24] While there were no submissions on this point, it is my view *Doaktown Lumber* cannot be distinguished on the basis that it involved the appeal of both an affirmative order terminating the time to file a proposal and the dismissal of the motion to extend time to file a proposal. In either case, the resulting bankruptcy occurs by operation of s. 50.4(8), as a consequence of the failure to file a proposal within the time permitted. From the perspective of the insolvent, there is little practical difference, in terms of consequences, between an order terminating the time to file a proposal and an order denying a request to extend the time to do so. Either way, both result in the lack of time and preclude the filing of a proposal which leads, in the absence of a stay under s. 195, to an assignment in bankruptcy and an end of the s. 69 stay. The resulting practical inability of the Court of Appeal to remedy an error on appeal formed the basis for Russell J.'s interpretation in *Doaktown Lumber*.

[25] Suffice it to say, based on this Court's decisions in *Doaktown Lumber*, I will not declare that the Corporations' appeals did not continue, pursuant to s. 195, the stay which arose in July 2016 pursuant to s. 69.

[26] For the purposes of the alternative relief sought in this motion, I will proceed on the assumption that the stay continues, pursuant to s. 195.

B. *Declaration that s. 195 does not limit the Rights of Creditors under s. 65.1*

[27] This Court is requested to make a declaration that s. 195 does not limit the rights of the creditors under s. 65.1.

[28] Section 65.1 provides that, after an insolvent has filed a Notice of Intention to make a proposal, any person who has an agreement with the insolvent, including a security agreement, is precluded from terminating or amending such agreement by reason only that the insolvent has filed a Notice of Intention (or is an insolvent). This statutory limitation on the exercise of contractual rights is in addition or supplemental to the stay that arises under s. 69 on the filing of a Notice of Intention. (For a rejection of the position that the s. 65.1 statutory restriction on terminating or amending agreements is not necessary (or is redundant) since termination or amendment is also precluded by the more general s. 69 stay, see: *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, 2010 BCCA 469, [2010] B.C.J. No. 2065.)

[29] The limits on contractual rights under s. 65.1, not surprisingly, are not absolute. Both ss. 69 and 65.1 give the court the authority to grant relief from their operation. As mentioned above, s. 69.4 allows the court, on application, to declare that the stay ceases to operate where a material prejudice is established. Similarly, s. 65.1(6), allows the court to declare that the limitation on rights under s. 65.1 does not apply (or applies only to the extent ordered by the court) where an applicant establishes the limitation of rights "would likely cause it significant financial hardship".

[30] Relevant in this case is what may be described as a limitation or exception arising from the scope of the limitation on rights provided for in s. 65.1. Section 65.1(4) expressly provides that the limitation of rights under s. 65.1 does not prohibit a person from requiring the insolvent to make immediate payment for goods, services or use of leased or licensed property provided after the filing of the Notice of Intention. This provision received a great deal of attention since the Corporations have not made the lease payments to any of the moving parties since the filing of the Notices of Intention.

[31] It is my opinion that, like s. 69, the limitation on rights under s. 65.1 continues to apply pending appeal, pursuant to s. 195. However, s. 195 does not stay the operation of the *Act* in relation to the insolvent and it does not limit the ongoing rights of creditors under either of these provisions. Based on the claims of the moving parties, the Court of Queen's Bench, exercising its original jurisdiction under s. 183, could have determined such rights of the parties at any time since July 2016. In these motions, when exercising the authority of a single judge under s. 195, it is appropriate to consider the underlying circumstances raised by the parties in connection with s. 65.1 as part of the s. 195 analysis which follows, and not to independently determine the party's rights under s. 65.1.

III. Termination of the Stay

[32] The moving parties request this Court terminate the stay in relation to all creditors of the Corporations, pursuant to s. 195, or alternatively, in relation to them.

[33] As noted above, the moving parties do not allege "the appeal is not being prosecuted diligently" by the Corporations. The moving parties submit this Court should exercise the residual authority under s. 195 to terminate the stay and, in doing so, be guided by the principles and criteria set out in s. 69.4 (termination of stay) and s. 65.1 (re: limitation of rights). Blended with these submissions is the suggestion that this Court ought to make orders under those provisions, thus exercising the power of a court of original jurisdiction under s. 183(1) of the *Act*. While the exercise of the authority to terminate under s. 195 requires an analysis and consideration of factors and circumstances that are common to these sections, the required analysis, and the factors and circumstances to be weighed, are not identical.

[34] There is no dispute that moving parties bear the burden of establishing grounds for the making of an order to vary or terminate the stay. As explained by Chief Justice Drapeau in *Dugas Estate (Bankrupt), Re* (2003), 261 N.B.R. (2d) 99, [2003] N.B.J. No. 230 (C.A.) (QL):

> Under s. 195, all proceedings under an order or judgment appealed from are stayed until the disposition of the appeal. Section 195 goes on to provide that a judge of the Court of Appeal may cancel the stay for any reason deemed proper.
>
> It is settled law that the party seeking cancellation of the stay bears the burden of establishing compelling grounds for judicial intervention. See *Yewdale, Bankrupt v. Campbell, Saunders Ltd.* (1994), 53 B.C.A.C. 23; 87 W.A.C. 23; 9 B.C.L.R. (3d) 253 (C.A.), per Prowse, J.A., at paras. 14-15. In my judgment, the Trustee has discharged that burden in the case at hand. While I am of the view that Mr. Dugas' appeal poses a serious challenge to Justice Léger's decision, all other relevant considerations militate strongly in favor of lifting the stay. Chief among those considerations is the relative prejudice to the creditors and the bankrupt if the stay is allowed to remain effective. [paras. 13-14]

[35] In dismissing BNY's application to terminate the stay under s. 195 in *Doaktown Lumber*, Ayles J.A. applied the three-part test contemplated in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, [1987] S.C.J. No. 6 (QL) (and in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL)). Explaining his application of that test to s. 195 Ayles J.A. stated:

> The other criteria mentioned in section 195 is "...Such other reason as the Court of Appeal or a judge thereof may deem proper". In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at p. 127, Mr. Justice Beetz, speaking for the Court said:
>
> > A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions. [...]

[36] Fruman J.A., in *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121, [2006] A.J. No. 681 (QL) provides the following thorough and concise summary of the principles applicable to the authority to vary or terminate a stay under s. 195:

> Section 195 of the BIA imposes an automatic stay of certain orders on filing a notice of appeal. In this case, the effect of s. 195 is to stay all proceedings to challenge the fraudulent transactions until such time as the appeal of the preliminary objection is heard. However, s. 195 permits a Court of Appeal judge to "vary or cancel the stay ... if it appears that the appeal is not prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper." Alger now applies for an order lifting the stay.
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> The applicant seeking a cancellation of a s. 195 stay bears the burden of establishing compelling reasons supporting a cancellation: *Yewdale v. Campbell, Saunders Ltd.* (1994), 9 B.C.L.R. (3d) 253 (C.A.) at paras. 14-15; *Re Dugas* (2003), 261 N.B.R. (2d) 99 (C.A.) at para. 14. In the normal course, some variation of the tripartite test outlined by the Supreme Court in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 is applied on stay applications. This test would involve a consideration of whether there is a serious issue to be appealed, whether the applicants would suffer irreparable harm if the stay is not lifted and whether the applicants would suffer greater harm than the respondents if the stay is not lifted.
>
> However, in *Amex Bank of Canada v. Toronto Dominion Bank* (1996), 181 A.R. 279 (C.A.) at paras. 7-11, Hunt J.A. noted that, while all or part of the tripartite test may be relevant, the discretion granted by s. 195 is broader. Accordingly, a contextual approach is appropriate, meriting consideration of all the facts of the case. Consistent with this approach, courts considering applications to cancel a s. 195 stay have focused on relative prejudice to the parties and the interests of justice generally: *Yewdale*, *supra* at paras. 21-27; *Re Dugas, supra* at paras. 14-15; *RBI Plastic Inc. v. Sport Maska Inc.*, [2005] N.B.J. No. 542 (C.A.) at para. 4; *Marmot Concrete Equipment Ltd. v. Whissell*

> (1996), 40 Alta. L.R. (3d) 231; *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41 at paras. 17-20.
>
> In this case, it is difficult to evaluate the merits of the appeal in a meaningful way, as the reasons for judgment have been reserved. However, this is not an impediment to lifting the stay because other considerations may predominate. [paras. 4-7]
>
> [Emphasis added]

[37] The moving parties make a number of assertions which relate to the conduct of the Corporations. As noted above, in connection with s. 65.1, they have not received any lease payments since the filing of the Notices of Intention. They argue that this failure should itself permit them to recover their equipment. One of the main, ongoing complaints of the moving parties is the lack of information regarding the status of their equipment and progress respecting the proposal. It was a challenge for the moving parties to determine whether their equipment was insured. They point out that when the Corporations filed their Notices of Appeal they sent a letter to all creditors advising that they had done so, that the stay of proceedings against the Corporations continued and that they would provide the creditors with information as to the status of the proposal. The evidence on the motions makes it is clear that information has been as difficult for the creditors to obtain after the appeals were filed as it was before. Finally, as an indication of the extreme lack of cooperation on the part of the Corporations, Penske and Daimler point out that not only were they unable to take possession of equipment, for which the leases had expired, but also, they could not get the Corporations to respond to their inquiries. Both parties' motions seek a lifting of the s. 195 stay against such equipment. Before the hearing, Daimler received its equipment (for which the leases had expired) but Penske did not. In the absence of the Corporations identifying any basis to retain possession of such equipment, apart from the stay, the stay was ordered to be lifted in connection with such equipment owned by Penske.

[38] There were limited submissions on the merits of the appeals. The primary focus of the moving parties was the conduct of the Corporations and the allegations of prejudice by lack of payment for their equipment. Against this is the harm to the

Corporations if the stay is lifted. The evidence supports a recognition that lifting the stay would in all likelihood preclude the making of a proposal and lead to the inevitable bankruptcy of the Corporations.

[39] The residual discretion conferred on this Court by s. 195 required a broad, contextual consideration of all the facts. The actions of the Corporations made a decision to maintain the stay much more difficult than would otherwise have been the case. However, considering all the facts and knowing also that it was possible for the appeals to be heard within 30 days, it was my opinion that the balance of convenience favored dismissal of the motions to terminate or vary the stay pending appeal, either against all creditors or the moving parties.

IV. Disposition

[40] For these reasons, I dismissed the motions, except for ordering that:

1. the hearing of the appeals be held on November 30, 2016 at 10:00 a.m.; and

2. the stay be terminated in relation to that equipment of Penske Truck Leasing Canada Inc. where the lease terms had expired, as claimed in paragraph (d) of its Notice of Motion.

[41] The parties will bear their own costs.

Pursuant to ss. 24(2) and 25 of the Official *Languages Act*, S.N.B. 2002, c. O-0.5, these reasons were released, prior to the November 30, 2016 hearing of the appeal, in one official language and thereafter, are to be released in the other official language, at the earliest possible time.

DÉCISION

[Version française]

I. Introduction

[1] Dynamic Transport Inc. et Dynamic Transport Corp. appellent du rejet de leur demande de prorogation du délai de dépôt d'une proposition, rejet prononcé en vertu du par. 50.4(9) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3. Cette décision a été rendue oralement par un juge de la Cour du Banc de la Reine le 31 août 2016 et des avis d'appel ont été déposés le 1er septembre 2016. Les sociétés appelantes avaient déposé l'une et l'autre un avis d'intention de faire une proposition le 13 juillet 2016. Leurs motions en prorogation de délai avaient ensuite été présentées le 12 août 2016, avant l'expiration du délai initial de trente jours accordé pour le dépôt d'une proposition.

[2] Si, une fois la décision du juge rendue, ces motions étaient restées sans suite, les sociétés appelantes auraient été réputées avoir fait une cession de faillite, par application de l'al. 50.4(8)a), pour avoir omis de déposer une proposition auprès du séquestre officiel avant l'expiration du délai prescrit de trente jours (ou d'un délai prorogé). En outre, la suspension des procédures intervenue par application de l'art. 69 lors du dépôt initial des avis d'intention aurait pris fin, les sociétés appelantes étant devenues des faillies aux termes du par. 69(1). Les sociétés appelantes soutiennent toutefois que la suspension des procédures qui, comme le veut l'art. 195, s'est opérée automatiquement au moment du dépôt de leurs appels signifiait ce qui suit : en attendant ces appels, elles n'étaient pas réputées avoir fait une cession de faillite et la suspension que prévoit l'art. 69 avait, non pas pris fin, mais continué.

[3] Trois parties intimées à l'appel, Location de Camions Penske Canada Inc., Daimler Truck Financial, entité commerciale de La Corporation de services financiers Mercedes-Benz Canada, et Banque Laurentienne du Canada (et LBEL Inc.), qui sont toutes des sociétés de location de matériel, ont déposé des avis de motion respectivement

datés du 13, du 13 et du 19 octobre 2016. La réparation que chacune demande par voie de motion varie un peu, mais je formulerais ainsi les mesures sollicitées de notre Cour :

> 1. une déclaration portant que le dépôt des avis d'appel n'a pas, par application de l'art. 195 : a) maintenu la suspension opérée par l'art. 69; b) limité les droits dont jouissent les créanciers des sociétés appelantes au titre de l'art. 65.1;
>
> 2. subsidiairement, une ordonnance levant la suspension à l'égard de tous les créanciers (ou, subsidiairement encore, une ordonnance levant la suspension à l'égard des auteures des motions) en vertu de l'art. 195;
>
> 3. une ordonnance devançant l'audition des appels en vertu de la règle 62.18 des *Règles de procédure*.

[4] L'article 195 définit comme suit la portée de la suspension qu'il impose et le pouvoir de notre Cour, ou d'un seul de ses juges, de modifier ou d'annuler la suspension :

195 [...] all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay [...] if it appears that the appeal is not being prosecuted diligently or for such other reason as the Court of Appeal or a judge thereof may deem proper.	**195** [...] toutes les procédures exercées en vertu d'une ordonnance ou d'un jugement dont il est appelé sont suspendues jusqu'à ce qu'il soit disposé de l'appel; mais la Cour d'appel, ou un juge de ce tribunal, peut modifier ou annuler la suspension [...] s'il apparaît que l'appel n'est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable.

[5] Les sociétés appelantes consentent à une ordonnance qui devancera l'audition des appels. La règle 62.18 permet à la Cour ou à l'un de ses juges d'ordonner, « si des circonstances spéciales le justifient et en consultation avec le juge en chef », que l'audition d'un appel soit devancée, et de donner les directives jugées nécessaires. Après l'audience du 28 octobre 2016, soit le lundi 31 octobre, les parties ont été informées (i) qu'il était ordonné que les appels seraient entendus le 30 novembre 2016, et (ii) que la suspension des procédures était annulée en ce qui concerne le matériel de Location de Camions Penske Canada Inc. dont le bail avait expiré. Des directives ont été données en

vue de la mise en état des appels et du dépôt de mémoires. Les présents motifs sont ceux de ces décisions.

[6] D'ordinaire, il n'y a guère lieu de s'étendre sur les « circonstances spéciales » qui justifient une ordonnance d'audition devancée d'un appel. En l'espèce, cependant, ces circonstances procèdent des délais serrés qui font partie intégrante du régime instauré par la *Loi* au chapitre des propositions, et elles ressortissent également au contexte des autres mesures réparatoires sollicitées par les auteures des motions. C'est pourquoi, avant d'aborder les autres mesures que sollicitent les auteures des motions, je m'arrêterai brièvement aux dispositions pertinentes de la *Loi* en matière de propositions, ainsi qu'aux observations des parties sur ce point.

[7] Les dispositions qui régissent la présentation d'une proposition concordataire par une personne insolvable à ses créanciers, section I de la partie III de la *Loi*, établissent des droits et des obligations qui visent à atteindre un équilibre entre les intérêts de toutes les parties que touche le processus. La présentation d'une proposition, après le dépôt d'un avis d'intention de faire une proposition, est facilitée par la suspension des procédures qui s'opère, par application de l'art. 69, au moment du dépôt de l'avis (elle est également facilitée, autre considération pertinente ici, par la limitation de certains droits possédés contre la personne insolvable, limitation que prescrit l'art. 65.1). La personne insolvable a cependant des obligations, dont celle de déposer un état de l'évolution de l'encaisse (et les rapports connexes qu'elle et son syndic doivent produire) dans les dix jours et celle de déposer une proposition dans les trente jours (ou dans le délai prorogé accordé par le tribunal). La personne insolvable qui manque à ces obligations est réputée avoir fait une cession de faillite (al. 50.4(8)a)) et, la faillite intervenue, la suspension que prévoit l'art. 69 prend fin. Le délai de trente jours prescrit pour faire une proposition peut être prorogé par le tribunal pour une période n'excédant pas quarante-cinq jours, à laquelle peuvent s'ajouter de nouvelles prorogations n'excédant pas quarante-cinq jours, le délai ne pouvant être prorogé que de cinq mois en tout. Chaque fois qu'elle demande une prorogation, la personne insolvable doit convaincre le tribunal qu'elle continue d'agir de bonne foi et avec toute la diligence

voulue, qu'elle sera vraisemblablement en mesure de faire une proposition viable et que la prorogation ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers. À compter du dépôt de son avis d'intention, la personne insolvable doit avoir un syndic, lequel est tenu à ses propres obligations sous le régime de la *Loi*, dont celles de surveiller les affaires et les finances de la personne insolvable et de produire des rapports sur leur état. Enfin, la *Loi* reconnaît à un créancier le droit de demander au tribunal une ordonnance mettant fin au délai dont dispose la personne insolvable pour faire une proposition ou, s'il est touché par la suspension des procédures, le droit de demander une ordonnance annulant la suspension à son égard.

[8] Comme les auteures des motions l'ont fait remarquer, l'audition des appels des sociétés, sans son devancement, aurait probablement eu lieu après que le délai maximal accordé par la *Loi* pour présenter une proposition se serait écoulé. Il n'était pas contesté que la *Loi* ne permettrait de prorogations que jusqu'au 12 janvier 2017, terme de la période de cinq mois ayant débuté le 12 août 2016. Les motions en prorogation rejetées avaient été déposées le 12 août, à la fin du délai initial de trente jours. Si elle avait été octroyée, la prorogation du délai de présentation d'une proposition l'aurait repoussée de quarante-cinq jours tout au plus – au 27 septembre au plus tard. Après le dépôt de leurs appels, les sociétés ont présenté de nouvelles motions par lesquelles elles sollicitaient une deuxième prorogation, mais, pour une raison ou pour une autre, ces motions-là n'ont pas été mises au rôle. Il est possible qu'une certaine confusion quant à la situation et aux obligations des sociétés appelantes, en attendant les appels, y soit pour quelque chose. Quoi qu'il en soit, lorsque les présentes motions ont été entendues, l'appel n'avait pas été mis en état et toutes les parties convenaient, semble-t-il, que l'échéance de mise en état arriverait fin novembre – soit trente jours après le dépôt de la transcription de l'audience du 26 août (survenu quelques jours avant l'audience du 28 octobre). J'admets donc que, sans une ordonnance prescrivant une audition devancée, l'appel n'aurait probablement pas été entendu avant que soit écoulé le délai maximal qui pouvait être accordé aux sociétés appelantes pour déposer une proposition.

[9] La conduite des appels, menés tel que dans le cours ordinaire des affaires avant les motions des trois intimées, semblait confirmer ce qui était avancé : les sociétés appelantes se trouvaient satisfaites de bénéficier d'une suspension en attendant les appels et d'être soustraites, pendant ce temps, aux obligations imposées par la *Loi* aux personnes insolvables. L'une des intimées a présenté en ces termes l'iniquité entraînée par l'appel des sociétés : [TRADUCTION] « Il est inéquitable qu'il soit permis à un débiteur de se servir du dépôt d'un appel, interjeté d'un refus d'accorder une prorogation, pour obtenir un maintien de la suspension des procédures de durée sensiblement plus longue que la prorogation qu'il aurait obtenue s'il l'avait emporté en première instance. » Une autre des intimées a indiqué ce qui suit : [TRADUCTION] « En somme, DTI semble tirer profit des protections de la [*Loi sur la faillite et l'insolvabilité*] sans respecter la moindre des exigences ou des restrictions que cette loi lui impose ».

[10] Malgré qu'il soit avancé que la suspension des procédures en attendant les appels est cause d'iniquité, les auteures des motions ne prétendent pas que l'appel des sociétés « n'est pas poursuivi avec diligence » (seul motif exprès d'annulation ou de modification d'une suspension énoncé par l'art. 195). L'avocat des sociétés, prié d'expliquer le peu d'empressement à poursuivre les appels, a répondu que la partie appelante était prête à agir promptement et à procéder à la mise en état sans transcription de l'audience étant donné l'absence de témoignage de vive voix, mais que les auteures des motions, ou certaines d'entre elles, avaient exigé une transcription en vue des appels. Cette explication n'a pas été contestée.

[11] Il est parfaitement clair que les circonstances justifient une audition devancée. En fait, il est difficile d'imaginer qu'il puisse ne pas être approprié, dans un cas comme celui-ci, de demander une audition devancée de l'appel, que ce soit au moment du dépôt de l'avis d'appel ou peu après. Lors de l'audience, les avocats des deux camps ont appelé la procédure de faillite un [TRADUCTION] « litige en temps réel », d'après l'expression du juge Farley. Cette formule exprime beaucoup plus que la réalité de la situation des parties, souvent tenues de préparer procédures, affidavits, et cetera, ou d'y réagir, à la dernière minute. Elle exprime que souvent, pendant que se poursuit le litige

auquel est partie la personne insolvable, elle et de nombreuses autres personnes touchées par le litige continuent d'avoir affaire les unes aux autres. Elle exprime également que, pour que les objectifs de la *Loi* soient atteints, pour que soit maintenu l'équilibre que la *Loi* tente de réaliser par les droits qu'elle confère et les obligations qu'elle impose, tous ceux qui interviennent dans le litige, y compris les tribunaux, se doivent d'agir promptement. Le juge Farley, dont les motifs traduisent l'interdépendance des questions litigieuses en situation d'insolvabilité et l'opportunité de poursuivre et de juger sans retard les procédures, y compris les appels, afin que clarté et certitude soient apportées aux affaires en cours, a indiqué, dans *Canada c. Curragh*, [1994] O.J. No. 1452 (C.J. Ont.) (QL) :

> [TRADUCTION]
> Je ferai observer ce qui suit : j'ai examiné l'arrêt *Westlake*, précité, dans ma décision du 3 avril 1994. Je répète que, si les parties intéressées estimaient qu'il leur fallait que le bien-fondé de ma décision soit tranché plutôt rapidement (je saurais certainement gré à la Cour d'appel de ses vues, d'autant plus que nous avançons en [TRADUCTION] « terrain inconnu »), il aurait été utile, je pense, de procéder à la mise en état de l'appel et de demander une audition accélérée. Je ferai remarquer que la Cour d'appel s'est montrée tout à fait disposée à traiter à très brève échéance les appels interjetés d'affaires du rôle commercial lorsque le litige est véritablement un [TRADUCTION] « litige en temps réel ». [par. 5]

[12] La situation des parties n'était pas arrêtée au moment où les avis d'appel ont été déposés, le 31 août, et les droits et les obligations que prescrit la *Loi* ne sont pas, non plus, suspendus par application de l'art. 195. Vu les demandes et les observations des auteures des motions, il est manifeste que, n'eût été l'appel, la Cour du Banc de la Reine, siégeant en matière de faillite, aurait pu être saisie de certaines des demandes et l'aurait probablement été. L'exercice de ces droits et l'acquittement de ces obligations ne doivent être compromis ni par un manque de clarté ni par des lenteurs à agir. Le temps presse véritablement.

[13] Bref, en l'espèce, si l'audition devancée de l'appel avait été demandée, il aurait pu être possible d'obtenir qu'une décision soit rendue, et que la voie à suivre soit tracée clairement, avant l'expiration du délai prorogé sollicité initialement par les sociétés appelantes. Le cas échéant, et quelle que soit l'issue de l'appel, cette façon de procéder se serait conformée davantage au régime instauré par les dispositions de la *Loi* applicables aux propositions.

[14] Je donne, dans les paragraphes qui suivent, les motifs de mon refus d'ordonner les autres mesures réparatoires sollicitées par les parties (sauf pour ce qui est du matériel dont le bail est arrivé à expiration).

II. Demande de déclaration ou d'ordonnance portant que l'art. 195 ne maintient pas la suspension des procédures opérée par l'art. 69 ou ne limite pas les droits dont jouissent les créanciers au titre de l'art. 65.1

A. *Déclaration portant que l'art. 195 ne maintient pas la suspension des procédures opérée par l'art. 69*

[15] Je n'accorderai pas aux auteures des motions une déclaration, ou une ordonnance, portant que la suspension opérée par l'art. 69 a pris fin le 31 août 2016 et qu'elle n'a pas été maintenue, par application de l'art. 195, en conséquence de l'appel. Pareille déclaration ne devrait être prononcée que par une formation des juges de notre Cour, puisqu'elle va à l'encontre de la thèse, implicitement admise par la Cour, voulant qu'un appel, interjeté de la décision de mettre fin au délai de dépôt d'une proposition ou d'en refuser la prorogation, suspende, par application de l'art. 195, d'une part la cession de faillite que la personne insolvable, sans cet appel, serait réputée avoir faite, d'autre part l'annulation de la suspension opérée par l'art. 69 (*Doaktown Lumber Ltd. c. BNY Financial Corp. Canada* (1996), 174 R.N.-B. (2e) 297, [1996] A.N.-B. nº 110 (C.A.) (QL); on trouvera une décision expresse en ce sens, prononcée dans la même affaire par le juge Russell, de la Cour du Banc de la Reine, dans *Doaktown Lumber Ltd., Re* (1995), 169 R.N.-B. (2e) 213, [1995] A.N.-B. nº 488 (QL)).

[16] Dans *Doaktown Lumber*, la compagnie avait présenté une demande initiale de prorogation du délai de dépôt d'une proposition en vertu du par. 50.4(9). À la fin de l'audience, Corporation financière BNY, la créancière la plus importante de Doaktown Lumber, a présenté une motion orale sollicitant, sur le fondement du par. 50.4(11), qu'il soit mis fin au délai de dépôt d'une proposition, parce qu'elle entendait ne donner son aval à aucune des propositions que Doaktown Lumber pourrait faire. Le juge Turnbull a accueilli la motion de BNY et rejeté la motion de Doaktown Lumber en prorogation de délai.

[17] Doaktown Lumber a appelé de la décision auprès de notre Cour. Elle soutenait que la suspension des procédures opérée par l'art. 69, qui existait avant la décision du juge saisi de la motion, était maintenue en attendant l'appel par application de l'art. 195. Par voie de motion, BNY a sollicité l'autorisation de notre Cour en vue d'obtenir une ordonnance portant qu'il n'y avait pas suspension par suite de l'appel ou, subsidiairement, annulant la suspension en vertu de l'art. 195. Le juge d'appel Ayles a rejeté la motion de BNY en annulation de la suspension et, après s'être penché sur les critères d'annulation ou de modification d'une suspension énoncés à l'art. 195, a imposé des conditions à son maintien. Encore que la décision n'exprime pas un rejet exprès de l'argument de BNY, selon qui il ne découlait pas de la suspension prescrite à l'art. 195 le maintien de la suspension opérée par l'art. 69, ce rejet s'en dégage implicitement.

[18] Tandis que l'appel était en instance, Doaktown Lumber a demandé à la Cour du Banc de la Reine une deuxième prorogation de quarante-cinq jours du délai de dépôt d'une proposition. Doaktown Lumber a vraisemblablement supposé que, si elle avait gain de cause en Cour d'appel, elle ne pourrait obtenir, tout au plus, qu'une première prorogation (la prorogation qui avait été refusée) et que l'appel ne la libérait pas de l'obligation de satisfaire aux exigences de la *Loi*. Le juge saisi de la motion a toutefois conclu qu'il n'avait pas compétence pour examiner la demande de deuxième prorogation tandis qu'était en instance un appel lié à la première prorogation. Lors de cette audience,

BNY a affirmé, encore une fois, qu'il n'y avait pas suspension par application de l'art. 195. Le juge Russell a expressément rejeté cette prétention et conclu en ces termes :

> [TRADUCTION]
> À mon sens, l'avis d'appel, dans le contexte de l'article 195 de la *Loi*, a pour effet de placer la requérante dans la situation dans laquelle elle se trouvait immédiatement avant que le juge Turnbull ne rende sa décision du 8 septembre. Arriver à une autre conclusion aurait pour effet d'enlever à la Cour d'appel le pouvoir ou la capacité de corriger une décision inacceptable d'un juge saisi des motions. Je fais cette affirmation sans me prononcer sur le bien-fondé de la position de chacune des parties ou sur la validité de la décision du 8 septembre.
>
> Par conséquent, la Cour d'appel étant saisie de la question d'une demande de prorogation, je conclus que la présente Cour n'est pas compétente pour entendre la présente motion. [par. 15 et 16]

[19] Par la suite, lors de l'audition de son appel, Doaktown Lumber a informé la Cour qu'elle avait fait, après le dépôt de l'appel, une proposition qui avait été acceptée par ses créanciers, y compris BNY. De même, BNY a informé la Cour qu'elle consentait à ce que l'appel de Doaktown Lumber soit accueilli. Notre Cour a accueilli l'appel et a fait référence à la décision antérieure du juge d'appel Ayles, qui avait rejeté la demande de BNY en annulation de la suspension :

> [TRADUCTION]
> L'article 195 de la *Loi* prévoit la suspension de toutes les procédures exercées en vertu d'une ordonnance ou d'un jugement dont il est appelé devant cette cour. Toutefois, cet article prévoit aussi que la Cour d'appel ou un juge de ce tribunal peut :
>
> > [...] modifier ou annuler la suspension ou l'ordonnance d'exécution provisoire s'il apparaît que l'appel n'est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable.
>
> Le 21 septembre 1995, un juge de cette Cour, le juge Ayles, a rejeté une motion dans laquelle BNY sollicitait

> l'annulation de la suspension des procédures qui avait pris effet lorsque Doaktown avait interjeté appel de la décision du juge saisi des motions [...] [par. 3 et 4]

[20] Il est à noter aussi que notre Cour a exercé le pouvoir, conféré par la *Loi*, de proroger le délai de dépôt d'une proposition du total de cinq mois autorisé par cette loi. Extrait de nos motifs :

> [...] Cependant, le fait que j'accueille l'appel fait renaître la question de savoir si le syndic de Doaktown devrait obtenir une prorogation du délai imparti pour déposer une proposition afin d'éviter les conséquences d'une cession présumée aux termes du paragraphe 50.4(8) de la *Loi* [...] [par. 9]
>
> [...]
>
> Par conséquent, compte tenu des circonstances, je conclurais que la cour est habilitée, conformément au par. 50.4(9), à accorder des prorogations dont le total « n'excède pas cinq mois à compter de l'expiration du délai de 30 jours ... »[.] [par. 13]

[21] *Doaktown Lumber* reconnaît implicitement que l'appel interjeté d'une décision ayant mis fin au délai de dépôt d'une proposition (et ayant donné lieu au rejet effectif d'une demande de prorogation de délai) suspend, par application de l'art. 195, à la fois la cession de faillite que la personne insolvable est réputée avoir faite, par application du par. 50.4(8), et l'annulation de la suspension existante, opérée par l'art. 69.

[22] Les auteures des motions avancent que l'arrêt *Doaktown Lumber* ne devrait pas être suivi. Elles estiment que l'art. 195 n'a pas pour effet de maintenir le statu quo – il ne maintient pas la suspension qui s'est opérée, par application de l'art. 69, lorsque les sociétés appelantes ont déposé initialement leurs avis d'intention. Elles invoquent *Caslexa Construction Inc. (Re)*, [1996] O.J. No. 1502 (C.A.) (QL). Dans cette affaire, une requête en faillite avait été déposée contre Caslexa et devait être entendue le 29 avril 1996. Par voie de motion, Caslexa a demandé une suspension de l'audience. La suspension lui a été refusée le 16 avril et Caslexa a déposé un appel le 24 avril. Le

25 avril, des créanciers ont saisi la Cour d'une motion la priant d'annuler la suspension des procédures, en vertu de l'art. 195, ou de déclarer subsidiairement que l'art. 195 n'avait pas pour effet de suspendre l'audition de la pétition. La décision du juge d'appel Austin s'est appuyée sur le raisonnement suivant : la suspension demandée ayant été refusée à Caslexa, aucune « procédure » n'était exercée en vertu de l'ordonnance dont il était appelé et il ne se trouvait [TRADUCTION] « rien sur quoi puisse porter la suspension prévue à l'art. 195 »; il ne pouvait donc y avoir suspension. La Cour a arrêté subsidiairement, pour le cas où cette interprétation serait erronée, que la suspension était annulée.

[23] Les prétentions des auteures des motions sur ce que l'art. 195 suspend, le cas échéant, diffèrent. Il en résulte des vues divergentes sur la situation des sociétés appelantes au 31 août 2016. Deux des auteures des motions admettent qu'il est raisonnable de considérer l'art. 195 comme suspendant ou comme différant la cession de faillite que les sociétés appelantes sont réputées avoir faite (par application du par. 50.4(8)), mais estiment que cet article n'empêche pas l'annulation de la suspension opérée par l'art. 69. La troisième d'entre elles soutient que l'art. 195 ne suspend pas la cession de faillite réputée et qu'ainsi, en dépit de l'appel, les sociétés appelantes sont faillies. Cette distinction est intéressante, étant donné que le par. 69(1) prévoit que la suspension des procédures prend fin à la date du dépôt d'une proposition ou à « la date à laquelle [la personne insolvable] devient un failli ». Ainsi, une suspension de la faillite préviendrait l'annulation de la suspension des procédures que le par. 69(1) prévoit en conséquence de la faillite. Par ailleurs, il est difficile de voir comment l'interprétation de l'art. 195 voulant que la cession de faillite réputée soit suspendue, sans que le soit également l'annulation de la suspension opérée par l'art. 69, permettrait d'atteindre l'objectif d'une suspension en appel qui, en pratique, ne serait pas illusoire.

[24] Je signale, malgré que les parties n'aient pas présenté d'observations sur ce point, qu'à mon sens *Doaktown Lumber* ne peut pas être distingué en faisant valoir que l'appel s'y trouvait interjeté tant d'une ordonnance positive, mettant fin au délai de dépôt d'une proposition, que d'un rejet d'une motion en prorogation du délai de dépôt. Dans un

cas comme dans l'autre, la faillite résulte, par application du par. 50.4(8), de l'omission de déposer une proposition dans le délai imparti. Du point de vue de la personne insolvable, une ordonnance mettant fin au délai de dépôt d'une proposition et une ordonnance refusant une prorogation de ce délai diffèrent peu, en pratique, quant à leurs conséquences. L'une et l'autre signifient l'achèvement du délai et empêchent le dépôt d'une proposition, ce qui conduit, s'il n'y a pas suspension par application de l'art. 195, à une cession de faillite et à la fin de la suspension des procédures que l'art. 69 avait opérée. L'incapacité qui s'ensuit en pratique, pour la Cour d'appel, de corriger une erreur en appel a servi de fondement à l'interprétation adoptée par le juge Russell dans *Doaktown Lumber*.

[25] Je dirai simplement que, compte tenu des décisions rendues par notre Cour dans *Doaktown Lumber*, je ne déclarerai pas que les appels des sociétés n'ont pas maintenu, par application de l'art. 195, la suspension des procédures qui s'était opérée en juillet 2016 par application de l'art. 69.

[26] Pour les besoins de la décision à rendre sur la mesure subsidiaire sollicitée par les auteures des motions, je suppose que la suspension des procédures est maintenue par application de l'art. 195.

B. *Déclaration portant que l'art. 195 ne limite pas les droits dont jouissent les créanciers au titre de l'art. 65.1*

[27] Notre Cour est priée de déclarer que l'art. 195 ne limite pas les droits dont jouissent les créanciers au titre de l'art. 65.1.

[28] L'article 65.1 prévoit que, une fois qu'une personne insolvable a déposé un avis d'intention de faire une proposition, il est interdit à quiconque a conclu un contrat avec elle, y compris un contrat de garantie, de résilier ou de modifier le contrat au seul motif que cette personne a déposé un avis d'intention (ou qu'elle est insolvable). Cette limitation législative de l'exercice de droits contractuels s'ajoute, ou apporte un

complément, à la suspension des procédures qui intervient par application de l'art. 69 au moment du dépôt d'un avis d'intention. (Pour une réfutation de la thèse voulant que la restriction législative imposée par l'art. 65.1 à la résiliation ou à la modification de contrats ne soit pas nécessaire (ou soit superflue) du fait que la suspension générale prévue par l'art. 69 empêche également la résiliation ou la modification : voir *Canadian Petcetera Limited Partnership c. 2876 R Holdings Ltd.*, 2010 BCCA 469, [2010] B.C.J. No. 2065.)

[29] Les limites que l'art. 65.1 pose aux droits contractuels, naturellement, ne sont pas absolues. Les articles 65.1 et 69 habilitent l'un comme l'autre le tribunal à soustraire une partie à leur application. Comme il a été mentionné précédemment, l'article 69.4 autorise le tribunal à déclarer, sur présentation d'une demande, que la suspension n'est plus applicable lorsqu'un préjudice sérieux est démontré. De même, le par. 65.1(6) autorise le tribunal à déclarer que la limitation de certains droits prévue à l'art. 65.1 est inapplicable (ou applicable uniquement dans la mesure où il l'ordonne), si le demandeur établit qu'elle « lui causerait vraisemblablement de sérieuses difficultés financières ».

[30] Une autre disposition est pertinente en l'espèce. Elle peut être tenue pour une limite, ou une exception, restreignant la portée de la limitation de certains droits prévue à l'art. 65.1. Le paragraphe 65.1(4) prévoit expressément que la limitation de certains droits prescrite par l'art. 65.1 n'empêche pas d'exiger que la personne insolvable effectue sans délai des paiements relatifs à la fourniture de marchandises ou de services, ou à l'utilisation de biens loués ou faisant l'objet d'une licence, dans la mesure où la fourniture ou l'utilisation a eu lieu <u>après</u> le dépôt de l'avis d'intention. Il a été abondamment question de cette disposition du fait que, depuis le dépôt des avis d'intention, les sociétés appelantes n'ont versé de paiements de location à aucune des auteures des motions.

[31] Je suis d'avis que, comme l'art. 69, la limitation à certains droits prévue à l'art. 65.1 continue de s'appliquer en attendant l'appel, par application de l'art. 195. Par

contre, l'art. 195 ne suspend pas l'application de la *Loi* à l'égard de la personne insolvable et ne limite pas les droits dont jouissent les créanciers au titre de l'une ou l'autre de ces dispositions. Vu les demandes présentées par les auteures des motions, la Cour du Banc de la Reine aurait pu, dans l'exercice de la juridiction de première instance que lui reconnaît l'art. 183, statuer sur ces droits des parties à tout moment à compter de juillet 2016. Dans le contexte des présentes motions, et dans l'exercice de la compétence d'un juge unique en vertu de l'art. 195, il convient d'incorporer à l'analyse menée en application de l'art. 195, laquelle analyse suit, l'examen des circonstances invoquées par les parties en ce qui concerne l'art. 65.1, au lieu de statuer séparément sur les droits dont jouissent les parties au titre de cet article.

III. Annulation de la suspension

[32] Notre Cour est priée d'annuler la suspension des procédures à l'égard de tous les créanciers des sociétés appelantes, en vertu de l'art. 195, ou subsidiairement à l'égard des auteures des motions.

[33] Nous avons vu que les auteures des motions ne prétendent pas que « l'appel n'est pas poursuivi avec diligence » par les sociétés. Elles soutiennent que notre Cour doit user du pouvoir résiduel que lui octroie l'art. 195 pour annuler la suspension et qu'elle doit se guider, à cette fin, sur les principes et les critères qu'énoncent l'art. 69.4 (annulation de la suspension) et l'art. 65.1 (limitation de droits). Les prétentions des auteures des motions laissent entendre que notre Cour devrait rendre des ordonnances en vertu de ces dispositions, ce par quoi elle exercerait le pouvoir dont les juridictions de première instance sont investies au titre du par. 183(1) de la *Loi*. Quoique l'exercice du pouvoir d'annulation que confère l'art. 195 exige l'analyse et la prise en compte de facteurs et de circonstances que ces articles font intervenir également, l'analyse requise, et les facteurs et les circonstances qu'il faut peser, ne sont pas identiques.

[34] Il n'est pas contesté qu'il incombe à l'auteur de la motion d'établir que des motifs justifient de prononcer une ordonnance de modification ou d'annulation de la

suspension des procédures. Comme l'expliquait le juge en chef Drapeau dans *Dugas Estate (Bankrupt), Re* (2003), 261 R.N.-B. (2e) 99, [2003] A.N.-B. n° 230 (C.A.) (QL) :

> Aux termes de l'article 195, toutes les procédures exercées en vertu d'une ordonnance ou d'un jugement dont il est appelé sont suspendues jusqu'à ce qu'il soit disposé de l'appel. L'article 195 dispose ensuite qu'un juge de la Cour d'appel peut annuler la suspension pour toute raison jugée convenable.
>
> Il est bien établi en droit que c'est à la partie qui sollicite l'annulation de la suspension qu'il incombe d'établir qu'il existe des motifs impérieux justifiant l'intervention du tribunal. Voir l'arrêt *Yewdale (Bankrupt) c. Campbell, Saunders Ltd.* (1994), 53 B.C.A.C. 23; 87 W.A.C. 23; 9 B.C.L.R. (3d) 253 (C.A.), le juge d'appel Prowse, aux paragraphes 14 et 15. J'estime que la syndique s'est acquittée de ce fardeau en l'espèce. Bien que je sois d'avis que l'appel de M. Dugas met sérieusement en question la décision du juge Léger, les autres considérations pertinentes militent toutes fortement en faveur de la levée de la suspension. La plus importante de ces considérations est le préjudice relatif que subiraient les créanciers et le failli si la suspension devait rester en vigueur. [par. 13 et 14]

[35] Le juge d'appel Ayles, qui a rejeté la demande de BNY sollicitant l'annulation de la suspension en vertu de l'art. 195 dans *Doaktown Lumber*, a appliqué l'analyse en trois étapes élaborée dans *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, [1987] A.C.S. n° 6 (QL) (et dans *RJR – MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, [1994] A.C.S. n° 17 (QL)). Le juge d'appel Ayles a expliqué pourquoi il recourait à cette analyse pour statuer en application de l'art. 195 :

> [TRADUCTION]
> L'autre critère mentionné à l'art. 195 est celui-ci : « [T]oute autre raison qui peut être jugée convenable ». Dans *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, à la p. 127, le juge Beetz, au nom de la Cour, a écrit :

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires[.]

[36] La juge d'appel Fruman, dans *After Eight Interiors Inc. c. Glenwood Homes Inc.*, 2006 ABCA 121, [2006] A.J. No. 681 (QL), donne un résumé complet et concis des principes qui encadrent le pouvoir de modification ou d'annulation d'une suspension conféré par l'art. 195 :

> [TRADUCTION]
> L'article 195 de la [*Loi sur la faillite et l'insolvabilité*] impose une annulation automatique de certaines ordonnances lors du dépôt d'un avis d'appel. En l'espèce, l'art. 195 a pour effet de suspendre toutes les procédures engagées contre les opérations frauduleuses, jusqu'à ce que soit entendu l'appel interjeté du rejet de l'objection préliminaire. L'article 195 permet toutefois à un juge de la Cour d'appel de « modifier ou [d']annuler la suspension [...] s'il apparaît que l'appel n'est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable ». Alger demande aujourd'hui une ordonnance qui lèverait la suspension.
>
> Il incombe à la partie qui sollicite l'annulation de la suspension prévue par l'art. 195 d'établir qu'il existe des motifs impérieux qui justifient cette annulation (*Yewdale c. Campbell, Saunders Ltd.* (1994), 9 B.C.L.R. (3d) 253 (C.A.), par. 14 et 15; *Dugas Estate (Bankrupt), Re* (2003), 261 R.N.-B. (2e) 99 (C.A.), par. 14). En temps ordinaire, les demandes de suspension amènent l'application, sous une forme ou une autre, de l'analyse en trois étapes que la Cour suprême a énoncée dans *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, et dans *RJR – MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311. L'analyse consisterait en principe à examiner s'il existe une question sérieuse à juger en appel, si la partie requérante subirait un préjudice irréparable sans une levée

> de la suspension et si elle subirait un plus grand préjudice que la partie intimée sans une levée de la suspension.
>
> Mais, dans *Amex Bank of Canada c. Toronto Dominion Bank* (1996), 181 A.R. 279 (C.A.), aux par. 7 à 11, la juge d'appel Hunt a fait remarquer que, quoique l'analyse en trois étapes puisse être pertinente, en tout ou en partie, le pouvoir discrétionnaire accordé par l'art. 195 est plus vaste. Il est donc indiqué d'adopter une méthode contextuelle, qui requiert d'examiner tous les faits de la cause. Les tribunaux ont agi en accord avec cette méthode et, saisis de demandes d'annulation de la suspension opérée par l'art. 195, ont concentré leur attention sur le préjudice relatif porté aux parties et sur les intérêts de la justice en général :*Yewdale*, précité, par. 21 à 27; *Dugas Estate (Bankrupt), Re*, précité, par. 14 et 15; *RBI Plastique Inc./RBI Plastic Inc. c. Sport Maska Inc.*, [2005] A.N.-B. n° 542 (C.A.), par. 4; *Whissell c. Marmot Concrete Equipment Ltd.* (1996), 40 Alta. L.R. (3d) 231; *Kubota Canada Ltd. c. Case Credit Ltd.*, 2004 ABCA 41, par. 17 à 20.
>
> Comme les motifs du jugement n'ont pas été donnés, il est difficile, en l'espèce, de juger valablement du bien-fondé de l'appel. Ce n'est toutefois pas un obstacle à une levée de la suspension, parce que d'autres considérations peuvent l'emporter. [par. 4 à 7]
>
> [Je souligne.]

[37] Les auteures des motions avancent diverses assertions au sujet de la conduite des sociétés appelantes. Comme le mentionnait la partie des présents motifs portant sur l'art. 65.1, elles n'ont reçu aucun paiement de location depuis le dépôt des avis d'intention. Elles soutiennent que ce manquement, en soi, devrait leur permettre de recouvrer leur matériel. L'un des sujets de plainte principaux et constants des auteures des motions tient au manque d'information sur la situation de leur matériel et sur la progression de la proposition. Il leur a été ardu de déterminer si leur matériel était assuré. Elles soulignent que les sociétés, lorsqu'elles ont déposé leurs avis d'appel, ont fait parvenir une lettre à tous les créanciers leur indiquant que ces avis avaient été déposés, que la suspension des procédures engagées contre elles était maintenue et qu'elles les informeraient de l'état d'avancement de la proposition. Il ressort nettement de la preuve présentée à l'appui des motions que les créanciers ont eu, après le dépôt des appels,

autant de mal à obtenir de l'information qu'ils en avaient eu auparavant. Enfin, Penske et Daimler font valoir, pour exemple de l'immense réticence à coopérer des sociétés appelantes, qu'il leur a été impossible, non seulement de prendre possession du matériel dont le bail avait expiré, mais d'obtenir réponse à leurs demandes de renseignements. Les motions des deux parties prient la Cour de lever, à l'égard de ce matériel, la suspension prévue par l'art. 195. Avant l'audience, Daimler avait reçu son matériel (celui dont le bail avait expiré), Penske non. Les sociétés appelantes n'ayant pu donner aucune raison, hormis la suspension, d'en conserver la possession, la Cour a ordonné la levée de la suspension à l'égard du matériel de Penske dont le bail avait expiré.

[38] Les parties ont peu plaidé sur le fond des appels. Les auteures des motions ont invoqué principalement la conduite des sociétés appelantes et le préjudice qu'elles affirment avoir subi du fait des paiements non reçus pour leur matériel. Il faut mettre dans la balance, également, le préjudice qui serait porté aux sociétés appelantes si la suspension était levée. La preuve autorise à penser que, selon toute probabilité, une levée de la suspension empêcherait de faire une proposition et mènerait inévitablement à la faillite des sociétés appelantes.

[39] Le pouvoir discrétionnaire résiduel que l'art. 195 confère à notre Cour exigeait un examen large, contextuel, de tous les faits. Les actions des sociétés appelantes ont rendu la décision de maintenir la suspension beaucoup plus difficile qu'elle ne l'aurait été d'ordinaire. J'étais toutefois d'avis, vu l'ensemble des faits, et sachant qu'il serait possible d'entendre les appels dans un délai de trente jours, que la prépondérance des inconvénients jouait en faveur d'un rejet des motions sollicitant de notre Cour qu'elle annule ou modifie, pour tous les créanciers ou pour les auteures des motions, la suspension intervenue en attendant les appels.

IV. Dispositif

[40] Pour les motifs qui précèdent, j'ai rejeté les motions, sauf que j'ai ordonné :

1. que les appels seraient entendus le 30 novembre 2016 à 10 h;

2. que la suspension serait annulée en ce qui concerne le matériel de Location de Camions Penske Canada Inc. dont le bail avait expiré, mesure demandée à l'al. d) de son avis de motion.

[41] Les parties acquitteront leurs propres dépens.

Vu le par. 24(2) et l'art. 25 de la *Loi sur les langues officielles*, L.N.-B. 2002, ch. O-0.5, l'exposé des motifs a été publié dans l'une des langues officielles avant l'audition de l'appel, qui a eu lieu le 30 novembre 2016, puis le sera dans l'autre langue officielle dans les meilleurs délais.

(11)

Citation: Business Development Bank of Canada v. Paletta & Company Hotels Ltd., 2012 MBCA 115

Date: 20121214
Docket: AI 12-30-07892

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

BUSINESS DEVELOPMENT BANK OF CANADA	)	***R. W. Schwartz*** *and*
	)	***J. S. Harvey***
	)	*for the Appellant*
(Applicant) Respondent	)	
	)	***G. B. Taylor*** *and*
	)	***J. J. Burnell***
- and -	)	*for the Respondent*
	)	
	)	***D. G. Douglas*** *and*
PALETTA & COMPANY HOTELS LTD.	)	***R. A. McFadyen***
	)	*for the Receiver, Lazer Grant Inc.*
(Respondent) Appellant	)	
	)	***D. G. Guénette*** *and*
	)	***D. A. Johnston***
	)	*for the Government of Manitoba*
	)	*(Manitoba Development Corporation)*
	)	
	)	*Chambers motion heard:*
	)	***December 13, 2012***
	)	
	)	*Decision pronounced:*
	)	***December 14, 2012***

SCOTT C.J.M.

1 On November 18, 2010, a Court of Queen's Bench motions court judge appointed Lazer Grant Inc. as receiver of essentially all the assets of the respondent (Paletta) in relation to a business known as the Hecla Oasis Resort. On November 16, 2012, after numerous and lengthy efforts made by the receiver and an experienced hotel consultant to dispose of the assets of

the resort, the receiver applied to the same Queen's Bench motions court judge (who had remained seized of the matter throughout) for a vesting order to approve an asset purchase agreement dated November 15, 2012, with Lakeview Management Inc. In the absence of an agreement by both the receiver and Lakeview Management Inc., the transaction must close by no later than December 14, 2012. It is common ground that the actual price for the assets being purchased, consisting of chattels and equipment, is approximately $350,000.

2 There can be no doubt that the receiver and the secured creditors were disappointed by the amount of the sale price; notwithstanding, the applicant (Business Development Bank of Canada) and Manitoba Development Corporation, the two largest secured creditors, approved the sale.

3 On November 20, the motions court judge approved the transaction.

4 Section 195 of the *Bankruptcy and Insolvency Act* reads as follows:

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

5 On November 29, 2012, Paletta filed a notice of appeal against the decision of the motions court judge. In the result, an "automatic stay" came into effect. This caused the receiver to move before a Court of Appeal judge in chambers, returnable Thursday, December 13, being the next available

chambers day, to remove the stay so that the sale approved by the motions court judge could be completed.

6 Argument proceeded before me on December 13 by counsel for the parties, for the receiver and for Manitoba Development Corporation.

7 At the conclusion of argument, I indicated to counsel that in light of the urgency, I would endeavour to have my decision completed by today and that my reasons would be brief and to the point.

Standard of Review

8 The motions court judge's decision was an exercise in judicial discretion and is hence entitled to deference. See *Towers Ltd. v. Quinton's Cleaners Ltd. et al.*, 2009 MBCA 81 at para. 25, 245 Man.R. (2d) 70, and *Soldier v. Canada (Attorney General)*, 2009 MBCA 12, 236 Man.R. (2d) 107.

Decision

9 The facts overwhelmingly support the conclusion that the balance of convenience favours the removal of the stay and that irreparable harm will result if this is not done. The receiver estimates that it will cost in excess of $300,000 to heat and maintain the resort premises over the winter. The Business Development Bank of Canada has already advanced approximately $1.2 million to the receiver with respect to the costs of the bankruptcy, including maintenance of the property, and is not willing to continue this level of support. Despite serious efforts, the receiver has been unable to obtain a better offer. The deal is approved and is ready to close now. There

will be enormous uncertainty if the sale is not completed, with no guarantee that Lakeview Management Inc. will still be "at the table" at a future date.

10 On December 12, the parties and the court were provided with a form of "letter of intent" proferred on behalf of a corporation related to Paletta. The letter of intent is conditional on a 60-day inspection period and specifically states that it is not a "legally binding and enforceable Agreement of Purchase and Sale." The proposed purchase price, I was told, is $500,000. Paletta's counsel advised that his client was not willing to fund the upkeep and heating of the resort while "due diligence" was taking place pursuant to the letter of intent.

11 Counsel for Paletta focussed his argument on the assertion that there had been a lack of procedural and substantive fairness on the part of the receiver. This concern arises, counsel argues, because the receiver failed to advise Paletta until a day and a half prior to the proceedings before the motions court judge on November 19, that the chattels and physical assets had become "unhinged" from the resort enterprise itself, and that efforts were no longer being made to sell the entire complex as one entity. Counsel asserted that the final negotiations between Lakeview Management Inc. and the receiver were done "behind closed doors," which prevented Paletta or someone on its behalf from bettering the Lakeview Management Inc. offer.

12 But the facts are that, throughout, Paletta was provided with the receiver's reports (eight in all) and was fully aware of the difficulties being encountered by the receiver in even obtaining signs of interest in the assets under receivership. It is obvious that the Queen's Bench motions court judge was fully aware that there were difficulties with some Paletta family

members and addressed it in his reasons for decision of November 20 as follows:

> What is particularly important to me in my assessment of this matter is that the Paletta group have been served with materials for every application which the Receiver has made during the course of this receivership and have been present at many, if not most of them. Although Mr. Schwartz argues that the relationship between the Receiver has been strained, that does not depart from the fact that there is a court appointed receiver. If the receiver is doing something that is inappropriate or not commercially reasonable, there was ready access to the court to complain and to convince the court to put the Receiver back on track.
>
> . . . . .
>
> I do not accept that a party who claims to be a stakeholder can sit quietly back and then come in at the last minute and say that the publicized process is all wrong. At best, the Paletta group has simply stuck their heads in the sand. At worst, they wanted to see what someone else would offer and then try and arrange for someone else or themselves to do better. Neither extreme nor anything in between is reason for me to interfere with the process which has been undertaken by the Receiver with the knowledge of all concerned.
>
> . . . . .
>
> The practical thing to do, at this time, is to approve the offer of Lakeview Management. It is not the court's function to make its Receiver, nor the major creditors, take unnecessary risks and there being no one prepared to fund, it is time to move on or at least give Lakeview and the government the opportunity to work out their plans.

13 It is noteworthy that the existing lease agreement between Paletta and the Province of Manitoba deals essentially with the very same classification of assets as are now the subject of the agreement with Lakeview Management Inc.

14 Based on all of these facts, I am not satisfied that Paletta has an arguable case, or a reasonable prospect of success, in challenging the procedure followed by the receiver in arriving at the asset purchase agreement with Lakeview Management Inc., as approved by the motions court judge.

15 I am completely satisfied the receiver has made out a compelling case for the stay to be removed. See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, and *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. My decision would be the same regardless of the deference required of me by the applicable standard of review.

16 For the foregoing reasons, I grant the receiver's application to cancel the stay under s. 195 of the *Bankruptcy and Insolvency Act*.

17 Costs may be spoken to.

_____ C.J.M.

Attorney General of Manitoba *Appellant*

v.

Metropolitan Stores (MTS) Ltd. *Respondent*

and

Manitoba Food and Commercial Workers, Local 832 *Respondent*

and

The Manitoba Labour Board *Respondent*

INDEXED AS: MANITOBA (ATTORNEY GENERAL) *v.* METROPOLITAN STORES LTD.

File No.: 19609.

1986: June 20; 1987: March 5.

Present: Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts — Procedure — Stay of proceedings and interlocutory injunctions — Constitutional validity of legislation challenged — Board proposing to act pursuant to challenged legislation — Motion to stay Board's proceedings until determination of constitutional validity of legislation — Decision to deny motion overturned by Court of Appeal — Principle governing judge's discretionary power to grant stay — Appropriateness of Court of Appeal's intervention in motion judge's discretion — Labour Relations Act, C.C.S.M., c. L10, s. 75.1.

Constitutional law — Charter of Rights — Currency of impugned legislation — Whether or not presumption of constitutionality when legislation challenged under Charter.

The Manitoba Labour Board was empowered by *The Labour Relations Act* to impose a first collective agreement. When the union applied to have the Board impose a first contract, the employer commenced proceedings in the Manitoba Court of Queen's Bench to have that power declared invalid as contravening the *Canadian Charter of Rights and Freedoms*. Within the framework of this action, the employer applied by way of motion in the Court of Queen's Bench for an order to stay The Manitoba Labour Board until the issue of the legislation's validity had been heard. The motion was denied. The Board, unfettered by a stay order, indicated that a

Procureur général du Manitoba *Appelant*

c.

Metropolitan Stores (MTS) Ltd. *Intimée*

et

Manitoba Food and Commercial Workers, section locale 832 *Intimé*

et

The Manitoba Labour Board *Intimée*

RÉPERTORIÉ: MANITOBA (PROCUREUR GÉNÉRAL) *c.* METROPOLITAN STORES LTD.

N° du greffe: 19609.

1986: 20 juin; 1987: 5 mars.

Présents: Les juges Beetz, McIntyre, Lamer, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Tribunaux — Procédure — Suspension d'instance et injonctions interlocutoires — Contestation de la constitutionnalité d'une loi — Commission qui se propose d'agir en vertu de la loi contestée — Requête en suspension des procédures devant la Commission jusqu'à la détermination de la constitutionnalité de la loi — Décision rejetant la requête infirmée par la Cour d'appel — Principe régissant le pouvoir discrétionnaire du juge d'accorder la suspension d'instance — Est-il approprié pour la Cour d'appel d'intervenir dans le pouvoir discrétionnaire du juge de première instance? — Labour Relations Act, C.C.S.M., chap. L10, art. 75.1.

Droit constitutionnel — Charte des droits — Application de la loi attaquée — Existe-t-il une présomption de constitutionnalité lorsqu'une loi est contestée en vertu de la Charte?

The Manitoba Labour Board (la Commission) était habilitée par *The Labour Relations Act* à imposer une première convention collective. Quand le syndicat a demandé à la Commission d'imposer une première convention collective, l'employeur a engagé devant la Cour du Banc de la Reine du Manitoba des procédures visant à faire déclarer la disposition conférant ce pouvoir invalide parce qu'elle contrevenait à la *Charte canadienne des droits et libertés*. Dans le cadre de cette action, l'employeur a saisi la Cour du Banc de la Reine d'une requête pour obtenir une suspension des procédures devant la Commission en attendant que la question de la

collective agreement would be imposed if the parties failed to reach an agreement. The Manitoba Court of Appeal allowed the employer's appeal from the decision denying the stay order and granted a stay. At issue here are: (1) whether the Court of Appeal erred in failing to recognize a presumption of constitutional validity where legislation is challenged under the *Charter*; (2) what principles govern the exercise of a Superior Court Judge's discretionary power to order a stay of proceedings until the constitutionality of impugned legislation has been determined; and (3) whether the Court of Appeal's intervention in the motion judge's discretion was appropriate.

Held: The appeal should be allowed.

The innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the presumption of constitutional validity in its literal meaning—that a legislative provision challenged on the basis of the *Charter* can be presumed to be consistent with the *Charter* and of full force and effect.

A stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules. In order to better delineate the situations in which it is just and equitable to grant an interlocutory injunction, the courts currently apply three main tests.

The first test is a preliminary and tentative assessment of the merits of the case. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a *prima facie* case. A more recent formulation holds that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. The "serious question" test is sufficient in a case involving the constitutional challenge of a law where the public interest must be taken into consideration in the balance of convenience. The second test addresses the question of irreparable harm. The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.

When one contrasts the uncertainty in which a court finds itself with respect to the merits of the constitution-

validité de la loi soit entendue. La requête fut rejetée. N'étant donc pas assujettie à une ordonnance de suspension, la Commission a fait savoir qu'une convention collective serait imposée si les parties n'en venaient pas à une entente. La Cour d'appel du Manitoba a accueilli l'appel formé par l'employeur contre la décision de refuser l'ordonnance de suspension et a accordé une suspension d'instance. Les questions en litige en l'espèce sont de savoir: (1) si la Cour d'appel a commis une erreur en ne reconnaissant pas l'existence d'une présomption de constitutionnalité lorsqu'une loi est contestée en vertu de la *Charte*; (2) quels principes régissent l'exercice du pouvoir discrétionnaire d'un juge de cour supérieure d'ordonner une suspension d'instance en attendant que soit déterminée la constitutionnalité d'une loi dont on conteste la validité; et (3) si c'est à bon droit que la Cour d'appel est intervenue dans le pouvoir discrétionnaire du juge de première instance.

Arrêt: Le pourvoi est accueilli.

Le caractère innovateur et évolutif de la *Charte canadienne des droits et libertés* s'oppose à la présomption de constitutionnalité selon le sens littéral, savoir qu'une disposition législative attaquée en vertu de la *Charte* doit être présumée conforme à celle-ci et, en conséquence, pleinement opérante.

La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature qui doivent être régies par les mêmes règles. Pour aider à mieux délimiter les situations dans lesquelles il est juste et équitable d'accorder une injonction interlocutoire, les tribunaux appliquent actuellement trois critères principaux.

Le premier critère revêt la forme d'une évaluation préliminaire et provisoire du fond du litige. La manière traditionnelle consiste à se demander si la partie qui demande l'injonction interlocutoire est en mesure d'établir une apparence de droit suffisante. Selon une formulation plus récente, il suffit de convaincre la cour de l'existence d'une question sérieuse à juger, par opposition à une réclamation futile ou vexatoire. Le critère de la «question sérieuse» suffit dans une affaire soulevant la constitutionnalité d'une loi quand l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients. Le deuxième critère se penche sur la question du préjudice irréparable. Le troisième critère, celui de la prépondérance des inconvénients, consiste à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond.

Quand on oppose l'incertitude dans laquelle un tribunal se trouve au stade interlocutoire relativement au

al challenge of a law at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an interlocutory injunction, not only for the parties to the litigation but also for the public at large, it becomes evident that the courts ought not to be restricted to the traditional application of the balance of convenience.

It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties, and in cases involving interlocutory injunctions directed at statutory authorities, it is erroneous to deal with these authorities as if they had any interest distinct from that of the public to which they owe the duties imposed upon them by statute. Such is the rule even where there is a *prima facie* case against the enforcement agency, such as one which would require the coming into play of s. 1 of the *Charter*.

The granting of an interlocutory injunction generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant who requests the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type are called exemption cases. The rule of the public interest should not be interpreted as meaning that interlocutory injunctive relief will only be granted in exceptional or rare circumstances, at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons.

Finally, in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar.

Here, the motion judge applied the correct principles in taking into consideration the public interest and the

fond de la contestation constitutionnelle d'une loi et les conséquences pratiques parfois graves, quoique temporaires, qu'entraîne une injonction interlocutoire non seulement *pour* les parties au litige mais aussi pour le grand public, il devient évident que les tribunaux ne doivent pas se limiter à l'application traditionnelle de la prépondérance des inconvénients.

Il est donc nécessaire que l'intérêt public soit pris en considération dans l'appréciation de la prépondérance des inconvénients en même temps que l'intérêt des plaideurs privés, et dans les cas où il s'agit d'injonctions interlocutoires adressées à des organismes constitués en vertu d'une loi, c'est une erreur que d'agir à leur égard comme s'ils avaient un intérêt distinct de celui du public au bénéfice duquel ils sont tenus de remplir les fonctions que leur impose la loi. Telle est la règle, même s'il existe une apparence de droit suffisante contre l'organisme chargé de l'application de la loi, laquelle apparence nécessiterait le recours à l'article premier de la *Charte*.

Une injonction interlocutoire peut en général avoir deux effets. Elle peut interdire totalement à l'organisme chargé de l'application de la loi d'appliquer les dispositions attaquées en attendant une décision définitive sur la question de leur validité ou elle peut lui interdire d'appliquer les dispositions attaquées à l'égard de la partie qui a précisément demandé la suspension d'instance. Dans le premier volet de l'alternative, l'application des dispositions attaquées est en pratique temporairement suspendue. On peut appeler les cas de ce genre les cas de suspension. Dans le second volet de l'alternative, le plaideur qui se voit accorder une suspension d'instance bénéficie en réalité d'une exemption de l'application de la loi attaquée, laquelle demeure toutefois opérante à l'égard des tiers. On appelle les cas de cet autre genre des cas d'exemption. On ne doit pas interpréter la règle de l'intérêt public comme signifiant qu'une injonction interlocutoire ne sera accordée que dans des cas rares ou exceptionnels, du moins dans les cas d'exemption où les dispositions attaquées revêtent la forme de règlement applicable à un nombre relativement limité de personne et lorsqu'aucun préjudice appréciable n'est subi par le public. D'un autre côté, l'intérêt public commande normalement davantage le respect de la législation existante dans les cas de suspension lorsque les dispositions contestées sont de portée large et générale et touchent un grand nombre de personnes.

Finalement, dans les cas où une injonction interlocutoire est accordée en conformité avec les principes énoncés ci-dessus, les parties devraient généralement être tenues de respecter un calendrier spécial.

En l'espèce, le juge des requêtes a appliqué les principes appropriés en tenant compte de l'intérêt public et de

inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the parties. The Court of Appeal was not justified in substituting its discretion for that of the motion judge: the emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion.

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l'effet inhibitif d'une suspension d'instance sur la Commission, en plus de son effet sur les parties. Rien ne justifiait la Cour d'appel de substituer son jugement à celui du juge de première instance: pour qu'ils justifient qu'une cour d'appel exerce un nouveau pouvoir discrétionnaire, les faits nouveaux qui émergent après le prononcé du jugement de première instance doivent être de telle nature qu'ils aient un effet appréciable sur la décision du juge de première instance.

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

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

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

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

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

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

Related Abridgment Classifications

Civil practice and procedure

XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.e Stay pending appeal

Remedies

II Injunctions
II.1 Principles relating to availability of injunctions
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Remedies

II Injunctions
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Remedies

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Headnote

Injunctions — Injunctions involving Crown — Miscellaneous injunctions

...m Legal Citation

Abridgment digests and classifications for all levels of this case

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CIV.XXIII.18.e Civil practice and procedure — Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal

REM.II.1.e Remedies — Injunctions — Principles relating to availability of injunctions — Public interest

REM.II.7.k Remedies — Injunctions — Injunctions in specific contexts — Injunctions involving Crown or government entities

REM.II.9.f.i Remedies — Injunctions — Form and operation of order — Stay of injunction — Pending appeal

Injunctions --- Availability of injunctions — Public interest

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

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

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

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

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

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

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

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

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

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

I. Factual Background

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

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

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

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

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

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

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

advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

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

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

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

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

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

II. Relevant Statutory Provisions

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

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> > (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> >
> > (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> >
> > (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

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

15

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

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

16

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

III. Courts Below

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

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

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

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

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

Court of Appeal (on the application for a stay)

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

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

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

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

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

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

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

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

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment

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

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

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

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

IV. Jurisdiction

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

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

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

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

Supreme Court Act

31

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

Rules of the Supreme Court of Canada

32

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

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

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

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

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

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

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

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

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

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

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

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings.

While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

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

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

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

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

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

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

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

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

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

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

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

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

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

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

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

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

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

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

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

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

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

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

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

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

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

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

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Irreparable Harm

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

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

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

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

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

D. The Balance of Inconvenience and Public Interest Considerations

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

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

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

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

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

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

1. The Public Interest

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

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

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

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

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

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

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

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

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

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

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

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the

action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

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

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

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

2. The Status Quo

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

E. Summary

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

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

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

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

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

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the

second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

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

B. Irreparable Harm

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

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applications dismissed.

Solicitors of record:
Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais* , Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault* , Montreal.
Solicitors for the respondent: *Côté & Ouellet* , Montreal.
Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault* , Toronto.

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Next

RJR — MacDonald Inc. v. Canada (Attorney General)
1994 SCC 117, 1994 CarswellQue 120 Supreme Court of Canada Quebec March 3, 1994 *(Approx. 26 pages)*

1994 SCC 117
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, 1994 SCC 117, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17

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(2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

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

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

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

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

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

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

Related Abridgment Classifications

Civil practice and procedure

XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.e Stay pending appeal

Remedies

II Injunctions
II.1 Principles relating to availability of injunctions
II.1.e Public interest

Remedies

II Injunctions
II.7 Injunctions in specific contexts
II.7.k Injunctions involving Crown or government entities

Remedies

II Injunctions
II.9 Form and operation of order
II.9.f Stay of injunction
II.9.f.i Pending appeal

Headnote

Injunctions — Injunctions involving Crown — Miscellaneous injunctions

Injunctions --- Availability of injunctions — Public interest

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

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

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

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

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

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

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

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

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

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

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

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

I. Factual Background

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

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

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

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

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

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

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

advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

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

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

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

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

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

II. Relevant Statutory Provisions

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

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> > (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> >
> > (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> >
> > (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

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

15

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

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

16

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

III. Courts Below

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

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

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

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

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

Court of Appeal (on the application for a stay)

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

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

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

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

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

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

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

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

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment

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

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

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

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

IV. Jurisdiction

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

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

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

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

Supreme Court Act

31

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

Rules of the Supreme Court of Canada

32

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

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

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

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

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

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

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

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

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

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

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

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings.

While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

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

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

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

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

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

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

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

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

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

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General)* v. *Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

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

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

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

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

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

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

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

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

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

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

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

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

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

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

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

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

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Irreparable Harm

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

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

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

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

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

D. The Balance of Inconvenience and Public Interest Considerations

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

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

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

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

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

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

1. The Public Interest

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

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

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

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

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

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

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

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

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

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

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

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the

action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

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

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

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

2. The Status Quo

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

E. Summary

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

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

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

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

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

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the

second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

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

B. Irreparable Harm

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

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applications dismissed.

Solicitors of record:
Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais* , Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault* , Montreal.
Solicitors for the respondent: *Côté & Ouellet* , Montreal.
Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault* , Toronto.

End of Document

(14)

In the Court of Appeal of Alberta

Citation: Toronto Dominion Bank v. Amex Bank of Canada, 1996 ABCA 128

Date: 19960325
Docket: 16309
Registry: Calgary

Between:

The Toronto Dominion Bank

Appellant
(Respondent)

- and -

Amex Bank of Canada

Respondent
(Applicant)

Memorandum of Decision of
The Honourable Madam Justice Hunt
In Chambers

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE MEDHURST OF THE 22ND DAY OF JANUARY, 1996

COUNSEL:

Robert C. Stemp, for the Appellant (Respondent)

John Bessemer, for the Respondent (Applicant)

MEMORANDUM OF DECISION OF
THE HONOURABLE MADAM JUSTICE HUNT
IN CHAMBERS

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[1] The Applicant Amex Bank of Canada ("Amex") seeks to cancel a stay ordered by Medhurst, J. on January 22, 1996, with respect to funds held in the trust account of Annex's solicitor. The Respondent, Toronto Dominion Bank ("TD Bank"), opposes the application.

[2] At issue is the application of s. 195 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("the Act") which provides:

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

[3] The background is as follows. In 1993 Amex was a creditor of the bankrupt, Rexilius. Rexilius had some RRSPs in his name with TD Bank. Rexilius and his wife also had a line of credit with TD Bank. In April, 1993, over a period of about 12 days, Rexilius cashed in the RRSPs; the funds remaining after the statutory holdback were retained by the TD Bank against the line of credit.

[4] In September 1993 Rexilius made an assignment in bankruptcy. The trustee declined the request of Amex to attack the April transactions. Amex exercised its right, as a creditor, under s. 38 of the Act, to take the proceeding itself, at its own risk and expense. Under s. 38, if the creditor is successful in its action, it retains the benefit derived from the proceeding to the extent of its claim and costs, with any surplus belonging to the estate.

[5] Amex's claim succeeded before the Registrar and the April transactions were set aside. TD Bank appealed. In November, 1995, Mr. Justice Dixon ordered a stay pending the appeal. Before the appeal was heard, the TD Bank deposited the funds at issue (some $52,000) into a lawyer's trust account. The funds are earning interest of 3.9% in an account with a financial institution. The appeal was heard and denied by Mr. Justice Medhurst in January, 1996.

[6] Section 195 operates differently than the normal Rules of Court in this jurisdiction, in that an appeal to the Court of Appeal automatically operates as a stay. A judge of this Court is empowered to cancel the stay if the appeal is not being prosecuted diligently or "for such other reason as ... a judge ... may deem proper." No argument has been made about a lack of diligence in prosecuting the appeal, so the critical question concerns the application of the latter phrase.

[7] Amex notes that, under the Alberta Rules of Court, the burden is upon the applicant for a stay. It says that the effect of s. 195 is to place that burden upon the party seeking to cancel or vary the "automatic" stay that arises when an appeal is taken to the Court of Appeal. It argues, however, that for the purposes of assessing whether that burden has been satisfied, the Court should apply the tripartite test that is used in the stay cases. This test was described by Laycraft, C.J.A. in Horsemen's Benevolent and Protective Assoc. of Alberta v. Alberta Racing Commission (No.2) [1989] 97 A.R. 287 at 290 as follows:

(1) A preliminary assessment of the merits.

(2) Would the applicant suffer irreparable harm if the relief is not granted.

(3) The balance of convenience or inconvenience.

[8] Laycraft, J.A. noted that the second part of this tripartite test might merge into or be part of the third.

[9] The only case directly on point cited by counsel is Yewdale v. Campbell. Saunders Ltd. (1994) 34 C.B.R. (3d) 73 (C.A. Chambers). In that decision, Madam Justice Prowse observed that the onus is on the party seeking to upset the stay. Noting the language of discretion found in s. 195, she outlined the conditions that, in her view, should be taken into account. These included the merits of the appeal; the relative prejudice to the creditor and the bankrupt if the stay is cancelled; prejudice to third parties; and the presence or absence or fraud of bad faith on the part of any party to the proceedings. On the facts before her, she also took into account the likelihood that there would be a shortfall in the bankrupt's estate concerning the judgment that had triggered her assignment in bankruptcy.

[10] Madam Justice Prowse's approach confirms my view that, while part or all of the tripartite test may be relevant to a decision under s. 195, the discretion granted by the section is broader than that. Also supportive of this view is the language of Beetz, J. in Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers Local 832 and Labour Board (Man.) (1987), 65 NR. 159; 46 Man. R. (2d) 241; 38 D.L.R. (4th) 321. At 321 he said that a stay of proceedings and an interim injunction are similar remedies and that "[i]n the absence of a different test prescribed by statute", they were sufficiently similar to be governed by the same rule.

[11] But here there is a 'lest prescribed by statute". It. Is a very broad test. Thus, it seems to me that all the facts of the case should be considered, not merely those that engage the tripartite test.

[12] Counsel for Amex acknowledged that there are legitimate issues arising on the appeal, not the least of which is a Supreme Court of Canada decision that was handed down after the decisions below (Royal Bank of Canada v. North American Life Assurance Co. [1996] S. C.J. 17.) TD Bank says that this decision accepts the authorities upon which much of its case rests while rejecting many of the authorities upon which Amex relies. Thus there is no doubt that there is merit to the appeal.

[13] Amex argues that, since it an extremely solvent organization, there is no doubt of its ability to repay should the appeal succeed. Its position has been upheld on two previous occasions. It receives a return of between 15 and 30 per cent on its own investments and would prefer to do the same with these funds, rather than receiving less than four per cent through deposits with a competitor. It argues that its claim and costs and the trustee's fees will likely take up the bulk of the funds (should its position be upheld on appeal); thus, it says, it is unlikely that there will be a significant amount remaining for distribution to other creditors.

[14] TD Bank disputes Annex's argument that there would be little left of the fund after Amex's claim and costs and the trustee's fees, observing that Annex's costs have not been taxed as yet. It argues that if the stay is cancelled and the monies distributed, and its appeal is successful, it would be difficult or impossible for it to recover the monies distributed to other creditors.

[15] In my view Amex has not discharged the burden of establishing that there are sufficient reasons in this case to cancel the stay. The amount of money is relatively small. Assuming the appeal is pursued in a reasonable fashion (and there is no suggestion to the contrary), the matter is likely to be resolved in a relatively short time. The "lost interest' will be relatively insignificant. Counsel for Amex admitted that, even on his assessment of the numbers, there would still be about $4,000 to be distributed after payment of its claim and costs and the trustee's fees. Thus, if the appeal succeeds, I agree with TD Bank that it could be placed in a difficult position trying to recapture funds that had been distributed to the other creditors. The harm to Amex in receiving a modest return on $52,000, over what will likely be a relatively short time, is not a sufficiently compelling reason to cancel the stay.

[16] For these reasons, the application is dismissed.

JUDGMENT DATED at CALGARY, Alberta
this 25th day of MARCH,
A.D. 1996