Court File No. CV-16-11290-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF MAPLE BANK GmbH
AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED
AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

MAPLE BANK GmbH

Respondent

BRIEF OF AUTHORITIES OF THE LIQUIDATOR KPMG INC.
(Motion returnable December 13, 2017)

December 12, 2017

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3

Alex MacFarlane (LSUC No. 28133Q)
Tel: 416.367.6305
amacfarlane@blg.com

Bevan Brooksbank (LSUC No. 56717U)
Tel: 416.367.6604
bbrooksbank@blg.com

Lawyers for KPMG Inc., in its capacity as Liquidator of the business in Canada of Maple Bank GmbH and its assets

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TAB 1

1996 CarswellQue 369
Supreme Court of Canada

Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.

1996 CarswellQue 369F, 1996 CarswellQue 369, [1993] A.Q. No. 2213, [1996] 1 S.C.R. 900, 133 D.L.R. (4th) 643, 196 N.R. 81, 39 C.B.R. (3d) 253, 62 A.C.W.S. (3d) 701, J.E. 96-901, EYB 1996-67896

Richard Dubois c. Raymond, Chabot, Fafard, Gagnon Inc., en sa qualité de liquidateur provisoire de Les Coopérants, Société mutuelle d'assurance-vie/Coopérants, Mutual Life Insurance Society

Lamer C.J.C., L'Heureux-Dubé, Gonthier, McLachlin and Major JJ.

Heard: October 4, 1995
Judgment: April 25, 1996
Docket: 23993

Proceedings: reversing (1993), [1994] R.J.Q. 55 ((C.A.)

Counsel: *Richard Wagner* and *Odette Jobin-Laberge*, for appellant.
Robert Tessier and *Paul Paradis*, for respondent.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Winding-up — Under Dominion Act — Liquidator — Actions involving liquidator — Setting aside transactions.

Corporations — Winding-up — Under Dominion Act — Liquidator — Actions involving liquidator — Setting aside transactions — Purchaser and debtor being co-owners of two immovables — Purchaser and debtor waiving rights to demand partition of immovables for 35 years in agreements — Agreements containing clauses directing one co-owner's interest to be sold to other co-owner where one applies for appointment of liquidator — Debtor applying for appointment of liquidator and court appointing liquidator — Liquidator bringing motion to have clauses limiting liquidator's powers declared unenforceable against liquidator — Trial judge determining agreements being lawful and binding — Liquidator successfully appealing — Purchaser appealing — Liquidator required to comply with mandatory sale clauses provided they did not create unjust preference in favour of purchaser — Parties having right to apply to court to clarify terms and conditions of implementation of clauses.

The purchaser and the debtor were undivided co-owners of two immovables with shares of 49 per cent and 51 per cent respectively. Each immovable was the subject of a contract establishing undivided co-ownership and an agreement governing the rights and obligations of the two undivided co-owners. Under the agreements the undivided co-owners waived their rights to demand partitions of the immovable property for a period of 35 years and explained the reasons of utility justifying the postponement of partition. The agreements each provided for the sharing of disbursements and expenses and contained a default clause directing the interest of one undivided co-owner to be sold to the other where one of the undivided co-owners applied to a court for the appointment of a liquidator. The non-defaulting party could give a 30-day default notice to rectify the default. At the end of that period the non-defaulting party could offer to purchase the defaulting party's undivided share of the immovable. If the defaulting party refused the offer within 10 days of its delivery, the purchase price would be set at 75 per cent of the fair market value of the undivided interest. The undivided co-ownership titles were registered, but the indivision agreements were not. The debtor applied for the appointment of a liquidator on the ground of insolvency and the liquidator was subsequently appointed. The purchaser sent the liquidator two default notices in respect of the two immovables and two offers to purchase. The liquidator refused the offers and refused to pay its share of the disbursements and expenses related to the two immovables. The liquidator brought a

motion for a declaratory judgment seeking to have all of the clauses in the indivision agreements limiting the liquidator's powers declared ineffective or unenforceable against the liquidator. The trial judge determined that the two indivision agreements were lawful and binding on the purchaser, the debtor, and the liquidator. The liquidator appealed and the Court of Appeal reversed the trial judgment, determining that the obligations in the indivision agreements could not be set up against the liquidator. The purchaser appealed.

Held:

The appeal was allowed.

The parties were free to organize the exercise of their undivided rights and the terms and conditions for terminating the indivision by agreement. A 35-year waiver was not unjustified on its face. The purchaser's interest in the immovables was not required to be registered to be set up against the liquidator because the liquidator was acting for the debtor. Contracts signed in good faith prior to a winding-up must be respected unless the obligations contained therein are prejudicial to the other creditors and give rise to an unjust preference in light of all the circumstances. It had not been established that complying with the mandatory sale clauses in the indivision agreements would be prejudicial to the other creditors' interests. The liquidator should be required to comply with the mandatory sale clauses provided that they do not create an unjust preference in favour of the purchaser. The parties should have the reight to apply to court, if necessary, to clarify the terms and conditions of the implementation of the clauses.

APPEAL from judgment reported at (1993), *(*sub nom. *Coopérants Société mutuelle d'assurance-vie v. Raymond Chabot Fafard Gagnon Inc.)* [1994] R.J.Q. 55 (C.A.), allowing appeal from judgment reported at [1992] R.J.Q. 2574 (C.S.), allowing appeal from judgment declaring that obligations agreed to by purchaser and debtor not able to be set up against liquidator.

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

1 This appeal relates to indivision agreements between undivided co-owners of immovables and to the effect of a winding-up on the obligations set out in those agreements. There are two main issues: (1) whether unregistered indivision agreements may be set up against a liquidator appointed under the *Winding-up Act*, R.S.C., 1985, c. W-11; and (2) whether a clause in an indivision agreement providing that the undivided share of a company being wound up must be sold to the undivided co-owner for 75% of its market value may be set up against the liquidator.

I — Facts

2 The appellant and Coopérants, Mutual Life Insurance Society ("the debtor") are undivided co-owners of two immovables situated in Laval, with shares of 49% and 51% respectively. Each immovable is the subject of a contract establishing undivided co-ownership and an agreement governing the rights and obligations of the two undivided co-owners. The undivided co-ownership titles are registered, but the indivision agreements are not.

3 Under the agreements, the undivided co-owners have waived the right to demand a partition of the immovable property for a period of 35 years. The agreements also provide for the sharing of disbursements and expenses and contain a default clause stating that the interest of one undivided co-owner must be sold to the other in certain circumstances, *inter alia* where one of the undivided co-owners applies to a court for the appointment of a liquidator for his or its property.

4 Under the default and mandatory sale clause, the non-defaulting party may give a 30-day default notice to rectify the default. At the end of that period, the non-defaulting party may offer to purchase the defaulting party's undivided share of the immovable. If the defaulting party refuses this offer within 10 days after it is delivered, the purchase price is then set at 75% of the fair market value of the undivided interest, established on the basis of the value of the immovable as a whole. The appraisers are required to appraise the immovable as a whole without considering the fact that it is held in undivided co-ownership.

5 The debtor applied for the appointment of a liquidator on January 3, 1992, on the ground of insolvency. That same day, Martin J. of the Superior Court granted the application and appointed the respondent liquidator of the debtor's property under the *Winding-up Act*.

6 On January 10, 1992, the appellant initiated the procedure for purchasing the debtor's interest by mandatory sale, pursuant to the indivision agreements. He sent the respondent two default notices in respect of the two immovables in question. With these notices, he included two offers to purchase the debtor's undivided interest in the immovables, for an amount equal to the greater of $3,000,000 or 51% of the balance of the hypothecary debt for one immovable and an amount equal to the greater of $4,000,000 or 51% of the balance of the hypothecary debt for the other.

7 The respondent refused these offers on January 23, 1992. The appellant claims that this refusal was out of time, being more than 10 days after the offer was delivered. This claim is unfounded since, under the indivision agreements, the 10-day period does not begin to run until after the initial 30-day period has expired. The appellant in fact renewed his offers on February 10, 1992 and the respondent refused them the following day. The sale price in the event of refusal therefore applied, namely 75% of the fair market value of these undivided interests, established on the basis of the immovable appraised as a whole.

8 In the meantime, the respondent refused to pay its share of the disbursements and expenses related to the two immovables, contrary to the requirements of the indivision agreements.

9 On June 9, 1992 the respondent brought a motion in the Superior Court for a declaratory judgment seeking to have the default and mandatory sale clauses, the clauses providing for partition and sale by licitation, the clauses providing for sharing of disbursements and expenses and any other clauses in the indivision agreements limiting the liquidator's powers declared ineffective or unenforceable against the liquidator. The respondent argues that it is not bound by these provisions, either because it is a third party with respect to these contracts, or because it has an obligation to protect the interests of the debtor's creditors.

II — Judgments of the Courts Below

Superior Court, [1992] R.J.Q. 2574

10 Dealing with the respondent's motion for a declaratory judgement, Trudel J. declared that the two indivision agreements were lawful and binding on the debtor, the respondent and the appellant. He stated the following (at pp. 2577-78):

> [TRANSLATION]
>
> In this case, the undivided co-owners took care that disorder would not ensue and protected themselves from the difficulties that would result should one of them become insolvent. They thus contemplated remedial measures, including measures to protect themselves from the coerciveness of a judicial sale and at the same time to avoid having a new partner imposed on them. They limited or eliminated the right to assign their shares and included in the contracts a mechanism and conditions for terminating the indivision.
>
> There was no reason they could not provide in this manner for the future resolution of the contract in the event that either of them failed to fulfil his or its obligations. Bankruptcy and winding-up are events upon which an obligation may validly be conditional and there was nothing to prevent the co-owners from providing in advance for the termination of indivision in such a case. Moreover, there is no rule in the *Civil Code of Lower Canada* limiting the right to enjoy, benefit from the fruits or alienate an undivided portion.
>
> In addition, the clauses in the agreements relating to default, mandatory or default sale and partition or sale by licitation are in no way contrary to public order or good morals (art. 13 C.C.).

Finally, unless I am mistaken, there are no decisions declaring these clauses unwritten.

Accordingly, the court must confine itself to a contractual approach and finds that these clauses are lawful.

11 The trial judge was also of the view that these clauses could be set up against the liquidator. He noted that a company being wound up does not lose its juridical personality and that the respondent is not a third-party purchaser but is identified with the debtor. The provisions could thus be set up against the respondent. The trial judge noted that the debtor and the respondent could not unilaterally modify the terms of the agreements in their own interests. The clauses had in fact been included at the behest of the debtor, which wanted to protect itself in the event that the appellant experienced financial difficulties.

Court of Appeal, [1994] R.J.Q. 55

12 The Court of Appeal reversed the trial judgment. Beauregard J.A., writing for the court, found that the undertaking to assign an undivided interest at 75% of its market value violated the fundamental legal principle that a debtor's property is the common pledge of the debtor's creditors, apart from security provided for by law. Since the indivision agreements were unregistered, they could not take precedence over the creditors' interests in the debtor's property.

13 Beauregard J.A. wrote (at p. 57):

[TRANSLATION]

It may first be asked whether parties can be in good faith when they provide, other than in an instrument creating a valid real security, that if one of them becomes insolvent the other can obtain a preference over other creditors. In any event, an assignment by an insolvent debtor to one of its creditors at a reduced price, which causes harm to the other creditors, is not made valid by the fact that, much earlier when the debtor was solvent, it promised that creditor preferential treatment should the debtor ever be declared insolvent. If this way of proceeding were allowed, security law would serve no purpose.

14 Beauregard J.A. was of the view that the fundamental principle concerning the protection of creditors [Translation] "is applicable whenever an orderly distribution of the proceeds of a debtor's property is to be made" (p. 58), and is therefore as applicable to a winding-up as it is to a bankruptcy.

15 Beauregard J.A. also attempted to characterize the legal status of a liquidator, compared with a trustee in bankruptcy. In his view, the two functions have much in common, although a company that is being wound up retains its juridical existence. He concluded that a liquidator is more than a representative of the company being wound up and is above all the "trustee" for the company's creditors, with the same rights that they have. For this reason, the obligations in the indivision agreements between the appellant and the debtor could not be set up against the liquidator.

IIImdash;Issues

16 The appellant submitted a series of questions to be resolved. In my view, they may be summed up in three fundamental issues: (1) whether the indivision agreements are valid; (2) whether the indivision agreements may in general be set up against the liquidator; and (3) whether, in particular, the clause providing for the mandatory sale of the share of a defaulting undivided co-owner at 75% of its market value may be set up against the liquidator.

IV — Statutory Provisions

17 The *Winding-up Act* contains the following provisions:

19. A company, from the time of the making of a winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof, but the corporate state

and all the corporate powers of the company, notwithstanding that it is otherwise provided by the Act, charter or instrument of incorporation of the company, continue until the affairs of the company are wound up.

21. After a winding-up order is made in respect of a company, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

22. Every attachment, sequestration, distress or execution put in force against the estate or effects of a company after the making of a winding-up order is void.

33. A liquidator, on his appointment, shall take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled, and shall perform such duties with reference to winding-up the business of the company as are imposed by the court or by this Act.

35. (1) A liquidator may, with the approval of the court, and on such previous notice to the creditors, contributories, shareholders or members of the company as the court orders,

. . . . .

(*b*) carry on the business of the company so far as is necessary to the beneficial winding-up of the company;

(*c*) sell the real and personal property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell them in parcels for such consideration as may be approved by the court;

. . . . .

(*h*) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets.

38. A liquidator may, with the approval of the court, make such compromise or other arrangements with creditors or persons claiming to be creditors of the company as he deems expedient.

93. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding-up its affairs.

94. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, are payable out of the assets of the company, in priority to all other claims.

95. The court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

18 Unlike the *Civil Code of Québec*, S.Q. 1991, c. 64, the *Civil Code of Lower Canada*, which is applicable here, does not deal with undivided co-ownership, although it contains the following provision on indivision:

689. No one can be compelled to remain in undivided ownership; a partition may always be demanded notwithstanding any prohibition or agreement to the contrary.

It may however be agreed or ordered that the partition shall be deferred during a limited time, if there be any reason of utility which justifies the delay.

19 The *Civil Code of Lower Canada* also contains the following provisions:

1981. The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference.

1982. The legal causes of preference are privileges and hypothecs.

V — Analysis

(A) Validity of the Indivision Agreements

20 Undivided co-ownership is a special mode of ownership that arises by operation of law or the will of the parties. Marie Deschamps (now a Quebec Court of Appeal judge) described it very accurately as follows in her article "Vers une approche renouvelée de l'indivision" (1984), 29 *McGill L.J.* 215, at p. 221:

[TRANSLATION]

Undivided co-ownership is the situation in which two or more persons hold property in common and none of them can claim any right to a specific portion of the property. Undivided co-ownership will be said to exist where two or more persons have the same type of rights in a property. Each of the undivided co-owners has rights in a fraction of the property, without that share being crystallized in a specific portion of the thing. Their right is abstract and incorporeal. It is only as a body that the undivided co-owners have a right in the physical object.

From the outset, therefore, a distinction must be drawn between the rights that an undivided co-owner may claim in the thing or physical object and the rights he or she has in his or her share, which is incorporeal property. The undivided co-owner may not claim an exclusive right in the thing or physical object since his or her share has not crystallized in a specific portion. The participation of all the undivided co-owners is needed to take any action whatsoever with respect to the thing considered as a whole.

21 The *Civil Code of Lower Canada* deals only very briefly with undivided ownership, unlike the new *Civil Code of Québec*, a number of articles of which concern undivided co-ownership, which is now much more common in Quebec. Under art. 689 *C.C.L.C.*, which is under the title on successions but is generally applicable, undivided ownership is exceptional; one cannot be compelled to remain in it, although for reasons of utility it may be agreed to defer partition of undivided co-ownership during a limited time.

22 Like Marie Deschamps, we can draw a distinction between the case of imposed undivided ownership, which occurs most often in matters of succession, when the heirs become undivided co-owners by operation of law or the will of the testator, and the case of undivided ownership resulting from the will of the parties. She wrote the following, at pp. 235-36:

[TRANSLATION]

[I]n the case of undivided ownership by agreement, the terms and conditions for terminating the indivision may have been the subject of an agreement. If so, the parties may have agreed on the manner in which they could terminate the indivision without necessarily resorting to an action in partition. ...

The strictness of articles 689 and 746 of the Civil Code can be explained only by the fact that the legislature anticipated that this situation would be unwanted, undesirable and a source of conflict. However, this rule should be relaxed in cases where the parties have chosen to place themselves in this situation. Having made this choice, it would be unfair and inequitable to allow those same parties to use these rules to frustrate a project in which others have invested with them.

We therefore believe that the prohibition in article 689 of the Civil Code does not prevent those who agree to become undivided co-owners from providing for terms and conditions for terminating the indivision.

23 Like the trial judge, I adopt this opinion and agree that the parties are free to organize the exercise of their undivided rights and the terms and conditions for terminating the indivision by agreement.

24 Under art. 689 *C.C.L.C.*, undivided co-owners may agree to suspend their right to demand partition temporarily, but only for a justifiable reason of utility. The appellant and the debtor thus agreed in the indivision agreements to postpone the partition of their undivided interests for a period that would be the lesser of 35 years or the maximum term allowed by law. Under the *Civil Code of Lower Canada*, which applies here, there is no maximum term stipulated, unlike art. 1013 *C.C.Q.*, which sets the maximum term of an agreement to postpone partition at 30 years.

25 The indivision agreements include the following reference to reasons of utility justifying the postponement of partition:

> [TRANSLATION]
>
> > 10.3 The undivided co-owners recognize that they have thus waived an action in partition or for a sale by licitation for a number of reasons of common utility, including the possibility of obtaining hypothecary financing on the office tower and the desire to avoid the costs, delays, administrative difficulties and low realized prices that would result from an action in partition or for a sale by licitation.
> >
> > (Indivision contract entered into between 119855 Canada Inc. and Coopérants on January 8, 1986, with respect to 3090 boul. Le Carrefour, Laval, Quebec (Exhibit R-9).)

26 In the case at bar, the parties expressly agreed on the terms and conditions of partition and sale by licitation. Moreover, in their agreements they explained the reasons of utility justifying the postponement of partition. A 35-year waiver of partition is not unjustified on its face, especially in view of the 30- to 35-year amortization period for the hypothecary financing. In my view, the contractual will of the two parties, both of whom were knowledgeable about real estate investments, must prevail and the Court must not intervene in these agreements. The waiver of partition clause is therefore valid.

(B) Whether the Indivision Agreements Can Be Set Up against the Liquidator

27 Given that the agreements are valid, can they be set up against the liquidator? To decide this question, it is necessary properly to define and situate the liquidator's legal status.

28 Section 19 of the *Winding-up Act* provides that a company in respect of which a winding-up order has been made must cease to carry on its business, "except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof". This section establishes that the corporate state and all the corporate powers of the company "continue until the affairs of the company are wound up". As explained in *McCart v. York County Loan Co.* (1907), 14 O.L.R. 420 (H.C.), at p. 422:

> The only effect of the winding-up order is to prevent the company from carrying on its business except in so far as is, in the opinion of the liquidator, required for the beneficial winding up thereof; the corporate state and all the corporate powers of the company continue until the affairs of the company are wound up. ...

29 Similarly, in *Jolicoeur c. Boivin & Cie*, [1951] Que. P.R. 369 (S.C.), at p. 372, the Superior Court stated:

> [TRANSLATION
>
> [T]he defendant company does not cease to exist when it is being wound up. Winding-up requires the company to cease carrying on its business, but does not deprive it of its legal existence, its corporate state or status or even the powers it has as a corporation. The defendant company will not cease to exist until its affairs have been wound up and the proceeds of the winding-up distributed to its creditors and its shareholders, where applicable.

30 Contrary to what occurs in the case of bankruptcy, the company continues to own its property, which is not transferred to the liquidator. Under s. 33 of the *Winding-up Act*, the liquidator takes all the company's property, effects and choses in action "into his custody or under his control", whereas under s. 71(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the property of a bankrupt "shall ... forthwith pass to and vest in the trustee" and under s. 74(1) of that statute a receiving order or assignment may be registered by or on behalf of the trustee in respect of any real property that the bankrupt owns. As Professor Bohémier explained in *Faillite et insolvabilité* (1992), vol. 1, at p. 726:

> [TRANSLATION]
>
> Bankruptcy entails the divestment of the debtor in favour of the trustee. The trustee's primary responsibility as administrator is to determine what property is part of the bankruptcy and to take the necessary steps to obtain possession thereof and ensure its protection ....
>
> . . . . .
>
> The trustee must immediately take possession of the bankrupt's property, deeds and documents and make an inventory thereof.

31 He added, at p. 732, that [Translation] "the primary purpose of such registration is to enable the trustee to appear as owner of the immovable", free of the charges mentioned elsewhere in the statute, including judicial hypothecs.

32 The difference between the two schemes was described as follows in *Partington c. Cushing* (1906), 1 E.L.R. 493 (N.B. S.C.), at pp. 494-95:

> There is in reality but little analogy between a winding-up of a company and a bankruptcy. The property of a bankrupt vests by operation of law in his assignee; the title as well as the control is completely divested from the one and vested in the other. Nothing of the kind takes place in the case of a winding-up. The title to the company's property remains in the company; the control and management and disposal of it is taken from the directors and placed in the liquidators, who simply are officers of the Court, receivers and managers acting under the direction of the Court, for the purpose of closing up the company's business, realizing its assets and making a legal distribution thereof among the creditors and shareholders. ... Every statutory power conferred upon the liquidators is given with a view to the speedy, inexpensive and effectual accomplishment of this object.

33 See also *McCart, supra*, at p. 422:

> The liquidator seems to be somewhat in the position of a receiver or agent appointed by the Court to represent the company for the purposes of the Act; not as an assignee, but as the statutory representative of the company for the purposes of winding up. The liquidator has power, with the approval of the Court, to sell the real estate of the company; in this case it was authorized to sell the property in question; it could sell only subject to the terms and conditions of the plaintiff's lease; possession could be given only upon expiry of the plaintiff's term; and the provision regarding the plaintiff's right to purchase was, I think, equally binding upon the liquidator.

Authors have expressed the same view. In *Fraser & Stewart Company Law of Canada* (6th ed. 1993), we find the following at p. 845:

> The liquidator is an officer of the court, appointed by the court to perform the functions prescribed by the Act and exercising his powers and performing his duties under the court's supervision. The corporate state and all the powers of the corporation continue after a winding-up order is made; but from the time of such order the corporation is to cease to carry on business, except in so far as the liquidator considers it necessary for its beneficial winding up (s. 19). Even then, the liquidator must have the court's approval to do so under s. 35.

34 From the perspective of the legal winding-up scheme, therefore, the liquidator is an officer of the court whose function it is to close up the company's business and distribute its assets to its creditors. The liquidator is not a third

party in relation to the insolvent company, but is the person designated by the court to act in place of the directors of the company being wound up. Accordingly, the appellant's interest in the immovables (an interest created purely by agreement in this case) need not be registered to be set up against the liquidator, because the liquidator is acting for the debtor.

35 Even though the contracts previously entered into between the appellant and the debtor can in principle be set up against the liquidator because no fraudulent preference has been alleged, in particular under the relevant provisions of the *Winding-up Act* (ss. 96 to 101), there remains the question of whether, and to what extent, the imposition of a winding-up scheme may affect the future performance of obligations agreed on earlier that have some effect on what assets are to be distributed to the other creditors. It is necessary to refer to the purpose of the statute in this regard.

36 In *Re J. McCarthy & Sons Co. Ltd.* (1916), 38 O.L.R. 3 (C.A.), at p. 9, the Ontario Court of Appeal described this purpose as follows:

> The purpose of the Act is to wind up, finally, the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action, and all that may follow upon that right, such as mode of trial, right of appeal, etc., and all are confined to the remedies which the Act provides or permits.

37 The purpose of the statute is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and by distributing the assets in accordance with the Act. The mechanism provided consists in requiring the court's leave for proceedings by the creditors (ss. 21 and 22) and giving responsibility for the company's affairs to a court-appointed liquidator, who acts as an officer of the court, under its control and in accordance with its directives (s. 19). The court and the liquidator must respect and give effect to the creditors' rights as much as possible, taking their nature into account and not disregarding the other interests involved. As Galipeault C.J.Q. stated in *Maranda-Desaulniers v. Peckham* (1952), [1953] Que. Q.B. 163, at p. 172, the court has a discretionary power in this regard:

> [TRANSLATION]
>
> In making decisions, a liquidator acting under the Winding-up Act is subject only to the orders of the court (R.S.C., c. 213, s. 35), since the duty of an inspector appointed by court order for the winding-up is merely to assist and advise the liquidator in the winding-up of the company's business (s. 41).
>
> In selling the property of a company that is being wound up, the liquidator is subject to the court's control (s. 35), and nothing in the Act itself limits the court's discretion in exercising such control. The liquidator must of course take into account the creditors' interests and wishes, but he is not bound by what the creditors want. It is up to him to determine what actions are most likely to protect the creditors' interests.

38 In performing this task and choosing how to dispose equitably and most beneficially of the property of the company being wound up, there may be several factors to consider. It is in this regard that the court may be called upon to intervene in the exercise of its discretion. In the present case, an application has thus been made for the specific performance of an obligation under a bilateral contract. That obligation differs from a monetary debt for which the consideration has already been received and which, subject to the prior claims provided for by law, is resolved in the event of insolvency by the *pari passu* ranking of the creditors' claims to the proceeds of the winding-up. It is therefore an obligation to do, and more particularly an obligation to give, the subject of which is a unique, non-fungible and indivisible property with respect to which the appellant, as co-owner, has a specific interest and is liable to suffer specific harm. He made commitments in a context of continuity over time and reciprocity and has fulfilled and is offering to fulfil his obligations. The obligations involved are comparable in a number of respects to those under a lease of an immovable granted by the insolvent owner thereof. It has been recognized that such a lease may be set up even against a trustee in bankruptcy (*McCart, supra; Brault c. Langlois* (1953), [1954] B.R. 41 (Qué.); and *Re Palais des sports de Montréal Ltée*, [1960] Que.

Q.B. 1012). It is advisable to respect such contracts and ensure that they are as stable as possible. (See Henri de Page, *Traité élémentaire de droit civil belge* (1953), vol. 6, Nos. 721-22, at pp. 621-22, on the application of the principle of *pari passu* ranking of claims, under Belgian statutory provisions similar to arts. 1981 and 1982 *C.C.L.C.*, to obligations to do in respect of which specific performance is available.)

39 Moreover, these assets cannot be wound up except by disposing of them for a price. The liquidator will have to sell the debtor's undivided share in the two immovables in any event. The amount realized from that sale will be part of the common pledge of the company being wound up and will be distributed to the creditors. By selling the debtor's undivided share to the appellant, the liquidator will avoid the administrative expenses of a forced sale of the immovable and the risks of sale at a loss.

40 It is therefore clear that, at least for the same price, there is no advantage in selling to a purchaser other than the appellant. The assets available for distribution to the other creditors are not diminished. Even if this may mean that the appellant's claim is satisfied while unsecured monetary claims are not, the other unsecured creditors cannot complain because they will not be suffering any harm. On the other hand, a refusal to sell to the appellant may cause him harm related to the nature and object of his rights, harm that is completely gratuitous since it does not benefit the other creditors in any way. In deciding on the course to take in such a situation, the liquidator and the court, in the exercise of its discretion, must take into account both the benefits to be obtained and the harm caused in order to distribute them as equally as possible. The *pari passu* rule among unsecured creditors can be fully applied only for fungible obligations. In other cases, it must be tempered with equity to ensure that the burdens imposed on unsecured creditors are minimized and distributed as fairly as possible.

41 The principle that must guide the court in exercising its discretion in such a case is that of respect for contracts signed in good faith prior to the winding-up, unless the obligations contained therein are prejudicial to the other creditors and give rise to an unjust preference in light of all the circumstances, in which case equitable relief will be available.

(C) Harm to the Other Creditors

42 The indivision agreements provide that if one of the parties is wound up the other will be entitled, on the terms and conditions specified, to purchase the undivided share held by the company being wound up. The purchase price of this undivided share is either the price offered by the purchaser or, if the other party refuses it, a price determined by appraisers appointed by both parties or a Superior Court judge in accordance with the procedure established. The method for determining the price is as follows: the appraisers must appraise the immovable as a whole without regard to the fact that it is held in undivided co-ownership and must determine the fair market value of the undivided interest as a fraction — half in this case — of the whole. The price to be paid for the undivided interest is 75% of that market value as determined in this manner.

43 Certain comments should be made about this method for determining the price. The price to be paid is not 75% of the market value of the debtor's undivided interest in light of the restrictions to which the ownership of that undivided portion is subject. Such restrictions should normally be reflected in the price the liquidator can obtain for such an interest. It therefore cannot be concluded that, on the face of it, the price provided for is less than the market value of the undivided share in undivided co-ownership or is liable to harm the other creditors. Nor, *a fortiori*, has it been established that the harm caused to the other unsecured creditors would be disproportionate to the harm caused to the appellant, given the nature of his claim, by a failure to comply with the agreements and would create an unjust preference in his favour.

44 The value of the debtor's undivided shares is not in evidence. The parties have not had the immovable appraised in accordance with the indivision agreements, since the liquidator applied to court rather than giving effect to them; hence there is also no evidence as to the price that the appellant would have to pay under the agreements. In the absence of such evidence, which would permit a comparison between the price payable under the agreements and the market value in undivided co-ownership of the debtor's shares, it cannot be concluded that complying with the mandatory sale clauses in the indivision agreements would harm the other creditors. The respondent argues that an appraisal at 75% on the basis

of the immovable's value without regard to the undivided co-ownership is less than the market value of the undivided rights and is therefore prejudicial to the other creditors' interests. It has not established this, however.

45 Since the clauses providing for the mandatory sale of the undivided interests in the immovables may be set up against the debtor and the respondent, which represents it, the respondent must comply with them provided that they do not create an unjust preference in favour of the appellant.

46 Their implementation remains subject to the controlling discretionary power of the court to which the parties may apply, if necessary, to clarify the terms and conditions of such implementation in the context of the winding-up. The parties' rights in this regard should be reserved.

VI — Disposition

47 For these reasons, I would allow the appeal and declare that the clauses providing for the mandatory sale to the appellant of the undivided shares of the two immovables at the prices provided for in the indivision agreements (Exhibits R-9, R-10 and R-11) are valid and may be set up against the respondent, subject to the parties' right to apply to court, if necessary, to clarify the terms and conditions of the implementation of those clauses in the context of the winding-up, the whole with costs throughout.

Appeal allowed.

TAB 2

2017 ONSC 2536
Ontario Superior Court of Justice

Maple Bank GmbH, Re

2017 CarswellOnt 6220, 2017 ONSC 2536, 278 A.C.W.S. (3d) 472, 47 C.B.R. (6th) 45

IN THE MATTER OF MAPLE BANK GmbH

IN THE MATTER OF THE WINDING-UP AND RESTRUCTURING ACT, R.S.C. 1985, C.W-11, AS AMENDED

IN THE MATTER OF THE BANK ACT, S.C. 1991, C.46, AS AMENDED

Geoffrey B. Morawetz R.S.J.

Heard: March 10, 2017
Judgment: April 27, 2017
Docket: CV-16-11290-00CL

Counsel: Alex MacFarlane, Robert Weir, Rachel Belanger, for KPMG Inc., in its capacity as the Liquidator of the Business in Canada of Maple Bank GmbH and its Assets as defined under s. 618 of the Bank Act
David Byers, for German Insolvency Administrator
Jonathan Wigley — Court Appointed Costs Counsel
Jane Milburn, for Paul Lishman, Jeff Campbell and Cyrus Sekhia
Kimberley Boara Alexander, for Don Scott
Maurice Fleming, for Radius Financial
Kyla Maher, Erin Pleet, for Paul Lishman
Massimo Starnino, Megan Shortreed, for Employees

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

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous

Interim distribution order — On winding up date of March 16, 2016, upon application of Attorney General of Canada, court granted winding-up order pursuant to s. 10.1 of Winding-Up and Restructuring Act ("WURA") — This was to wind up business in Canada of German-owned bank, M Bank ("business") and appoint K Inc. as liquidator of M Bank's business and assets ("T branch assets") as defined in s. 618 of Bank Act — K Inc. brought motion for interim distribution order — Motion granted — Order was to authorize and direct K Inc. to make partial distribution to German Insolvency Administration ("GIA") of portion of estimated surplus of funds realized by K Inc. from liquidation and/or sale of T branch assets and business ("interim distribution") on, or after March 10, 2017 ("interim distribution date") — Interim distribution was appropriate in context of these proceedings — No creditors of Toronto branch would suffer prejudice as result of interim distribution, as T branch had significant surplus and K Inc. had calculated that it would be able to maintain adequate reserves that would ultimately pay all proven claims and future potential claims — In these circumstances, there was no principled basis on which to delay distribution of surplus to GIA, until such time as K Inc. resolved all outstanding claims against T branch — Indeed, it would have been inequitable to GIA to delay distribution — Superior Court of Justice has all powers that are necessary to do justice between parties — Except where provided specifically to contrary, court's jurisdiction is unlimited and unrestricted in substantive law and civil matters — Estimated reserve being maintained by K Inc. provided adequate security to ensure that all claims proved in winding-up could be paid — K Inc. had established reserve for benefit of those who had unproven claims and future potential claims — It was reasonable in circumstances to deem that these claims had been paid for purposes of section 158.1(2) of WURA, which thus enabled K Inc. to make interim distribution.

MOTION brought by liquidator for interim distribution order.

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

1 On March 10, 2017, this motion was granted with reasons to follow.

2 These are the reasons.

3 On March 16, 2016 (the "Winding-Up Date") upon the application of the Attorney General of Canada, the court granted an order (the "Winding-Up Order") pursuant to s. 10.1 of the *Winding-Up and Restructuring Act*, R.S.C. ("WURA"):

> (i) winding-up the business (the "Business") in Canada of Maple Bank GmbH ("Maple Bank"); and
>
> (ii) appointing KPMG Inc. (the "Liquidator") as the Liquidator of the Business and the assets (as defined in section 618 of the *Bank Act*) of Maple Bank (the "Toronto Branch Assets").

4 The Liquidator brought this motion for an order (the "Interim Distribution Order") authorizing and directing the Liquidator to make a partial distribution to the German Insolvency Administration (the "GIA") of a portion of the estimated surplus of funds, which have been realized by the Liquidator from the liquidation and/or sale of the Toronto Branch Assets and the Business (the "Interim Distribution") on, or after March 10, 2017 (the "Interim Distribution Date").

5 Maple Bank is a Canadian owned German Bank, and an authorized foreign bank in Canada under s. 2 and Part XII.I of the *Bank Act* (an "Authorized Foreign Bank"). In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority Service. As an Authorized Foreign Bank, Maple Bank was regulated with respect to its Business in Canada (the "Toronto Branch") by the Office of the Superintendent of Financial Institutions ("OSFI").

6 In February 2016, the emergence of significant German tax claims led to the appointment of the GIA over Maple Bank, which appointment led OSFI to request that the Attorney General of Canada obtain the Winding-Up Order in respect of the Business of the Toronto Branch Assets (the "Winding-Up Proceedings").

7 Since the Winding-Up Date, the Liquidator has worked to liquidate the Toronto Branch Assets and wind-up the Toronto Branch.

8 The realization process for all of the Toronto Branch assets is essentially complete and the Liquidator has approximately $820.1 million available to satisfy outstanding claims.

9 On June 8, 2016, the court issued a claims procedure order (the "Claims Procedure Order"), in order to facilitate a determination of the existence and amount of any claims against the Toronto Branch. Creditors were requested to file their claims by September 19, 2016 (the "Claims Submission Date")

10 The Claims Procedure Order resulted in Liquidator receiving 56 proofs of claim totaling $1.57 billion, including a proof of claim submitted by the GIA on behalf of Maple Bank totalling $791.33 million (the "GIA Claim") in respect of certain term loans, as well as other operational funding that was provided to the Toronto Branch by Maple Bank from Germany.

11 On November 25, 2016, the court issued a distribution order (the "Distribution Order"), authorizing the Liquidator to make a distribution to creditors of the Toronto Branch with proven claims. In accordance with the Distribution Order, on December 9, 2016, the Liquidator paid proven claims in the total value on account of principal and statutory interest under WURA of approximately $686.8 million.

12 The Liquidator has reached an agreement with respect to the GIA Claim, whereby the GIA Claim, to the extent that it is valid, will be reduced to the extent of any distributions made to the GIA. The GIA has further agreed that such corresponding portion of the GIA Claim shall be extinguished and released by such distribution. In addition, the remaining portion of the GIA Claim, to the extent that it is valid, after taking into account any interim distribution, shall be capped at an amount (which amount may, from time to time, increase or decrease) that results in the Toronto Branch having assets in excess of its liabilities, so that creditors with proven claims will receive 100% of their claim plus interest in accordance with the WURA.

13 There remain 24 unproven claims with an aggregate value of $82.4 million.

14 On January 27, 2014, the court issued a principal officers additional claims order (the "Principal Officers Additional Claims Order"), with the aim of facilitating the determination of the existence and amount of any claims that may exist against certain Principal Officers of the Toronto Branch and in order to determine the corresponding quantum of any potential indemnity claims by such Principal Officer against the Toronto Branch. Pursuant to the Principal Officer's Additional Claims Order, creditors were required to file their claims with the Liquidator prior to February 28, 2017 (the "Principal Officers Claims Bar Date"). The Liquidator is not aware of any valid claims against Principal Officers having been filed.

15 The Claims Procedure Order has been implemented in excess of 150 days and the Principal Officers Claim Bar Date has passed.

16 In its Eleventh Report, the Liquidator advises that it can now predict, with a high degree of certainty, both:

(i) the universe of Claims that will be proven under the Winding-Up Proceedings; and

(ii) that the Toronto Branch will have an estimated surplus of at least $660.6 million.

17 The Liquidator has worked with the GIA in order to implement a distribution process in Canada that will ensure that appropriate reserves will be maintained in order to pay, in full, proven claims of creditors of the Toronto Branch, while effecting a prompt distribution to the GIA, after the establishment of the estimated reserve. The Liquidator has, in consultation with the GIA, developed a proposed Interim Distribution.

18 The Liquidator reports that, in order to facilitate the Interim Distribution, the Liquidator has established a reserve (the "Estimated Reserve") to provide for:

(i) the Unproven Claims;

(ii) the Future Potential Claims;

(iii) interest on Unproven Claims and Future Potential Claims at 5% per annum up to and including March 31, 2018; and

(iv) estimated costs to administer the Toronto Branch Liquidation through March 31, 2018.

19 The Estimated Reserve is in the approximate amount of $157.1 million.

20 The GIA supports the establishment of the Estimated Reserve.

21 The Liquidator is of the view that the Interim Distribution is appropriate in the context of the Winding-Up Proceedings.

22 The motion was not opposed.

23 The sole issue to be determined is whether it is appropriate for the court to approve the Interim Distribution.

24 In general terms, the underlying purpose of the WURA is to provide a mechanism for the orderly gathering of and realization on the assets of a debtor (including, an Authorized Foreign Bank) as inexpensively and expeditiously as possible and the corresponding distribution of the proceeds by the Liquidator under the supervision of the court to the creditors and, where applicable, the equity holders of a debtor (see: *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.*, [1996] 1 S.C.R. 900 (S.C.C.) at paras. 36-37 and *Canada (Attorney General) v. Reliance Insurance Co.*, 2015 ONSC 7489 (Ont. S.C.J. [Commercial List]), at para. 10).

25 Sections 75 and 77 of the WURA provide a skeletal framework for the distribution of the assets of the debtor by the Liquidator.

26 Counsel to the Liquidator submits that the case law has developed which confirms that it is not a precondition to a distribution to creditors of a debtor under the WURA that:

> (i) all claims filed in the WURA proceeding at the date of the intended distribution be allowed or disallowed by the Liquidator; nor
>
> (ii) that there be complete certainty that all potential creditors have submitted proofs of claim at the date of the intended distribution.

27 Counsel further submits that orders granting interim distribution in the context of a WURA proceeding are neither unusual nor unheard of (see: *Canada Deposit Insurance Corp. v. Columbia Trust Co.*, 1987 CarswellBC 100 (B.C. S.C.); *Reliance*, *supra*; *Canada (Attorney General) v. Reliance Insurance Co.*, 2009 CarswellOnt 4250 (Ont. S.C.J. [Commercial List]); and *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2002] O.J. No. 4360 (Ont. S.C.J. [Commercial List]). It is noted, however, that in all of these proceedings, the proposed interim distributions were not opposed and the issue before me was not the subject of comment.

28 Section 158.1(2) of the WURA provides for a distribution scheme pursuant to which an Authorized Foreign Bank, in liquidation in Canada may, with the approval of the court, receive the surplus from the Winding-Up after all creditors with proven claim have receive payment of the full value of their proven claim and statutory interest (the "Priority Amount"):

> **Distribution of Property**
>
> 158.1 (1) Where a winding-up order is made in respect of an authorized foreign bank, claims shall be paid in the following order of priority:
>
> > (a) charges, costs and expenses, including the remuneration of the liquidator, incurred in the winding-up of the business in Canada of the authorized foreign bank and of the liquidation of its assets;
> >
> > (b) claims of preferred creditors, specified in section 72; and
> >
> > (c) debts and liabilities of the authorized foreign bank in respect of its business in Canada in order of priority as set out in sections 625 and 627 of the *Bank Act*.
>
> **Distribution and Release of Surplus Assets**
>
> (2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.

29 The Liquidator submits that section 158.1 is not a bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves are established to ensure that all priority amounts will be paid in due course.

30 Counsel to the Liquidator submits that federal insolvency law statutes are complementary and operate in tandem and further, that the court has long recognized that in dealing with insolvency legislation, a technical interpretation should not be applied. Rather, insolvency legislation needs to be given a broad, flexible and purposive interpretation. In support of these propositions, counsel cites: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.); *Union of Canada Life Insurance, Re*, 2012 ONSC 957 (Ont. S.C.J. [Commercial List]); *Kansa General International Insurance Co., Re*, [2002] Q.J. No. 1732 (C.S. Que.); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]).

31 Counsel then submitted that an interpretation of section 158.1(2) that would serve as a temporal bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves have been established to satisfy the Priority Amounts, solely on the basis that the Priority Amounts have not yet been paid out, would be: (i) overly technical and strict; and (ii) where an Authorized Foreign Bank is in liquidation in the jurisdiction of its head office, contrary to the recognized policy of this court to, where possible, assist with and accommodate insolvency proceedings in a foreign jurisdiction, in order to maximize value for the benefit of all creditors.

32 Counsel to the Liquidator further submits that in determining whether or not to approve the Interim Distribution, the Court should focus on whether or not the creditors of the Toronto Branch would be prejudiced by the Interim Distribution. The Liquidator proposes to maintain the Estimated Reserve to cover Unproven Claims, Future Potential Claims, interest on Unproven Claims and Future Claims at five percent per annum, as well as costs to administer the Toronto Branch Liquidation.

33 The Liquidator is of the view that the Interim Distribution will not prejudice the Toronto Branch's creditors, but the failure to approve the Interim Distribution would expose creditors in Germany to delay and to considerable foreign exchange risks on the amounts that would eventually be distributed to them.

34 I am satisfied that the Interim Distribution is appropriate in the context of these proceedings. I am satisfied that no creditors of the Toronto Branch will suffer prejudice as a result of the Interim Distribution, as the Toronto Branch has a significant surplus and the Liquidator has calculated that it will be able to maintain adequate reserves which will ultimately pay all Proven Claims and Future Potential Claims.

35 In these circumstances, there is no principled basis on which to delay the distribution of the surplus to the GIA, until such time as the Liquidator resolves all outstanding claims against the Toronto Branch. Indeed, it would be inequitable to the GIA to delay the distribution.

36 As a Superior Court of general jurisdiction, the Superior Court of Justice has all the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law and civil matters (see: *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] O.J. No. 1713 (Ont. C.A.) and *InterTAN Canada Ltd., Re*, [2009] O.J. No. 293, 174 A.C.W.S. (3d) 617 (Ont. S.C.J. [Commercial List])).

37 In this case, the Estimated Reserve being maintained by the Liquidator provides adequate security to ensure that all claims proved in the Winding-Up can be paid. The Liquidator has established the reserve for the benefit of those who have Unproven Claims and Future Potential Claims. In this respect, it is reasonable in the circumstances to deem that these claims have been paid for the purposes of section 158.1(2), which thus enables the Liquidator to make the Interim Distribution.

38 I do not read section 158.1 as prohibiting a distribution in these circumstances.

Motion granted.

End of Document

TAB 3

2002 CarswellOnt 3681
Ontario Superior Court of Justice [Commercial List]

Canada (Attorney General) v. Confederation Life Insurance Co.

2002 CarswellOnt 3681, [2002] O.J. No. 4360, 32 B.L.R. (3d) 127, 39 C.B.R. (4th) 182, 46 C.C.L.I. (3d) 36

In the Matter of Confederation Life Insurance Company

In the Matter of the Insurance Companies Act, S.C. 1991, as amended

In the Matter of the Winding-Up Act, R.S.C. 1985, c. W-11, as amended

The Attorney General of Canada, Applicant and Confederation Life Insurance Company, Respondent

Confederation Life Insurance Company, Plaintiff and George R. Albino, William H. Alexander, William G. Benton, Patrick D. Burns, Paul G.S. Cantor, William D. Douglas, Mark E. Edwards, Kenneth E. Field, Nan-B De Gaspe Beaubien, Barry Graham, Irving R. Gerstein, Anthony F. Griffiths, Sir Anthony S. Jolliffe, George E. Mara, Robert W. Martin, David R. McCamus, Daryl E. McLean, Michael D. Regester, John A. Rhind, Michael Rosenfelder, Borden D. Rosiak, Michael J. White, Adam H. Zimmerman, Zoolfikar Samji, Defendants

R.A. Blair R.S.J.

Heard: May 27, 2002
Judgment: October 1, 2002
Docket: 97-BK-000543, 99-CV-179874

Counsel: *Benjamin Zarnett* and *Jessica Kimmel*, for KPMG Inc., liquidator of Confederation Life
Clifton P. Prophet and *Patrick Eichenberg*, for Messrs. Rhind and Burns
S. Rowland, for Michael Regester
G.S. Kelly, for Albino et al. Directors
D. Rubin, for Alexander, Graham, Samji, Rosenfelder and Rosiak

Subject: Insolvency; Insurance

Headnote

Bankruptcy --- Proving claim — Practice and procedure — Right to set-off

Insurance company was wound up — Several former directors and officers of company filed proofs of claim in respect of amounts owing to them under company's supplementary pension and other compensation plans — Liquidator refused to pay dividends or make distributions to former directors and officers because they were defendants in action commenced by liquidator on behalf of company — Action was for damages for alleged breaches of fiduciary duty, negligence, and negligent misstatements while acting as directors and officers of company — Former directors and officers moved for order requiring liquidator to pay or deal with their claims as ordinary creditors — Liquidator moved for advice and directions — Liquidator was not entitled to set off amounts payable pursuant to proofs of claim filed by former directors and officers against any amounts found to be owing by them to insurance company in negligence action — Liquidator was not entitled to withhold amounts payable pursuant to proofs of claim filed by former directors and officers until company's claims in negligence action were finally determined and satisfied — Principles of equitable set-off did not apply — Substantial or inseparable connection between claims of former directors and officers and liquidator's action did not exist — To enforce claims without taking action into account would not be manifestly unfair — To extend principle in Cherry v. Boultbee would not be equitable in this case — Rule that person cannot take anything that he or she is owed out of fund until he or she has made good what he or she owes to fund should not be extended to encompass crossclaim

by fund in damages alone — Action against former directors and officers was in damages alone and was many years from determination, and amount claimed was far from liquidated.

MOTION by former directors and officers of insurance company for order that liquidator of insurance company be required to pay or deal with their claims for debts owing as ordinary creditors; MOTION by liquidator for advice and directions.

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

Overview

1 On May 27, 2002, counsel argued a series of motions and a cross-motion dealing with whether the Liquidator of Confederation Life Insurance Company is required to pay or deal with the claims of certain former officers and directors for debts owing as ordinary creditors or whether the Liquidator is entitled to defer doing so pending the disposition of an outstanding lawsuit against the former officers and directors for negligence and breach of duty in the performance of their duties. These are my Reasons in relation to those proceedings.

2 John Rhind and Patrick Burns are retired senior officers of Confederation Life Insurance Company ("Confed"). At the date of its winding-up, namely, August 12, 1994, they were receiving payments under the company's Supplementary Pension Plan and its Deferred Compensation Plan. Since the date of the winding-up they have received no further payments.

3 By Order dated July 4, 1995, the Court ruled that Messrs. Rhind and Burns (and others) had claims against the Confed estate as ordinary creditors. On February 11, 2000, they filed proofs of claim. It is agreed that the valuation of their respective claims is as follows:

	Supplementary Pension	**Deferred Compensation**
Patrick Burns	$4,826,065.00	$ 405,693.00
John Rhind	$ 446,130.00	$ 735,232.00

4 A Court-approved claims process for disallowing and admitting ordinary creditor claims has been established in the Confed insolvency. To date, four interim distributions have been authorized. As a result, ordinary creditors with allowed claims have been paid 75 cents on the dollar. Indeed, in this remarkable liquidation there is every reason to believe that even the ordinary creditors will recover 100 cents on the dollar.

5 However, although there is no dispute as to the valuation of the claims filed by Messrs. Rhind and Burns, the Liquidator has declined to pay dividends or make distributions to them because they are defendants in an action commenced by the Liquidator on behalf of Confed against former directors and officers (amongst others). The action commenced by the Liquidator on behalf of Confed is for damages in the amount of $285 million for alleged breaches of fiduciary duty, negligence and negligent misstatements while acting (or failing to act) in their capacity as directors and officers of Confed (the "Negligence Action"). Monies have been held back from each of the distributions to date to cover the dispute over these claims, and others, that are the subject matter of these proceedings as well.

6 The other claims are asserted on behalf of 15 other former officers and/or directors of Confed who have ordinary creditor claims against the estate for Supplementary or Additional Pension proceeds, termination/severance pay, life and health benefits or mortgage set-offs. These other claimants are William H. Alexander, Paul G.S. Cantor, William D. Douglas, Mark Edwards, Nan-Bowles De Gaspe Beaubien, Barry F.H. Graham, Anthony F. Griffiths, Robert Martin, Dafid McCamus, Daryl E. McLean, Michael D. Regester, Michael Rosenfelder, Borden Rosiak, Zoolfikar H.H. Samji, and Michael J. White. I shall refer to them globally, along with Messrs. Rhind and Burns, as the "Claiming Creditors."

7 Like Mr. Rhind and Mr. Burns, the other Claiming Creditors have filed Proofs of Claim in the Confed insolvency proceedings. Their claims have neither been allowed nor disallowed. The Liquidator takes the same position with respect to these claims, namely, that it ought not to deal with them pending the disposition of the Negligence Action.

8 A group of the Claiming Creditors consisting of Barry Graham, Michael Rosenfelder, Borden Rosiak and Zoolfikar Samji, have brought a specific cross-motion seeking an order directing the Liquidator to allow or disallow their claims in accord with the Order of this Court dated May 5, 2000, setting up the claims procedure. I shall refer to this particular group of creditors together as "the Moving Creditors."

9 In their defence to the Negligence Action, the Claiming Creditors have denied that their conduct resulted either in Confed's insolvency or in its insolvency deepening. In addition, they have denied that Confed was insolvent at the time the Winding-Up Order was made, pleading [1] that "at no time prior to that date or thereafter had the plaintiff:

> (i) defaulted on any of its redemptions to its policy holders;
>
> (ii) experienced a capital adequacy shortfall;
>
> (iii) experienced a liquidity crisis; or
>
> (iv) defaulted on any of its debt obligations."

10 The Liquidator has asserted that this plea - namely, that Confed had not defaulted on any of its debt obligations prior to the date of liquidation *or thereafter* - constitutes a waiver by the Claiming Creditors of their proofs of claim.

The Relief Claimed

11 Messrs. Rhind and Burns seek an order requiring KPMG Inc., in its capacity as Liquidator, to pay dividends and make distributions to them on account of their claims against Confed under the Supplementary Pension Plan and Deferred Compensation Plan at the same rate and to the same extent as the dividends and distributions which have been paid and made to ordinary creditors of Confed.

12 As noted, the Moving Creditors seek an order directing the Liquidator to allow or disallow their claims in accordance with the claims process established by this Court's Order of May 5, 2000.

13 For its part, the Liquidator moves for advice and directions with respect to the following questions:

> (i) May the Liquidator treat the proofs of claim filed by the Claiming Creditors for monies claimed to be owing to them by Confed as having been withdrawn, by virtue of their allegation in their defence in the Negligence Action that Confed has not defaulted on any of its debt obligations prior to or after the effective date of its liquidation?
>
> (ii) If the answer to the question in (i) above is no, can the Liquidator set off against any amounts which might otherwise be payable pursuant to the proofs of claims filed by the Claiming Creditors any amounts found or claimed to be owing by them to Confed in the Negligence Action?
>
> (iii) If the answer to the question in (i) above is no, is the Liquidator entitled to withhold payment of any amounts payable in respect of any proofs of claims filed by the Claiming Creditors until Confed's claims in the Negligence Action have been finally determined and the Claimants have, by insurance or otherwise, satisfied any amounts ordered payable by them?

14 The Liquidator has sought other relief in the form of a consolidation order and Commercial List case management of the Negligence Action and other related proceedings. That portion of the claim for relief has been adjourned for consideration at a later date.

The Position of the Parties

15 On behalf of Messrs. Rhind and Burns and the other Claiming Creditors, counsel submit that the Liquidator has a statutory duty under the provisions of the *Winding-Up and Restructuring Act*, R.S.C. 1985, c. W-11, to take such steps as are necessary to wind up the affairs of Confed and to distribute its assets to creditors in a timely fashion (after satisfaction of the Company's debts and obligations and any costs incurred in the winding-up). In distributing assets to ordinary creditors, the Liquidator has a duty to ensure that the creditors with enforceable claims are treated equally and without preference, and that the debts are paid pari passu: *Re Orzy* (1923), 53 O.L.R. 323 (Ont. C.A.), at 327, *Ex parte Pottinger* (1878), 8 Ch. D. 621 (Eng. C.A.), *Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q.B.D. 179 (Eng. Q.B.), at p. 184. The Claiming Creditors therefore argue that, having received the proofs of claim in accordance with the court ordered process, the Liquidator must either allow them or disallow them. The Liquidator cannot accept the value of the claims but refuse to pay dividends (as in the case of Messrs. Rhind and Burns) or simply fail to deal with the proofs of claim (as in the case of the other Claiming Creditors). To do so, they contend, is to deal with the creditors on an unequal basis by granting a preference to other ordinary creditors whose claims have been dealt with and who have received dividends.

16 On behalf of the Liquidator, Mr. Zarnett argues,

> (a) that the Liquidator should be able to treat the proofs of claim of Claiming Creditors as having been withdrawn, by virtue of the allegation in their defences in the Negligence Action that Confed has not defaulted on any of its debt obligations prior to or after the effective date of the liquidation;
>
> (b) that, if not, the Liquidator should be able to set off against any amounts which might otherwise be payable pursuant to the proofs of claim, any amounts found or claimed to be owing to Confed in the Negligence action, on the basis of equitable set-off; and, further,
>
> (c) that the Liquidator should be able to withhold making any payments in respect of the proofs of claim until the Negligence Action has been determined and any amounts ordered payable by the defendants in that action are satisfied, on the basis of what is known as "the rule in *Cherry v. Boultbee*."

Waiver and Withdrawal of Claims

17 Mr. Zarnett submits that in their defence in the Negligence Action the Claiming Creditors have pleaded that Confed has never defaulted in paying anyone anything it has ever owed, either before or after the date of liquidation. This approach to the plea, of course, puts it directly at odds with the position taken by the Claimants in their proofs of claim that Confed is indebted to them for its failure to pay the claims asserted. Mr. Zarnett therefore argues that the claims have either been waived or (what amounts to the same thing) should be treated as having been withdrawn.

18 In my view, this argument cannot succeed.

19 The test for waiver is set out by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), per Major J., at p. 500, as follows:

> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

20 I am not prepared to hold, on the facts before me, that there was "an unequivocal and conscious intention" on the part of the Claiming Creditors "to abandon" their claims. It is true that the pleading in defence of the Negligence Action post-dated the filing of proofs of claim. However, different solicitors are representing the Claimants in respect of their proofs of claim and in the Negligence Action. In the same period of time that the Statement of Defence was being prepared and filed, the Claiming Creditors were asserting their claims, and counsel for Messrs. Rhind and Burns were in the midst of negotiations with counsel for the Liquidator about the valuation of their proofs of claim (ultimately agreed to).

21 Moreover, the language of the defence is ambiguous. It could be argued that a plea that "at no time prior to [August 11, 1994] *or thereafter* has [Confed] . . . (iv) defaulted on *any of its debt obligations*" is a plea that Confed has never defaulted in paying anyone anything. However, "debt obligations" - as opposed to "debt" or "obligations" alone - is a phrase often used in financial transactions to refer to corporate debt instruments (bonds, for instance) issued by a company to finance its operations. Mr. Prophet submits that the statement made in para. 7 of the Statement of Defence was simply to indicate that Confed was not insolvent at the time in question and that it is untenable to extend it to encompass a waiver of claims against Confed under the proofs of claim. Whether the former is the case or not is something that will have to be pursued in the litigation. I am satisfied, however, that it would be an inappropriate stretch to characterize the plea as a waiver or withdrawal of those claims.

22 In any event, the law is clear that a waiver may be retracted if reasonable notice is given to the party in whose favour it operates: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, *supra*, at p. 502. Here, following receipt of the Liquidator's letter in February 2002, taking the position that they had waived their claims, the Claiming Creditors all sent letters to the Liquidator advising their claims had not been withdrawn.

23 The waiver/withdrawal argument must fail.

Set-Off

24 It is common ground that the requirements for legal set-off are not met in the circumstances of this case. The issue is whether or not the principles of equitable set-off apply.

25 This Court had occasion to consider the issues of legal and equitable set-off earlier in these insolvency proceedings, in *Citibank Canada v. Confederation Life Insurance Co.* (1996), 42 C.B.R. (3d) 288 (Ont. Gen. Div.). At paras. 35-39, it said:

> Set-off may arise contractually, or at law (including by statute), or in equity: see, generally, *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.).
>
> No question of contractual set-off exists here.
>
> For set-off at law to occur, the following circumstances must arise:
>
> 1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and,
>
> 2. Both debts must be mutual cross-obligations, i.e., cross-claims between the same parties and in the same right.
>
> Not surprisingly, for set-off to occur in equity, the requirements are more relaxed. There is no necessity for mutuality. The cross-obligations need not be debts, but may be for a sum of money whether liquidated or unliquidated. However, the cross-claims for money must be connected or interrelated in some manner which would make it unjust to permit one party to enforce payment without accounting for the existence of the other claim.

As to set-off at law and in equity, see generally *Telford v. Holt*, *supra*; *Re Northland Bank* (1994), 25 C.B.R. (3d) 166 (Man. Q.B.), at pp. 169-170; Kelly R. Palmer, *The Law of Set-Off* (Aurora: Canada Law Book, 1993), at pp. 4-5; and *The Courts of Justice Act*, R.S.O. 1990, C.43, s. 111.

26 While it is not essential for the crossclaims to arise out of the same contract, a "cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim": *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C. C.A.), per Macfarlane J.A., at pp. 696-697, cited with approval in *Telford v. Holt* [(1987), 41 D.L.R. (4th) 385 (S.C.C.)], *supra*, at pp. 398-399. See also *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (Eng. Q.B.), per Lord Denning M.R., at p. 1078.

27 In *Newfoundland v. Newfoundland Railway* (1888), LR 13 App. Cas. 199 (Newfoundland P.C.) - described by Wilson J. in *Telford v. Holt*, *supra*, as "the seminal case on the right to set-off debts arising under the same or interrelated contracts"- the Privy Council stated (at p. 213):

Unliquidated damages may now be set off as between the original parties, and also against an assignee, *if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment*. [Emphasis added.]

28 The following principles respecting equitable set-off were extracted from a review of English authorities by Macfarlane J.A. in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, *supra*, at pp. 696-697. They have been accepted by the Ontario Court of Appeal in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (Ont. C.A.), at p. 11, and by the Supreme Court of Canada in *Telford v. Holt*, *supra*, at p. 398:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: [*Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.)].

2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: . . . [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: . . . [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, *supra*].

4. The plaintiff's claim and the cross-claim need not arise out of the same contracts: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.

5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.)].

29 In the Negligence Action, Confed (by its Court appointed Liquidator) claims damages against its former directors and officers in the amount of $285 million "for breaches of fiduciary duty, negligence, and negligent misstatements while acting (or failing to act) in their capacity as directors, officers, or both, of the Plaintiff" (Statement of Claim, para. 1(a)). The impugned conduct is alleged to have occurred between 1988 and August 1994. Paragraph 37 of the Statement of Claim sets out the thrust of Confed's claim, under the heading "Overview of the Defendants' Breaches of Duties." It reads as follows:

Between 1988 and August 1994, Confed was transformed from one of the oldest, largest and most stable insurance companies in North America to an insolvent company with insolvent subsidiaries. *The Defendants were responsible for managing the business and affairs of Confed throughout this period, and failed in their duties*. Confed's true financial situation was either not recognized by the Defendants or, if recognized, was not appropriately responded to by the

> Defendants. The true financial situation of, and the effect of transactions being undertaken by, Confed was not accurately disclosed in the financial statements and Annual Reports of Confed in breach of the defendants' duties, preventing policyholders, creditors and regulators from taking the appropriate steps and making decisions based on timely and accurate financial disclosure. Rather than taking appropriate steps in the face of Confed's financial situation, the Defendants caused or permitted Confed to undertake transactions and incur expenses which were imprudent and not in its best interests, and which caused it significant financial damage and loss. The effect of all of the Defendants' breaches was to cause loss and damage to Confed, resulting in its insolvency or in its insolvency deepening. The Defendants are liable for all such damages and losses.

30 The Claiming Creditors' proofs of claim in the insolvency proceedings relate to demands for payment of benefits and compensation accruing to their advantage in the course of the performance of their duties as officers, directors and employees of Confed. Mr. Zarnett argues that these claims are sufficiently "closely connected" to the Liquidator's claim in the Negligence Action for damages arising out of breaches of duty, negligence and misrepresentations in the course of those same duties that equitable set-off applies. On behalf of Messrs. Rhind and Burns, Mr. Prophet contends that their claims under the Supplementary Pension and Deferred Compensation Plans do not "arise out of the same contract or series of events which gave rise to" [2] the claims in the Negligence Action, because these benefit schemes had all been put in place in the late 1970s and early 1980s - long before the impugned events relied upon in the action. There is, therefore, in his words, "a temporal and subjective discontinuity" between the transactions or series of events in question, destroying the requirement of a close connection going to the root of his clients' claims which would be necessary for equitable set-off to apply. Counsel for the other Claiming Creditors make similar arguments.

31 It strikes me that there is a *connection* between the claims put forward by the Claiming Creditors and the basis for the action in damages asserted against the former directors and officers. The claims relate to benefits and remuneration earned for services rendered to Confed. The Negligence Action alleges that these services - at least from 1988 to 1994 - were performed in a fashion that was negligent and breached the former officers and directors fiduciary duties to the Company. A simple *connection* is not sufficient, however. In *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, *supra*, at p. 697, Justice Macfarlane recognized,

> . . . the need to ascertain if the cross-claim flows out of *and is inseparably connected* with the dealings and transactions that give rise to the claim, and if *the cross-claim goes to the very root of the claim in such a way that it would be manifestly unjust* to allow the plaintiff to enforce his claim without taking into account the cross-claim. [Emphasis added.]

32 I am satisfied that the kind of substantial or "inseparable" connection that goes to the very root of the Claiming Creditors' claim, rendering it "manifestly unjust" to enforce the latters' claim without taking into account the Liquidator's action, does not exist in the circumstances here.

33 With respect to Mr. Rhind and Mr. Burns, the amounts owed to them - the value of which has been agreed - arise out of payments made under Confed's Supplementary Pension Plan and monies owing under the Deferred Compensation Plan. They are 81 and 73 years of age, respectively, and were members of these Plans for more than 10 years prior to the commencement of the Negligence Action. For instance, both entered the Deferred Compensation Plan in late 1981 and deposits were made into the Plan from that date forward. They were retired at the date of the winding-up and had already been receiving payments under the Plans, which had been put in place long before and for legitimate company/senior-officer planning considerations arising out of the terms of their employment. Thus, there is no suggestion that either of these Plans were hastily concocted schemes by self-protecting officers and directors in order to shelter them in pending stormy times. Accordingly, at best, there is only a tenuous temporal or factual connection between the crossclaims, and not a sufficient substantial connection to attract the operation of principles of equitable set-off.

34 Only Messrs. Rhind and Burns have asserted claims for monies under the Deferred Compensation Plan. Of the other Moving Claimants, however, all but Mr. Rosiak have claims under the Supplementary Pension Plan. Although the details of their years of service are not provided, and they were not "in pay" at the time of the liquidation as were

Messrs. Rhind and Burns, I do not think that different considerations in terms of set-off should apply to these claims, if proved, than apply to the claims of Mr. Rhind and Mr. Burns. The same thing may be said for the Supplementary Pension claim of Mr. Regester, who did not bring a formal motion but on whose behalf Ms Rowland appeared.

35 Mr. Regester and the other Moving Claimants also claim termination/severance pay. Mr. Regester was severed by Confed about a year before the liquidation. The others were severed as a result of the liquidation. It is not said that they were dismissed for cause. Nonetheless, it is less clear to me that these termination/severance claims are unconnected to the Liquidator's claim in the Negligence Action in a way that would avoid set-off. In my view, a determination of that issue is best deferred until after the Liquidator has considered the other aspects of the proofs of claim and decided whether to allow or disallow them and for what reasons.

36 I do conclude and hold, though, that the Liquidator is obliged at this time to consider the claims of the other Claiming Creditors and to determine whether they are to be allowed or disallowed, and on what basis the determination is being made. Whether the termination/severance portion of the claims will then be subject to a set-off claim by the Liquidator can be decided on a fuller and better record once the determination has been made.

37 Messrs. Alexander, Graham, Rosenfelder and Samji also assert claims for life and health benefits. I do not see any connection between such claims and the crossclaim asserted against them in the form of the Negligence Action. I therefore conclude that the principles of equitable set-off do not apply to those portions of those Claimants' proofs of claim.

The Rule in *Cherry v. Boultbee*

38 The Liquidator seeks advice and directions as to whether it is entitled - even if equitable set-off does not apply - to withhold payment of any amounts payable pursuant to the proofs of claim filed by the former directors and officers of Confed, pending the final determination of the Negligence Action and satisfaction by the former directors and officers, by insurance or otherwise, of any amounts ordered payable by them in that action. The advice and directions are sought on the basis of what is known as "the rule in *Cherry v. Boultbee*."

39 In general terms, the rule derived from *Cherry v. Boultbee* (1839), 4 My. & Cr. 442, 48 E.R. 651, 9 L.J. Ch. 118 (Eng. Ch. Div.), is that a person who is entitled to a share in a specific fund but who is also under a liability to contribute to that fund cannot recover the share from the fund until the liability to contribute has been determined and accounted for. In Derham, *Set-Off* (1987), the principle is referred to as "a right analogous to set-off," but it is also said to be somewhat broader than set-off. In *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, the Court of Appeal quoted extensively from Derham with approval, including the following (at p. 13):

> Derham's treatment of this analogous right begins as follows at p. 218:
>
> > Generally speaking, the principle underlying the Rule in *Cherry v. Boultbee* is that "where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute".
> >
> > . . . . .
>
> Derham says at pp. 219-20:
>
> > The more popular explanation, which can be traced back to the judgment of Sir Joseph Jekyll in 1723 in *Jeffs v. Wood*, [(1723) 2 P. Wms 128, 130] is that the Rule in effect provides a method of payment. The administrator of the fund may assert that the debtor to the estate has in his own hands an asset of the estate, in the form of his debt, which should be appropriated as *pro tanto* payment of his right to participate in the fund. It is not strictly correct to say that the administrator "retains" anything as payment of the debt. Rather he directs the debtor to satisfy his entitlement to a share of the fund from a particular source. The Rule is better described as a right to appropriate a particular asset as payment, as opposed to a right of set-off or right of retainer.

With respect to the scope of the rule, Derham says at p. 220:

> The Rule in *Cherry v. Boultbee* is not confined to cases in which a legatee, who was indebted to the testator, is the beneficiary of a "bounty" from the testator in the form of a legacy, but applies whenever a person who is entitled to a share of a specific fund is also under a liability to contribute to that fund. (Underlining added.)

40 The concept was applied in *Re Rhodesia Goldfields Ltd.* (1909), [1910] 1 Ch. 239 (Eng. Ch. Div.), a case concerned with the distribution of a fund in court relating to a company in liquidation. In the course of his judgment in that case, Swinfen Eady J. said (at p. 246):

> Various cases on the subject of set-off were referred to in order to shew that an unliquidated demand cannot be set off against a liquidated debt, or a debt not due against one that is due; but this rule is of much wider application than the doctrine of set-off. In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, *a party cannot take anything out of the fund until he has made good what he owes to the fund*. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him. (Emphasis added.)

41 As the Court of Appeal noted in *Olympia & York Developments Ltd.*, *supra*, at p. 12, "the rule in *Cherry v. Boultbee* has not been confined to the administration of deceaseds' estates and has been extended to cases where a person obligated to contribute to a fund is entitled to make a claim against the fund."

42 Mr. Zarnett submits that is precisely the case at hand, and that in the rule elaborated from *Cherry v. Boultbee* the courts of equity have developed a doctrine of more general application. It has been used where set-off has been held to be inapplicable, but where it is still considered to be unjust to allow a claimant against a fund to receive payment from the fund without first fulfilling any obligation to contribute to the fund. Here, it is argued, the Liquidator has a right of action against the Claiming Creditors, who, in turn, seek to recover from the liquidation fund their contractual claims for Supplementary Pension and Deferred Compensation Plan benefits, life and health benefits and termination/severance pay. The Liquidator should, therefore, be entitled to retain the monies owing to the Claimants, once their claims are accepted, pending a determination of their obligations to pay to the fund. Mr. Zarnett submits that the principle applies not only to crossclaims for debt (liquidated or unliquidated) but to crossclaims for unliquidated damages as well.

43 The *Cherry v. Boultbee* principle has its origins in circumstances involving crossclaims in debt. The case itself involved a claim by the executor of an estate to retain part of a legacy due to a legatee [3] sufficient to satisfy a debt due by the legatee to the estate. The Lord Chancellor, Lord Cottenham, said (*supra*, p. 447):

> . . . The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, *is rather a right to pay out of the fund in hand*, than a right of set-off. Such right of payment, therefore, can only arise where there is *a right to receive* the debt so to be paid; and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt. [Emphasis added.]

44 In *Re Rhodesia Goldfields Ltd.*, *supra*, the claim by the estate in liquidation against Mr. Partridge was for money had and received. The judge, Swinfen Eady J., had had some prior dealings with the liquidation, "sufficiently for [him] to know that the claim against [Mr. Partridge was] of a very serious character" (p. 244). He emphasized (p. 245) that the claim was "a claim not in damages but in debt." The same theme emerges from the passage from Derham, *Set-Off*, cited above; the administrator is said to be able to "assert that *the debtor* to the estate has in his own hands an asset of the estate, *in the form of his debt*, which should be appropriated as *pro tanto* payment of his right to participate in the fund."

45 In one case in England, the *Cherry v. Boultbee* precept has been applied to permit the withholding of payments from a fund because of a claim for damages, on the part of the trustees of the fund against the person applying to the fund.[4] The case is *Jewell's Settlement*, [1919] 2 Ch. 161 (Eng. Ch. Div.). It involved a marriage settlement in which a policy of assurance on the husband's life was assigned to trustees to pay the income therefrom to his wife for life. The wife also assigned certain reversionary property (called the wife's fund) to the trustees on trust to receive the property when it fell into possession and to pay the income to the wife for life and to the husband for life following her death. The husband covenanted to pay the premiums on the policy, but failed to do so and the insurance lapsed. The wife died. The husband remarried and, in another complicated arrangement, assigned his life interest in the wife's fund to the same trustees upon trusts in favour of his second wife. Later, the property comprising the wife's fund fell into possession. The trustees thereby had funds to distribute to the second wife, by virtue of the assignment. They took the position, however, that they were entitled first to utilize the income from the wife's fund to purchase another policy of insurance equal to what would then be the surrender value of the original lapsed policy.

46 The Court concluded that, on general principles of equity, neither the husband nor his assignees could take anything out of the wife's fund without first making good to the trust estate the loss occasioned by the husband's default in allowing the original policy to lapse. The argument that the *Cherry v. Boultbee* notion could only apply where what was owing to the fund was in the nature of a debt properly so called and could not be extended to claims sounding only in damages was rejected. The judge said (at pp. 173-174):

> . . . I confess that this distinction insisted upon by Mr. Hall does not commend itself to my judgment. It is, however, the fact that in such leading cases on the subject as *Priddy v. Rose*; *Smith v. Smith*; *Burridge v. Rowe*;[5] there was always a debt due to the trustees. It is also true that the statement of the general principle, as, for example, in *Cherry v. Boultbee* . . . is expressed in terms of debt, that in *In re Rhodesia Goldfields Ltd.* . . . Swinfen Eady J. was at pains to point out that the liability there was in the nature of debt and not of damages, and that in *In re Smelting Corporation*[6] the decision was, inter alia, that, as the unpaid instalments there in question - they were instalments on debenture stock - did not constitute a debt to the company or the trustee, the principle of *Cherry v. Boultbee* had no application. On the other hand it has again and again been said that the equity in question does not depend on any refined or technical considerations, but is of general application, and I feel satisfied that this argument of Mr. Hall's would, if accepted, most injuriously curtail the operation of the rule by inventing distinctions which in substance have no existence.
>
> . . . . .
>
> But, really, the substance and result of the husband's default in this matter is, as I have said, that a valuable property which he covenanted to bring into settlement has been lost to the trust. It was a policy of insurance. It might have been a house; it might have been a sum of money. If the property which is lost to the settlement by reason of the breach of covenant can be measured in money, why should not the equity to impound extend to the value so lost as much as it would to money covenanted to be paid and left unpaid. I can see no reason on principle why it should not.

47 As noted in *Olympia & York Developments Ltd.*, *supra*, at pp. 14-15, the rule in *Cherry v. Boultbee* has been accepted in Canadian decisions and, where appropriate, applied: see *Noecker v. Noecker* (1917), 41 O.L.R. 296, 41 D.L.R. 138 (Ont. H.C.), *Bailey Cobalt Mines Ltd. v. Benson* (1919), 44 O.L.R. 1, 45 D.L.R. 585 (Ont. C.A.), *Re Lasham* (1924), 56 O.L.R. 137 (Ont. C.A.), *Re Lussier* (1927), 61 O.L.R. 177, 8 C.B.R. 454 (Ont. S.C.), *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300, 66 D.L.R. (2d) 722 (S.C.C.), and *Re Limberlost Club* (1973), 2 O.R. (2d) 139, 42 D.L.R. (3d) 183 (Ont. H.C.).

48 However, I am not aware of any Canadian authority in which the rule in *Cherry v. Boultbee* has been extended to encompass a crossclaim by the fund sounding only in damages. Indeed, in a case very similar to the present facts, this Court earlier declined to do so.

49 *Canada (Attorney General) v. Standard Trust Co.* (1995), 128 D.L.R. (4th) 747 (Ont. Gen. Div.), arose out of the liquidation of Standard Trust Co. The Company had established a pension fund for senior executives. The investments made to the pension funds matured. The fund was being wound up, and at the time of the liquidation the assets had been transferred to the Company's guaranteed fund, pending disposition to the executives after receipt of instructions concerning appropriate rollover vehicles. The assets of the pension fund thus became commingled with the other guaranteed funds held by Standard Trust. The administrator of the pension fund applied for payment of the monies owing under the plan. The claim was allowed and monies forwarded to the liquidator from CDIC to be paid out to the executives if the liquidator was sure that the Standard Trust estate had no claims against the plan beneficiaries. As in this case, the liquidator had commenced an action for damages against the beneficiaries and former senior officers of Standard Trust for negligence and breach of statutory duties. The liquidator therefore withheld the funds, relying on the principle of *Cherry v. Boultbee*.

50 Justice Haley ruled the liquidator of Standard Trust was not entitled to withhold the funds. She reviewed the authorities respecting the rule, including the decision of the Court of Appeal in *Olympia & York Developments*, *supra*, and concluded that the liquidator was not entitled to withhold payment from the beneficiaries pending the outcome of the liquidator's action. After examining what she referred to as "the extension of the *Cherry v. Boultbee* principle in *Re Rhodesia Goldfields Ltd.*," she said (at p. 752):

> The action against the pension plan members is in damages alone. I think that to extend the principle in *Cherry v. Boultbee* to an action for damages goes beyond the reasonable position put forward in the principle. To accede to the liquidator's position would be to grant a Mareva injunction without consideration of the different requirements which have to be met before being granted by the court. I find the liquidator is not entitled to refuse the administrator's request for payment of the distributions pending determination of the action for damages.

51 I agree, and I prefer this reasoning to that of engrafting onto the principle yet another extension, such as was added in *Jewell's Settlement*, *supra*. In any event, the circumstances in *Jewell's Settlement* were at least analogous to a claim for a liquidated debt because the value of the replacement insurance policy required to make good the loss in question (1437 pounds, 10 shillings) was already known. In that circumstance, it was not a great leap to extend the principle from crossclaims based solely on debt to that of a liquidated claim. Here, however, the claim of the Liquidator of Confed is far from liquidated and many years from determination.

52 In my view, it would not be equitable to extend the principle of *Cherry v. Boultbee* to the circumstances of this case.

Conclusion and Disposition

53 For the foregoing reasons I conclude that neither the principles of equitable set-off nor those embodied in the rule of *Cherry v. Boultbee* apply in the circumstances of this case to permit the Liquidator of Confed (a) to refuse to pay the claims of Mr. Rhind and Mr. Burns in the same fashion as other ordinary creditors whose claims have been accepted by the Liquidator and have been paid, or (b) to refuse to deal with the claims of the other Claiming Creditors and to treat them in the same way as claims filed by other ordinary creditors. I also find that the claims of the Claiming Creditors have not been waived or withdrawn.

54 Accordingly, I give the following advice and directions with respect to each of the questions posed by the Liquidator:

> (i) May the Liquidator treat the proofs of claim filed by the Claiming Creditors for monies claimed to be owing to them by Confed as having been withdrawn, by virtue of their allegation in their defence in the Negligence Action that Confed has not defaulted on any of its debt obligations prior to or after the effective date of its liquidation?
>
> Answer: No

(ii) If the answer to the question in (i) above is no, can the Liquidator set off against any amounts which might otherwise be payable pursuant to the proofs of claims filed by the Claiming Creditors any amounts found or claimed to be owing by them to Confed in the Negligence Action?

Answer: No

(iii) If the answer to the question in (i) above is no, is the Liquidator entitled to withhold payment of any amounts payable in respect of any proofs of claims filed by the Claiming Creditors until Confed's claims in the Negligence Action have been finally determined and the Claimants have, by insurance or otherwise, satisfied any amounts ordered payable by them?

Answer: No

55 It follows that Mr. Rhind and Mr. Burns are entitled to an order requiring the Liquidator to pay dividends and make distributions to them on account of their claims against Confed under the Supplementary Pension Plan and the Deferred Compensation Plan at the same rate and to the same extent as the dividends and distributions which have been paid and made to ordinary creditors of Confed. An Order is granted to that effect.

56 It also follows that the other Claiming Creditors are entitled to an order directing the Liquidator to allow or disallow their claims in accordance with the claims process established by this Court's Order of May 5, 2000. As indicated earlier in these Reasons, however, a determination of whether their termination/severance claims may be set off against the Liquidator's claim in the Negligence Action is deferred until after the Liquidator has decided whether to allow or disallow the claims on their merits, and for what reasons. An Order is also granted to give effect to these dispositions.

57 I may be spoken to with respect to costs if counsel are unable to agree.

58 Finally, I would like to thank all counsel for their assistance in dealing with these somewhat complex issues.

Order accordingly.

Footnotes

1 Statement of Defence, para. 7

2 *Telford v. Holt*, *supra*, at p. 206

3 In fact, it was the assignee of the legatee, but the difference is immaterial.

4 Again, it was an assignee who was the claimant, but the principle was held to be the same.

5 *Priddy v. Rose* (1817), 3 Mer. 86, *Smith v. Smith* (1835), 1 Y. & C. Ex. 338, *Burridge v. Rowe* (1835), 1 Y. & C. Ex. 183

6 *Re Smelting Corp.*, [1915] 1 Ch. 472 (Eng. Ch. Div.)

TAB 4

2003 CarswellOnt 2786
Ontario Superior Court of Justice [Commercial List]

United Air Lines Inc., Re

2003 CarswellOnt 2786, 43 C.B.R. (4th) 284

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

In the Matter of United Air Lines, Inc. of the State of Delaware, in the United States of America and the other Entities Listed on Schedule "A"

Application Under Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Farley J.

Heard: May 16, 2003
Judgment: May 16, 2003
Docket: 03-CL-5003

Counsel: Michael A. Penny, Scott A. Bomhof for Applicants, United Air Lines, Inc.

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

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Debtor was under bankruptcy protection in United States — Debtor brought application for stay of proceedings in Canada — Application granted — Proceedings in United States were "foreign proceeding" in s. 18.6 of Companies' Creditors Arrangement Act — Substantive and procedural aspects of United States insolvency system were similar to those of Canadian system — Insolvency matters required international coordination to preserve and maximize value for benefit of all concerned stakeholders — Stay was appropriate for coordination of proceedings — Creditors would have 30 days to file proof of claim — Debtor would have onus of showing stay was still appropriate on application by any affected parties who had not received notice — Stay was granted without prejudice to proceedings in Federal Court.

APPLICATION by debtor for stay of proceedings.

***Farley J.*:**

1 United is in Chapter 11 *U.S. Bankruptcy Code* proceedings in the U.S. This is a "foreign proceeding" within the meaning of s. 18.6 of CCAA. See *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and *Matlack Inc., Re* (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J. [Commercial List]). As I noted in *Babcock & Wilcox Canada Ltd.*, the substantive and procedural aspects of the *U.S. Bankruptcy Code* are similar to and do not radically diverge from the Canadian insolvency system. See *Roberts v. Picture Butte Municipal Hospital* (1998), 227 A.R. 308 (Alta. Q.B.) where Forsyth J. reviewed the aspect of Canada's dedication to comity and cooperation with respect to foreign courts and the necessity in insolvency matters in particular to ensure that there is coordination to preserve and maximize value for the benefit of all concerned stakeholders. I fully share those views.

2 In these circumstances, I think it appropriate to so coordinate these proceedings and impose a Canadian stay. In this regard, I note that Canadian creditors have been sent proofs of claim on March 11, 2003 and that therefore a further extension of a filing date for Canadian claims of 30 days would be sufficient.

3 I would note the presence of a comeback clause in the order. That is a safety device to ensure that anyone who is affected by this order and who has not had a meaningful opportunity to make timely representations (if they deem that necessary) are able to re-attend in this Court to ask for relief - with the onus remaining on the applicant United to demonstrate that the original relief obtained by it remains appropriate in the circumstances prevailing. In other words any affected party is not put at any disadvantage. I would note the Ontario Court of Appeal's views in *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) as to the appropriate use of the comeback clause.

4 I note that the draft order at the request of counsel involved in a Federal Court case contains the *proviso* in para. 7 thereof as follows:

> This order is without prejudice to any argument the plaintiffs in Federal Court action T-575-02 may wish to make before the Federal Court of Canada with respect to the effect of this order on that action.

5 I wish to make it clear that I have the highest respect and regard for the Federal Court and nothing herein contained should be interpreted in any way as denigrating from that respect and regard. I find it puzzling that any such interested party would not (instead of going to the Federal Court) come to this Court to either make submissions that a CCAA stay order in the usual form does not affect any ongoing Federal Court litigation or that the stay not extend to such or, if granted, that the stay be lifted in the circumstances as to that proceeding. By my allowing the requested *proviso* to remain in para. 7, I do not wish to be interpreted as retracting from the foregoing sentence.

6 Order to issue as per my fiat.

Application granted.

End of Document

TAB 5

2001 CarswellOnt 1830
Ontario Superior Court of Justice [Commercial List]

Matlack Inc., Re

2001 CarswellOnt 1830, [2001] O.J. No. 6121, [2001] O.T.C. 382, 26 C.B.R. (4th) 45

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, Section 18.6 as Amended

In the Matter of an Application of Matlack, Inc. and the Other Parties Set Out in Schedule "A" Ancillary to Proceedings Under Chapter 11 of the United States Bankruptcy Code

Matlack, Inc. and the Other Parties Set Out in Schedule "A", Applicant

Farley J.

Heard: April 19, 2001
Judgment: April 19, 2001
Docket: 01-CL-4109

Counsel: *E. Bruce Leonard*, *Shahana Kar*, for Applicant, Matlack Inc.

Subject: Insolvency; International; Corporate and Commercial

Headnote

Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of bankruptcy court — Territorial jurisdiction — Foreign bankruptcies

Foreign bankrupt was carrier based in Pennsylvania and operated leased facility in Ontario — Bankrupt obtained relief pursuant to Chapter 11 of United States Bankruptcy Code which precluded creditors from commencing or continuing proceedings against bankrupt — Canadian creditor seized and intended to sell bankrupt's assets to satisfy bankrupt's obligations — Bankrupt brought application for order for recognition of proceedings commenced pursuant to Chapter 11 to be recognized as "foreign proceeding" for purpose of Companies' Creditors Arrangement Act, for stay of proceedings commence by creditor and for ancillary relief — Application granted — Coordinated reorganization of bankrupt was in interest of all creditors as would ensure that all creditors were treated equitably and fairly — Based on principles of comity court had jurisdiction to stay proceedings commenced against bankrupt — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy Code, 11 U.S.C. 1982, Chapter 11.

Corporations --- Foreign and extra-provincial corporations — Carrying on business — Comity of nations (common law) — General principles

Foreign bankrupt was carrier based in Pennsylvania and operated leased facility in Ontario — Bankrupt obtained relief pursuant to Chapter 11 of United States Bankruptcy Code which precluded creditors from commencing or continuing proceedings against bankrupt — Canadian creditor seized and intended to sell bankrupt's assets to satisfy bankrupt's obligations — Bankrupt brought application for order for recognition of proceedings commenced pursuant to Chapter 11 to be recognized as "foreign proceeding" for purpose of Companies' Creditors Arrangement Act, for stay of proceedings commence by creditor and for ancillary relief — Application granted — Coordinated reorganization of bankrupt was in interest of all creditors as would ensure that all creditors were treated equitably and fairly — Based on principles of comity court had jurisdiction to stay proceedings commenced against bankrupt — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy Code, 11 U.S.C. 1982, Chapter 11.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

2001 CarswellOnt 1830, [2001] O.J. No. 6121, [2001] O.T.C. 382, 26 C.B.R. (4th) 45

Foreign bankrupt was carrier based in Pennsylvania and operated leased facility in Ontario — Bankrupt obtained relief pursuant to Chapter 11 of United States Bankruptcy Code which precluded creditors from commencing or continuing proceedings against bankrupt — Canadian creditor seized and intended to sell bankrupt's assets to satisfy bankrupt's obligations — Bankrupt brought application for order for recognition of proceedings commenced pursuant to Chapter 11 to be recognized as "foreign proceeding" for purpose of Companies' Creditors Arrangement Act, for stay of proceedings commence by creditor and for ancillary relief — Application granted — Coordinated reorganization of bankrupt was in interest of all creditors as would ensure that all creditors were treated equitably and fairly — Based on principles of comity court had jurisdiction to stay proceedings commenced against bankrupt — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy Code, 11 U.S.C. 1982, Chapter 11.

APPLICATION by foreign bankrupt for recognition of proceedings commenced pursuant to Chapter 11 of United States *Bankruptcy Code* to be recognized as "foreign proceeding" for purpose of *Companies' Creditors Arrangement Act*, for stay of proceedings commenced by creditor and for ancillary relief.

Endorsement. ***Farley J.*****:**

1 This was an application pursuant to section 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA") for recognition of the proceedings commenced by the applicants in the U.S. Bankruptcy Court for the District of Delaware for relief under Chapter 11 of the United States Bankruptcy Code be recognized as a "foreign proceeding" for the purposes of the CCAA and to have this Court issue a stay of proceedings compatible with the Chapter 11 stay and for ancillary relief. That Order is granted with the usual comeback clause and subject to its expiry being May 11, 2001 unless otherwise extended.

2 The one applicant Matlack, Inc. ("Matlack") is a Pennsylvania corporation which is in the business of transporting chemical products throughout the United States, Mexico and Canada. It has developed a substantial Canadian business over the past 20 years and it currently operates a large leased facility in Ontario from which its Canadian licensed fleet services customers throughout Ontario and Quebec. Matlack's Canadian operations are fully integrated into Matlack's North American enterprise from both an operational and financial standpoint.

3 On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, *wherever they are located*. Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's assets and enterprise throughout the two jurisdictions. I note that a Canadian creditor of Matlack has recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

4 Canadian courts have consistently recognized and applied the principles of comity. See *Morguard Investments Ltd. v. DeSavoye* (1990), 76 D.L.R. (4th) 256; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.); *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), at pp. 160-2.

5 In an increasingly commercially integrated world, countries cannot live in isolation and refuse to recognize foreign judgments and orders. The Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction. The determination of whether a sufficient connection exists between a jurisdiction and a matter should be based on considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction. See *Morguard supra*; *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

6 I concur with what Forsyth J. stated in *Roberts v. Picture Butte Municipal Hospital* (1998), [1999] 4 W.W.R. 443, 64 Alta. L.R. (3d) 218, [1998] A.J. No. 817 (Alta. Q.B.), at pp. 5-7 (A.J.):

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty*.
>
> *...I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is the U.S. Bankruptcy Court*. Thus, in either case, whether there has been attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding... (emphasis added)

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts*, *supra*; *Borden & Elliot v. Winston Industries Inc.* (November 1, 1983), Doc. 352/83 (Ont. H.C.).

8 Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings. See *Microbiz Corp. v. Classic Software Systems Inc.* (1996), [1996] O.J. No. 5094 (Ont. Gen. Div.).

9 Section 18.6(1) of the CCAA provides the following definition:

> "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

The U.S. Bankruptcy Code's Chapter 11 proceedings would be such a foreign proceeding.

10 As I indicated in *Babcock*, *supra*, at p. 166: "Section 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding". Accordingly, it is appropriate for Matlack to be granted ancillary relief in recognizing the Chapter 11 proceedings and in enforcing the stay of proceedings resulting therefrom. In addition this Court can also grant relief pursuant to section 18.6(5). A stay in Canada would promote a stable atmosphere with a view to the reorganization of Matlack and its affiliates while allowing creditors, *wherever situate*, to be treated as equitably as possible. The stay would also assist with respect to claimants in Canada attempting to seize assets so as to get a leg up on the other creditors. See *Babcock*, *supra*, at pp. 165-6. Aside from the *Babcock* case, see also *Re GST Telecommunications Inc.* (May 18, 2000), Ground J. and *Re Grace Canada Inc.* (April 4, 2001), Farley J.

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries — the U.S., Mexico and Canada — and was completed as to the Restatement of the Law in 2000 after six years of analysis. [1] As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

12 The Project continues with the development of implementation and practical aids. Most recently this consists of the *Guidelines Applicable to Court-to-Court Communications on Cross-Border Cases*. I understand that Judge Mary Walrath

is handling the Chapter 11 case. It will be my pleasure to work in coordination with her on this cross-border proceeding. To assist further with the handling of these matters, I would approve the proposed Protocol from the Canadian side, including what I understand may be the first opportunity to incorporate the *Communication Guidelines*, such to be effective if, as and when Judge Walrath is satisfied with same from the U.S. side.

13 A copy of the ALI Guidelines and the Matlack Protocol are annexed to these reasons for the benefit of other counsel involved in anything similar.

14 Order to issue accordingly.

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Submitted by the Council to the Members of The American Law Institute for Discussion at the Seventy-Seventh Annual Meeting on May 15, 16, 17, and 18, 2000

The Executive Office

THE AMERICAN LAW INSTITUTE

4025 Chestnut Street

Philadelphia, Pa. 19104-3099

Amended — February 12, 2001

Appendix 2

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with Principles of Cooperation courts and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a sindico with foreign administrators or courts.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parries in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means in which case Guideline 7 shall apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court to made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative or any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submission to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof of exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application of motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

— UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re: MATLACK SYSTEMS, INC., *et al.*, Debtors

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, SECTION 18.6 AS AMENDED

IN THE MATTER OF AN APPLICATION OF MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" ANCILLARY TO PROCEEDINGS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" Applicant

Chapter 11

Case No. 01-01114 (MFW)

Jointly Administered

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

This Cross-Border Insolvency Protocol (the "Protocol") shall govern the conduct of all parties in interest in a proceeding brought by Matlack, Inc. and certain other parties in the Ontario Superior Court of Justice and a proceeding brought by Matlack Systems, Inc. and certain other parties in the United States Bankruptcy Court for the District of Delaware as Case No. 01-01114.

A. Background

1 Matlack Systems, Inc., a Delaware corporation ("MSI"), is the parent company of a multinational transportation business that operates, through its various affiliates, in the United States, Canada and Mexico.

2 MSI and certain of its affiliates (collectively, the "Matlack Companies") have commenced reorganization cases (collectively, the "U.S. Cases") under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court"). The Matlack Companies are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the U.S. Bankruptcy Code. An Official Committee of Unsecured Creditors has been appointed in the U.S. Cases (the "Creditor's Committee").

3 One of the Matlack Companies, Matlack, Inc. (for ease of reference, "Matlack Canada"), a United States affiliate of MSI, has assets and carries on business in Canada. The Matlack Companies have commenced proceedings (collectively, the "Canadian Case") under section 18.6 of the *Companies' Creditors Arrangement Act* (the "CCAA") in the Ontario Superior Court of Justice (the "Canadian Court"). The Matlack Companies have sought an Order of the Canadian Court (as initially made under the CCAA and as subsequently amended or modified, the "CCAA Order") under which (a) the U.S. Cases have been determined to be "foreign proceedings" for the purposes of section 18.6 of the CCAA; and (b) a stay

was granted against actions, enforcements, extra-judicial proceedings or other proceeding until and including August 15, 2001 against the Matlack Companies and their property.

4 The Matlack Companies are parties to both the Canadian Case and the U.S. Cases. For convenience, the U.S. Cases and the Canadian Case are referred to herein collectively as the "Insolvency Proceedings" and the U.S. Bankruptcy Court and the Canadian Court are referred to herein collectively as the "Courts".

B. Purpose and Goals

5 While the Insolvency Proceedings are pending in the United States and Canada for the Matlack Companies, the implementation of basic administrative procedures is necessary to coordinate certain activities in the Insolvency Proceedings, to protect the rights of parties thereto, the creditors of the Matlack Companies and to ensure the maintenance of the Courts' independent jurisdiction and comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in both the U.S. Cases and the Canadian Case:

- harmonize and coordinate activities in the Insolvency Proceedings before the U.S. Court and the Canadian Court;

- promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

- honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada;

- promote international cooperation and respect for comity among the Courts, the parties to the Insolvency Proceedings and the creditors of the Matlack Companies and other parties interested in or affected by the Insolvency Proceedings;

- facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors, creditors and other interested parties, wherever located; and

- implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

6 The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Matlack Companies nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

7 The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.

8 In accordance with the principles of comity and independence established in Paragraph 6 and 7 above, nothing contained herein shall be construed to:

- increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;

- require the Matlack Companies or any Creditor's Committee or Estate Representatives to take any action or refrain from taking, any action that would result in a breach of any duty imposed on them by any applicable law;

• authorize any action that requires the specific approval of one or both of the Courts under the U.S. Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

• preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.

9 The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

10 To assist in the efficient administration of the Insolvency Proceedings, the Matlack Companies, the Creditor's Committee and the Estate Representatives shall (a) cooperate with each other in connection with actions taken in both the U.S. Bankruptcy Court and the Canadian Court, and (b) take any other appropriate steps to coordinate the administration of the U.S. Cases and the Canadian Case for the benefit of the Matlack Companies' respective estates and stakeholders.

11 To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Bankruptcy Court and the Canadian Court each shall use its best efforts to coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible. The U.S. Bankruptcy Court and the Canadian Court may communicate with one another in accordance with the Guidelines for Court-to-Court Communication in Cross-Border Cases developed by the American Law Institute and attached as Schedule "1" to this Protocol with respect to any matter relating to the Insolvency Proceedings and may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of the U.S. Cases and the Canadian Case, in circumstances where both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Cases and the Canadian Case.

12 Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Bankruptcy Court and the Canadian Court are independent Courts and, accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall at all times exercise its independent jurisdiction and authority with respect to (a) matters presented to such Court and (b) the conduct of the parties appearing in such matters.

E. Retention and Compensation of Professionals

13 Except as provided in paragraph 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.

14 Any Canadian professionals retained by or with the approval of the Matlack Companies for purposes of the Canadian Case, including Canadian professionals retained by the Creditor's Committee (collectively, the "Canadian Professionals"), shall be subject to the exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada, and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

15 Any United States professionals retained by the Matlack Companies and any United States professionals retained by the Creditor's Committee (collectively, the "U.S. Professionals") shall be subject to the exclusive jurisdiction of the U.S. Bankruptcy Court. Accordingly, the U.S. Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Bankruptcy Court under the U.S. Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

F. Rights to Appear and Be Heard

16 The Matlack Companies, their creditors and other interested parties in the Insolvency Proceedings, including the Creditor's Committee and the U.S. Trustee, shall have the right and standing to (a) appear and be heard in either the U.S. Court or the Canadian Court in the Insolvency Proceedings to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the Clerk of the U.S. Bankruptcy Court or the Canadian Court in the Insolvency Proceedings; *provided*, *however*, that any appearance or filing may subject a creditor or an interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that appearance by the Creditor's Committee in the Canadian Case shall not form a basis for personal jurisdiction in Canada over the members of the Creditor's Committee. Notwithstanding the foregoing, and in accordance with paragraph 13 above, the Canadian Court shall have jurisdiction over the Estate Representatives and the U.S. Trustee with respect to the particular matters as to which the Estate Representatives or the U.S. Trustee appear before the Canadian Court.

G. Notice

17 Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings, or this Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors, including the Creditor's Committee, and other interested parties in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) above, the U.S. Trustee, the Office of the United States Trustee, and such other parties as may be designated by either of the Courts from time to time.

H. Joint Recognition of Stays of Proceedings Under the U.S. Bankruptcy Code and the CCAA

18 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.

19 In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 362 of the U.S. Bankruptcy Code (the "U.S. Stay") to the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the Canadian Court shall extend and enforce the U.S. Stay in Canada (to the same extent such stay of proceedings and action is applicable in the United States) to prevent adverse actions against the assets, rights and holdings, of the Matlack Companies in Canada. In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding (a) the interpretation and application of the U.S. Stay and any order of the U.S. Court modifying or granting relief from the U.S. Stay, and (b) the enforcement in Canada of the U.S. Stay.

20 Nothing contained herein shall affect or limit the Matlack Companies' or other parties' rights to assert the applicability or non-applicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

I. Effectiveness and Modification of Protocol

21 This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

22 This Protocol may not be supplemented, modified, terminated or replaced in any manner except by the U.S. Court and the Canadian Court. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with paragraph 17 above.

J. Procedure for Resolving Disputes Under the Protocol

23 Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice, in accordance with paragraph 17 above. Where an issue is addressed to only one Court, in rendering a determination in any such dispute, such Court: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either (i) render a binding decision after such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court or (iii) seek a joint hearing of both Courts. Notwithstanding the foregoing, each Court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other Court established under existing law.

K. Preservation of Rights

24 Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the powers, rights, claims and defences of the Matlack Companies and their estates, the Creditor's Committee, the U.S. Trustee or any of the creditors of the Matlack Companies under applicable law, including the U.S. Bankruptcy Code and the CCAA.

L. Guidelines

25 The Protocol shall adopt by reference the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") developed by The American Law Institute for the Transnational Insolvency Project, a copy of which are attached hereto as Schedule "1". In the case of any conflict between the terms of this Protocol and the terms of the Guidelines, the terms of this Protocol shall govern.

Application granted.

Footnotes

1 A copy of this material may be obtained from the Executive Office, The American Law Institute, 4025 Chestnut Street, Philadelphia, PA, USA 19104-3099.

End of Document

TAB 6

2014 ONSC 5811
Ontario Superior Court of Justice [Commercial List]

MtGox Co., Re

2014 CarswellOnt 13871, 2014 ONSC 5811, 122 O.R. (3d) 465, 20 C.B.R. (6th) 307, 245 A.C.W.S. (3d) 280

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1992, C. 27, S.2, as Amended

In the Matter of Mtgox Co., Ltd., the Bankrupt in a Proceeding under Japan's Bankruptcy Act before the Tokyo District Court Twentieth Civil Division

Application of Nobuaki Kobayashi, in his capacity as the bankrupcty Trustee of MtGox Co., Ltd. Pursuant to Japan's Bankruptcy Act Under Part XIII of The Bankruptcy and Insolvency Act (Cross-Border Insolvencies)

Newbould J.

Heard: October 3, 2014
Judgment: October 6, 2014
Docket: CV-14-10709-00CL

Counsel: Margaret R. Sims for Applicant

Subject: Insolvency; International

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies

M Co. was Japanese corporation that operated online exchange for purchase and sale of bitcoins, a form of digital currency — M Co. was located and headquartered in Tokyo, Japan — In February 2014, M Co. halted all bitcoin withdrawals by its customers after it was subject to a massive theft — These events caused M Co. to become insolvent, and eventually led to bankruptcy proceeding in Japan — M Co. was subsequently named as defendant in pending class action filed in Ontario Superior Court of Justice (Ontario Court) — Trustee of M Co. applied to Ontario Court for initial recognition order recognizing bankruptcy proceeding commenced in Japan, declaring trustee as foreign representative, and staying all proceedings against M Co. — Application granted — Japan bankruptcy proceeding was judicial proceeding dealing with creditors' collective interests generally under Japan Bankruptcy Act (JPA), in which M Co.'s property was subject to supervision by Tokyo District Court — Trustee had authority pursuant to JPA and order of Tokyo District Court to administer M Co.'s property and affairs and to act as foreign representative — Accordingly, Japan bankruptcy proceeding constituted "foreign proceeding" and trustee constituted "foreign representative" under s. 268(1) of Bankruptcy and Insolvency Act (BIA) — M Co.'s centre of its main interests was its registered head office in Japan — Accordingly, Japan bankruptcy proceeding was foreign main proceeding, entitling M Co. to automatic stay under s. 271(1) of BIA.

APPLICATION by bankruptcy trustee for initial recognition order pursuant to Part XIII of *Bankruptcy and Insolvency Act*.

***Newbould J.*:**

1 Nobuaki Kobayashi, in his capacity as the bankruptcy trustee of MtGox Co., Ltd. applied on October 3, 2014 for an initial recognition order pursuant to Part XIII (section 267 to 284) of the Bankruptcy and Insolvency Act, R.S.C. 1992, c. 27, s.2, as amended ("BIA"):

(a) declaring and recognizing the bankruptcy proceedings commenced in respect of MtGox pursuant to the Bankruptcy Act of Japan, Act No. 75 of June 2, 2004 before the Tokyo District Court, Twentieth Civil Division as a foreign main proceeding for the purposes of section 270 of the BIA;

(b) declaring that the Trustee is a foreign representative pursuant to section 268(1) of the BIA, and is entitled to bring this application pursuant to section 269 of the BIA; and

(c) staying and enjoining any claims, rights, liens or proceedings against or in respect of MtGox and the property of MtGox.

2 I concluded at the hearing that the relief sought should be granted, for reasons to follow. These are my reasons.

3 MtGox is a Japanese corporation formed in 2011. It is, and always has been, located and headquartered in Tokyo, Japan. From April 2012 to February 2014, its business was the operation of an online exchange for the purchase and sale of bitcoins through its website located at http://www.mtgox.com. Bitcoins are a form of digital currency. At one time, the MtGox Exchange was reported to be the largest online bitcoin exchange in the world.

4 On or about February 10, 2014, MtGox halted all bitcoin withdrawals by its customers after it was subject to what appears to have been a massive theft or disappearance of bitcoins held by it. MtGox suspended all trading on or about February 24, 2014 after it was discovered that approximately 850,000 bitcoins were missing. These events caused, among other things, MtGox to become insolvent and ultimately led to the Japan bankruptcy proceeding.

5 On February 28, 2014, MtGox filed a petition for the commencement of a civil rehabilitation proceeding in the Tokyo Court pursuant to Article 21(1) of the Japan Civil Rehabilitation Act (JCRA), reporting that it had lost almost 850,000 bitcoins. A civil rehabilitation proceeding under the JCRA is analogous to a restructuring proceeding in Canada pursuant to the BIA or the CCAA.

6 Following the filing of the Japan civil rehabilitation petition, MtGox commenced an investigation with regard to the circumstances that led to the Japan civil rehabilitation. However, by mid-April, 2014, the Tokyo Court decided to dismiss the Japan civil rehabilitation petition pursuant to Article 25(3) of the JCRA, recognizing that under the circumstances it would be very difficult for MtGox to successfully prepare and obtain approval of a rehabilitation plan or otherwise successfully carry out the Japan civil rehabilitation.

7 On April 24, 2014, the Tokyo Court entered the Japan bankruptcy order, formally commencing MtGox's Japan bankruptcy proceeding and appointing the applicant as bankruptcy trustee.

8 MtGox has approximately 120,000 customers who had a bitcoin or fiat currency balance in their accounts as of the date of the Japan petition. The customers live in approximately 175 countries around the world.

9 MtGox has been named as a defendant in a pending class action filed in the Ontario Superior Court of Justice. The notice of action and statement of claim were provided to the Trustee under the Hague Convention on August 29, 2014.

Applicable law

10 Various theories as to how multi-national bankruptcies should be dealt with have long existed. Historically many countries adopted a territorialism approach under which insolvency proceedings had an exclusively national or territorial focus that allowed each country to distribute the assets located in that country to local creditors in accordance with its local laws. Universalism is a theory that posits that the bankruptcy law to be applied should be that of the debtor's home jurisdiction, that all of the assets of the insolvent corporation, in whichever country they are situated, should be pooled together and administered by the court of the home country. Local courts in other countries would be expected, under universalism, to recognize and enforce the judgment of the home country's court. This theory of universalism has not taken hold.

11 There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and cooperation. It has been advanced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency, which Canada largely adopted by 2009 amendments to the CCAA and the BIA. [1] Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

12 In the BIA, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

> The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;
>
> (d) the protection and the maximization of the value of debtors' property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

(a) Recognition of foreign proceeding

13 Section 269(1) of the BIA provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to section 270(1) of the BIA, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

14 A foreign proceeding is broadly defined in section 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

15 The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the Japan Bankruptcy Act, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to section 268(1) of the BIA.

16 Section 268(1) of the BIA defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

17 The Trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus the Trustee is a foreign representative pursuant to section 268(1) of the BIA.

18 In the circumstances it is appropriate to recognize the Japan bankruptcy proceeding as a foreign proceeding.

(b) Foreign Main Proceeding

19 A foreign proceeding can be a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in section 271(1) against law suits concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. The Trustee in this case has made such a request.

20 A foreign main proceeding is defined in section 268(1) as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests (COMI). Section 268(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

21 In considering whether the registered office presumption has been rebutted a court should consider the following factors in determining COMI (i) the location is readily ascertainable by creditors (ii) the location is one in which the debtor's principal assets and operations are found and (iii) the location is where the management of the debtor takes place. See *Lightsquared LP, Re* (2012), 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]).

22 The Trustee relies on the following facts in support of his position that the COMI of MtGox is in Japan and not in Canada.

> (1) MtGox has no offices in Canada, there are no Canadian subsidiaries and no assets in located in Canada.
>
> (2) MtGox is and has always been organized under the laws of Japan.
>
> (3) MtGox's registered office and corporate headquarters are, and have always been, located in Japan, and the its books and records are located at its head office in Japan.
>
> (4) The Debtor's sole director and representative director, Mr. Karpeles, resides, and at all relevant times has resided, in Japan.
>
> (5) Most of the MtGox's bank accounts are located in Japan, including the primary account for operating its business.
>
> (6) MtGox's parent company, Tibanne, provided operational and administrative services to it, including the provision of its primary workforce, in Japan.
>
> (7) MtGox's Website clearly disclosed to customers and other third parties that it is a Japanese corporation that is located in Japan.
>
> (8) Upon the filing of the Japan Petition, MtGox commenced an investigation in Japan with regard to the circumstances that led to the Japan civil rehabilitation, which investigation was subject to the oversight of the Tokyo Court.

23 Taking into account this evidence, I am satisfied that the COMI of MtGox is its registered head office in Japan and that the Japan bankruptcy proceeding is a foreign main proceeding.

Stay of Proceedings

24 The effect of recognition of a foreign main proceeding is an automatic grant of the relief set out under subsection 271(1) of the BIA:

271. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and

(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

25 The Trustee seeks recognition of the the Japan bankruptcy proceeding in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors. In particular, the Trustee believes that the enjoining of the ongoing litigation against MtGox in Canada, in conjunction with the protections afforded by the Japan bankruptcy proceeding, is essential to this effort.

26 In *Braycon International Inc. v. Everest & Jennings Canadian Ltd.* (2001), 26 C.B.R. (4th) 154 (Ont. S.C.J.), prior to the adoption of the Model Law in Canada, a stay of an action in Ontario against a U.S. corporation subject to bankruptcy proceedings in the U.S. under chapter 11 of U.S. the Bankruptcy Code in which there was a stay of all proceedings against it was ordered pursuant to the comity principles recognized in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.).

27 The Model Law, which was adopted in Japan in 2000, provides a transparent regime for the right of foreign creditors to commence or participate in an insolvency proceeding in another state. See Dr. Janis Sarra, *supra*, at fn 1. Section 271(1)(a) of the BIA provides for an automatic stay in furtherance of that objective. As the Japanese foreign proceeding is a foreign main proceeding, the Trustee is entitled to that automatic stay. The Tokyo court has order ordered a process for claims to be made with a filing date of no later than May 29, 2015.

28 There have been two class actions commenced against MtGox in the U.S. The Trustee has obtained recognition of the Japan bankruptcy proceedings in the U.S. under chapter 15 of the U.S. Bankruptcy Code as a foreign main proceeding, resulting in an automatic stay of the U.S. litigation. The Trustee is entitled to the same relief in Canada relating to the class action filed in Ontario.

29 At the conclusion of the hearing on October 3, 2014 I signed an order reflecting these reasons.

Application granted.

Footnotes

1 See Dr. Janis Sarra, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 Texas International Law Journal 547

TAB 7

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

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

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

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

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

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

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

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

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

Headnote

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

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

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on

freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

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

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

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

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

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

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

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

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

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the

context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

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

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

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

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

Arrêt: Le pourvoi a été accueilli.

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

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

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

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

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

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

I. Introduction

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

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

II. Facts

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

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

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

IV. Judgments below

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

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

contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

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

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

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

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

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

V. Issues

35

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

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

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

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

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

> A publication ban should only be ordered when:
>
> > (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

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

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

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

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

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

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

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

A publication ban should only be ordered when:

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does

not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

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

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

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

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

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

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

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

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

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

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

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

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

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

(2) The Proportionality Stage

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

(a) Salutary Effects of the Confidentiality Order

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

Charter right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

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

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

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

(b) Deleterious Effects of the Confidentiality Order

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

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

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

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

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

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

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

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

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

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

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

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of

a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

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

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

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

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

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

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

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

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

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

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

VII. Conclusion

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

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

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 8

Office of the Privacy Commissioner of Canada
Commissariat à la protection de la vie privée du Canada

Disclosure of mortgage information required by law; collection of information by bankruptcy trustee also allowed

PIPEDA Case Summary #2006-336

(Principle 4.3; paragraphs 4(1)(a), 7(3)(b) and 7(3)(i); subsection 2(1))

An individual complained after a bank, from which she and her husband had obtained a mortgage, disclosed her personal information to the Trustee of the Bankrupt Estate of her husband. There was no dispute that this disclosure occurred without the complainant's knowledge or consent. However, the Assistant Privacy Commissioner determined that it was allowable under the *Personal Information Protection and Electronic Documents Act* (the *Act*) since the bank was required to hand over the information under the provisions of another law, namely, the *Bankruptcy and Insolvency Act*.

The complainant also objected to the Trustee's collection of her personal information. However, the Assistant Commissioner noted that if the bank was required to disclose personal information by law, then there was an implied right on the part of the collector, in this case, the trustee, to collect that information.

The following is a detailed summary of the investigation and the Assistant Commissioner's deliberations and findings.

Summary of Investigation

The complainant and her husband obtained a mortgage from the bank when they purchased a home. They are tenants in common. They married a month after making the purchase, and the marriage contract set out a strict separation of assets and liabilities. The marriage contract provided that the mortgage for the home was to be charged against the complainant's husband's one-half interest in the property. The bank was not aware of the marriage contract at the time that it received the mortgage application and approved it.

The complainant's husband was forced into bankruptcy some time later. The assigned trustee for her husband's bankrupt estate wrote to the bank, demanding that the complete bank file relating to the mortgage on the home jointly owned by the complainant and her husband be disclosed, pursuant to the provisions of subsection 164(2) of the *Bankruptcy and Insolvency Act*. The bank complied with the disclosure demand, releasing, among other things, a copy of the mortgage application, a tax return, and net worth statements of the complainant.

The complainant felt that, as she had entered into a marriage contract with her husband, she was not liable for his debts or obligations. Therefore, she believed that the trustee did not have the right to collect her personal information from the bank without her knowledge or consent.

The bank stated that it disclosed the complainant's personal information without her knowledge or consent in accordance with two provisions of the *Act,* namely, paragraphs 7(3)(b) and 7(3)(i). Paragraph 7(3)(b) allows an organization to disclose an individual's personal information to a third party without knowledge or consent, if the disclosure is made for the purpose of collecting a debt owed by the individual to the organization. Paragraph 7(3)(i) allows an organization to disclose personal information without knowledge or consent if the disclosure is required by law.

As for the trustee, it contended that it was not an organization as defined in subsection 2(1) of the *Act* and that, when sending the request letter, it was not acting in the course of a commercial activity. Instead, the trustee claimed that, in administering the estate, it was acting as an officer of the Court and fulfilling duties prescribed by statute.

Findings

Issued June 21, 2006

Application: Subsection 2(1) defines "commercial activity" as any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, and defines "organization" to include an association, a partnership, a person and a trade union. Paragraph 4(1)(a) states that Part I of the *Act* applies to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities.

Principle 4.3 states that the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate. Paragraphs 7(3)(b) and 7(3)(i) are exceptions to the requirement for consent. Paragraph 7(3)(b) states that an organization may disclose personal information without the knowledge or consent of the individual if the disclosure is for the purpose of collecting a debt owed by the individual to the organization. Paragraph 7(3)(i) states that an organization may disclose personal information without the knowledge or consent of the individual if the disclosure is required by law.

In making her determinations, the Assistant Privacy Commissioner deliberated as follows:

- With respect to the Trustee's view that it was not subject to the *Act*, the Assistant Commissioner noted that the mere fact that an organization may be designated an "officer of the Court" is not sufficient to remove them from the jurisdiction of the *Act*. Trustees are licensed under the *Bankruptcy and Insolvency Act* and are held to standards of behaviour or service established by that law. Trustees do not work for the bankrupt, but rather are appointed by the court to administer a bankruptcy, and are remunerated for their work.
- The Assistant Commissioner therefore determined that the trustee in this instance was an organization that was acting in the course of a commercial activity and was thus subject to the provisions of the *Act*, under paragraph 4(1)(a).
- With respect to the bank, it referred to paragraphs 7(3)(b) and 7(3)(i) to defend its disclosure of the complainant's personal information.
- As for its reliance on paragraph 7(3)(b), the Assistant Commissioner did not agree that this paragraph applied in this instance since the mortgage was not in default and the bank was not therefore trying to collect a debt.
- However, she considered paragraph 7(3)(i), which allows personal information to be disclosed without the individual's knowledge or consent where required by law, to be applicable in this case.
- She referred to subsection 164(1) of the *Bankruptcy and Insolvency Act*, which states:

> *Where a person is believed or suspected to have in his possession or power any of the property of the bankrupt or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property…he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.*

- Both the complainant and her husband were co-owners of the property and thus co-holders of the mortgage. Both had submitted personal information as part of the application process, and the mortgage was granted based on all of the personal information submitted, not merely that of the husband. The Assistant Commissioner was of the view that when the trustee demanded information regarding the mortgage from the bank, the bank rightly provided the entire file of information.
- The Assistant Commissioner stated that the information in that file constituted a "book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property" and the trustee was therefore within its power under subsection 164(1) to compel the production of the information. Although the information related in part to the complainant, it also related in part to the bankrupt who held the mortgage.
- She also noted that, in addition to subsection 164(1) of the *Bankruptcy and Insolvency Act*, subsection 164(2) of the same *Act* allows a trustee to, without an order, examine the person before the court registrar concerning the information if a person does not produce the information within 5 days of being required to do so. Under subsection 164(3), the person may be compelled to attend and testify and produce any information subject to the same rules of examination and the same consequences as would apply to the bankrupt.
- The Assistant Commissioner was therefore satisfied that the *Bankruptcy and Insolvency Act* is a law that requires the disclosure of all information relating in whole or in part to the bankrupt. She thus determined that the bank's disclosure to the trustee met the requirements of the exception to consent set out in paragraph 7(3)(i), and was not a contravention of Principle 4.3.
- Although the complainant argued that the bank did not take its clients' privacy seriously since it could have contacted her to obtain her consent during the 5 day timeframe it had to respond to the trustee, the Assistant Commissioner noted that Act does allow for exceptions to consent, and thus, the bank was not required to request the complainant's consent.
- As for the collection by the trustee, the Assistant Commissioner stated that if an organization is required to disclose information by law, there is an implied right on the part of the collector, the trustee in this case, to collect that information. She therefore determined that the trustee did not contravene Principle 4.3.

The Assistant Commissioner concluded that the complaints were not well-founded (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/def-pipeda/).

Date modified:

2006-09-07

TAB 9

Privacy Commissioner of Canada

Commissaire à la protection de la vie privée du Canada

Privacy

Annual Report to Parliament 2004

Report on the *Personal Information Protection and Electronic Documents Act*

Canada

Office of the Privacy Commissioner of Canada
112 Kent Street
Ottawa, Ontario
K1A 1H3

(613) 995-8210, 1-800-282-1376
Fax (613) 947-6850
TDD (613) 992-9190

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Privacy Commissioner of Canada

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Ottawa, Ontario
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www.privcom.gc.ca

Commissaire à la protection de la vie privée du Canada

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K1A 1H3
Tél. : (613) 995-8210
Téléc. : (613) 947-6850
1-800-282-1376
www.privcom.gc.ca

October 2005

The Honourable Daniel Hays, Senator
The Speaker
The Senate of Canada
Ottawa

Dear Mr. Speaker:

I have the honour to submit to Parliament the Annual Report of the Office of the Privacy Commissioner of Canada on the *Personal Information Protection and Electronic Documents Act* for the period from January 1 to December 31, 2004.

Yours sincerely,

Original signed by

Jennifer Stoddart
Privacy Commissioner of Canada

Privacy Commissioner of Canada

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Téléc. : (613) 947-6850
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October 2005

The Honourable Peter Milliken, M.P.
The Speaker
The House of Commons
Ottawa

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Yours sincerely,

Original signed by

Jennifer Stoddart
Privacy Commissioner of Canada

Table of Contents

Foreword

The year 2004 saw the *Personal Information Protection and Electronic Documents Act* (*PIPEDA)* reach maturity, with the Act extending across the country to all commercial activities, except in provinces with legislation deemed substantially similar. British Columbia, Alberta and Quebec have enacted private sector privacy legislation that has been deemed substantially similar to *PIPEDA*. *PIPEDA* applies to federal works, undertakings and businesses across the country, as well as to interprovincial and international transactions.

The maturing of *PIPEDA* is cause for some celebration. Canadians now have comprehensive rights relating to personal information in the private sector in Canada, in addition to longstanding protections in the public sector through the *Privacy Act* and its provincial equivalent legislation. That is not to say that either the private sector or public sector privacy laws fully protect the privacy rights of Canadians in every sense. They do not. But much of the essential framework for protecting those rights is now in place. Our Office will continue to enforce and analyze the application of *PIPEDA* to ensure that Canadians are well-served by it, and that the Canadian private sector understands and respects its obligations under the Act. We will continue to help the business community comply with it, and develop the best practices which will minimize burden and clarify expectations.

Interjurisdictional challenges

As with any relatively new legislation, problems can emerge. Where a province has enacted legislation that is substantially similar to all or part of *PIPEDA*, confusion may arise about which law – provincial or federal – will apply to certain information-handling practices. In other cases, the laws of two jurisdictions may be involved in addressing an issue. Some elements of the handling of personal information may be subject to a provincial law – the collection of the information within a province,

for example – while another element, such as the transborder disclosure of the information, may fall under *PIPEDA*.

However, the dust is beginning to settle around these jurisdictional issues due to concerted efforts by our Office, our provincial counterparts and industry. We are working with our provincial colleagues to streamline investigations where provincial and federal jurisdictions both apply. It is not our intention to make life difficult for those who must comply with the various privacy laws in Canada, and we clearly do not want to waste the limited resources available to privacy commissioners across Canada by duplicating efforts in conducting investigations and developing policy.

A complex and changing universe

There are many powerful forces in the universe in which we assert our privacy rights – galloping advances in surveillance and data-handling technologies, global competition in business which drives companies to obtain and use more personal information about customers and personnel, and the government imperative to acquire personal information to enhance administrative efficiency and respond to the security concerns of our world. Those of us attempting to protect this fundamental right must call out strongly for a debate that can be at times unpopular and demands a wealth of expertise in ever more complex fields of research. It is a challenge to keep up.

It is important to remember that information is power, and holding the personal information of individuals conveys power to the holder. One complexity that we have been grappling with this year stems from a convergence of two phenomena which are not new by any means, but which have reached a critical point. "Outsourcing" of data processing operations and call centres results in the personal information of Canadian residents or customers of Canadian companies being transferred and processed outside Canada. The thirst of foreign governments, particularly that of the United States and its allies in the war on terror, for access to personal information for "security" purposes means that the outsourced data may be accessed for law enforcement or national security purposes, outside our jurisdiction and the protection of our laws and our Court system.

Transborder data flow has been discussed in Canada since the 1960s. The original report on *Privacy and Computers,* published in 1972 by the Departments of Communications and Justice, dealt with the matter extensively, including matters of sovereignty. The issue prompted the Organization for Economic Cooperation and Development (OECD) to meet and develop the first Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data in 1980, and it drove

the European Union to pass its Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Yet we know very little about the details of transborder flows of personal information about Canadian residents and customers.

The current interest in the *USA PATRIOT Act* has raised an issue that has been lurking beneath the surface for decades – the extent to which Canadian businesses, and governments in Canada, should share personal information with foreign governments. The discussion is far from over. In fact, it is just beginning. Our Office endorsed many of the recommendations of the B.C. Information and Privacy Commissioner, David Loukidelis, on issues of transborder flows of personal information and we will continue working to ensure Canadians' privacy protections remain in place.

This Office is tasked with protecting privacy in Canada. We cannot do the job alone, we depend on all players in society to contribute to preserving the freedoms and rights which are an intrinsic part of Canada's rich fabric and history. The complexity of the current privacy environment has led our Office to launch a Contributions Program to help develop a national privacy research capacity in Canada. The findings of this first round of research projects will be available in 2005. These research findings will complement the existing policy research function within our Office, and in a modest way help to enrich the community of privacy scholarship in Canada.

Responding to a greater need

This Office received 723 complaints under *PIPEDA* between January 1 and December 31, 2004, more than double the 302 received in the previous calendar year. We closed 379 complaints, significantly more than the 278 cases closed in 2003. While the debate about the merits of having the Commissioner continue to operate as an ombudsman versus giving the Commissioner order-making powers remains, it is clear that our Office has accomplished much that is positive using the current ombudsman approach. Some 40 per cent of the complaints closed during the year were settled, and another seven per cent resolved – an indication that suasion, a prominent feature of the ombudsman approach, is an effective tool.

We have introduced a formal procedure of systematic follow-ups to complaint investigations under *PIPEDA*. We will now be in position to monitor the progress of organizations in implementing commitments they make during complaint investigations and in response to the recommendations our Office issues to them. Equally important, our Audit and Review Branch is strengthening its capacity to audit organizations subject to *PIPEDA*.

We faced many challenges in 2004, challenges that will only increase in frequency and complexity. This is not a time for those concerned about this fundamental human right called privacy to shrink from speaking out, from debate or from controversy. We will seize the opportunity of the 2006 review of *PIPEDA* to make recommendations about how to improve and better enforce the two pieces of legislation that we oversee, Although the Act is still very new in application, the dynamic environment of information policy demands that we keep current and try to ensure that the legislation also responds effectively to current threats. We are developing a list of improvements and suggestions for change, and we are confident that in another five years, when the next review is due, there will be more changes necessary. Parliament was wise to insist on periodic review of this legislation, and we will continue to push for review of the *Privacy Act* and inclusion of such a review mechanism in it.

This year, we have published two separate reports, dividing the Privacy Act from the Personal Information Protection and Electronic Documents Act (PIPEDA). We felt this was more appropriate given that the Privacy Act requires us to report on the fiscal year (2004-2005), while under PIPEDA we are required to report on the calendar year (2004). As well, each Act provides a separate framework for investigations and audits. Both our reports detail efforts we have taken to meet the growing demands on our Office to act as the guardians of privacy for Canadians on behalf of Parliament. There is much overlapping between these reports because many of our activities are not particular to one law or another and, increasingly, the policy issues are common across the two regimes.

Our Multi-Faceted Mandate

The Office of the Privacy Commissioner oversees two laws – the *Privacy Act*, which applies to federal government institutions, and *PIPEDA,* which governs personal information management in commercial activities.

Parliament requires our Office to ensure that both the federal public sector and private sector (in most provinces) are held accountable for their personal information handling, and that the public is informed about privacy rights. The mandate is not always well understood.

As an independent ombudsman, we are:

- An *investigator* and *auditor* with full powers to investigate and initiate complaints, conduct audits and verify compliance under both Acts;

- A *public educator* and *advocate* with a responsibility both to sensitize businesses about their obligations under *PIPEDA* and to help the public better understand their data protection rights;

- A *researcher* and *expert adviser* on privacy issues to Parliament, government and businesses; and

- An *advocate for privacy principles* involved in litigating the application and interpretation of the two privacy laws. We also analyze the legal and policy implications of bills and government proposals.

Policy Perspective

In 2004, our major preoccupations in the policy area were the heightened demands for personal information in the name of national security, the transborder flow of personal information, and that hardy perennial, privacy invasive technologies. From cell phones in locker rooms to global positioning systems in cars, the need to measure the impact of these new technologies and read the privacy law into their design and application is an ongoing challenge.

Technology

During the past year, the privacy implications of using Radio Frequency Identification Devices (RFIDs) as tracking devices have become increasingly prominent. RFIDs encompass technologies that use radio waves to read a serial number stored on a microchip. The microchip or tag can be placed in military equipment, passports, clothing, currency notes, vehicles, tires, pass cards and just about anything else sold in the marketplace, including food and drink packages. RFID applications include tracking goods from the manufacturer to the retail store, tracking people in a health institution or monitoring the movements of schoolchildren.

Depending on its individual design, an RFID can transmit information over long distances or only a few centimeters. It may hold no personal information or store extensive personal information, including biometrics. An RFID can be "active" or "passive" – active where it has its own power to broadcast information to a reader, or passive in that it lies dormant until awakened by a signal from a "reader."

The combination of tags, (sometimes smaller than a grain of rice or built invisibly into the paper of a product), powerful coding and advanced computer systems has created enormous economic incentives for companies to introduce RFID technology.

A recent market forecast predicts that the global value of the total RFID tag market will expand from $1.95 billion in 2005 to $26.9 billion in 2015. Given that each RFID tag may eventually cost only pennies, the potential scale of use is greater than almost any other single technology.

Organizations must think carefully about the legal implications of deploying RFID systems. Amidst the flurry of activity involving RFIDs, very few people fully understand the myriad of privacy implications. We are now encountering many marketplace uses of RFIDs, and expect that we will soon be investigating complaints about tracking the use of RFIDs.

Similarly, although there have been some interesting stories in the press about the use and abuse of global positioning technology, most individuals are unaware of the data that is accumulated by such devices. Fortunately, *PIPEDA* contains an innovative provision requiring openness with respect to information practices.

Organizations placing global positioning devices in consumer goods or conveyances (rental cars, for example) must identify what the device does, the data it collects, how long the data is kept, and who has access to it.

We are entering a world where computing power will be present in the most ordinary day-to-day devices. If we are not careful, that power will be used to gather or broadcast personal information in ways that greatly diminish our privacy, not to mention our autonomy and human dignity. As transmitting devices are built into roadsides, licence plates, currency and books, we are hard pressed to keep up with the potential privacy invasions and abuses. Canadians need to become more aware of and participate in discussing the privacy issues that flow from these developments. We need to shape our future into something that reflects the rights and freedoms we cherish today. From Reginald Fessenden to Marshall McLuhan, Canadians have shown leadership in the development of communications technologies and in communications theory. We are confident we can now rise to the current challenge, and demonstrate how we can use these powerful devices, in the world of ubiquitous computing and communications, yet maintain respect for that most fundamental of human values, privacy.

Parliament's Window on Privacy

The Privacy Commissioner of Canada is an Agent of Parliament who reports directly to the Senate and the House of Commons. As such, the OPC acts as Parliament's window on privacy issues. Through the Commissioner, Assistant Commissioners and

other senior OPC staff, the Office brings to the attention of Parliamentarians issues that have an impact on the privacy rights of Canadians. The OPC does this by tabling Annual Reports to Parliament, by appearing before Committees of the Senate and the House of Commons to comment on the privacy implications of proposed legislation and government initiatives, and by identifying and analyzing issues that we believe should be brought to Parliament's attention.

The Office also assists Parliament in becoming better informed about privacy, acting as a resource or centre of expertise on privacy issues. This includes responding to a significant number of inquiries and letters from Senators and Members of Parliament.

➤ *Appearances before Parliamentary Committees*

Appearances before committees of the Senate and the House of Commons constitute a key element of our work as Parliament's window on privacy issues. During the period covered by this report, the Privacy Commissioner and other senior OPC staff appeared nine times before Parliamentary committees: six times on bills with privacy implications and three times on matters relating to the management and operations of the Office.

The OPC appeared on the following bills before Parliamentary committees in 2004:

- Bill C-6, the *Assisted Human Reproduction Act* (March 3, 2004)
- Bill C-7, the *Public Safety Act, 2002* (March 18, 2004)
- Bill C-2, *An Act to Amend the Radiocommunication Act* (May 6, 2004)
- Bill C-12, the *Quarantine Act* (November 18, 2004)
- Bill C-22, *An Act to establish the Department of Social Development and to amend and repeal certain related Acts* (December 9, 2004)
- Bill C-23, *An Act to establish the Department of Human Resources and Skills Development and to amend and repeal certain related Acts* (December 9, 2004)
- Bill C-11, the *Public Servants Disclosure Protection Act* (December 14, 2004)

Regarding the management and operations of the Office, OPC officials appeared before Parliamentary committees on the following matters in 2004:

- Annual Report and Main Estimates 2003-2004 (November 17, 2004)
- Supplementary Estimates (December 1, 2004)

➤ *Other Parliamentary Liaison Activities*

The OPC has undertaken a number of other initiatives over the course of the past year to improve its ability to advise Parliament on privacy matters.

In May 2004, we created a dedicated Parliamentary liaison function within the Office to improve our relationship with Parliament. This function resides in the Research and Policy Branch, reflecting the OPC's desire to focus its Parliamentary affairs activities on providing in-depth and accurate policy advice to Senators and Members of Parliament.

Improving on how we assess, monitor and forecast Parliamentary activity has been a priority for us in the past year. The OPC put in place a new and improved system for monitoring the status of bills on Parliament Hill, as well as keeping tabs on new and emerging developments of interest to privacy promotion and protection. Our goal is to build bridges to departments so that we can comment earlier in the legislative process, when our criticisms could be dealt with more effectively. It is often too late when a bill has been introduced in the House of Commons, to rethink approaches to information issues.

The Office has responded to a significant number of inquiries and letters from Senators and MPs this year, and the Commissioner and Assistant Commissioners have also met privately with Senators and MPs who wished to discuss policy matters relating to privacy, or wanted to know more about the operations of the Office.

In late 2004, the OPC in conjunction with the Office of the Information Commissioner, and in collaboration with the Research Branch of the Library of Parliament, held an information session for Parliamentarians and their staff on the roles and mandates of both Offices. This information session was well attended and raised many questions among participants. We believe such information sessions contribute to increasing awareness of privacy issues on Parliament Hill, and look forward to holding more such sessions in the future.

➤ *Priorities for the Coming Year*

The Office expects to be busy in the area of Parliamentary affairs over the next fiscal year. There are a number of bills of interest to us expected in the upcoming session, and the statutory review by Parliament of the *Personal Information Protection and Electronic Documents Act* is expected to start in 2006. The OPC plans to play a

constructive role during this review, by providing thoughtful advice to Parliamentarians mandated with studying at how the Act has worked over the course of its first years of implementation, and how it may be modified and improved.

The OPC will continue to follow with interest the Parliamentary review of the *Anti-terrorism Act*. The Privacy Commissioner appeared twice before committee on this matter in fiscal year 2005-06—once before a Senate special committee reviewing the Act (May 9, 2005), and on another occasion before a sub-committee of the Commons Standing Committee on Justice (June 1, 2005).

We recognize that to act as an effective Agent of Parliament we need to have good working relationships with federal departments and agencies. The OPC plans to put more emphasis on identifying and raising privacy concerns when government initiatives are being developed rather than waiting until they reach Parliament, as this increases the possibility that privacy concerns will be taken into account.

National Security

In May 2004, the *Public Safety Act, 2002* was enacted. The Act, first introduced in November 2001 in the wake of the September 11 terrorist attacks, allows the Minister of Transport, the Commissioner of the RCMP and the Director of the Canadian Security Intelligence Service (CSIS), without a warrant, to compel air carriers and operators of aviation reservation systems to provide information about passengers. While this may seem reasonable given the risks that terrorists pose to air transport, authorities are not using this information exclusively for anti-terrorism and transportation safety. The *Public Safety Act, 2002* also allows the information to be used to identify passengers for whom there are outstanding arrest warrants for a wide range of lesser criminal offences. In other words, the machinery of anti-terrorism is being used to meet the needs of ordinary law enforcement, lowering the legal standards that law enforcement authorities in a democratic society must normally meet.

The retention and mining of private sector data collections by government sends a troubling signal to private sector organizations trying to comply with privacy legislation. If the government can use data to manage risks from unknown individuals, why can't the private sector? Private sector companies are cutting down on data collection to comply with *PIPEDA*, but now the government is asking them to retain it so that they can access it for government purposes. *PIPEDA* sets a high bar for organizations with respect to using and disclosing personal information without consent for the purposes of investigating fraud and other illegal activities that have

an impact, while the standards that government must meet under the *Privacy Act* are much less rigorous.

In 2004, our Office raised concerns about a provision in the *Public Safety Act, 2002* that amends *PIPEDA*. The amendment allows organizations subject to *PIPEDA* to collect personal information, without consent, for the purposes of disclosing this information to government, law enforcement and national security agencies if the information relates to national security, the defence of Canada or the conduct of international affairs. Allowing private sector organizations to collect personal information without consent in these circumstances effectively co-opts them into service for law enforcement activities. This dangerously blurs the line between the private sector and the state. We comment more extensively on public safety issues in the *Privacy Act* Annual Report, but this is also an important issue under *PIPEDA* because of the potential for inappropriate manipulation of private sector data to serve state interests.

The 2001 *Anti-terrorism Act* contained a provision requiring a review after three years. The Senate has appointed a special committee to conduct its review. The House of Commons review is being conducted by the Subcommittee on Public Safety and National Security, a subcommittee of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. However, the Commons Committee is not looking at the many other pieces of legislation that were also enacted or amended in the wake of the terrorist attacks. Many of these laws contain extensive powers to intrude and should be examined as well.

The *Official Secrets Act* was replaced by the *Security of Information Act* in 2001. Section 10 of the new Act allows the deputy head of a department, on the issuance of a certificate, to bind members of the private sector to secrecy for life with respect to methods of investigation or special operations. We understand that sometimes it is necessary to deal with threats to our national security and critical infrastructure, but we raise the warning flag when we see new powers without complementary oversight provisions to ensure accountability. We have raised the issue of accountability and oversight in our submission to Parliament on the review of the *Anti-terrorism Act*, but this particular provision is in the *Security of Information Act*, and we think it merits public reporting on how often it is being used.

In the war on terror, governments have made it clear that they must have the cooperation of the private sector to ensure public safety and the security of the critical infrastructure. From the perspective of this Office, we must also ask whether we can

effectively oversee the private sector and the role it might play in security matters. In the United States, the use of private sector databases and information retention for law enforcement and anti-terrorism continue to attract criticism. We do not know the extent to which such use and retention occurs in Canada, but it is an issue of growing concern to Canadians and we are trying to get answers so that we can respond to their queries and complaints.

In July 2004, Canada began enforcing new marine security requirements under the International Maritime Organization's International Ship and Port Facility Security (ISPS) Code. To further enhance port security, Transport Canada is proposing to introduce a controversial Marine Facilities Restricted Area Access Clearance Program to screen port workers who have access to restricted areas. This screening process will involve collecting significant amounts of personal and potentially sensitive information about as many as 30,000 port workers. Once again, the extent to which such security checks are dependent on private sector information databases is of interest to our Office.

The issue of data-matching is an old one that has pre-occupied privacy scholars and oversight bodies for over twenty years. Technology has advanced, and we really no longer speak of data-matching but rather data-mining. There are many invisible uses of integrated information systems that collect and analyze significant amounts of personal information related to our travel patterns, our financial transactions, and even the people with whom we associate. Many of these systems would be viewed by consumers as immensely positive, were they to know of them and fully understand them because they provide faster loan approvals, instant recognition of credit card theft, and better customer service. However, these systems also now analyze deep reservoirs of personal information in an attempt to find patterns that might suggest that an individual is a security threat, a money launderer or is engaged in financing a terrorist group.

As law enforcement and national security agencies collect more information from more sources about more individuals, the chances increase that decisions will be based on information of questionable accuracy, or that information will be taken out of context.

When personal information is misused, misinterpreted or inappropriately disclosed it can have serious adverse consequences for individuals, families, and even communities. The problem is aggravated when, because of secrecy provisions and a lack of transparency, we cannot find out where the system broke down or on what basis individuals were wrongly targeted.

Outsourcing and Transborder Flows of Personal Information

The transfer of personal information from Canada into foreign jurisdictions (transborder data flows) is another issue as old as privacy legislation itself. Scholars and government policy experts in the 1960s and 70s anticipated greater flows of data in the future as communications technology improved. Whether they could have predicted the enormity of the global flow of data that we see today is another question.

In 2004, the transborder issue became more visible in Canada when a complaint was raised in British Columbia about the outsourcing of health information processing from the B.C. government to a U.S.-linked company operating in the province. The B.C. Government Employees Union alleged that the information would be available to the U.S. government under the expansive search powers introduced in 2001 by the *USA PATRIOT Act*. Although there have been many high profile instances of outsourcing in recent years, with occasional concern about the privacy implications, this appeared to be the first where a specific piece of legislation was singled out as a threat. The B.C. Information and Privacy Commissioner, David Loukidelis, took the step of issuing a call for public comment on this issue, and we submitted a brief in response.

Our submission explained that a company holding personal information *in Canada* about Canadian residents was not required to provide the information to a foreign government or agency in response to a direct court order issued abroad. In fact, the organization in Canada would in many cases violate *PIPEDA* if it disclosed the information without the consent of the individuals to whom the information relates.

However, there would be no violation of *PIPEDA*, for example, if the organization disclosed the information under Canadian legislation such as the *Aeronautics Act* provision that allows Canadian air carriers to disclose passenger information to foreign states.

We also concluded that an organization operating in a foreign country and that holds personal information about Canadians *in that country* must comply with the laws of that country. This means that when a Canadian organization outsources the processing of personal information to a company in the United States or another country, that information may be accessible under the laws of those countries.

The foreign government could of course request the same information through a mutual legal assistance treaty (MLAT) and ask the federal Department of Justice to arrange for Canadian law enforcement agencies to obtain the information from corporations in Canada for them – a system of government-to-government cooperation that predates the *USA PATRIOT Act*.

PIPEDA deals succinctly with transborder data flows in Principle 4.1.3 of the Schedule to the Act. This principle requires that information transferred for processing must be protected at a level "comparable" to that provided by *PIPEDA*. However, when data is held or processed outside Canada there is a loss of control over what a foreign jurisdiction might do with that information and our Office has no oversight authority.

We urgently need to address these flows of personal information so that we can ensure protection of the personal information we send around the world. A series of news reports in early 2005 concerning security breaches by companies in other countries holding personal information about Canadians has further emphasized the importance of devoting attention to transborder flows of personal information.

Research into Emerging Privacy Issues

On June 1, 2004, our Office officially launched a Contributions Program to support research by not-for-profit groups, including education institutions, industry and trade associations, and consumer, voluntary and advocacy organizations, into the protection of personal information and the ways to protect it. The program represented a milestone in the development of national privacy research capacity in Canada. The program is designed to assist our Office to foster greater public awareness and understanding of privacy.

The 2003-2004 Contributions Program had two key priorities. The first was to examine how and to what extent emerging technologies affect privacy. These included video surveillance, RFIDs, location technology and biometrics. Many of these technologies have their most profound impact on privacy when they are in the hands of government, but they often also have significant privacy implications when used by the private sector.

The second priority of the research program related more directly to the implementation of *PIPEDA*, especially since new sectors of the economy became subject to the Act in January 2004. This part of the Contributions Program focused on awareness and promotion of good privacy practices as a key component of responsible commercial behaviour.

The projects that were funded for a total of $371,590 include:

FUNDED PROJECTS		
Canadian Marketing Association **Toronto, Ontario**	**Taking Privacy to the Next Level** *Assess and develop privacy best practices to assist businesses in better handling customer personal information under PIPEDA*	$50,000
École nationale d'administration publique (ENAP) **Quebec, Quebec**	**Study on the use of video surveillance cameras in Canada** *Perceptions, issues, privacy impact and best practices on the use of video surveillance*	$50,000
Queen's University **Kingston, Ontario**	**Location Technologies: Mobility, Surveillance and Privacy** *Trends and stated and implicit purposes of technology with workers, consumers, travelers and citizens*	$49,972
The B.C. Freedom of Information and Privacy Association **Vancouver, British Columbia**	***PIPEDA* & Identify Theft: Solutions for Protecting Canadians** *Gap analysis on weaknesses in personal information management practices that lead to identity theft and policy recommendations for PIPEDA implementation*	$49,775
Universities of Alberta and Victoria **Edmonton, Alberta** **Victoria, British Columbia**	**Electronic Health Records and *PIPEDA*** *Implementation of PIPEDA in the health care sector and application to electronic health records in the primary care setting*	$49,600
University of Toronto **Toronto, Ontario**	**A review of Internet privacy statements and on-line practices** *Evaluation of implementation of PIPEDA and privacy statements on the Internet by companies in the telecommunications, airline, banking and retail sectors*	$48,300
University of Victoria **Victoria, British Columbia**	**Location-Based Services: An Analysis of Privacy Implications in the Canadian Context** *Privacy implications of geographic location-based services — issues raised and major challenges and guidance to encourage compliance*	$27,390
Option Consommateurs **Montreal, Quebec**	**The challenge of consumer identification with new methods of electronic payment** *Current and new proposed methods of identification of consumers for electronic payment and risk factors*	$17,100
Simon Fraser University **Vancouver, British Columbia**	**Privacy Rights and Prepaid Communications Services: Assessing the Anonymity Question** *Justification and feasibility of regulatory measures to eliminate the sale of anonymous prepaid communications services in Canada*	$14,850
Dalhousie University **Halifax, Nova Scotia**	**An Analysis of Legal and Technological Privacy Implications of Radio Frequency Identification Technologies** *Study of RFID technology and privacy impact and legal measures to protect privacy*	$14,603

The projects are to be completed in 2005. We will post links to the research results on our Web site.

Substantially Similar Provincial Legislation

Our Office is required by section 25(1) of *PIPEDA* to report annually to Parliament on the extent to which the provinces have enacted legislation that is substantially similar to *PIPEDA*.

Beginning on January 1, 2004, *PIPEDA* extended to all commercial activities. However, section 26(2)(b) allows the Governor in Council to issue an order exempting certain activities from the ambit of *PIPEDA*. This order can be issued if the province has passed legislation that is deemed substantially similar to *PIPEDA*. The order can exempt an organization, a class of organizations, an activity or a class of activities from the application of *PIPEDA* with respect to the collection, use or disclosure of personal information subject to that legislation that occurs within the province.

The intent of this provision is to allow provinces and territories to regulate the personal information management practices of organizations within their borders while ensuring seamless and meaningful privacy protection throughout Canada.

If the Governor in Council issues an Order declaring a provincial act to be substantially similar, the collection, use or disclosure of personal information by organizations subject to the provincial act will not be covered by *PIPEDA*. Interprovincial and international transactions will be subject to *PIPEDA,* and *PIPEDA* will continue to apply within a province to the activities of federal works, undertakings and businesses that are under federal jurisdiction, such as banks, airlines, and broadcasting and telecommunications companies.

Process for assessing provincial and territorial legislation

On August 3, 2002, Industry Canada published a notice in the *Canada Gazette* Part 1 setting out how it will determine whether provincial/territorial legislation is deemed substantially similar to *PIPEDA*.

A province, territory or organization triggers the process by advising the Minister of Industry of legislation that they believe is substantially similar to *PIPEDA*. The Minister may also act on his or her own initiative and recommend to the Governor in Council that provincial or territorial legislation be found substantially similar. The notice states that the Minister will seek the Privacy Commissioner's views and include those views in the submission to the Governor in Council. The public and interested parties will also have a chance to comment.

According to the *Canada Gazette* notice, the Minister will expect substantially similar provincial or territorial legislation to:

- Incorporate the ten principles found in Schedule 1 of *PIPEDA*;
- Provide for an independent and effective oversight and redress mechanism, with powers to investigate; and
- Restrict the collection, use and disclosure of personal information to purposes that are appropriate or legitimate.

"Substantially similar" provincial legislation enacted to date

Quebec's *An Act Respecting the Protection of Personal Information in the Private Sector* came into effect, with a few exceptions, on January 1, 1994. The legislation sets out detailed provisions that enlarge upon and give effect to the information privacy rights contained in Articles 35 to 41 of the *Civil Code of Quebec*. In November 2003, the Governor in Council issued an Order in Council (P.C. 2003-1842, 19 November 2003) exempting organizations in that province, to which the provincial legislation applies. *PIPEDA* continues to apply to federal works, undertakings or businesses and to interprovincial and international transactions.

British Columbia and Alberta passed legislation in 2003 that applies to all organizations within the two provinces, except for (a) those covered by other provincial privacy legislation and (b) federal works, undertakings or businesses covered by *PIPEDA*. The two laws – both called the *Personal Information Protection Act* – came into force on January 1, 2004.

Using the criteria set out in the *Canada Gazette* notice – the presence of the ten principles found in Schedule 1 of *PIPEDA*, independent oversight and redress and a provision restricting collection, use and disclosure to legitimate purposes (a reasonable person test) – we concluded that the British Columbia and Alberta laws are substantially similar to *PIPEDA*.

For Alberta and British Columbia, the Governor in Council issued two Orders in Council (P.C. 2004-1163, 12 October 2004 and P.C. 2004-1164, 12 October 2004) exempting organizations, to which the provincial legislation applies. *PIPEDA* continues to apply to federal works, undertakings or businesses and to interprovincial and international transactions..

Ontario's *Personal Health Information Protection Act* (*PHIPA*) came into force on November 1, 2004. *PHIPA* establishes rules for the collection, use and disclosure of personal health information by health information custodians in Ontario. Our Office has informed Industry Canada that we believe *PHIPA* as it relates to health information custodians to be substantially similar to *PIPEDA*. Industry Canada has requested comments on a proposed order declaring the Ontario law substantially similar to *PIPEDA*, but an Order in Council had not been issued when we prepared this Annual Report.

Jurisdictional Issues

For most of 2004 – beginning January 1 and ending October 12 – the Alberta and B.C. private sector privacy laws were in force, but had not yet been declared substantially similar to federal law. During this period, both the provincial private sector laws and *PIPEDA* applied. There was concurrent jurisdiction.

In Ontario, *PIPEDA* applied to personal information in the private sector (except for provincially-regulated employees) beginning on January 1, 2004. Ontario's *Personal Health Information Protection Act, 2004* (*PHIPA*) came into force on November 1, 2004. Since November 1, both *PIPEDA* and the Ontario legislation have applied to personal health information in the private sector. As was the case with the Alberta and B.C. private sector legislation until Ontario's *PHIPA* is deemed substantially similar, both *PIPEDA* and *PHIPA* will apply to personal health information in the private sector.

Even a "substantially similar" order may not be broad enough to eliminate concurrent jurisdiction completely. With Ontario, for example, the "substantially similar" order

will not apply to some entities regulated by Ontario's *PHIPA*. The proposed order may apply in respect of the rules governing health information custodians; Ontario's *PHIPA* would therefore be the sole law applying to health information custodians' collection, use, or disclosure of personal information in Ontario.

But the substantially similar order would not apply to third parties who receive personal information from health information custodians. *PHIPA* imposes rules on non-health information custodians only about the use and disclosure of personal health information. *PHIPA* does not regulate other privacy obligations, such as collection, access and safeguards. Therefore, *PIPEDA* would continue to apply to these activities.

One simple way to avoid the work of Commissioners overlapping in areas of concurrent jurisdiction is to reach informal agreements about who handles what. Our Office will work closely with Ontario, as it has with B.C. and Alberta, to ensure that both Acts are enforced in the most seamless way possible.

Even where a "substantially similar" order exists, not all intraprovincial commercial activity will necessarily be covered by the order, and jurisdictional boundaries are not always clear. Complex jurisdictional issues may still arise and require close collaboration between jurisdictions to deal with them.

For instance, Alberta's *Health Information Act* (*HIA*) applies to health service providers who are paid under the Alberta Health Care Insurance Plan to provide health services. On this definition, *HIA* does not cover health practitioners, who provide health services privately. While Alberta's *Personal Information Protection Act* (*PIPA*) does apply to private sector organizations, it does not apply to health information, as defined by *HIA,* which is collected, used or disclosed for health care purposes. Under this regime, the collection, use or disclosure of personal health information by practitioners working in private practice to provide health services seems to have fallen between the cracks; it is not currently covered by either Alberta Act. Hence, such activity is subject to the federal *PIPEDA*.

As a postscript, a bill was introduced in the Legislative Assembly of Alberta in March 2005 to amend Alberta's *PIPA* in favour of bringing the activities of private practitioners who collect, use or disclose personal health information in the course of providing health services clearly within the scope of *PIPA*. This amendment has since come into force and resolved this jurisdictional problem.

Flows of personal information across provincial boundaries

Another aspect of the jurisdictional issue arises with flows of information across provincial boundaries. An Alberta company may disclose personal information to another company in Saskatchewan in the course of a commercial activity. An individual could complain about this interprovincial transaction to our Office. Alternatively, an individual who wants to complain about the disclosure of personal information by the Alberta company could direct the complaint to the Alberta Information and Privacy Commissioner under Alberta's *PIPA*. However, if the individual is complaining about the collection in Saskatchewan of their personal information, he or she may direct the complaint to the Privacy Commissioner of Canada, as Saskatchewan does not have substantially similar legislation in place governing its private sector organizations' activities. Whether the complaint is initiated in Alberta, with our Office, or both, our respective offices will work together to coordinate our work where possible.

Sometimes the jurisdictional issue is entangled. In one case handled by our Office, the complainant worked for an organization in one of the western provinces that has substantially similar legislation. The organization provides disability insurance. The individual applied to the insurance company, located in Quebec, for access to her files. Those files are kept in Toronto. The insurance company responded as if *PIPEDA* regulated the question. Is *PIPEDA* the appropriate legislation or does it fall to one of the provinces?

In another case, an individual worked for a company in one of the western provinces with substantially similar legislation. Through the company, the individual had an employee assistance program (EAP) in Ontario, and complained about a disclosure by the EAP. Because Ontario does not yet have substantially similar legislation, *PIPEDA* would apply in Ontario. But is this an Ontario issue – because the EAP is located in Ontario – or is it within the jurisdiction of the western province under that province's private sector legislation?

Streamlining our approach to jurisdictional issues

Federal and provincial Commissioners are working together to resolve jurisdictional challenges. This process has been collegial, not confrontational. Some individuals may raise jurisdictional matters in the courts but these issues can largely be resolved through discussion. Our goal in every case is to establish as simple and clear a mechanism as possible for individuals and organizations.

One way we have sought to streamline our approach to jurisdictional and related investigative issues is to establish a regional private sector privacy forum with Alberta

and British Columbia. This forum operates under the authority of the federal and provincial Commissioners and seeks to coordinate and harmonize federal and provincial oversight of the private sector in Canada. Senior investigations and legal staff from each of the Commissioners' offices take part in monthly teleconferences and twice-yearly meetings. The forum serves many functions, but among the most important is to develop procedures for determining jurisdiction, transferring complaints and conducting parallel investigations.

Federal and provincial Commissioners have also been working to develop protocols for handling investigations where there may be overlapping jurisdiction. In March 2004, the Privacy Commissioner of Canada sent a letter of understanding to the Information and Privacy Commissioners of Alberta, British Columbia, and a similar letter to the Ontario Information and Privacy Commissioner in January 2005, to confirm discussions about the handling of complaints relating to organizations in those provinces. In part, these letters of understanding set out how our Office would handle complaints both before and after a finding of "substantially similar" occurs in respect of the provincial laws.

These letters of understanding are available on the Privacy Commissioner of Canada's Web site (www.privcom.gc.ca). There is further information about jurisdictional issues, including a fact sheet, on our Web site, as well as on the Web sites of other provincial Information and Privacy Commissioners.

Our Office has had a long-standing relationship with the *Commission d'accès à l'information* (CAI) in Quebec. Quebec was the first Canadian jurisdiction to adopt private sector privacy legislation in 1994. In order to take advantage of the rich body of jurisprudence accumulated in Quebec since 1994, we have commissioned a document to review and summarize Quebec's experience to date.

In order to ensure that this may be as helpful as possible to all jurisdictions, we established an External Editorial Board to assist in the project. The members are:

Madeleine Aubé, General Counsel, Commission d'accès à l'information du Québec
Jeffrey Kaufman, Fasken Martineau, Toronto
Mary O'Donoghue, Senior Counsel, Ontario Information and Privacy Commissioner's Office
Murray Rankin, Arvay Finlay, Victoria
Frank Work, Q.C., Information and Privacy Commissioner of Alberta

This document was published in August 2005 and is available on our Web site.

The Alberta and federal Commissioners have already cooperated in investigating issues that have both federal and provincial elements – see for example, the case summary relating to a joint federal/provincial investigation of misdirected medical information mentioned below in the section on Incidents under *PIPEDA*. In another case, Edmonton police conducting an investigation found information used in determining security clearances for Alberta government employees. The information included credit reports. The aspects of the investigation relating to correction of erroneous credit reports fell to the Alberta Information and Privacy Commissioner, while our Office handled the systemic issue of retention of credit reports.

While the constitutional pitfalls may be numerous, we hope a practical approach to the application of the way personal information protection legislation in Canada will yield, overall, effective privacy protection in Canada.

Evolution of the *Personal Information Protection and Electronic Documents Act*

Statutory Changes

PIPEDA Amendments

The *Public Safety Act, 2002*[1] included two amendments to *PIPEDA*. Their effect is to permit organizations to collect and use personal information without consent for the purposes of disclosing this information when required by law or to government institutions if the information relates to national security, the defence of Canada or the conduct of international affairs.

The Commissioner appeared before the Senate Standing Committee on Transport and Communications on March 18, 2004, to voice her concerns about these amendments.[2] In her statement to the Committee, the Commissioner pointed out that the amendments will allow organizations to act as agents of the state by collecting information without consent for the sole purpose of disclosing it to government and law enforcement agencies. She asked that the changes to *PIPEDA* be dropped, and expressed concern that the wording of these changes was so broad that they could apply to any organization subject to *PIPEDA*, with no limit on the amount of information to be collected or the sources of the information.

The *Public Safety Act, 2002*, without the changes recommended by the Commissioner, came into force on May 11, 2004.

[1] See http://www.parl.gc.ca/PDF/37/3/parlbus/chambus/house/bills/government/C-7_4.pdf

[2] See http://www.privcom.gc.ca/speech/2004/sp-d_040318_e.asp

Amendments to Other Acts

The *Federal Court Rules, 1998* were enacted before *PIPEDA*. Because of this, rule 304(1)(c), which deals with service of a "notice of application", had no reference to *PIPEDA*. Accordingly, in February 2003 our Office's Legal Branch requested an amendment to rule 304(1)(c) to include notifying the Privacy Commissioner whenever an application is filed under *PIPEDA*, as well as when one is filed under the *Privacy Act*.

The *Rules Amending the Federal Court Rules, 1998* came into force on November 29, 2004 and were published in the *Canada Gazette, Part II* of December 15, 2004 as SOR/2004-283. Section 16 of this document amended rule 304(1)(c) to include *PIPEDA* so that the text of that section now reads:

> […] 304(1)(c) where the application is made under the *Access to Information Act*, Part 1 of the *Personal Information Protection and Electronic Documents Act*, the *Privacy Act* or the *Official Languages Act*, the Commissioner named for the purposes of that Act; and […]

2006 Review of *PIPEDA* by Parliament

The Office has been preparing for the upcoming review of *PIPEDA* by Parliament, scheduled to take place in 2006. The year 2006 may appear a long way off from the vantage point of this 2004 Annual Report, but our experience over the past four years in overseeing the application of the law has convinced us that this a good time to begin preparing, and that our Office is also the right place to begin. This Office will be active in developing policy positions to make the operation of the law simpler and more effective for organizations and individuals alike, and to ensure that the fair information practices at the heart of *PIPEDA* are translated into practice.

Like any significant new law, *PIPEDA* has its problems. It is hard to get the first version of any law completely "right", particularly when it is breaking new ground and providing new rights and obligations. We don't have all the solutions for these problems, but we have identified several issues and, in some cases, suggested possible ways to address them.

- **Scope**

  - Does *PIPEDA* deal effectively with employee information? Many of our complaints arise in the context of the employer/employee relationship. The current *PIPEDA* doesn't always fit that relationship. Both the B.C. and Alberta private sector legislation deal with employee information under a separate set of rules.

  - There are clear overlaps between *PIPEDA* and the *Canada Labour Code* and between the mandate of the Office of the Privacy Commissioner and that of labour arbitrators.

  - There remains uncertainty about the distinction, if there is one, between "commercial" activity, as defined in the Act, and "professional" services.

  - Elsewhere in this report, we describe a case that involved sending unsolicited commercial e-mail to a business e-mail address. The legislated definition of "personal information" excludes certain business information such as address and phone number. Should business e-mail addresses also be excluded?

- **Consent**

  - Consent is at the heart of *PIPEDA*. It is also one of the most problematic issues under the Act. For example, must an organization obtain the consent of all its customers when it proposes to disclose their information in the context of a business merger or acquisition? That seems to be what the law requires, but it is not always practicable for several sound business reasons. The B.C. and Alberta private sector laws both deal with this issue head-on and establish rules to protect customer information in these circumstances. Should *PIPEDA* do the same?

- **Oversight**

  - *PIPEDA* gives the Commissioner the powers of an ombudsman – in other words, no power to issue an order or levy a penalty against an organization violating *PIPEDA*. While we think that the ombudsman model works well overall (in fact, even in jurisdictions that have order-making powers on privacy matters, the vast majority of cases are settled without an

order) we are aware that oversight bodies in other jurisdictions have enforcement powers. Parliament may want to consider the advantages and disadvantages of both models in its 2006 review of *PIPEDA*.

These are simply a few of the issues that may need to be addressed in the five year review of the Act.

Complaints

In 2004, *PIPEDA* reached its full extension, to cover all commercial activities in provinces without substantially similar legislation. Over the year, we saw a significant spike in complaints filed under *PIPEDA*: we received 723 complaints between January 1 and December 31, more than double the 302 received in the previous calendar year. The expansion of the Act's coverage appears to be a considerable factor in the increase. Financial institutions were once again the most frequent object of complaints, as one might expect given the vast quantities of personal information that pass through their hands. They were followed by the telecommunications sector, also a front-runner in years past. But complaints in four areas new to us – insurance, sales, accommodation, and professionals – accounted between them for over 25 per cent of the complaints. It remains to be seen whether we will see further increases, as the Act becomes better known to Canadians.

PIPEDA COMPLAINTS RECEIVED BETWEEN JANUARY 1 AND DECEMBER 31, 2004

Sectoral Breakdown

Sector	Count	Percentage
Financial Institutions	212	29.3%
Telecommunications	125	17.3%
Insurance	82	11.3%
Sales	82	11.3%
Transportation	67	9.3%
Health	36	5%
Accommodation	18	2.5%
Professionals	15	2.1%
Services	10	1.4%
Other	76	10.5%
Total	**723**	**100%**

The complaints related to the following concerns:

Breakdown by Complaint Type

Complaint type	Count	Percentage
Use and Disclosure	286	39.6%
Collection	172	23.8%
Access	112	15.5%
Safeguards	40	5.5%
Consent	37	5.1%
Accuracy	22	3%
Correction/Notation	11	1.5%
Fee	12	1.7%
Other	4	0.6%
Retention	6	0.8%
Accountability	9	1.2%
Time Limits	9	1.2%
Challenging Compliance	1	0.2%
Openness	2	0.3%
Total	**723**	**100%**

During the year, we closed 379 complaints. This is an improvement over the previous year, where we closed 278. Nonetheless, in both years we received more complaints than we closed. This presents the Office with the risk of a developing backlog.

We are taking initiatives to address this, including reallocating resources and reviewing the way in which we conduct our investigations. One of the most promising approaches may be a new emphasis, since January 2004, on a category of complaint disposition, "Settled during the course of the investigation." These are cases in which, during the investigation, we have helped bring about a solution satisfactory to all parties.

COMPLAINT INVESTIGATIONS TREATMENT TIMES – *PIPEDA*

This table represents the average number of months it has taken to complete a complaint investigation by disposition, from the date the complaint is received to when a finding is made.

By Disposition

For the period between January 1 and December 31, 2004.

Disposition	Average Treatment Time in Months
Early resolution	2.9
Discontinued	5.6
Settled	7.2
No jurisdiction	7.8
Overall average	8.3
Resolved	10.5
Not well-founded	11.0
Well-founded	11.0
Overall Average	8.3

By Complaint Type

For the period between January 1 and December 31, 2004.

Complaint Type	Average Treatment Time in Months
Fee	3.4
Accuracy	6.4
Consent	6.9
Time Limits	8.1
Use and Disclosure	8.2
Access	8.3
Safeguards	8.4
Correction/Notation	8.5
Collection	8.9
Retention	9.5
Accountability	12.0*
Challenging compliance	12.0*
Overall average	8.3

* The average treatment times for these two complaint types in fact represent one case for each.

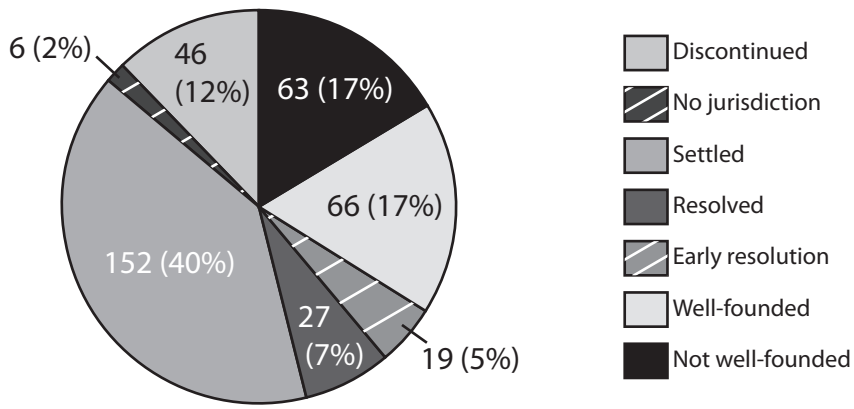
Settling complaints in investigation is not new, but our emphasis on it is. In 2003, settled cases represented two per cent of our completed cases. In contrast, of the 379 cases concluded in 2004, 152 – just over 40 per cent – fell in the "settled" category. This was by far the most frequent disposition of our cases.

This new emphasis on settlement is an important element in dealing with the volume of complaints that we face. Over the course of the year, settlement of a complaint took, on average, less time than any other complaint resolution except discontinuance (where, for instance, the complainant may no longer want to pursue the matter or cannot be located) or early resolution, where the issue is dealt with before any investigation takes place.

If we take the figures for the "settled" and "early resolution" categories, we can see that 45 per cent of our complaints are concluded without the investment of resources entailed in a complete investigation. This is welcome news to an organization facing an increasing workload.

That we were able to settle so many of our cases suggests that organizations and individual complainants welcome the opportunity to resolve complaints expeditiously and pragmatically. This fits well with our ombudsman role; we are in this business, after all, to help people resolve problems. At the same time, of course, we have a responsibility to ensure that the public policy intentions of *PIPEDA* are respected. Our Office, as much as the complainant and the organization, has an interest in any settlement; our view, however, is that enthusiasm for settlement does not mean settling complaints at any cost. Our investigators work closely with the parties in the settlement process to ensure that systemic issues raised in a complaint are addressed.

COMPLAINTS CLOSED BETWEEN JANUARY 1 AND DECEMBER 31, 2004: TYPE OF CONCLUSION

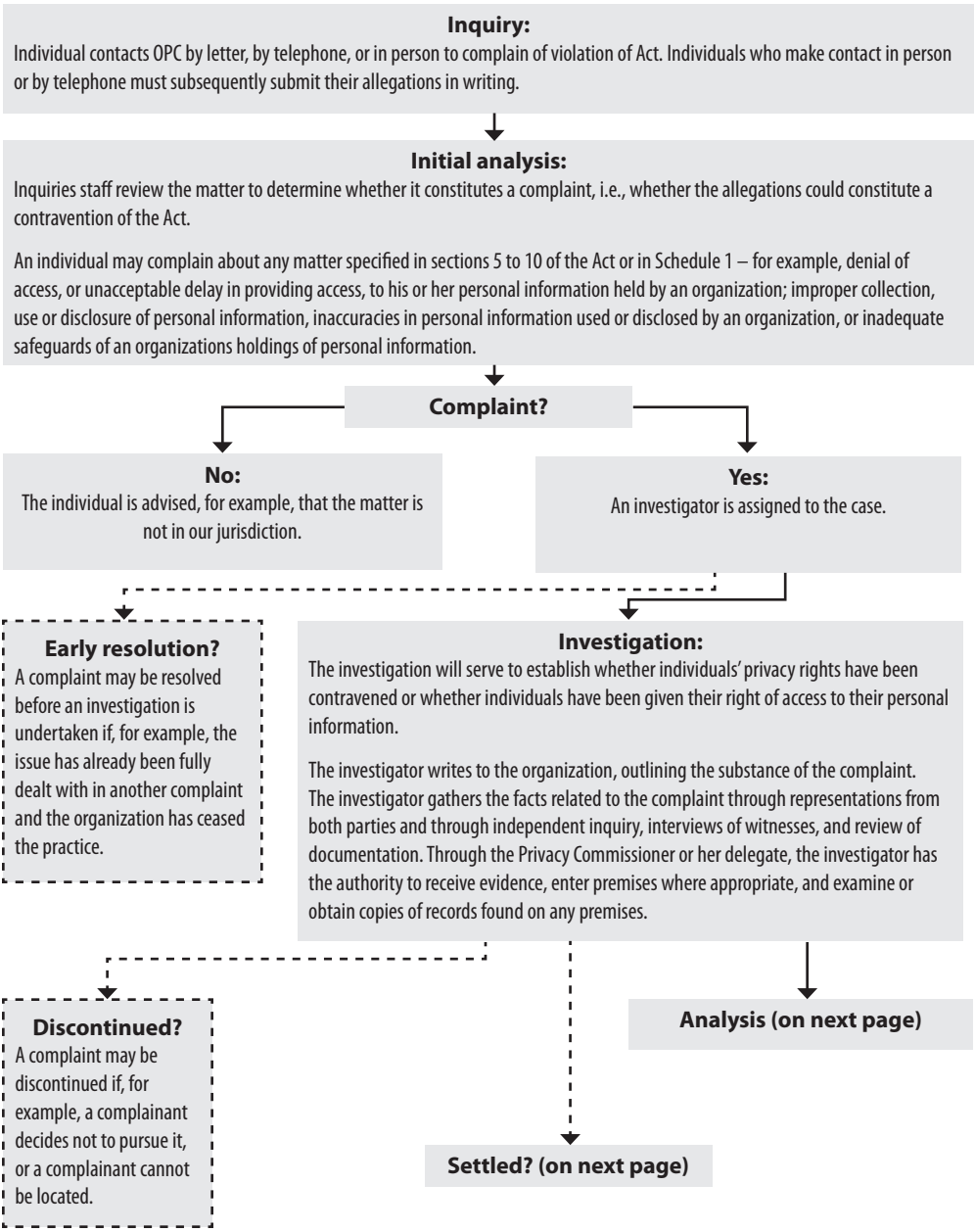


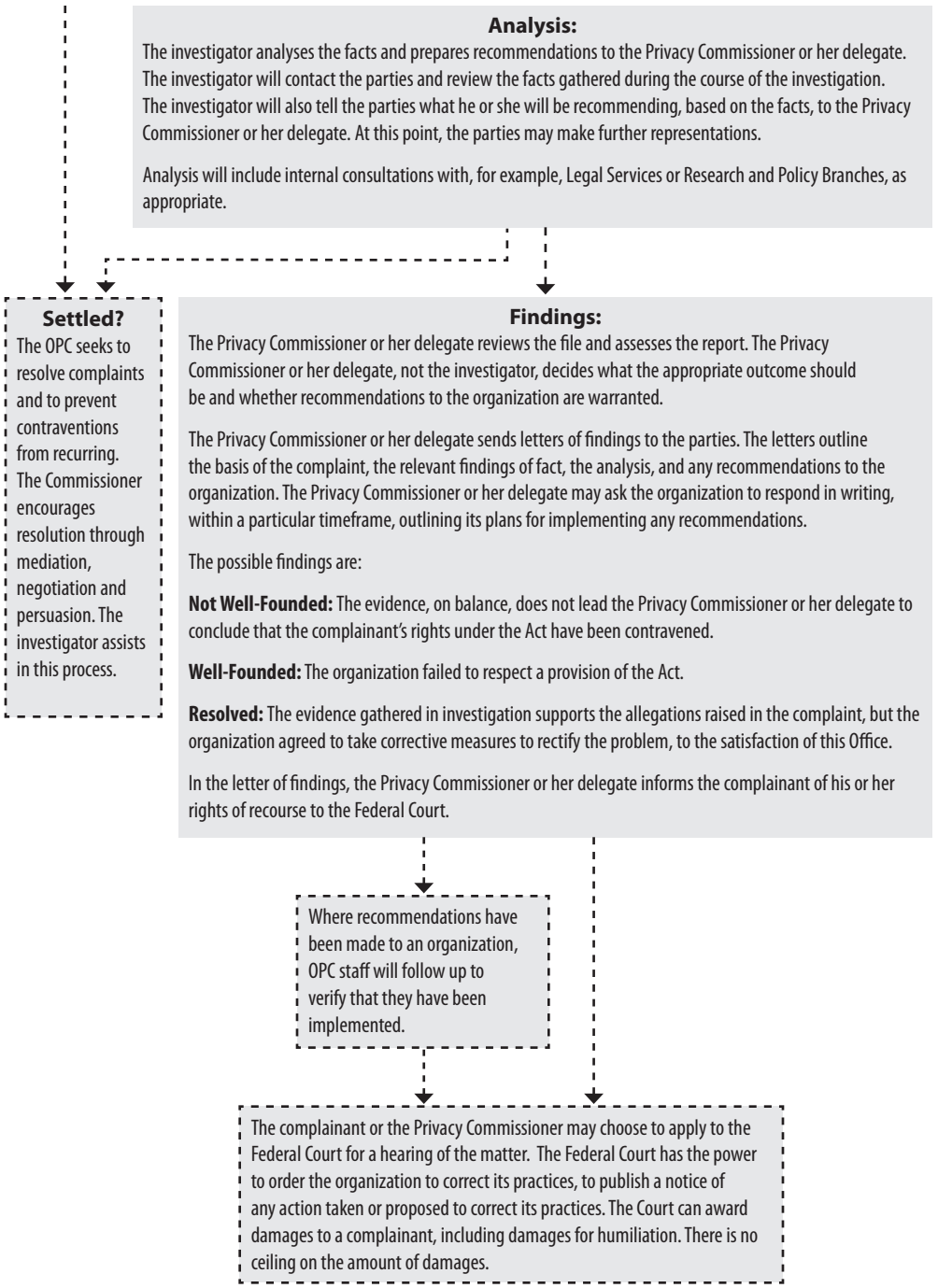
Definitions of Complaint Types under *PIPEDA*

Complaints received in the Office are categorized according to the principles and provisions of *PIPEDA* that are alleged to have been contravened:

- **Access.** An individual has been denied access to his or her personal information by an organization, or has not received all his or her personal information, either because some documents or information are missing or the organization has applied exemptions to withhold information.
- **Accountability.** An organization has failed to exercise responsibility for personal information in its possession or custody, or failed to identify an individual responsible for overseeing its compliance with the Act.
- **Accuracy.** An organization has failed to ensure that the personal information that it uses is accurate, complete, and up-to-date.
- **Challenging compliance.** An organization has failed to put procedures or policies in place that allow an individual to challenge its compliance with the Act, or has failed to follow its own procedures and policies.
- **Collection.** An organization has collected personal information that is not necessary, or has collected it by unfair or unlawful means.
- **Consent.** An organization has collected, used, or disclosed personal information without valid consent, or has made the provision of a good or service conditional on individuals consenting to an unreasonable collection, use, or disclosure.
- **Correction/Notation.** The organization has failed to correct personal information as requested by an individual, or, where it disagrees with the requested correction, has not placed a notation on the information indicating the substance of the disagreement.
- **Fee.** An organization has required more than a minimal fee for providing individuals with access to their personal information.
- **Retention.** Personal information is retained longer than necessary for the fulfillment of the purposes that an organization stated when it collected the information, or, if it has been used to make a decision about an individual, has not been retained long enough to allow the individual access to the information.
- **Safeguards.** An organization has failed to protect personal information with appropriate security safeguards.
- **Time Limits.** An organization has failed to provide an individual with access to his or her personal information within the time limits set out in the Act.
- **Use and Disclosure.** Personal information is used or disclosed for purposes other than those for which it was collected, without the consent of the individual, and the use or disclosure without consent is not one of the permitted exceptions in the Act.

Investigation Process under *PIPEDA*





Note: a broken line (- - - -) indicates a *possible* outcome.

Definitions of Findings under *PIPEDA*

The Office has developed a series of definitions of "findings" to explain the outcome of its investigations under *PIPEDA*:

Not well-founded: This means that the investigation uncovered no or insufficient evidence to conclude that an organization violated the complainant's rights under *PIPEDA*.

Well-founded: This means that an organization failed to respect a provision of *PIPEDA*.

Resolved: This means that the investigation substantiates the allegations, but that the organization has taken or has committed to take corrective action to remedy the situation, to the satisfaction of our Office.

Settled during the course of the investigation: This means that the Office has helped negotiate a solution that satisfies all involved parties during the course of the investigation. No finding is issued.

Discontinued: This means that the investigation ended before a full investigation of all the allegations. A case may be discontinued for any number of reasons — for instance, the complainant may no longer want to pursue the matter or cannot be located to provide information critical to making a finding.

No jurisdiction: This means that the investigation leads to a conclusion that *PIPEDA* does not apply to the organization or to the activity that is the subject of the complaint.

Early resolution: This is a new type of disposition. It applies to situations where the issue is dealt with before a formal investigation occurs. For example, if an individual files a complaint about a type of issue that the Office has already investigated and found to comply with *PIPEDA*, we would explain this to the individual. "Early resolution" would also apply when an organization, on learning of allegations against it, addresses them immediately to the satisfaction of the complainant and this Office.

FINDINGS BY COMPLAINT TYPE

Complaints closed between January 1 and December 31, 2004

	Discontinued	Early Resolution	No Jurisdiction	Not Well-founded	Resolved	Settled	Well-founded	TOTAL
Access	10	3	2	8	5	20	14	**62 (16%)**
Accountability	0	0	0	0	0	1	0	**1 (0%)**
Accuracy	2	1	0	1	0	1	0	**5 (1%)**
Challenging Compliance	0	0	0	0	0	0	1	**1 (0%)**
Collection	10	2	1	25	15	30	13	**96 (25%)**
Consent	2	1	0	0	0	3	1	**7 (2%)**
Correction/ Notation	0	0	0	0	0	1	1	**2 (1%)**
Fee	0	2	1	0	0	2	0	**5 (1%)**
Retention	0	0	0	0	1	1	0	**2 (1%)**
Safeguards	0	0	1	2	0	13	2	**18 (5%)**
Time Limits	0	0	0	2	1	3	1	**7 (2%)**
Use and Disclosure	22	10	1	25	5	77	33	**173 (46%)**
TOTAL (# and %)	**46 (12%)**	**19 (5%)**	**6 (2%)**	**63 (17%)**	**27 (7%)**	**152 (40%)**	**66 (17%)**	**379**

Inquiries

The Inquiries Unit responds to requests for information from the public about the application of *PIPEDA* as well as the *Privacy Act*. The Office receives thousands of inquiries each year from the public and organizations seeking advice on private sector privacy issues.

In 2004, the Office received 12,132 *PIPEDA* inquiries, down from 2003, when we received 13,422. The decline may be attributable to greater understanding of *PIPEDA* among the organizations that are subject to it; in 2003, many organizations were searching for guidance as they anticipated the full implementation of *PIPEDA* on January 1, 2004.

In the course of the year, staff shortages in the Inquiries Unit coupled with the ongoing heavy volume of work have presented challenges. As a result, it was necessary

to reassess the way we respond to public inquiries. We no longer accept or respond to inquiries or complaints by e-mail. We introduced an automated telephone system to answer the public's most frequently asked questions such as those about identity theft, telemarketing and, of course, the social insurance number. And we continue adding information to our Web site to answer the most frequently asked questions. We also temporarily assigned some investigators to help the unit. Lastly, we now invite individuals to telephone during office hours since we can often determine a caller's needs faster and better in person than in a series of e-mails and letters.

INQUIRIES STATISTICS

January 1 to December 31, 2004

The following table represents the total number of *PIPEDA* inquiries responded by the Inquiries Unit.

Telephone inquiries	8,861
Written inquiries (letter, email or fax)	3,271
Total number of inquiries received	12,132

Inquiries Response Times

On average, written inquiries (one quarter of the workload of the Unit) were responded to within three months. Nearly 3/4 of our inquires were received by telephone. The majority of these were responded to immediately; the remainder, which may have required research, were responded to within one to two weeks.

Providing written responses to inquiries is very time consuming and labour intensive. Over the year, the Inquiries Unit accrued a backlog of inquiries which exacerbated the average monthly response times. As we implement new measures, we will monitor the situation to determine whether these changes have resulted in efficiency gains.

Select Cases under PIPEDA

The following cases illustrate the breadth and variety of the cases investigated by our Office. We also posted 29 summaries of findings for 2004 on our Web site.

Medical information divulged through indiscreet choice of words

Even with the best of intentions, and even in such seemingly harmless activities as arranging for a taxi, health professionals must watch what they say to company managers about employees' health situations.

The facts

After completing a substance abuse program, a complainant signed a "last chance" contract as a condition of continued employment with a national transportation company. This contract required him to submit to regular monitoring, as well as random drug and alcohol testing, by the company's health service provider. The complainant was very concerned about confidentiality and for the most part had managed to keep his situation from fellow employees and supervisors.

One day while he was at home on active furlough, he received a call from a nurse, who told him he had to be at the clinic within four hours to give a urine sample. When he told the nurse he had no way of getting there, she said she would call the company and arrange for a taxi. The complainant soon got a call from his supervisor, who told him a taxi would take him "to the lab". The supervisor then asked him whether he was "under contract" – meaning a last-chance contract.

From the supervisor's words, the complainant assumed that the nurse had revealed too much information about him. Angered by what he believed to be a breach of his confidentiality, he later confronted both the nurse and the supervisor in abusive language that the company deemed to be grounds for disciplinary action. An investigation ensued, and the complainant was eventually dismissed for conduct unbecoming an employee (he has since been reinstated).

The supervisor told our Office that he had assumed the complainant's involvement in the substance abuse monitoring program from the nurse's use of the words "test" and "clinic" in his telephone conversation with her. The nurse, on the other hand, told us that she had used the word "appointment", not "test". She claimed to have given the supervisor only the minimum information necessary to make it clear that a taxi was needed and that there was a reasonable basis for the company to pay for it.

At one point, the company's regional superintendent had asked the nurse to document her version of the events relating to the complainant's alleged misconduct. She did so in an e-mail, which was sent to the regional superintendent and later forwarded to two other senior managers. In the e-mail, the nurse stated that the complainant had been required to undergo a "medical test … to assure his continuing fitness for duty" and that he had had to take the test within four hours after her phone call to him. Believing that this information implied his participation in the program, the complainant objected that it had been conveyed to the parties in question.

The complainant's allegation to our Office was that the nurse had inappropriately divulged his personal information to his supervisor in a telephone conversation and to other senior managers in an e-mail message.

Our findings

With respect to the telephone conversation, though it seemed appropriate that the nurse would have had to provide the supervisor with a reason to justify the taxi request, our investigation could not establish what exactly she had said to the supervisor. Whatever wording she used, it either caused the supervisor to conclude, or confirmed his suspicion, that the complainant was in the substance abuse monitoring program.

Similarly with respect to the e-mail, we did not dispute the need to inform senior managers of the complainant's alleged misconduct, but the problem was the information's content. Since the nurse's purpose had been to document the complainant's behaviour, stating that he had been required to go for a medical test within four hours was superfluous. The words "medical appointment" would have been sufficient to explain the need for a taxi.

The company was therefore found to have inappropriately used the complainant's personal information in contravention of Principle 4.3 of the Act. The complaint was well-founded.

Professor objects to getting spammed at the office

Is a person's business e-mail address fair game for marketers?

The facts

At his university office, a complainant received an unsolicited commercial e-mail promoting season's tickets for a professional team's games. The sales agent in question admitted to having obtained the e-mail address from the university's Web site, and he

agreed not to send the complainant further e-mails without his consent. Two weeks later, however, the complainant received a second e-mail solicitation from the same organization, but a different sales agent.

The complainant's allegation to our Office was that the organization had collected and used his personal information without his consent.

The organization did not dispute that it had sent the complainant a solicitation at his office e-mail address on two occasions. The two sales representatives in question were each responsible for a different solicitation "program" – one the "university program", and the other the "lawyer program". The agent responsible for the lawyer program had generated his contact list from the Web site of a law firm with which the complainant was associated. There was no cross-referencing system in place to flag the complainant's previous request that his name be deleted from the organization's marketing lists.

In response to the complaint, the organization removed the complainant's name from all its marketing lists and instituted cross-selling controls to ensure similar treatment of any future objection. The organization has also engaged a new ticketing and sales firm that is more knowledgeable about the requirements of *PIPEDA*.

The view of the university in question is that the e-mail addresses of its staff are business information. The university generally requires its faculty members to agree to have their business e-mail addresses published, in accordance with its business model and its expectation that employees be easily accessible. However, the university also expects a business or organization to obtain permission before contacting faculty for purposes unrelated to promoting the university's interests.

Section 2 of the Act specifically excludes the name, title, or business address or phone number of an employee of an organization from the definition of personal information, but makes no mention of an employee's business e-mail address. Sections 7(1)(d) and 7(2)(c.1) stipulate that an organization may collect and use personal information without the individual's knowledge and consent if the information is publicly available and specified in the regulations.

The regulations applying to these sections state that publicly available information includes an individual's name, title, address, and telephone number appearing in a professional or business directory, listing, or notice that is available to the public, where the collection, use, and disclosure of the personal information relate directly to the purpose for which the information appears.

Our findings

We determined first that, since section 2 does not specify a business e-mail address as being among the excluded types of information, it must therefore be deemed personal information for purposes of the Act.

The question then to be considered was whether the sports organization could rely on the exceptions to consent set out in sections 7(1)(d) and 7(2)(c.1).

The university had listed faculty e-mail addresses on its Web site with the expectation that businesses, organizations, and individuals might contact faculty members to further the university's interests. The sale of season's tickets to a sporting event, however, was not related to that purpose. The same reasoning applied to the Web site of the firm with which the complainant was associated. Moreover, even after the complainant's initial objection, the organization had collected his e-mail address from that other source and used it again for marketing purposes against his explicit instructions.

In sum, we determined that, since the purposes for which the organization had collected and used the complainant's personal information was entirely unrelated to the reason for which the information had been published, the organization could not rely on the exceptions to consent. The organization had thus collected and used the complainant's personal information without his consent, in contravention of Principle 4.3 of the Act. The complaint was well-founded.

Video surveillance as a last resort

Our Office considers video surveillance an extremely privacy-invasive form of technology. The medium's very nature entails the collection of a great deal of personal information, much of which may relate to innocent third parties, may be extraneous, or may lead to judgments about the subject that have nothing to do with the original purpose for collecting the information.

Only as a last resort should companies use video surveillance for investigative purposes – especially in investigating employees away from the workplace.

The facts

Over the course of his employment with a company, a complainant had reported a number of work-related injuries and had eventually requested workplace accommodation for physical limitations. For almost two years, the company attempted to satisfy his accommodation requests, but to no avail. The complainant

grew increasingly dissatisfied with the company's efforts, unwilling to perform his work duties, and resistant to the company's repeated requests for up-to-date medical information.

In view of the complainant's behaviour and lack of cooperation in providing accurate information about his ability to perform certain job-related tasks, the company became increasingly suspicious about the extent of his physical limitations. It eventually requested that he undergo an independent medical assessment, which he initially refused but in the end accepted. The independent assessors concluded that, although the complainant did have physical limitations, there also appeared to be many "non-physical barriers" to his returning to work. The assessors also noted that further functional testing would be unlikely to provide an accurate assessment of the complainant's true functional abilities.

Two months later, while the complainant was on leave, the company hired a private investigator to conduct surveillance on him with a view to determining whether he was being truthful about his physical limitations. After two weeks, the investigator provided the company with a report and eight hours of videotape showing the complainant performing tasks of which he had claimed to be incapable. On this evidence that he had misrepresented the state of his health, the company dismissed him.

The complainant's allegation to our Office was that his employer had collected his personal information by way of video surveillance without his knowledge and consent and had used that information to terminate his employment.

To justify its actions in this case, the company relied on sections 7(1)(b) and 7(2)(d) of the Act. These provisions permit an organization to collect and use personal information without the individual's knowledge and consent if seeking knowledge and consent would compromise the availability or the accuracy of the information and if the collection and use are reasonable for purposes of investigating a breach of an agreement or a contravention of a law.

The company maintained that its decision to conduct video surveillance was the result of consultation among a small team of legal, medical, and industrial-relations professionals, who had determined that such a measure was necessary as a last resort in the circumstances. The company had provided information about the complainant's physical limitations and had instructed the investigator to monitor the complainant's activities over a significant-enough period to provide a complete picture of his capability and establish sound, factual, and irrefutable evidence of his fraudulent behaviour. The

company acknowledged, however, that it had no formal policy or procedures in place to guide managers in such situations.

Our findings

There was no question that the company had collected the complainant's personal information through video surveillance without his knowledge and consent. The issue was whether section 7(1)(b) could apply. However, this exception could not be read in isolation. Among the factors to consider were whether the organization had substantial evidence to support the suspicion that the relationship of trust had been broken, could show that it had exhausted all other means of obtaining the information that it required in less privacy-invasive ways, and had limited the collection to the purposes as far as possible.

On the evidence, our Office was satisfied that the company's purpose of determining whether the complainant was violating his employment contract by misrepresenting the state of his health was based on substantial evidence. Furthermore, the company had made numerous less privacy-invasive attempts to gather the information it had required, but these had mostly met with resistance from the complainant and in the end had not dispelled the organization's concerns. It had also, in taking the step of hiring the private investigator, outlined what information it was seeking and focused the collection of personal information as far as possible.

In sum, the company had had reasonable cause to believe that the complainant was violating his employment contract, and had clearly had difficulty in obtaining accurate information from him with his knowledge and consent. We accepted the company's reliance on sections 7(1)(b) and 7(2)(d) to collect and use the complainant's personal information without his knowledge and consent. The complaint was not well-founded.

Notwithstanding the findings, we recommended that the company formalize the measures it had taken by developing privacy-conscious policy and practices regarding the use of video surveillance. Such policy should consider the following:

- Video surveillance is a last resort and should only be contemplated if all other avenues of collecting personal information have been exhausted.
- The decision to undertake video surveillance should occur at a very senior level of the organization.

- The private investigator should be instructed to collect personal information in accordance with the Act, and should be especially mindful of Principle 4.4 (Limiting Collection).

The company implemented this recommendation.

Cameras in the workplace: The importance of stating purposes

Employees naturally tend to resent the presence of video cameras on the job. However, by being forthcoming about purposes, the employer can often alleviate employees' fears about loss of privacy.

The facts

Implementing a recommendation from a security review, a broadcasting company installed three surveillance cameras at its workplace – one outside and two inside the building. The outside camera captured the parking lot and building entrance, and the inside cameras aimed at the interior entrance and a central corridor.

Several employees of the company lodged complaints with our Office, alleging that the company was using the cameras to collect their personal information, particularly about their behaviour and work performance.

The employer maintained that a memorandum had been posted to inform employees of the camera installation and its true purpose, which was to ensure the safety and well-being of employees by tracking non-employee traffic in and out of the building. The employees, however, were not aware of the memorandum.

During our investigation, the company agreed to inform employees of the purposes for which information collected by the cameras would be used. It also agreed to develop a policy document on the use of surveillance cameras, including the objectives, installation sites, employees authorized to operate the system, time of surveillance and recording, and applicable equity principles.

The company subsequently fulfilled these commitments.

Our findings

The company had not made reasonable efforts to inform its employees and had thereby violated Principle 4.3.2 of the Act.

However, it was also established that the use of such a surveillance system constituted an appropriate means of protecting employees. Since the cameras were not to be used to collect employees' personal information and were not installed in places where there was a reasonable possibility of privacy invasion, it did not seem appropriate that the employer be required to obtain employees' consent for their use. If the cameras inadvertently collected employees' personal information, the employer would not be able to use such information without the employees' consent except in the circumstances set out in the sections 7(2)(a) and (b) of the Act (these provisions apply to legal investigations and emergencies, respectively).

Because of the company's commitments to inform employees and develop a policy document, the complaints were deemed resolved.

Cameras in the workplace: The importance of keeping to reasonable purposes

In this case, our Office supported the use of video cameras to enhance the safety of the workplace, but warned that the unrestrained use of such cameras to monitor employee productivity or to manage the employer/employee relationship would have a chilling effect on employee morale. Employers using cameras for legitimate operational purposes must make every effort to keep to those purposes, and must exercise great care and deliberation in resorting to video surveillance for any exceptional purposes allowable under the Act.

The facts

A railway company uses cameras to monitor train movements and to inform crew members of train locations. The company installed the cameras after a risk analysis, and both the company and the employee union agree that the cameras are needed for operational purposes.

One day the manager responsible for the cameras spotted two on-duty employees getting into a car. He went into his office and used the cameras' zoom capacity to determine that the employees were driving off site. The company subsequently imposed a disciplinary penalty against them for leaving work without permission. One of the two employees grieved the discipline, and the matter was referred to arbitration. Both employees complained to our Office that the company had used video cameras, ordinarily used for operational purposes, to determine that they were leaving company property during regular working hours.

The company argued initially that the Commissioner should exercise her discretion not to issue a report of findings, since the matter was also being dealt with through arbitration. Referring to a recent decision of the Federal Court to the effect that labour tribunals have exclusive jurisdiction over disputes arising out of collective agreements, the company later contended that the Commissioner's Office did not have jurisdiction with respect to such complaints.

The company also argued that the Act allows organizations to collect, use, and disclose information for purposes that a reasonable person would consider appropriate in the circumstances. It denied actually having *collected* the complainants' personal information, since the camera did not record. It described the camera as a "visual aid" that had allowed the manager to follow up on a concern he had already identified without the use of a camera. It maintained that the complainants had had no reasonable expectation of privacy, given that the rail yard was constantly busy with pedestrian traffic. It contended that, given the complainants' suspicious behaviour on the day in question, a reasonable person would have considered it appropriate to use the cameras as a visual aid to determine the direction of their vehicle.

Finally, the company referred to section 7(1)(b) and argued that, should the Commissioner conclude that the camera had indeed collected the complainants' personal information, their consent to the collection and use of the information had not been required since the company was investigating a breach of an employment condition at the time.

Our findings

The Office observed first that the Federal Court decision to which the company had referred was under appeal. We therefore concluded that we had jurisdiction to investigate the complaints.

The Office also declined to exercise its discretion not to deal with the complaints. We referred to the lead role of the Office in determining whether organizations are adhering to the *Act* and in educating both organizations and the public about the Act. We noted that the complaints raised issues that could set a precedent.

We concluded as follows:

- The *Act* does not restrict the definition of personal information to information that is recorded only, but rather clearly defines personal information as including any information about an identifiable individual. The cameras in question do

collect the personal information of employees, and were used to collect the complainants' personal information – that is, the fact that they were leaving the yard during work hours.

- There is no question that the customary use of the cameras to enhance the safety of the workplace is appropriate in the circumstances, as contemplated by section 5(3) of the Act. The cameras were installed after a risk analysis, and both union and management support their use.

- Regarding the appropriateness of using the cameras in the circumstances surrounding the complaints, the company did not present any evidence that unauthorized absences from the workplace were a persistent problem with the complainants or with other employees. The company did not present any evidence of other, less intrusive efforts it had taken to manage unauthorized absences. A reasonable person would not consider it appropriate to use the cameras to manage a workplace performance issue. In the circumstances, the use was contrary to section 5(3) of the Act.

- Where an employer suspects that the relationship of trust has been broken, it can initiate the collection of information to investigate that breach without the consent of the individual. However, the only evidence the company presented to suggest a possible breach in the relationship of trust was that the employees in question had been seen entering a private vehicle. The company admitted that the employees might have been leaving the site with the permission of their immediate supervisor and that the manager who used the camera had only determined *after the fact* that the employees left the work site without permission. Cameras being highly privacy-intrusive, a decision to use them, even in the circumstances set out in section 7(1)(b), must be taken with great care and deliberation. Where there is a less intrusive method of achieving the same result, that method should be the first choice.

We concluded that the complaints were well-founded.

Bank customers required to declare citizenship

This complaint, specifically about a bank's collection and use of personal information, also raised a general concern about whether a bank was putting the requirements of foreign legislation ahead of the privacy interests of its Canadian customers.

The facts

Several account holders complained when their bank sent them a form letter asking them to declare whether or not they were U.S. citizens.

In 2001, the bank had become an indirect subsidiary of a U.S.-based holding company. For purposes of U.S. income tax law, the bank was therefore a "controlled foreign corporation" and was required to comply with applicable U.S. Internal Revenue Service (IRS) regulations on information reporting and tax withholding. Notably, it had to report interest income earned on personal deposit accounts by persons either known to be U.S. citizens or presumed to be U.S. citizens because they had not declared themselves non-U.S. citizens.

The bank mailed an explanatory letter and an account declaration form to all of its personal deposit account holders. The letter indicated that, if an account holder did not declare that he or she was not a U.S. citizen, his or her name and address, as well as the amount of interest income earned, would be disclosed to the IRS. The letter also outlined the purpose for collecting such information and how it would be used.

The complainants alleged that the bank was requiring them to consent to the collection and use of more personal information than was needed to provide account services.

Our findings

As far as the substance of the complaint was concerned – that is, the collection and use of personal information – our Office was of the view that the bank was *not* putting foreign legislation ahead of Canadian customers' privacy interests.

As a controlled foreign corporation, the bank was required to comply with applicable IRS regulations. Notably, it had to report the interest income earned by U.S citizens, but did not have to report that earned by non-U.S. citizens. To ensure provision of accurate information to the IRS and to protect the personal information of non-U.S citizens, the bank had sent the account declaration form to its account holders, asking them to declare whether they were U.S. citizens or non-U.S. citizens. This was a

reasonable request, for purposes that a reasonable person would consider appropriate in the circumstances, as contemplated by section 5(3) of the Act.

Furthermore, since the bank had identified its purposes and limited the collection of personal information to those purposes, it was also in compliance with Principles 4.2 and 4.4 of the Act.

On this account, the complaint was not well-founded.

Quebec company's information-sharing notice not clear enough

If an organization intends to share customers' names and addresses with third parties for marketing purposes, it must let the customers know, but not just in any old way. Principle 4.3.2 of the Act puts an onus on organizations to make a "reasonable effort" at both bringing purposes to the attention of customers and presenting them in a way the customers can understand.

The company in this case did make an effort, but the question for our Office was, "How reasonable?" The case also has an interesting jurisdictional aspect relating to a transitional provision in *PIPEDA*.

The facts

Some months after purchasing beauty products by telephone from a company in Quebec, a complainant had requested in writing that the company remove her name from its mailing list. Several weeks later, in October 2002, her name was still on a list that the company had recently sent to an Ontario consultant hired to trade and rent its customer lists to other organizations.

The complainant's allegation to our Office was that the company had sold her name and address to third parties in Ontario without her consent. She also raised concerns about the company's procedure for allowing customers to opt-out of third-party marketing.

The company explained that the continued appearance of the complainant's name on the mailing list was the result of normal administrative delay in processing the opt-out request. The company also pointed out that its practice of sharing lists of customers' names and addresses with other businesses, as well as its procedure for having one's name removed from the lists, was set out in a document made available to customers in mail-outs and catalogues.

Our investigation confirmed the existence of this document. However, the dominant title on the document was "Money Back Guarantee", and the notifications in question appeared under the headings "Help Us Conserve Natural Resources" and "Beauty Care is Personal".

The company removed the complainant's name from its mailing lists. As a result of our Office's intervention, the company changed its promotional materials to make them more understandable. Customers can now simply check a box on the purchase order to prevent the sharing of their information. The company also set up a privacy committee, which has adopted a policy on the protection of customers' personal information and is developing a similar policy for all employees.

The complainant expressed satisfaction with the company's removal of her name from its mailing lists and with the changes it made to its promotional materials.

Our findings

Under section 30 of *PIPEDA*, a transitional provision that remained in force for the first three years, the *Act* applied until 2004 to personal information that an organization disclosed outside the province for consideration. Even though the company in question resides in Quebec, our Office agreed to investigate the complaint under the *Act* because the complainant alleged that the company had disclosed her information outside that province for consideration in 2002 – that is, while section 30 was still in effect.

At the time of the complaint, the company's promotional materials contained a notice stating that customers' names and addresses were shared with third parties and laying out a procedure for customers to remove themselves from the lists. However, the notice and the removal procedure lacked clarity. The information was hidden away under headings that were not representative of the contents. The notice did not constitute a reasonable effort by the company to ensure that individuals were clearly informed about the secondary disclosure purposes for which the personal information was collected. Therefore, the company was in contravention of Principle 4.3.2 of the Act, and the complainant's consent was not meaningful.

However, since the complainant was satisfied with the outcome of the investigation, our Office concluded that the complaint was resolved.

Satellite television company alleged to have monitored customers' viewing habits

When told to keep his satellite system continuously plugged in, the customer assumed the worst of the company. But was its intention really to invade his privacy?

The facts

A complainant believed that his satellite television provider was keeping track of what programs he watched. He was convinced that, in requiring customers to keep their telephone lines continuously plugged into receiver boxes, the company's sole purpose was to monitor their viewing habits.

His allegation to our Office was that the company was indiscriminately collecting and using his personal information that it gathered through his telephone connection.

The company confirmed that it does require its satellite customers to keep their telephone lines continuously plugged into the receiver boxes it supplies, but for purposes of billing for pay-per-view and preventing piracy, not monitoring viewing habits. The company explained, and our Office confirmed, that it was not possible with its current technology to monitor any programming other than pay-per-view, since the satellite transmission is one-way only and the receiver boxes are not capable of recording other programs. The only information the company collects is about the packages a customer has purchased and transactions that customers initiate electronically through the pay-per-view ordering system, and it collects such information only for billing purposes.

As for preventing piracy, our Office examined the technical aspects and was satisfied that continuous connection with a live telephone line is effective for this purpose. Despite the company's explanation, the complainant continued to believe it was collecting more information than necessary to prevent piracy, but he could not provide any evidence to support his belief.

Our findings

The company's purposes of billing for pay-per-view and preventing piracy were ones that a reasonable person would find appropriate in the circumstances.

There was no evidence that the company was collecting information on subscribers' viewing habits from the telephone connection. Information on program packages and other billing information was collected at the time of purchase, not through a telephone line.

Although the company did collect pay-per-view information through the connection, it did so to meet one of its stated purposes – billing the customer. The continuous connection was also effective in fulfilling the company's other purpose – preventing piracy.

In sum, the company was collecting and using customers' personal information to fulfil reasonable purposes and was not collecting or using excessive information for those purposes or any others. The company had complied with Principles 4.4 and 4.5 and section 5(3) of the Act. The complaint was not well-founded.

Bank discloses client's mortgage history to her ex-husband's lawyer

"He-said, she-said" cases can be devilishly difficult to adjudicate. In this one, fortunately, a paper trail largely supported what "she said".

If there's a lesson for bank staff in this situation, it's that, when dealing with lawyers, you had better make sure at the outset whose side they're on.

The facts

While attending a court hearing regarding her support arrears action, the complainant had received copies of three documents entered into evidence by her ex-husband's side: the deed for her home, a land registry office listing of mortgages registered against her home, and a mortgage transaction history.

The complainant believed that the manager of financial services at her bank had given these documents, as well as other information about her financial affairs, to her ex-husband's lawyer on a certain date. She also held that the manager had admitted as much to her and had asked her not to tell the court about his inappropriate disclosures.

Her allegation to our Office was that the bank had disclosed her personal financial information to her ex-husband's lawyer.

With respect to the deed and the mortgage listing, our investigation determined that the bank manager would not have had access to these documents on the date in question. Moreover, such documents are publicly available at the land registry office, and evidence indicated that the lawyer had already obtained these two documents from that office when he visited the bank manager.

However, with respect to the mortgage transaction history, documentary evidence established that the lawyer had prepared and sent a summons to the bank manager,

had then written to the manager to make an appointment for the date in question in order to review the documentation demanded on the summons, and had, on the day before the date in question, acknowledged receipt of a reply from the manager. Furthermore, the copy of the complainant's mortgage transaction history that the lawyer submitted to the court had been printed from the bank manager's computer and was dated the same day as his reply to the lawyer.

The manager did not admit to printing the document, providing it to the lawyer, or asking the complainant not to reveal his disclosures. Nevertheless, he did admit that, at first contact, he had mistakenly assumed that the lawyer was acting on the complainant's behalf.

Conceding that the complainant's mortgage transaction history had been disclosed to the complainant, the bank issued her an apology.

Our findings

The deed of land and the mortgages registered against the complainant's home were determined to be publicly available information obtainable through the land registry office. Such information could be disclosed without knowledge and consent, pursuant to section 7(3)(h.1) of the Act. In any case, it appeared that the lawyer had already gathered this information before approaching the bank.

The mortgage transaction history, however, was determined to have been printed from the bank manager's computer on the same date he had written to the lawyer. Our Office believed, and the bank agreed, that the document had been disclosed without the complainant's consent. The complaint was well-founded.

Select Settled Cases under *PIPEDA*

In January 2004, the Office of the Privacy Commissioner introduced a new category of complaint disposition, "Settled during the course of the investigation". A settled case is one in which, during the actual complaint investigation, the Office has helped negotiate a solution satisfactory to all parties, including the Office itself. Of the 379 cases concluded in 2004, 152 (or 40 per cent) fell under the "settled" category.

The following are summaries of several representative settled cases.

Laptop lapse by computer store

When a computer store did not fix a complainant's laptop within a certain time limit, it provided her a new one. Some time later, she was surprised to get a call from a complete stranger, telling her he had just bought a laptop containing her personal information.

As it turned out, the store had repaired the complainant's original computer, and an employee had put it up for resale without examining its contents. The store was able to retrieve the laptop and return it to the complainant. The company also significantly improved its safeguarding policy and practices. Notably, employees now have to not only ensure, but also document, that personal information is completely erased from the hard drives of all computers returned to any of the company's stores across Canada. The company also agreed to implement similar safeguarding procedures for other electronic devices that it sells.

Phone and e-mail procedures: One security concern leads to another

Whenever customers pay their bills through the telecommunications company's interactive voice response system, the system reads back the credit card number and expiry date that the customer entered via the telephone keypad. A complainant was concerned that anyone intercepting a cell phone call could obtain these numbers. But when he e-mailed to express this concern, the company's e-mail reply repeated the account number and personal identification number that he had entered to gain access to the secure account information system. The complainant was now concerned that this sensitive personal information, too, could be available to anyone else who might gain access to the e-mail.

The company reviewed its practices and agreed that it was not necessary to automatically reproduce in e-mail responses the personal data required for accessing the secure site. It has now ceased to include message threads in its e-mail responses to customers. As for the original concern, however, the company pointed out to the complainant that several payment options were available to customers and that, even if credit card numbers were no longer to be read back, customers who chose to pay bills by cell phone would still risk interception of the numbers as they were keyed in.

Insurance company fails to heed client's warning

On two distinct occasions, a complainant had warned his insurance company that unauthorized persons might try to obtain information about life insurance policies he held on his nephews. Despite these warnings, and despite the company's authentication and flagging procedures in place at the time, information was later disclosed to an unauthorized party against the complainant's express wish.

The complainant and the company reached a settlement. As a result of the complaint, the company has greatly improved its authentication and flagging policy and procedures and has incorporated the new policy in its training for customer service representatives.

Transportation company eliminates excessive database information

An employee of a national transportation company complained about lack of security of personal information in an automated crew management system. Specifically, he was concerned that unauthorized personnel, especially union representatives, could gain access to such employee information as date of birth, social insurance number (SIN), health information, wage rates, and vacation eligibility.

In fact, it was not possible for union representatives to gain access to some of the information of concern to the complainant. Moreover, at the time of the complaint, the company had already identified date of birth and the SIN as privacy concerns and was in the process of adjusting its crew management system accordingly. In the end, the company agreed also to remove employees' health information from the system.

Personal information circulates on hundred-dollar bill

When a complainant offered a $100 bill for a gasoline purchase, the service station attendant asked for identification. According to the complainant, the attendant then wrote his name and driver's licence number on the bill itself, explaining the practice as "company policy" due to the high incidence of counterfeit bills. On reflection after the incident, the complainant worried that his personal information would thus be available to anyone handling the bill for as long as it remained in circulation.

The company does make a policy of having station staff temporarily record identification for customers tendering $100 bills, but stipulates that the recording be done on separate tracking sheets, not on the bills themselves. Although the attendant

knew the correct procedures and did not admit to having written on the bill, the company took responsibility in the matter, apologized to the complainant, and reached a settlement with him. The company also reminded all its service station employees of the proper procedures for handling personal information.

Pharmacy makes consent procedure more customer-friendly

A complainant objected that his pharmacy was requiring him to sign a consent form before giving him his medication. It seemed to him that the form authorized overly broad disclosure practices, and he was concerned that his personal information might be disclosed for marketing purposes. He also worried that he would not be able to obtain the medications he needed if he refused to sign.

In fact, the pharmacy chain does not disclose customers' personal information to other organizations for marketing purposes. Nevertheless, in response to this and several other complaints about its consent form, the company decided to change the language of the form, making it simpler and easier for customers to understand. The company also implemented a new policy and practice whereby clients who are uncomfortable signing a consent form can provide oral consent to the company's privacy practices, as explained to them by the pharmacist.

Another pharmacy clarifies consent policy

A customer alleged that, even after he had withdrawn his consent to collection, use and disclosure practices, his pharmacy had disclosed personal information to his doctor. He also complained that the pharmacy refused to fill his prescriptions because of his consent withdrawal.

The pharmacy's only record of the complainant's withdrawal of consent was dated some time after the alleged disclosure. After recording the withdrawal, the pharmacy had indeed refused to fill the complainant's prescriptions, but had explained to him at the time that it was company practice not to fill prescriptions for persons who had revoked consent to the collection, use, or disclosure of personal information within the patient's circle of care. The company's privacy literature, however, explained such practice only in general ways, indicating that withdrawal of consent could adversely affect "service". The company agreed to amend its privacy policy to specify that prescriptions could not be filled unless consent was provided.

Insurance company welcomes complainant's suggestions about consent form

An applicant for life insurance complained that the insurance company was requiring her to consent to overly broad collection, use, and disclosure practices.

Our Office facilitated a teleconference with the complainant and the company. The company explained to her its actual practices, which were consistent with the Act. Though the complainant was satisfied with this explanation, the company acknowledged that she had raised a number of important issues about the precision and clarity of its consent language – issues it was taking into account in a current review. The company agreed to send the complainant a copy of its revised form and invited her to make further comments, to be considered in subsequent reviews.

An unappreciated birthday announcement

An employee of a foreign airline's Canadian office complained when a secretary e-mailed his date of birth to fellow employees, despite his previously expressed objection to the local tradition of announcing birthdays. He also alleged that the airline had disclosed his home address and telephone number on lists provided to employees having no need to know such information, and that these lists were not properly safeguarded.

At the suggestion of our Office, airline officials met with the complainant to address the issues he had raised. In the end, the airline resolved the issues to the complainant's satisfaction – notably, by ceasing the practice of announcing birthdays and by taking measures to safeguard and limit access to documents holding employees' personal information. The airline also held privacy briefing sessions with management and administrative staff and posted a privacy notice on an internal bulletin board accessible to all employees.

Department store neglects to identify itself as source of mail-out

Two individuals complained after receiving a mail solicitation ostensibly from a credit monitoring company. Though appearing to have been sent from the company itself, the solicitation indicated an association with a major department store chain with which both complainants held accounts. They both assumed that the chain had given their personal information to the credit monitoring company without their consent. In one case, the complainant had expressly withdrawn consent for the chain to use his personal information for any purpose other than directly conducting business with him.

In fact, the chain had not given personal information to the company. Rather, it had itself had the mail-out notice prepared and sent out, but under the other company's name. The chain's published policy is to rely on opt-out consent for disclosures of customer information to affiliated companies of its own "brand", but it does not disclose to non-affiliated third parties such as the credit monitoring company. In the case of the complainant who had previously withdrawn consent, the chain explained the mail-out as the result of a normal administrative delay in processing his opt-out request.

The chain agreed, however, that it had done a poor job in the marketing campaign and should have clearly indicated that it was acting on the other company's behalf. It also apologized to the complainants, agreed to revise its account application policy to allow new customers to opt-out at the time of enrolment, and undertook a review of its suppression mechanisms to ensure consistency of the opt-out process across all its companies.

Non-consensual disclosures to a union

Several employees complained that a transportation company had forwarded a list of participants in its voluntary separation program to the employees' union without their knowledge and consent. The list included the employees' SINs.

Admitting its mistake, the company changed the application form for severance packages to exclude the requirement for the SIN and to include a statement asking applicants to consent to the release of their personal information to the union.

Two cases of envelope mix-ups

In one case, a complainant had received a student loan notice from her bank – about someone else's loan, not hers. She worried that this other person might be in possession of the same personal information about her as she had received about him – specifically, name, address, SIN, loan number, and loan amount. The mix-up had been the result of simple human error in filling envelopes. No other persons in the complainant's mailing group had received a wrong notice, and the person whose information she had received had not received hers, since he had moved and not left a forwarding address. The bank reached a settlement with the complainant and advised its student centre staff to exercise greater diligence in mailing material to customers.

In the other case, a complainant had received another person's airline ticket in the mail, and that other person had received that of the complainant. The tickets contained personal information in the form of travel itinerary, home address, and telephone number. This mix-up was also the result of human error, in that an airline employee had inadvertently reversed the tickets and envelopes for two phone ticket purchases. The airline apologized to the complainant and reached a settlement with him. It has also reminded its employee to exercise due diligence and care in sending material out to customers.

SINs on display: An overly revealing envelope window

A pension fund administrator complained that transfer documents he regularly received from a certain bank displayed clients' SINs in the window of the envelopes. Readily acknowledging the problem, the bank instituted a new process whereby both the SIN and the account number were moved from the address portion of the document to an area not visible through the envelope window.

Collection agency corrects inaccurate information

A complainant had been having difficulty securing credit because of inaccurate information held by a collection agency. He had paid off a debt several years earlier, but the agency had not reported the payment to the credit bureaus. After several unsuccessful attempts through his lawyer to have the information corrected, the complainant approached our Office.

The collection agency had no record of the lawyer's letters. However, after receiving a notice from our Office and yet another letter from the lawyer, the agency looked into the complainant's file, confirmed the debt payoff, and notified the credit bureaus, which amended the complainant's credit files accordingly.

Car dealership refuses credit on erroneous information

A complainant knew her credit rating was good. When a car dealership turned down the credit application she had cosigned with her son, she wrote the company to ask for the information on which the credit decision had been based. Two months later, she wrote again. Still having received no response after three months, she filed her complaint.

As it turned out, the decision had been based not on her own credit rating, but on her son's. The company had not responded to her access requests because it was unsure

how to do so without disclosing the son's personal information. At our suggestion, the complainant wrote the company another letter, signed by both her and her son and stating that they consented to the disclosure of information about themselves to each other. The company finally responded, indicating that the credit application had been declined because of a bankruptcy entry on the son's credit report. The complainant wrote the company again to advise that the report was in error – the son had not in fact declared bankruptcy, but rather had made a proposal with his creditors and had satisfied its terms more than a year earlier. The company replied that it would use a current credit report for any future application. The complainant was satisfied just to finally have a response from the company.

Meanwhile, the son had managed to lease a car from another dealership under the same brand. In the complainant's words, someone at that dealership "clearly *did* know how to read the credit information."

Companies Getting Their Act Together

A lending institution

A woman complained that a lending institution had disclosed information about her delinquent account to her uncle without her consent.

The complaint had merit, and the institution adjusted the complainant's outstanding account and agreed to send her a letter of apology. During the investigation, our Office noted that the organization had no privacy policies or practices in place. At our urging, it struck a privacy committee, instituted privacy training for employees, and reminded staff to limit the amount of information disclosed in recovering debts.

A trucking company

A former employee alleged that a small, family-owned interprovincial trucking company had disclosed personal information to a creditor without his consent.

There was no evidence to support the allegation, and it came to light that the complainant himself had provided some of the information to the creditor. Nevertheless, our investigation had the effect of educating the company about its obligations under the Act. The company subsequently implemented a written privacy policy, appointed a privacy officer, reviewed its practices regarding employee personal information, and took steps to train employees in proper information handling.

Incidents under *PIPEDA*

Over and above individual complaints, incident investigations are conducted into matters of improper collection, use or disclosure of personal information that come to the attention of our Office from various sources, including the media, and directly from organizations themselves. They often highlight a systemic issue, or an unrecognized privacy breach that needs to be fixed as soon as possible. Usually, victims are not identified and a formal written complaint has not been filed with the Office.

Last year, the Office completed six incident investigations. Three cases of interest are described below.

Disclosure of credit reports to fraudster

In March 2004, a credit reporting agency issued a statement that, as a result of a security breach, the credit reports of some 1400 consumers had been disclosed to criminals posing as legitimate credit grantors. The media picked up the story.

The agency's security staff discovered the breach and notified the RCMP, which launched an investigation. It appeared that a single individual committed the breach, and had not been caught as of May 2004.

The agency confirmed that 1398 consumers were affected – 1145 in British Columbia, 163 in Ontario, and 90 in Alberta.

The information disclosed in each credit report was the consumer's name, address, previous address (if available), date of birth, and payment history, as well as creditor names and account numbers, public record items, and collection activity. The agency confirmed that the disclosed information did not include social insurance numbers or bank account particulars.

By way of corrective action, the agency:

- Notified all affected individuals by registered mail;
- Encouraged them to call the agency and review the contents of their credit files;
- Placed an alert message reading "Lost or stolen identification" on their credit files so that creditors would be prompted to ask for additional proof of identity;
- On being contacted by an affected individual, requested that the other major credit reporting agency place a similar message on its credit file for that individual; and

- Offered the affected individuals a free one-year subscription to a credit monitoring service (most accepted this offer).

To address the security problem, the agency put certain fixes in place on its systems. These fixes appear to be effective, in that the same perpetrator attempted to access credit files in the same way a second time, but was blocked.

Since the incident, there have been a small number of fraud attempts involving the disclosed information, but in each case the alerts prevented the fraud.

Joint federal/provincial investigation of misdirected medical information

In July 2004, a newspaper article reported that a married couple had been receiving faxes from various sources containing other parties' personal health information. The couple alleged that they had so notified some of the sources in question, but had continued to receive more of the same.

The Office of the Information and Privacy Commissioner for Alberta originally investigated this incident. That Office determined that, though provincial privacy legislation applied to some of the information transmitted in the faxes, it also appeared to fall under federal jurisdiction under *PIPEDA*. The Office of the Privacy Commissioner of Canada therefore undertook its own investigation in concert with the Alberta office.

The couple in question manages an apartment building. The fax line they use in managing the property has a telephone number similar to that of a health care provider, but with two of the digits reversed. The couple received ten faxes misdialed to their number.

Our Office concerned itself with seven of the ten errant faxes (the other three fell under provincial jurisdiction). Two of the seven were found not to contain personal information. For the remaining five, the sources were determined to be three separate and distinct companies.

The first is a company that owns and operates medical laboratories. The fax it misdirected to the couple's number contained the personal information of an individual who had undergone medical testing by the company. The information included the person's name, age, height, smoking habits, and patient number, as well as a diagnosis and specific medical test results.

In its own internal investigation, this company was unable to determine which of its employees had keyed in the erroneous telephone number, but it did manage to narrow the possibilities down to five. All five employees were aware of the confidential nature of the medical records and the need to ensure against disclosure, and all five had signed a confidentiality oath at the time they were hired, but had not been required to renew the oath since then.

For regularly used fax numbers, this company has now equipped its computers with an electronic automated fax function which checks numbers entered into the system for accuracy before use. For numbers used one time or infrequently (i.e., not programmed into the automated system), the company has provided its employees with a set of instructions to ensure accuracy of transmission. At the Office's request, the company also undertook to revise its policies and procedures to ensure full compliance with the provincial *Health Information Act* and *PIPEDA*.

The second source of the errant faxes is a waste disposal company whose employees are required to have annual medical examinations. This company misdirected three faxes, one of which predated the full implementation of *PIPEDA*. The other two were completed health information forms about two employees who had just had the annual examination. However, it was not the company that had misdirected the faxes, but rather the employees themselves, each misdialing the number in the same way. For privacy reasons, it is the company's practice to have its employees send in their own health forms.

This company has now put the correct fax number on speed dial so that its employees may continue to send in their own health forms with much less risk of inadvertent disclosure. The company also has a privacy officer and acceptable privacy policies in place.

The third company involved is a medical consulting firm whose doctors review and assess new medical consultants' reports on patients. The single misdirected fax in this instance contained such a report that one of the company's doctors had reviewed. The doctor in question had not sent the fax himself, and the company was unable to determine who had. The faxed report contained the patient's name, age, and occupation, as well as a detailed medical history relating to an injury she had sustained in a motor vehicle accident. It also contained information about her children.

When the couple had called to notify this company of the errant fax, a company employee had instructed them to destroy it. In hindsight, the company realized that

this instruction was inappropriate, in that the employee had had no way of confirming that the document was destroyed or whether it was destroyed by a suitable method. The company has arranged to have errant faxes picked up by courier in future. It has also taken procedural measures to have all facsimile numbers verified before transmission and to have any future incidents reported to management.

At our Office's request, this company has informed the patient in question of the disclosure of her personal information, has appointed a privacy officer and has sent the Office copies of its revised fax transmission procedures and privacy policy.

The Office made the following recommendations to the first and third of the companies:

(1) That the companies implement and follow the Office's recommendations on the transmission of faxes, as set out in the fact sheet entitled "Faxing Personal Information";

(2) That the companies implement measures to ensure that faxes are recovered if reported as misdirected;

(3) That the companies notify individuals when their personal information has been inadvertently disclosed as a result of a misdirected fax; and

(4) That the companies have their employees sign confidentiality/privacy agreements, update such agreements yearly, and review company privacy policies.

Credit card receipts blowing in the wind

In August 2004, a newspaper reported that two women had observed credit card receipts blowing about in their neighbourhood and had traced the source to a local gas station, where old receipts had been placed in a dumpster.

The station owner admitted to having disposed of various receipts from 2002 in the dumpster, but claimed he had been unaware of the privacy implications of this action. He said that the receipts had been contained in boxes, placed in the middle of the dumpster, and covered by other garbage. He suspected that neighbourhood children had climbed into the dumpster and opened the boxes out of curiosity, thereby exposing the receipts to the elements.

He stated that, on being informed of the problem by a reporter on the day in question, he had taken immediate action to gather up the loose receipts, clear the dumpster of

those remaining, and have all the receipts shredded. Though he maintained that he and his employees had been able to find few loose receipts to gather, our investigation established that the two original women witnesses had previously gathered three bags and one boxful of the loose receipts in vicinity of the gas station.

The witnesses turned in the receipts they had gathered to our investigator. A sampling of 1,897 of these documents indicated that most were debit card receipts with no identifiable personal information, and many others were credit card receipts showing a past expiry date. However, a further 151 credit card receipts showed valid (unexpired) account numbers, 16 showed valid account numbers as well as handwritten licence plate numbers, three showed valid account numbers as well as handwritten driver's licence numbers, and one showed both a driver's licence number and a plate number.

The owner gave assurances that he was now aware of his responsibilities under the *Act* and had initiated policies to keep all receipts only for the required six months and then have them destroyed securely by means of shredding.

The owner leases the station from an energy company. In an interview, the company's district manager initially took the position that the company's privacy policy did not apply to its leased establishments. He later conceded, however, that leaseholders were generally expected to adhere to the company's policies and procedures and that the company did customarily provide training and information sessions for leaseholders. But neither he nor the station owner could recall any such information session about privacy policy. The district manager indicated that the company would provide privacy information sessions for leaseholders in the near future, and that he himself would review privacy policies in his monthly meetings with the leaseholders in his district.

Our Office made two recommendations:

(1) That the company ensure that privacy policies are in place at all of its leased locations and examine the option of putting requirement to that effect into its lease agreements; and

(2) That the privacy policies for the company's gas stations contain procedures for the proper retention, safeguarding, and disposal of all personal information collected.

Following Up on *PIPEDA* Case Investigations

In 2004, we introduced a formal procedure of systematic follow-ups to complaint investigations under *PIPEDA*. As a matter of course, the Investigations and Inquiries Branch monitors the progress of organizations in implementing both commitments they make during complaint investigations and recommendations that the Office issues to them in letters of findings. We ask organizations to report on their intentions and their progress in meeting these commitments and recommendations. We also ask them to provide documentary evidence of implementation.

The purpose of follow-up is two-fold. First, it reinforces and clarifies the Office's expectations that organizations take remedial measures in response to specific problems identified in complaint investigations. Second, it provides a reliable ongoing record of organizations' compliance with *PIPEDA*.

In late 2004 and early 2005, in a special exercise to establish a solid basis for such a record, our Investigation and Inquiries Branch applied the new follow-up procedure to past cases in which organizations' responses to recommendations or commitments remained unverified. Specifically, Branch investigators completed follow-ups on over 50 significant unverified cases concluded between January 1, 2001 and November 1, 2004, and involving the federally regulated organizations that had been subject to *PIPEDA* from the beginning (banks, telecommunications companies, national transportation companies, etc.).[3] The subject cases were those in which the Office had identified privacy problems and expected the organizations to take specified remedial action in response either to commitments they had made at our suggestion during investigations or to recommendations we had later made to them in letters of findings.[4]

Through day-to-day dealings, the Office had already formed a good sense of how well respondent organizations had been co-operating in investigations and following through on commitments and recommendations. However, when we analyzed the results of these follow-ups in conjunction with case results already known, we were able to see a fuller, clearer and statistically representative picture of the cumulative effect of our complaint investigations on compliance with *PIPEDA*.[5]

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[3] The analysis did not include cases involving provincially regulated companies, since such organizations had been subject to the *Act* for less than a year (January 1, 2004).

[4] In the interest of time and efficiency, the many routine cases of (largely resolved) complaints under the access provisions of the *Act* were also excluded from consideration in both the follow-ups and the analysis.

[5] The analysis accounts for approximately 75 per cent of applicable cases concluded during the period in question.

Most notably, we determined that, of the verified cases in which our Office expected a remedial response, federally-regulated organizations had fully implemented our recommendations arising out of the investigation of a complaint about nine times out of ten. We also determined that 67 per cent of these satisfactory responses involved some degree of systemic improvement in the organizations themselves. In other words, in approximately two of every three cases, the organization's remedial response had gone beyond the mere settling of a complainant's immediate concern and had led the organization to establish positive substantive change in its information management systems relating to privacy policy, procedures and practices.

The following are just a few examples of systemic improvements implemented by respondent organizations in the first four years of *PIPEDA* arising from our recommendations:

- A bank instituted an alternative process to accommodate deposit account applicants who refused to consent to a credit check.
- Another bank, on our recommendation, collaborated with credit reporting agencies to develop understandable, consumer-friendly formats for credit information.
- Several organizations acknowledged that the use of social insurance numbers (SINs) is a privacy-sensitive issue and changed their policies and practices accordingly. One bank, for example, stopped requiring customers to use a SIN in activating credit cards. Another bank amended its loan application form to indicate that provision of the SIN is optional, and stressed to its employees that the SIN is not required for processing loan applications.
- Through extensive consultation with our Office, a bank whose privacy literature we originally considered to be the least compliant among all the banks greatly improved its consent language and practices, particularly as they related to use and disclosure of personal information for secondary marketing purposes. We now regard this bank's privacy literature as among the best.
- Another bank followed our recommendation to improve the security of computers at its kiosk branches.
- Another bank discontinued its practice of issuing unsolicited credit cards and creating credit card accounts without consent.
- A lending institution struck a privacy committee, instituted privacy training, and instructed staff on limiting the amounts of information they disclose in recovering debts.

- A telecommunications company stopped using customers' telephone records to obtain information about other individuals.
- In a case about the posting of employees' sales records, another telecommunications company told its sales managers about appropriate uses and disclosures of such information, updated its employee training program accordingly, and revised its recruitment and selection process to inform employees of the company's intended uses of their personal information.
- A broadcaster developed and distributed a policy on its use of security cameras and access controls.
- An airline vastly improved its privacy policy and practices related to its rewards program.
- A transportation-related management corporation fully implemented our recommendations concerning its sick leave policy. Most notably, the corporation no longer requires its employees to include specific diagnoses on their medical certificates.
- In close consultation with our Office, a market research company implemented our recommendations regarding its consumer surveys, particularly relating to identification of purposes, and consent to third-party disclosures. The result is a much more transparent and privacy-compliant survey form and process.
- A rewards program not only improved its communications materials as we recommended, but also made other privacy-related improvements beyond our recommendations.

Though not yet complete, the record already abounds with evidence that federally regulated organizations have largely taken their responsibilities under *PIPEDA* very seriously. They have generally cooperated with our Office in complaint investigations and have tended to remedy, in substantive and permanent ways, the problems that we identify. Similarly, the record clearly shows that complaint investigations in themselves greatly increased overall compliance with the *Act* by respondent organizations. Almost half of satisfactory responses by organizations have occurred, not pursuant to recommendations in a letter of findings, but rather during or as a direct result of the complaint investigation itself. In other words, our Office's investigators have been the main instruments of problem solving in almost half the cases of a satisfactory response by an organization.

Our rate of success shows not only the effectiveness of our investigative function, but also the continuing efficacy of the Commissioner's ombudsman role. Although the record appears sound, we are taking measures to improve it. We believe that our new formal procedure of systematic follow-up is one measure in particular that will enable us to bring about an even higher rate of compliance with *PIPEDA*.

Audit and Review

Strengthening the Audit Function

Section 18(1) of *PIPEDA* allows the Commissioner to audit the personal information management practices of an organization if the Commissioner has reasonable grounds to believe that the organization is contravening the fair information practices set out in the *Act* and Schedule. To date, we have conducted no audits under *PIPEDA*. However, now that *PIPEDA* is fully in force and organizations have had time to adapt to it, our Office has recently begun actions to use the audit power where warranted.

In March 2005, the Branch name changed from "Privacy Practices and Reviews" to "Audit and Review". This signals an important transformation. Our Office intends to make greater use of audits, and they will become an important tool in carrying out our mandate under both the *Privacy Act* and *PIPEDA*.

The Audit and Review Branch's goal is to conduct independent and objective audits and reviews of personal information management systems for the purpose of promoting compliance with applicable legislation, policies and standards and improving privacy practices and accountability.

The year 2004 marks the beginning of efforts to rebuild and strengthen audit and review functions. Audits have not yet been used to their potential as among the key tools for addressing the many privacy risks. The systemic risks are wide ranging, including inadequate data security, identity theft, inappropriate gathering, retention and use of personal information, and failure to act when privacy breaches occur.

It will take time to build the capacity to undertake sufficient and appropriate audits. The Branch now has only four auditors to undertake both public and private sector audits. The scope of the "audit universe" is over 150 federal departments and agencies subject to the *Privacy Act*, and thousands of commercial organizations in Canada subject to *PIPEDA*.

Steps our Office will take to strengthen the audit function include:

- Completing an external review of audit methods and practices;
- Setting a Branch goal and articulating team values;
- Undertaking a process to develop a longer term audit strategy and plan in view of privacy risks and issues;
- Building a business case to submit to Treasury Board of Canada to obtain further funding for audit and review;
- Raising awareness with Parliamentary committees about the value of privacy audits;
- Initiating a project to determine and test a process for establishing "reasonable grounds" to select subjects for audits under *PIPEDA*. The criteria and process will be published on our Web site during the next fiscal year, and we will welcome comments;
- Initiating a project to develop a self-assessment tool to help organizations ensure compliance with *PIPEDA*, and to promote good personal information management practices. We want organizations to understand that good privacy makes for good business and that they need a sound privacy management framework. This would include internal auditing of systems and practices for meeting privacy obligations. The self-assessment tool (audit program) will also be published on our Web site; and
- Undertaking a survey of private industry about the use of radio frequency identification devices (RFIDs).

Keeping Watch on Radio Frequency Identification

We continue to monitor advances in RFID technology. In our view, companies should establish policies and standards before they implement RFID technology, not after the fact. Any use of RFIDs must comply with *PIPEDA*. Furthermore, we want to know the role of RFID applications in data aggregation and mining activities, since these depend on obtaining ever-increasing amounts of detail about individuals and what they buy or rent.

We plan to send letters to selected corporations in Canada that might be introducing RFIDs, to better understand the emerging uses of RFID. Our primary interest is in learning how RFID might be used to link personal information with products and services. We want to know if the technology will be used to identify or track individuals. We also want to know if companies will do privacy impact assessments or threat/risk assessments when developing and implementing RFID applications, and how employees and customers would learn about the presence and use of RFIDs.

The survey results will appear in next year's Annual Report. We will not disclose proprietary business information. We will continue monitoring developments in RFID technology to see where guidance on privacy issues is necessary.

In the Courts

PIPEDA Applications

Under section 14 of *PIPEDA*, an individual complainant has a right, following the Commissioner's investigation and report, to apply to the Federal Court for a hearing in respect of any matter referred to in the Commissioner's report. These matters must be among those identified in section 14. Section 14 also allows the Commissioner to apply directly to the Federal Court in respect of a Commissioner-initiated complaint.

Section 15 also allows the Commissioner to apply directly to the court for a hearing in respect of any matter covered by section 14 (with the consent of the complainant); appear before the Court on behalf of any complainant who has applied for a hearing under section 14; or, with the permission of the Court, appear as a party to any section 14 hearing not initiated by the Commissioner.

Between January 1, 2001 and December 31, 2004, 35 applications were filed in Federal Court in relation to *PIPEDA*. Fifteen of those were filed in 2004. This means that the number of applications in 2004 alone almost equaled all other applications filed since *PIPEDA* came into force until the start of 2004 – a huge annual increase. Following is a list of all of the PIPEDA applications filed in the Federal Court in 2004:

- Karen and Daniel Edwards v. Canadian Imperial Bank of Commerce (Federal Court No. T-35-04), Discontinued November 2, 2004
- Keith Vanderbeke v. Royal Bank of Canada (Federal Court No. T-222-04)
- Ron Gass v. NAV Canada (Federal Court No. T-821-04), Dismissed July 2004 (by consent)

- Pierre Jean Trudeau v. Banque TD Canada Trust (Federal Court No. T-851-04), Dismissed February 23, 2005 (for delay)
- Bradley Nazaruk and United Transportation Union, Local 691 v. Canadian National Railways (Federal Court No. T-948-04), Discontinued July 8, 2005
- Janice Morgan v. Alta Flights (Charters) Inc. (Federal Court No. T-1066-04)
- Ian David Kosher v. Canadian Imperial Bank of Commerce (Federal Court No. T-1143-04)
- 3web Corporation v. Llano Gorman (Federal Court No. T-1603-04), Discontinued June 2005
- Paul Wansink and Telecommunications Workers Union v. Telus Communications Inc. (Federal Court No. T-1862-04), Consolidated with Federal Court No. T-1865-04, December 31, 2004
- Henry Fenske and Telecommunications Workers Union v. Telus Communications Inc. (Federal Court No. T-1863-04), Consolidated with Federal Court No. T-1865-04, December 31, 2004
- Paul Bernat and Telecommunications Workers Union v. Telus (Federal Court No. T-1864-04), Consolidated with Federal Court No. T-1865-04 31, December 2004
- Randy Turner and Telecommunications Workers Union v. Telus (Federal Court No. T-1865-04)
- John Testa and Brenda Marie Testa v. Citibank (Federal Court No. T-2135-04), Dismissed June 15, 2005 (settlement reached at pre-trial conference)
- Richard Breithaupt and Peggy Fournier v. Hali MacFarland and Calm Air International ltd. (Federal Court No. T-2061-04)

Important Decisions

Following are important decisions made in 2004 on the application of *PIPEDA*:

Mathew Englander v. Telus Communications Inc. and Privacy Commissioner of Canada
Federal Court File No. T-1717-01 and Federal Court of Appeal File No. A-388-03

Mr. Englander argued that Telus uses and discloses customers' names, addresses and telephone numbers in its white pages directories and otherwise, without customers' knowledge and consent. He also claimed that Telus inappropriately charges customers for choosing to have their telephone number "non-published". He felt that these actions by Telus contravene sections 5(1) and (3) of *PIPEDA*, as well as several clauses of Schedule 1.

On the question of consent, the former Commissioner found that the company did obtain valid consent through implication and complied with the regulations regarding publicly available information. He focused on the company's questioning of customers about how their information should appear in the white-pages directory and determined that the question itself implied the eventual appearance of the information in publicly available directories. Since information subsequently published in other formats merely reflects what is published in the white pages directory, it too is considered publicly available information for purposes of the regulations under the Act, and may be collected, used or disclosed without consent.

As to charging fees for the non-publication of customers' information, the Commissioner referred to CRTC Telecom Order 98-109, which states that telecommunications companies may charge no more than $2.00 per month to provide non-published telephone service. He determined that the company did have the authority to charge its monthly fee of $2.00 for non-publication, and that doing so was not unreasonable.

Mr. Englander filed the very first Federal Court application under section 14 of *PIPEDA* after the former Commissioner released his findings. The former Commissioner was not a party to these proceedings. Ultimately, the Federal Court concluded that Mr. Englander had failed to convince the court that his application was well-founded, and dismissed the application with costs to the Respondent.

Mr. Englander filed an appeal in the Federal Court of Appeal. The current Privacy Commissioner was granted leave to intervene in the appeal.

The Court heard the appeal on October 7, 2004. The decision, released on November 17, 2004, allowed the appeal in part on the basis that Telus did not have proper informed consent from first-time customers to use their personal information in directories; consent is not informed when the person allegedly giving it is not aware at the time of the possibility of opting-out. Information given to customers subsequently may factor into an evaluation of compliance with the "openness" principle, but comes too late for consent. The Court emphasized that consent in this situation was particularly critical because it was the gateway to information becoming publicly available.

The Court's February 9, 2005, decision declared that in light of Telus' undertaking to change its practices to conform with *PIPEDA*, there was no need to compel Telus to make those changes. The judgment states that "the Court is satisfied that it is sufficient in the case at bar to declare that Telus has infringed section 5 of the *Personal*

Information Protection and Electronic Documents Act and that there is no need for the issuance of a mandatory injunction."

Erwin Eastmond v. Canadian Pacific Railway and Privacy Commissioner of Canada
Federal Court File No. T-309-03

Mr. Eastmond complained that his employer was collecting the personal information of employees without their consent. Specifically, he was concerned that digital video recording cameras installed at the company yard could collect personal information of employees.

The former Privacy Commissioner applied section 5(3) of *PIPEDA* and explained that when using this section one must consider both the appropriateness of the organization's purposes for collection and the circumstances surrounding those purposes. To that end, he used a four-point test for assessing reasonableness: (1) Is the measure demonstrably necessary to meet a specific need; (2) Is it likely to be effective in meeting that need; (3) Is the loss of privacy proportional to the benefit gained; and (4) Is there a less privacy-invasive way of achieving the same end? The former Commissioner found that a reasonable person would not consider these circumstances to warrant such an intrusive measure as digital video surveillance. He concluded that the company's use of this type of surveillance for their stated purposes was not appropriate and that the company had contravened section 5(3) of *PIPEDA*.

In February 2003, Mr. Eastmond filed an application, as permitted by section 14 of *PIPEDA*. He sought an order confirming the finding of the former Commissioner as well as various related orders. He also requested a certified copy of the former Commissioner's record of investigation.

The former Commissioner objected to this request for materials, and the Court agreed in June 2003 that the *Federal Court Rules* do not allow an Applicant, in a section 14 application under *PIPEDA*, to request material in the possession of the Privacy Commissioner.

The Interim Privacy Commissioner was also added as a party pursuant to section 15(c) of *PIPEDA*, but took no position as to the appropriate outcome on the facts, instead arguing on points of law that the Court should accord some deference to the expertise of the Commissioner and should adopt the four-point test to determine the appropriateness of the collection of the information by CP Rail. A supplementary factum was filed in December 2003 addressing the jurisdiction over the issues of

both the Commissioner and the Court, notwithstanding that these issues arose in a collective bargaining situation. The supplementary factum suggested that concurrent jurisdiction existed in this situation.

The application was heard in April 2004. On June 11, 2004, the court released its decision. The Court found that the Privacy Commissioner did have jurisdiction, that the essence of this dispute did not arise from the collective agreement, and that it was not Parliament's intention to exclude unionized workers from the scope of *PIPEDA*.

The Court also concluded that although this was a proceeding *de novo,* the Commissioner was entitled to a degree of deference in light of the Commissioner's expertise.

Finally, the Court adopted the four-point test for section 5(3), with the caveat that the specific factors considered in this case might not be appropriate in all cases. Using that test, the Court concluded that a reasonable person would consider the organization's purposes for collecting the images through the medium of a digital video camera to be appropriate in the circumstances. CP Rail therefore had not contravened *PIPEDA*.

Cases in the Courts

The following cases are of particular interest in the ongoing interpretation of PIPEDA:

Keith Vanderbeke v. Royal Bank of Canada

Federal Court File No. T-222-04

Mr. Vanderbeke had previously made a complaint about Royal Bank of Canada's (RBC) treatment of his personal information. This related complaint alleged systemic improprieties in RBC's record keeping procedures, specifically that the bank was not "properly" retaining mortgage renewal acknowledgement letters for its clients. The bank explained that they do not keep a copy of the acknowledgement letters sent to customers as the letters contain information that is available in other documents. Reviewing the complaint, the Assistant Privacy Commissioner considered that *PIPEDA* provides individuals with a right of access to personal information itself, but not necessarily the specific documents containing that information. Accordingly, she considered the complaint not well-founded.

Mr. Vanderbeke filed an application, as permitted by section 14 of *PIPEDA*, on January 29, 2004. RBC made a motion for an order to strike the application, but was not successful.

An order dated July 5, 2004, stipulated that Mr. Vanderbeke pay security monies into Court before filing his affidavit. This caused delay in the proceedings until February 23, 2005. To date, the Commissioner has not become involved in this application, but is monitoring developments closely.

Janice Morgan v. Alta Flights (Charters) Inc. and Privacy Commissioner of Canada
Federal Court File No. T-1066-04 and Federal Court of Appeal File No. A-184-05

Ms. Morgan, a former employee of Alta Flights, complained that her employer tried to collect and use her personal information without her knowledge and consent. Specifically, she alleged that a manager had taped a digital recorder to the underside of a table in a smoking room accessible to employees in an attempt to collect their personal information. The company acknowledged that the manager had attempted to collect employee personal information without the knowledge or consent of those employees.

The investigation determined that since there was no evidence of a recording, there was no evidence that the complainant's personal information had been collected or used. The Assistant Privacy Commissioner concluded that the company was not in contravention of *PIPEDA* and, accordingly, the complaint was not well-founded. However, she cautioned that the company should not interpret her finding as an approval of what the manager had attempted to do.

Ms. Morgan filed an application in Federal Court, as permitted by section 14 of *PIPEDA*, on May 26, 2004. The original application incorrectly named the Privacy Commissioner as a respondent. On September 14, 2004, the Court granted the Privacy Commissioner's motion to be struck as a respondent and added as a party to the application, as permitted by section 15(c) of *PIPEDA*.

At trial, the Privacy Commissioner made representations concerning five matters: (1) jurisdiction of *PIPEDA* over the subject matter notwithstanding a *Canada Labour Code* unjust dismissal complaint in respect of the same issue; (2) the appropriate standard of review and deference to be accorded the Privacy Commissioner's findings; (3) the appropriate interpretation of section 7(1)(b); (4) whether an attempted collection constituted a collection; and (v) whether there is a common law jurisdiction to grant remedies not authorized by *PIPEDA*.

The court heard the application on March 15, 2005. Like the Assistant Privacy Commissioner, the Court concluded that since there was no evidence that any conversations were recorded, the company did not actually manage to collect and/or

use any personal information. There was no violation of *PIPEDA* since an attempt to breach the *Act* does not exist as a violation of *PIPEDA*.

On the issue of whether to give deference to the Privacy Commissioner's decision, the Court concluded that it may rely on the decision of the Privacy Commissioner or certain parts of it in arriving at its determination, but it is not bound to do so. When exercising its discretion *de novo*, the Court will give less deference to the decision of the Privacy Commissioner than it would otherwise. However, some regard is warranted about the factors taken into consideration by the Privacy Commissioner in balancing the privacy interests of the complainant and the employer's legitimate interest in protecting its employees and property.

Ms. Morgan filed an appeal of the decision in April 2005.

Paul Wansink and Telecommunications Workers Union v. Telus and Privacy Commissioner of Canada
Federal Court File No. T-1862-04
Henry Fenske and Telecommunications Workers Union v. Telus and Privacy Commissioner of Canada
Federal Court File No. T-1863-04
Paul Bernat and Telecommunications Workers Union v. Telus and Privacy Commissioner of Canada
Federal Court File No. T-1864-04
Randy Turner and Telecommunications Workers Union v. Telus and Privacy Commissioner of Canada
Federal Court File No. T-2222-03

The Applicants complained to the Privacy Commissioner that their employer, Telus Communications Inc., had contravened *PIPEDA* by forcing them to consent to the collection of personal biometric information and to provide the information to enable a computer to automatically authenticate identity using their voice prints.

The Assistant Privacy Commissioner assessed the requirement of the voice print and found it not overly invasive. She found it an appropriate balance between the employees' right to privacy and the employer's needs. The purpose was reasonable and appropriate, Telus had properly informed its employees of the purposes, and it had appropriate safeguards in place in relation to the information.

After the release of the Assistant Commissioner's findings, each of the four complainants filed a separate application in Federal Court under section 14 of *PIPEDA*. An order dated December 31, 2004 consolidated all of the applications under Federal Court File No. T-1865-04.

The Privacy Commissioner then sought under section 15(c) of *PIPEDA* to become a party to these applications in order to make representations to assist the court in developing a test for negotiating the balance between commercial needs and individual privacy rights. Telus consented to the motion but made representations to the Court suggesting a limited role for the Privacy Commissioner. The Commissioner successfully challenged this, and on February 22, 2005, obtained full party status.

The Commissioner made representations on several matters, including: (1) that the Telecommunications Union was not a proper applicant in the proceeding; (2) that the Court should have due regard for the factors to be considered in balancing the interests of the parties; (3) that the legal framework and factors used by the Commissioner in balancing the interests of the parties should be applied by the Court; (4) that *PIPEDA* does not require that the employer seek union consent rather than seeking consent directly from individual employees; (5) that exceptions to consent requirements do not apply in this situation; (6) when may consent be implied; and (7) a recognition of the ability to withdraw consent.

A hearing has been scheduled for September 20, 2005.

John Testa and Brenda Marie Testa v. Citibank
Federal Court File No. T-2135-04

Mr. Testa claimed that Citibank disclosed a significant amount of his personal information to his employees without his consent. He further alleged that these disclosures were extremely damaging to his reputation and contributed to his decision to resign as the head of the company.

In her finding, the Assistant Commissioner acknowledged that *PIPEDA* allows an organization to disclose an individual's personal information without consent for the purposes of collecting a debt. However, this exception did not confer *carte blanche* for an organization to disclose however much information it wished. She felt that in this instance it was clear that excessive amounts of information had been divulged. Accordingly, she found the bank to be in contravention of Principle 4.3 of Schedule 1 of *PIPEDA* and the complaint to be well-founded.

An application was filed in Federal Court on December 1, 2004. The Commissioner was expected to seek leave to appear as a party as permitted by section 15(c) of *PIPEDA*. However, a settlement was reached at a pre-trial dispute resolution conference and, accordingly, the application was dismissed on June 15, 2005.

Richard Breithaupt and Peggy Fournier v. Hali MacFarlane and Calm Air International Ltd.
Federal Court File No. T-2061-04

Mr. Breithaupt complained that a Calm Air employee (Ms. MacFarlane) disclosed his and his wife's itinerary information to the RCMP without their knowledge and consent. It was undisputed that the Calm Air employee had obtained access to the information without their knowledge and consent. However, both the Calm Air employee and the RCMP officer denied that the employee disclosed this information to the officer.

Documentary evidence led the Assistant Commissioner to conclude that there was indeed a disclosure. She found that the employee had used personal information for purposes other than those for which it was collected, and then disclosed it in contravention of Principles 4.3 and 4.5 of Schedule 1 of *PIPEDA*. Accordingly, the complaint was well-founded.

The complainant filed an application under section 14 of *PIPEDA* in Federal Court on November 18, 2004. The Commissioner is not a party to this application, though she is monitoring its progress.

Judicial Review

The following cases are important in defining the extent of the Commissioner's enforcement powers under *PIPEDA*:

Blood Tribe Department of Health v. Privacy Commissioner of Canada et al.
Federal Court File No. T-2222-03 and Federal Court of Appeal File No. A-147-05

A complaint was filed with our Office alleging (among other things) that the Blood Tribe Department of Health had denied an individual access to her personal information and did not provide reasons for the denial.

In our view, the Commissioner must have access to all documents to ensure that exemptions claimed have been properly applied and to guard against abuse. However, during this investigation the Blood Tribe Department of Health refused to provide the Commissioner with access to solicitor-client privileged documents. As a result, our Office issued its first order for the production of records, using the enforcement powers as set out in sections 12(1)(a) and (c) of *PIPEDA*.

In response, an application for judicial review of the Privacy Commissioner's decision to issue an order for production was made by the Blood Tribe Department of Health, as permitted by section 18.1 of the *Federal Court Act*. The Court dismissed the application in March 2005. Mr. Justice Mosley stated that when the Privacy Commissioner is seized with a complaint over the retention and use of personal information, she has the responsibility to determine the facts and the duty to prepare a report of her findings. She cannot effectively perform that role if she is denied access to the information necessary to ascertain the facts merely because a claim of privilege is made. The Court was satisfied that the Commissioner had correctly exercised her authority to issue the production order. The order did not limit or deny any solicitor-client privilege that the applicant may enjoy in the questioned documents.

The Applicant filed an appeal of this decision in April 2005.

3web Corporation v. Llano Gorman and Privacy Commissioner of Canada
Federal Court File No. T-1603-04

Mr. Gorman complained that 3web Corporation, an internet service provider who had been his employer, had installed web-cameras to monitor employees in the workplace. The cameras were located in the sales and marketing division and the technical support staff area. The Assistant Commissioner concluded that the complaint was well-founded. In doing so, she stated that: (a) it was unlikely that a reasonable person would consider employee productivity to be an appropriate reason to use video and audio surveillance; and (b) by using web cameras in the manner described in this complaint, the company was not fundamentally recognizing the right of privacy of its employees; the balance integral to section 3 of *PIPEDA* was tipped too far away from the privacy rights of individuals. The use of cameras for these purposes would undermine *PIPEDA*.

PIPEDA provides that a complainant or the Privacy Commissioner may apply to the Federal Court for a hearing of any matter referred to in the Commissioner's report. In that the Commissioner's report makes recommendations only, there is no such provision for a respondent organization. In this case, the organization initiated a judicial review application. It named Mr. Gorman as a respondent, although it also sought an order stating that the Assistant Privacy Commissioner's report was "illegal and invalid."

In October 2004, the Privacy Commissioner filed a motion requesting that (a) she be added as an intervener and (b) the application be struck. This motion was heard

in February 2005, at which time the Commissioner was added as an intervener to the proceeding. The Court dismissed the Commissioner's motion to strike the application as a whole, concluding that the issue was best suited for determination at trial.

The company discontinued the proceeding in June 2005.

Public Education and Communications

The Office of the Privacy Commissioner of Canada is mandated specifically under *PIPEDA* to develop and conduct information programs to foster public and organizational understanding and recognition of the rules that govern the collection, use and disclosure of personal information. And although there is no legislative mandate for public education specified under the *Privacy Act*, there is certainly a mandate to ensure departments and agencies are held accountable for their personal information handling practices. There is often a necessity to inform the public, as well as departments and agencies, about the requirements of the Act and related policies, and the impact on the privacy rights of Canadians of current and proposed government activities.

In 2004, the Office undertook a strategic communications planning effort with the expertise of external consultants, and the result was a comprehensive communications and outreach strategy for the coming years. This strategy will enable the Office to have a more comprehensive, proactive approach to communications planning and delivery; a more truly public education-focused approach to communications surrounding *PIPEDA*; and build a greater level of awareness of the Office and of key privacy issues under both laws.

In addition to developing this strategy the Office undertook the following communications activities in 2004:

Speeches and Special Events

Speaking engagement opportunities have helped our Office raise awareness of privacy issues among diverse audiences and settings, including professional and industry associations, non-profit and advocacy groups and universities. In 2004, the Commissioner, Assistant Commissioners and other senior officials delivered

19 speeches, speaking out about issues with privacy implications, such as security initiatives and health care delivery.

In March 2004, the Office began hosting an in-house Lecture Series (approximately one per month). These information sessions featured experts on a variety of privacy issues and brought together members of the privacy community and staff. In 2004, the Office hosted ten of these information sessions.

Media Relations

Privacy issues continued to be of interest to the media in 2004, with significant coverage in Canada on issues such as the full implementation of *PIPEDA*, about which the Office received media calls and participated in interviews. In addition, through other proactive media relations efforts, such as the dissemination of news releases, the Office had the opportunity to raise awareness of, for example, the launch of its Contributions Program; the Commissioner's views on important legislation, such as the *Public Safety Act* and the do-not-call list legislation; and the Office's views regarding transborder flows of personal information.

Web Site

We post new and useful information on our Web site on an ongoing basis. Fact sheets, news releases, speeches, case summaries of findings under *PIPEDA*, are posted to keep the site interesting to individuals and organizations. In 2004-2005, the Office redesigned its Web site in order to make it compliant with the Common Look and Feel standards established by Treasury Board. This resulted in an enhancement to the design as well as to the navigation tools on the site, in order to help visitors make better use of the site. The Office also made the site more dynamic with the posting of a downloadable Web-video for businesses on complying with *PIPEDA*. Since 2001, we are pleased to report that visits to the site have more than quadrupled, reaching 922,106 in 2004.

Publications

The Office has produced information materials, including guides for individuals and organizations on *PIPEDA*, as well as a variety of new fact sheets on issues including consent, use of the social insurance number in the private sector, transborder flow of personal information, and how our Office conducts investigations into potential privacy breaches.

In 2004-2005, in addition to preparing new fact sheets, we developed an e-kit for businesses to help them comply with the new law. We also revised the content of our guides, to ensure they were up-to-date given the final stage of implementation of *PIPEDA* on January 1, 2004. We received requests for these materials on a daily basis. Not only were these materials sent to individuals upon request, they were also distributed at conferences and special events, and accessed in electronic format by visitors to our Web site. In 2004, close to 22,000 of our publications (guides, fact sheets, annual reports, copies of both federal privacy laws) were sent out, in addition to the more than 742,000 publications which were downloaded from our Web site.

Internal Communications

Internal communications activities were also a focus of the Office and played a key role in 2004, increasing transparency between management and staff, especially during its ongoing institutional renewal, but also through day-to-day activities. Internal communications activities in 2004 involved providing staff with information on, for example, human resources issues, upcoming speaking engagements, Parliamentary appearances, senior management and labour management committee meetings, and special events such as all-staff meetings and information sessions. The Office has been developing an Intranet, an internal communications portal to host all internal communications and maximize staff access to information, which will be launched in 2005.

In the upcoming year, the Office will continue to undertake the activities outlined above. We also hope to be in a position to initiate many of the more proactive public education activities outlined in the communications and outreach strategy.

Corporate Services

On the Path to Institutional Renewal

The Commissioner's most immediate priority has been to lead the Office's institutional renewal by strengthening OPC management processes, particularly human resources and financial management – planning, budgeting, reporting and control mechanisms.

The overall financial framework in which our Office operates is based on the government fiscal year (2004-2005).

Planning and Reporting

A foundation component of the Office's institutional renewal is a strategic planning, reporting and control process. During 2004-05 we completed our first year under this revised process. The strategic plan established at the beginning of the year was our road map for the year. As part of the new process were reporting and review opportunities. We made adjustments to plans and budgets throughout the year. To assist in our reporting and reviews we developed a Performance Measurement Framework and a monthly performance report. We also launched a Business Process Review of the entire organization which will enable the Office to better estimate resource requirements and to draft a business case for permanent funding.

Human Resources

We continue to work toward the development and implementation of changes to improve how the office is run and the quality of the workplace. Significant changes and improvements have been made to the Human Resource management policies and practices.

We developed a number of Human Resource policies in consultation with central agencies and unions. These policies will guide us as we build on the successes of the past year and we continue on our path of institutional renewal. An Instrument of Delegation of Human Resource Management was developed and will serve as a tool to inform and guide managers, and enable them to manage their human resources. A new Strategic Human Resource Plan and Staffing Strategy, as well as an Employment Equity Action Plan, will help the OPC achieve its mandate and ensure the recruitment of a highly qualified workforce that is diversified and representative of Canadian society. As part of OPC's commitment to increase transparency in the staffing processes, a staff newsletter was developed; it is distributed on a monthly basis to all staff.

Over the course of the past fiscal year we made significant strides in the area of organizational learning, including the development of a learning strategy with the Canada School of Public Service (CSPS), training and information sessions in values based staffing, language training sessions, performance management and employee appraisals and harassment in the workplace. The development and implementation of a Learning Strategy and Curriculum with the CSPS will enable staff to continue to develop the expertise and competencies required to fulfil their functions, as well as to position staff to take on new responsibilities and accountabilities.

We continued to work collaboratively with Central Agencies such as the Public Service Commission and the Public Service Human Resources Management Agency of Canada on follow-up measures to the recommendations of the Public Service Commission and the 2003 report of the Auditor General of Canada. This included measures that will allow OPC the opportunity to regain its full staffing delegation authority.

Finance and Administration

The OPC received a clean opinion on Audited 2003-2004 Financial Statements by the Office of the Auditor General of Canada. This is a significant milestone and a very positive indicator that the organization has indeed advanced on the path of institutional renewal. The organization has built on that success by establishing planning and review cycles, by streamlining and improving the financial management policies and practices.

Information Management / Information Technology

Signification advancements have also been made in how we manage our information assets. We completed an audit of our information management systems and we

completed a vulnerability assessment of our information technology. We also completed an information technology strategy. This will help us to not only meet our obligations with respect to the management of government information and security policies, but more importantly it will guide us as we move forward in improving on the management of our information assets. During the year we completed a significant upgrade to our case tracking and reporting system, Integrated Investigations Application (IIA). Finally we also established the framework for an internal Intranet site. This site will allow for effective communicating and sharing on information for employees.

Down the road

Strategic planning is an important annual exercise for the OPC. Our last session in January 2005 provided managers and employees an opportunity to re-examine the OPC's priorities for 2005-2006, and the actions they would take to achieve these priorities.

Corporate Services priorities for 2005-2006 are to:

- Develop and implement a Management Accountability Framework (MAF);
- Implement and maintain a human resource strategy that enables the Office to recruit, retain and develop staff and foster a continuous learning environment;
- Satisfy central agencies' requirements to regain delegated authorities, and enable the Office to take on new delegation to implement the Public Service Modernization Act;
- Develop and implement integrated information management;
- Complete Business Case for Resources for the OPC;
- Review Corporate Services Branch and Human Resources Branch policies and procedures; and
- Continue providing effective integrated financial services to the OPC.

Our Resource Needs

At the beginning of fiscal year 2004-2005, the Office's budget was $11.2 million, the same as the previous year. Included was $6.7 million for the Office's *PIPEDA* activities. Ongoing funding of OPC activities continues to be extremely important.

With privacy rights continually under threat, the Office's operations need to be funded adequately so that it is prepared to address the multitude of emerging privacy issues in the public and private sector.

The Office does not have adequate resources to fully exercise its powers and responsibilities under both Acts. Without adequate permanent funding, the Office cannot:

- Reinforce our audit and review functions to effectively address compliance under both privacy laws or strengthen our capacity to monitor, research and respond to emerging issues of technology and privacy;
- Conduct outreach and public education to influence change so policies and programs are viewed through a privacy lens;
- Continue investigating in a timely manner and resolving the growing number of complaints under both Acts; and
- Continue providing specialized legal and strategic advice and litigation support under both federal privacy laws, as well as strengthening established approaches and procedures to deal with cross-jurisdictional complaints.

To this end, the Office's priority beginning in the last quarter of fiscal year 2004-05 was to completely review all business processes. The review included establishing workload indicators and reviewing the legislative requirements, as well as external and internal factors that have an impact on our operations. This will enable the Office to develop a Business Case and make a formal submission to the Treasury Board Secretariat and to Parliament later in 2005 to stabilize our resource base and seek permanent funding for the Office.

We hope that with adequate permanent funding, the Office can further assure Parliament that it is effectively ensuring respect for Canadians' privacy rights in the public and private sectors.

Financial Information

April 1, 2004 to March 31, 2005

	Expenditure Totals ($)	% of Totals
Privacy Act	3,745,058	32
PIPEDA	6,849,650	58.5
Corporate Services	1,107,296	9.5
Total	11,702,004	100

Note: Although OPC salary budget allows for approximately 100 FTEs (full-time equivalents), there were only 86 FTEs staffed at the Office at the end of March 2005.

Detailed Expenditures[1]	*Privacy Act*	*PIPEDA*	Corporate Services	Total
Salaries	3,330,147	3,039,732	419,120	6,788,999
Employee Benefits Program	190,327	844,575	154,640	1,189,542
Transportation & Communication	41,238	266,129	81,282	388,649
Information	1,907	147,911	5,239	155,057
Professional Services	171,783	1,397,579	210,403	1,779,765
Rentals	2,730	107,874	23,759	134,363
Repairs & Maintenance	4,698	155,805	85,353	245,856
Materials & Supplies	9,304	50,764	21,633	81,701
Acquisition of Machinery & Equipment	384	451,788	98,026	550,198
Other Subsidies & Payments	- 7,460	20,084	7,841	20,465
Transfer Payments	0	367,409	0	367,409
Total	**3,745,058**	**6,849,650**	**1,107,296**	**11,702,004**

[1] Total expenditure figures are consistent with the Public Accounts of Canada.

Financial Statements

The Management Responsibility letter and the audited financial statements as at March 31, 2005 will be available on our Web site at www.privcom.gc.ca in October 2005.

TAB 10

Office of the Privacy Commissioner of Canada
Commissariat à la protection de la vie privée du Canada

Outsourcing of canada.com e-mail services to U.S.-based firm raises questions for subscribers

PIPEDA Case Summary #2008-394

[Principles 4.1.3, 4.3, 4.3.2]

Lessons Learned

The Office of the Privacy Commissioner of Canada recognizes and shares the continued interest that Canadians and Canadian businesses have in the flow of their personal information beyond our borders. The Office has previously considered issues surrounding foreign outsourcing in Case Summaries #2005-313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/) and #2007-365 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/pipeda-2007-365/).

The present Case Summary addresses several of the same issues and summarizes the Office's position:

- The *Personal Information Protection and Electronic Documents Act (*the *Act)* does not prohibit organizations from outsourcing their operations across international borders.
- It is important for organizations to assess the risks that could jeopardize the security and confidentiality of customer personal information when it is transferred to foreign-based third-party service providers. The measures by which personal information is protected by a foreign-based firm must be formalized with the organization by using contractual or other means.
- No contract or contractual provision can override the laws of a country to which the information could be subject once the information has been transferred.
- Organizations must be transparent about their personal information handling practices. A company in Canada that outsources personal information processing to a company that operates in another country should notify its customers that the information may be available to the government of that country or its agencies under a lawful order made in that country.
- With regard to the issue of customer consent, the Office has taken the position that the sharing of information with a third-party service provider constitutes a "use" for the purposes of the *Act*. Organizations obtain customer consent for the use of personal information for the provision of services or products when individuals first apply for the service or product. Although service providers may change over time, if the purpose of the current provider's use of the personal information has remained the same, organizations are not required to obtain renewed customer consent for the information use.

Two complainants expressed doubt that subscribers' personal information was adequately protected after canada.com e-mail operations were outsourced to a U.S.-based firm. Moreover, the complainants did not believe that existing subscribers had had an opportunity to consent to the transfer of their information to the U.S. or that new subscribers were properly informed that their information would be used and stored in the U.S.

The Office's investigation established that existing subscribers were informed in advance that their new log-in to their account would be an opportunity for them to accept or reject the terms of the services. New e-mail subscribers were also informed, both of information transfers to the U.S.-based provider and of potential privacy implications.

The Assistant Privacy Commissioner was satisfied that canada.com had fulfilled its obligations to provide comparable protection under the *Act* by putting in place adequate contractual provisions. She noted that since the third party in this case is a U.S. company operating in that country, it is subject to U.S. laws, some of which could compel that company to disclose to U.S. authorities information in its possession.

The following is a detailed account of the Assistant Commissioner's investigation and findings:

Summary of Investigation

Complainants' position

According to the complainants, on February 20, 2007, canada.com sent an e-mail to its subscribers stating that e-mail services would henceforth be operated by a company based in the U.S. The complainants contended that, with no mention of obtaining the prior consent of subscribers, the e-mail also advised that all previously saved messages, folders and settings would automatically be transferred to the new account.

The Office examined a copy of that e-mail. The e-mail stated that upon logging in to their new account, subscribers would be asked to accept or decline the new services. If subscribers declined, their e-mail account and all its contents would be permanently deleted.

The complainants asserted that new subscribers to canada.com's e-mail services must provide their agreement with the company's terms and conditions, as well as with its privacy statement. The complainants noted that the terms and conditions point out that e-mail services are provided by a third party located in the U.S. and that, as such, the disclosure of subscriber personal information stored in that location is subject to foreign laws.

According to the complainants, the Frequently Asked Questions (FAQs) document produced by the respondent states the following:

> *… information processed or stored outside of Canada … no longer falls under the jurisdiction of Canada's Personal Information Protection and Electronic Documents Act ("PIPEDA") nor be subject to canada.com's Privacy Statement ....*

The complainants included in their representations copies of canada.com's website home page, the FAQs page, registration page, privacy statement and the terms and conditions document.

The complainants also cited an e-mail dated March 29, 2007, from the legal representative of the respondent to a canada.com subscriber in which the subscriber was advised that under the contractual agreement between the respondent and the U.S.-based e-mail provider, the provider was obligated to comply with privacy laws "… to the extent that they do not conflict with American Laws."

Respondent's position

In its representations, the respondent, CanWest Publishing Inc. (CanWest), explained that canada.com is an interactive Web portal owned and operated by CanWest, and that the e-mail services have always been provided by various third parties since 1998. (Since 2006, its e-mail service providers have operated from the U.S.) Moreover, from the respondent's point of view, the movement of client information to the third party does not constitute a *disclosure*, but rather an information *transfer*.

With regard to CanWest obtaining the consent of existing subscribers in early February 2007 for the purpose of transferring their personal information for e-mail services, the company contended that the necessary consent had previously been obtained when these subscribers originally signed up for canada.com e-mail. Although the third-party service provider may have changed in February 2007, the *purpose* of the third-party information transfer has remained constant and, thus, subscriber consent did not require renewal. CanWest noted that this position is in keeping with the findings of the Office's *Case Summary #2005-313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/)*.

Moreover, CanWest contends that, because the data was fragmented and some of it was still stored in Canada, no personally identifiable information of existing subscribers was ever transferred to the new, U.S.-based provider until subscribers had clearly consented to it.

CanWest provided a description of what would happen during the first login for existing e-mail subscribers on and after February 28, 2007 (i.e. the "go live" date for the new service): first, a subscriber login would be re-directed from Canada to the third-party's servers in the U.S., where partial data (i.e. subscriber e-mail message content, passwords and usernames) awaited activation, having previously been transferred and stored there. The usernames were stored on separate servers from the message content. Meanwhile, the full name and address of subscribers ("account information") remained on the canada.com servers in Canada, where the respondent claims that it has always been stored.

Since the subscriber data was still in raw format, CanWest did not consider it to be personally identifiable information at this point.

Upon receipt of the login, the third-party servers would then send an electronic message to the canada.com servers in Canada, asking for authentication of the user. Subscribers were then informed by way of a pop-up window of the new service provider in the U.S. (identified by name) and that, until they logged in and accepted the terms and conditions and the CanWest privacy statement, any of their e-mail content and username information would not be activated and could not be accessed by any third party.

If subscribers indicated their agreement, the server in Canada sent an "authentication ticket" to the U.S.-based server, which synchronized subscriber e-mail content information with the username. According to the respondent, in the event that a subscriber declined the new service, the account would be immediately and permanently deleted from the U.S.-based servers. Ninety days after the "go live" date, inactive accounts were also permanently deleted from these servers.

Concerning new subscribers' consent, they must also accept the company's privacy statement. CanWest also currently informs them in its terms and conditions (updated on February 28, 2007) of the following:

> *You acknowledge that in the event that a third party service provider is located in the United States or another foreign country, your personal information may be processed and stored in the United States or such other foreign country, and the governments, courts or law enforcement or regulatory agencies of that country may be able to obtain disclosure of your personal information through the laws of the foreign country.*

This information is also available in its FAQs document, available on the canada.com website, which clearly states that canada.com e-mail is provided by "…a company located in and conducting its business from the United States."

CanWest conceded to this Office that its FAQs document originally misrepresented the jurisdictional powers of the *Act* for personal information collected in Canada and transferred to another country. This erroneous information was also communicated to subscribers in the pop-up window that appeared (as a reminder) simultaneously with each e-mail login/sign up for approximately one week after subscriber agreement was obtained. It read as follows:

> *… information processed or stored outside of Canada may … no longer fall under the jurisdiction of Canada's Personal Information Protection and Electronic Documents Act ("PIPEDA") nor be subject to canada.com's Privacy Statement ....*

On March 14, 2007, the FAQs document was revised as follows:

> *… the information processed or stored outside of Canada may be available to the foreign government of the country in which the information or the entity controlling it is situated under a lawful order made in that jurisdiction.*

The respondent also concedes that it erroneously advised subscribers in an e-mail dated March 29, 2007, that under the contractual agreement between the two parties, the third-party provider was obligated to comply with privacy laws "… to the extent that they do not conflict with American Laws." CanWest has reviewed its message and now claims that the signed agreement does not, in fact, contain any statement worded in such a manner. Rather, the intended message to subscribers was to convey the following:

> *… while customer personal information is in the hands of a foreign third-party service provider, it is subject to the laws of that country and no contract or contractual provision can override those laws. (Case summary #2005-313) (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/)*

With regard to the level of personal information safeguarding required of the U.S.-based third party by CanWest, the latter provided our investigation with a copy of the signed agreement between the two parties, as well as four particular confidentiality items with which the third party must comply.

In addition, CanWest responded that the third party has in place strict technical requirements for the storage and processing of subscriber data (including separate storage of the e-mail content and user information) and for hosting the directory on a Uniform Naming Convention file share so as to disable text-based file queries. The U.S.-based servers are located in a 24-hour-secure data center, accessible only by authorized personnel.

Lastly, the respondent addressed the issue of the disclosure of personal information without consent in the context of the *USA PATRIOT Act* and privacy laws. CanWest contends that, notwithstanding the storage location of personal information data—for example, in Canada or the U.S.—the *Personal Information Protection and Electronic Documents Act (PIPEDA)* does not preclude disclosures to government institutions without an individual's consent. By way of example, CanWest cited paragraphs 7(3)c, 7(3)c.1, 7(3)c.2 and 7(3)i of PIPEDA, which describe particular circumstances involving governmental or legal authorities under which disclosure of personal information may occur without the knowledge and consent of the individual. In light of these provisions, CanWest states that "… government access without consent will always remain a possibility, both in Canada and in the United States."

Responding to the notion that the *USA PATRIOT Act* more readily allows access by U.S. authorities to Canadians' personal information—when compared to other statutes and information-sharing agreements—CanWest states the following:

> *While it is within the power of an organization to set forth contractual and operational controls on the treatment of personal information by its service providers, it is unreasonable to expect organizations to conduct exhaustive surveys of data access statutes in every jurisdiction in which they process or store data and make a determination whether or not those statutes put the data at greater risk than they would if situate in Canada. We submit that such a standard goes beyond the spirit and intent of PIPEDA, particularly the reasonableness standard set forth in Section 3.*

Findings

Issued August 7, 2008

Application: Principle 4.1.3 of the *Act* states that an organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party. Principle 4.3 provides that the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate. Principle 4.3.2 clarifies that organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information shall be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.

In making her determinations, the Assistant Commissioner deliberated as follows:

Consent:

- With regard to the issue of customer consent, the Office has taken the position in previous findings that the sharing of information with a third-party service provider constitutes a "use" for the purposes of the *Act* . In the Assistant Commissioner's view, CanWest obtains customer consent for the use of personal information for the provision of e-mail when subscribers first sign up for canada.com e-mail services. Although the service provider has changed over time, the purpose of the current provider's use of the personal information has remained the same. Thus, the respondent was not required to obtain customer consent for the information use when the new provider took over the service in February 2007.
- Nonetheless, at the time of the transfer of information to the new service provider, both new and existing customers were informed directly of the new arrangement (by e-mail) and were provided with a clear opportunity to consent to it by means of a pop-up box at time of login. Available supporting documents conveying the same information included the company's terms and conditions, privacy policy and the frequently asked questions (FAQs). Both the terms and conditions and the FAQs clearly advised subscribers that some information was stored in the U.S. and could potentially be accessed by a foreign government.
- Moreover, the Assistant Commissioner noted that any data which was transferred to the new service provider prior to notification of the subscribers in February 2007 was, in fact, not accessible to any third party and could not be personally identifiable until consent was given by e-mail account holders. Consequently, the Assistant Commissioner believed that Principles 4.3 and 4.3.2 were upheld.

Accountability and protection:

- The Assistant Commissioner was satisfied that CanWest maintains custody and control of the information that is processed by its third-party service provider in the U.S. The service agreement between the two parties relies on unambiguous language that provides guarantees of the confidentiality and security of personal information, and it allows for oversight, monitoring and audit of the services being provided. The contractual provisions with regard to information protection are no less stringent than they would be if the service provider were located within Canadian borders.
- Concerning U.S. authorities' access to subscriber personal information by virtue of a Section 215 Order under the *USA PATRIOT Act*, CanWest cannot rely on the exceptions set out in paragraphs 7(3)c, 7(3)c.1, 7(3)c.2 and 7(3)i of the *Act*. This position is consistent with our Office's findings in *Case Summary #2005-313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/)*. For that matter, it is also not possible for CanWest to use contractual or other provisions to override the provisions of the U.S. statute.
- The Assistant Commissioner noted that organizations that outsource the processing of personal information must provide sufficient notice with respect to the existence of service-provider arrangements, including notice that any foreign-based service provider may be required by the applicable laws of that country to disclose personal information in the custody of such a service provider to the country's government or agencies. In this respect, she found that CanWest respected its obligation by reliably informing its subscribers, new and existing, of its arrangement with a new U.S.-based e-mail provider and of the potential impact on confidentiality of subscriber information. Consequently, Principle 4.1.3 was not contravened.
- The risk of a U.S.-based service provider being ordered to disclose personal information to U.S. authorities is not a risk unique to U.S. organizations. In the national security and anti-terrorism context, Canadian organizations are subject to (and may be just as likely to receive) similar types of orders to disclose personal information of Canadians to Canadian authorities. There are also several formal bilateral agreements in place between analogous Canadian and U.S. organizations that provide for the cooperation and exchange of relevant information. In light of such arrangements, there are many alternatives to a Section 215 Order to obtain information about Canadians.

Conclusion

Satisfied that the respondent had met its obligations under the Act, the Assistant Commissioner concluded that the complaints were not well-founded (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/def-pipeda/).

Post-Script

After the Assistant Commissioner issued her findings, she was requested to clarify her comments from the following paragraph:

> *Concerning U.S. authorities' access to subscriber personal information by virtue of a Section 215 Order under the USA PATRIOT Act, CanWest cannot rely on the exceptions set out in paragraphs 7(3)c, 7(3)c.1, 7(3)c.2 and 7(3)i of the Act. This position is consistent with our Office's findings in Case Summary #2005-313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/) . For that matter, it is also not possible for CanWest to use contractual or other provisions to override the provisions of the U.S. statute.*

The Assistant Commissioner explained that her remarks were provided in the context of analyzing the issue of whether CanWest was ensuring a comparable level of protection with respect to the personal information being processed by its third-party, foreign-based service provider.

Her comments were intended to echo earlier findings made by the Office, as outlined in *Case Summary #2005-313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/)*, the fact situation of which is analogous to the present case. In *Case Summary #2005-313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/)*, this Office noted that while customer personal information is in the hands of a foreign third-party service provider, it is subject to the laws of that country—no contract or contractual provision can override those laws.

Similarly, in the present case, CanWest cannot prevent its customers' personal information from being lawfully accessed by U.S. authorities. Should a Section 215 Order be issued against CanWest's third-party service provider, the service provider would be obliged to respond as it is a U.S. company subject to U.S. laws. CanWest could do nothing to prevent its third-party service provider from responding to an order issued under the laws of the country in which the provider operates. The exceptions to consent would not be relevant in this scenario since CanWest would not be the party responding to the Order—the service provider would be.

The Assistant Commissioner further noted that her position in the present case is consistent with that contained in *Case Summary #2007-365 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/pipeda-2007-365/)*, where it was found that the *Act* could not prevent foreign authorities from lawfully accessing the personal information of Canadians held by organizations within their jurisdiction. Moreover, we noted that the respondents themselves in *Case Summary #2007-365 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/pipeda-2007-365/)* did not disclose the information—their common service provider did. In the present case, CanWest also notified customers of its arrangement with a U.S.-based e-mail provider.

See also

#2005-313 Bank's notification to customers triggers PATRIOT Act concerns
(/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/)

#2007-365 Responsibility of Canadian financial institutions in SWIFT's disclosure of personal information to US authorities considered
(/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/pipeda-2007-365/)

Final Comment

The Assistant Commissioner emphasizes the importance of organizations assessing the risks that could jeopardize the security and confidentiality of customer personal information when it is transferred to foreign-based third-party service providers. It is essential that organizations using third-party service providers outside Canada use contractual or other means to provide a comparable level of protection while the information is being processed by the third party.

Date modified:

2008-09-19

TAB 11

Office of the Privacy Commissioner of Canada
Commissariat à la protection de la vie privée du Canada

Responsibility of Canadian financial institutions in SWIFT's disclosure of personal information to US authorities considered

PIPEDA Case Summary #2007-365

[Principles 4.1.3, 4.3 and 4.8; subsection 5(3); paragraphs 7(3)(c) and 7(3)(c.1)]

Overview of complaint and Assistant Privacy Commissioner's findings

In the summer of 2006, the Office of the Privacy Commissioner of Canada received a complaint against six Canadian financial institutions as a result of the disclosures by the Society for Worldwide Interbank Financial Telecommunication (SWIFT) of personal information to US authorities.

This complaint was filed subsequent to the publication in the *New York Times*, in June of 2006, of an article revealing that since 9/11, the United States Department of the Treasury (UST) has been regularly accessing tens of thousands of records from SWIFT. According to the article, the records in question principally involve wire transfers into and out of the United States.

The complainant was of the view the banks were responsible for the personal information that was transferred to SWIFT for processing of money orders. She maintained that the disclosures were for an inappropriate purpose since they circumvented established approved processes for transferring data. She also contended that the exceptions to consent, outlined in paragraphs 7(3)(c) and 7(3)(c.1) of the *Personal Information Protection and Electronic Documents Act* (the Act), did not apply.

The Assistant Commissioner did not agree and concluded that the complaints were not well-founded. She reviewed the contractual documentation that exists between SWIFT and the banks, and concluded that they are meeting their obligations under the Act, specifically, Principle 4.1.3, to ensure a comparable level of protection. She echoed, however, an earlier finding (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/) made by this Office, by noting that when an organization contracts with a firm that operates both within and outside of Canada, it cannot prevent that firm from responding to lawfully issued subpoenas. Moreover, all of the banks clearly indicated what their practices were, in keeping with guidance offered by this Office. As such, she was satisfied that the banks had discharged their responsibilities under the Act.

Summary of Investigation

SWIFT did not dispute the disclosures. In response to the publicity about the *New York Times* article, it posted a statement on compliance on its website. According to the statement, it "responded to compulsory subpoenas for limited sets of data from the Office of Foreign Assets Control of the United States Department of the Treasury."

Neither SWIFT nor the US government suggested that the data disclosed to the UST is limited to American citizens or to US financial institutions. The disclosures involve bulk transfers of data, and the complainant reasonably inferred that the bulk transfers include information about Canadians or Canadian financial institutions. SWIFT confirmed to this Office that personal information originating from or transferred to Canadian financial institutions was likely included in the data handed over to the UST.

SWIFT describes itself as “the financial industry-owned co-operative supplying secure, standardised messaging services and interface software to 7,900 financial institutions in more than 200 countries.” SWIFT has identical operating centres that simultaneously collect, send, and store all SWIFT messages.

As a cooperative society under Belgian law, SWIFT’s shareholders own and control it. Each of the major domestic banks against whom a complaint has been filed is a shareholder member of SWIFT. There are in total fourteen Canadian financial institution shareholder members. Collectively, they form a National (SWIFT) Member’s group, which meets periodically and serves an advisory role to the Board of Directors of SWIFT. The shareholders also provide some specialized payment clearance and settlement services, through SWIFT, to other Canadian banks and financial institutions. The banks are part of the SWIFT User group, which also meets periodically with SWIFT members to discuss business issues related to the use of SWIFT services. There are 63 Canadian institutional SWIFT users.

A SWIFT user purchases the capability of transferring sets of financial messages consistent with its business needs. A fully subscribed SWIFT user could potentially transmit approximately 230 different messages, grouped into ten categories of messages. Only two of these categories may contain personally identifying information, such as the name, address, account number, amount of transfer and financial institutions involved.

SWIFT does not collect or hold any personal information involving paper-based Canadian payments systems (mostly cheques) and small value electronic payment systems, such as debit card or automated banking machine transactions, and pre-authorized debits and credits. SWIFT does not collect or hold any information about credit card transactions. In the case of most large value domestic transactions processed over SWIFT’s system, there is only corporate information.

There were three components to the complaint. Firstly, the complainant states that, in light of the disclosures by SWIFT, under Principle 4.1.3 of Schedule 1 of the Act, each financial institution remains responsible for personal information that has been transferred to SWIFT for processing of monetary transfers.

Secondly, she contended that the disclosure of personal banking data about Canadians to the US government, for counter-terrorism purposes, is contrary to subsection 5(3) of the Act, as it occurs outside of the approved processes for such data transfers (i.e., judicial authorization, FINTRAC, or a Mutual Legal Assistance Treaty (“MLAT”)). Since wholesale transfers of personal banking data circumvent these approved processes, they do not meet the Act’s requirement of an ‘appropriate purpose’.

Thirdly, the complainant stated that the exceptions to the requirement for consent, set out in subsections 7(3)(c) and/or 7(3)(c.1), do not apply in these circumstances. She was of the view that if the disclosures occurred in the United States, the subpoenas were overly broad and invalid (for the purpose of the exception set out in paragraph 7(3)(c) of the Act). She also maintained that a ‘government institution’ referenced in subsection 7(3)(c.1) means a federal or provincial Canadian government institution, and does not include foreign government institutions.

1. The banks’ responsibility for personal information

In determining the question of the banks’ responsibility for the personal information they transferred to SWIFT, the Office reviewed the contractual agreement between SWIFT and the banks and oversight mechanisms in place.

Contractual agreement between SWIFT and the banks

The Office was provided with documentation that constitutes the contractual agreement between the banks and SWIFT. All of the documents contain at least some information relevant to the banks’ obligations under Principle 4.1.3 of Schedule 1 of the Act.

Three of the documents provide comprehensive information about the measures that SWIFT has implemented to ensure the security, reliability, and resilience of its messaging systems, and the confidentiality and integrity of its data. The measures include proprietary hardware and software applications and security procedures.

One policy document sets out the obligations of SWIFT users that engage a third party provider (i.e., a service bureau) to host or operate SWIFT connectivity components, or provide services such as logging in, or managing sessions of security for SWIFT users. Service bureaus must meet the requirements set out in the Service Bureau Rules and Guidelines.

Another document provides detailed information about SWIFT's security practices and the requirements that users must have in place to access SWIFT's secure IP network.

We reviewed documentation outlining the audit mechanisms in place, as well as the company's security governance structure and its data handling, storage and retrieval policies and practices. We also reviewed information regarding SWIFT's measures to ensure the confidentiality of its data, as well as details on the oversight, security and control measures that SWIFT has implemented.

The banks' contractual relationship with SWIFT is primarily set out in one document, which describes the mutual covenants of the parties, with respect to confidentiality of data, and compliance with all applicable laws and regulations, including privacy laws (section 4.5.6).

One section of this document, entitled Data Protection Obligations indicates that:

> *By subscribing to the relevant SWIFT Services and Products, the Customer shall then be deemed to have consented to any such processing of personal data by SWIFT in accordance with the SWIFT Data Retrieval Policy and other relevant Service Documentation.*

The Data Retrieval Policy sets out SWIFT's policy on the retrieval, use and disclosure of SWIFT data. Section 3.2 of the policy deals with 'Mandatory Requests'. It states:

> *If a court or other competent regulatory, supervisory or governmental authority requests SWIFT to retrieve, use or disclose traffic or message data, SWIFT reviews and assesses such requests as per documented procedures.*
>
> *For the avoidance of any doubt, nothing in this policy or, more generally, SWIFT's obligations of confidence to customers, shall be construed as preventing SWIFT from retrieving, using, or disclosing traffic or message data as reasonably necessary to comply with a bona fide subpoena or other lawful process by a court or other competent authority.*

SWIFT members in each country have the right to nominate a certain number of Directors to the Board, based on the proportionate number of shares held by the shareholders of the country. The 14 Canadian shareholder members of SWIFT propose one Director for election.

According to SWIFT's corporate rule #3.4 (found on the company's web site),

> *The NMG (i.e. National Member Group) is independent from SWIFT and does not form part of the SWIFT legal structure. It can legally organize itself as it thinks appropriate…. The NMGhas an important role in the proposal of Directors…. (It serves in an) advisory role to the Board….[Subject to the SWIFT confidentiality protocols], the NMG is consulted in an advisory function at a national level on policy issues affecting shareholders which are due to be discussed in the Board. … The Board of Directors may from time to time ask the NMG for specific advice and support.*

There is also a National User Group that comprises all SWIFT users within a country. SWIFT users operate through contacts with national members.

With respect to oversight, SWIFT's website states:

> *While SWIFT is neither a payment nor a settlement system and, as such, is not regulated by central banks or bank supervisors, a large number of systemically important payment systems have become dependent on SWIFT, which has thus acquired a systemic character. . . Because of this, the central banks of the Group of Ten countries (G-10) agreed that SWIFT should be subject to cooperative oversight by central banks. Overseers review SWIFT's identification and mitigation of operational risks, andmay also review legal risks, transparency of arrangements and customer access policies.*

The National Bank of Belgium (NBB) is lead overseer, and has a memorandum of understanding (MOU) with each of the other cooperating G-10 banks, including the Bank of Canada.

We reviewed the MOU. Among other things, it sets out that there will be a two-tier structure of cooperation between the NBB and the Bank of Canada. At the senior level, there will be a SWIFT Co-operative Oversight Group, with an executive committee that communicates with SWIFT's Board and management on oversight findings, policy, on SWIFT's governance, and on its strategy. At the technical level, there is a technical Oversight Group, with a more proactive and interactive approach in its work with SWIFT.

2. The purpose of the disclosures

The complainant was of the view that the wholesale transfers of personal banking data by SWIFT circumvent the approved processes for data transfers (established to counter terrorism – such as MLATs, FINTRAC). She contended that they do not, therefore, meet the Act's requirement of an 'appropriate purpose'.

In setting out her argument, she relied in part upon the June 23rd "statement on compliance" that SWIFT posted on its website subsequent to the publication of the *NewYork Times* article. In its statement, SWIFT indicated that:

> *SWIFT takes its role as a key infrastructure of the international financial system very seriously and cooperates with authorities to prevent illegal uses of the international financial system. Where required, SWIFT has to comply with valid subpoenas. . .*
>
> *In the aftermath of the September 11th attacks, SWIFT responded to compulsory subpoenas for limited sets of data from the Office of Foreign Assets Control of the United States Department of the Treasury. . .*
>
> ***Statement on compliance***
>
> *Cooperating in the global fight against abuse of the financial system for illegal activities . . .*
> *Given its importance in the financial community, SWIFT takes its role in the global fight against money laundering and other illegal activities extremely seriously.*

The banks, however, set out a narrow and singular purpose for the disclosures: to comply with a valid US-issued subpoena. The Office received representations from SWIFT (in response to the Commissioner-initiated complaint) that set out SWIFT's position that the subpoenas were valid under US law. The Commissioner's findings on this matter are set out in the Report of Findings (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/swift_rep_070402/).

The banks stated that they did not become aware of the SWIFT disclosures to the UST until the practice was disclosed through the *New York Times* article. SWIFT has confirmed that it did not inform its members of the subpoenas or of its compliance with them.

3.The exceptions to the requirement of consent

As noted above, the banks indicated that they can rely upon the provisions of paragraph 7(3)(c) with respect to SWIFT's compliance with the UST subpoenas. Paragraph 7(3)(c) indicates that an organization may disclose personal information without the knowledge or consent of an individual for the purposes of complying with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records.

The banks' notification to customers about its practices with respect to outsourcing or processing information outside of Canada was also considered. All of the banks' privacy policies (both in electronic and paper format) contained notification to customers that they use third-party processors, some of which may be located outside of Canada. The language of the banks' notification (while differing slightly from bank to bank) basically indicates that while customer information is outside of the country, it is subject to the laws of that country.

Findings

Issued April 2, 2007

Application: Principle 4.1.3 states that an organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party. Principle 4.8 states that an organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information. Subsection 5(3) notes that an organization

may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances. Principle 4.3 stipulates that the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Paragraph 7(3)(c) explains that an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records.

Paragraph 7(3)(c.1) adds that an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that (i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs, (ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or (iii) the disclosure is requested for the purpose of administering any law of Canada or a province.

In making her determinations, the Assistant Privacy Commissioner deliberated as follows:

- She began by noting that the Office of the Privacy Commissioner of Canada recognizes and shares the concerns of Canadians with respect to the flow of their personal information outside of our borders.
- In the context of the complaint before the Office, she noted that we must consider what the Act states and what obligations it imposes on organizations operating in Canada. While the Act does not prohibit outsourcing or using service providers who transfer information outside our borders, it does oblige organizations to have provisions in place to ensure a comparable level of protection.

1. The banks' responsibility for personal information:

- We reviewed the contract in place between SWIFT and the banks, as well as the other means available to the banks to ensure that SWIFT is providing a comparable level of protection.
- SWIFT and its members have collaboratively developed and implemented a highly sophisticated and elaborate set of security measures to ensure the integrity, confidentiality, security and reliability of the financial messages that SWIFT delivers.
- SWIFT reports back to its committees and boards through its Annual Report and through the security audit report (it should be noted that these reports encompass far more than personal information handling practices).
- Although some of the contractual language appears to place SWIFT in control of how its system is used and, by extension, how personal information in its possession is handled, it is nevertheless also obliged to maintain confidentiality of information.
- Furthermore, the Assistant Commissioner noted that there are other means by which the banks, as members and users of the SWIFT system, can ensure that a comparable level of protection is in place, particularly with respect to the cooperative oversight and technical oversight groups. Through these various oversight and auditing mechanisms, and through the contractual language and various security measures in place, she was satisfied that the banks are meeting their obligations under Principle 4.1.3.
- Under the contract between SWIFT and the banks, the question of mandatory requests is contemplated. Under section 3.2 of SWIFT's Data Retrieval Policy, the customer (i.e. a member bank) is deemed to have consented to SWIFT's processing of personal data in accordance with the Data Retrieval Policy. Read in conjunction with another document, SWIFT has absolute discretion with respect to the manner in which it handles subpoenas "or other lawful process(es) by a court or other competent authority."
- On the surface, it would appear that the banks have surrendered the control of the personal information that they handle to SWIFT in these circumstances. However, it can be argued that they have no more "surrendered" control than any other organization that transfers personal information to organizations outside of the country.
- In Case summary 313 (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2005/pipeda-2005-313/), we noted

the following in the findings:

> *(the bank) has in place a contract with its third-party service provider that provides guarantees of confidentiality and security of personal information. The contract allows for oversight, monitoring, and an audit of the services being provided. (the bank) maintains custody and control of the information that is processed by the third-party service provider. However, while customer personal information is in the hands of a foreign third-party service provider, it is subject to the laws of that country and no contract or contractual provision can override those laws. In short, an organization with a presence in Canada that outsources the processing of personal information to a USfirm cannot prevent its customers' personal information from being lawfully accessed by US authorities.*

- In this case, the banks are meeting their obligations under Principle 4.1.3. When an organization contracts with a firm that operates both within and outside of Canada, it cannot prevent that firm from responding to lawfully issued subpoenas.
- The Assistant Commissioner commented that, in keeping with this Office's publicly stated position, namely, that, at the very least, a company in Canada that outsources information processing to a company that operates in another country should notify its customers that the information may be available to the government of that country or its agencies under a lawful order made in that country. She found that each of the banks has very clear language in their privacy policies. These policies inform customers that the banks may send their personal information outside of the country for certain purposes and that, while such information is out of the country, it is subject to the laws of the country in which it is held.
- The Assistant Commissioner was therefore satisfied that each bank has conformed to the requirements of Principle 4.8.

2. and 3. The purpose for the disclosures and lack of consent:

- The complainant had raised concerns about the purpose of the disclosures. She had also argued that the exceptions to consent under the Act that allow organizations to respond to subpoenas without knowledge or consent did not apply in this case. The banks, she contended, were therefore responsible for the disclosures.
- The Assistant Commissioner noted, however, that the banks did not disclose the information, SWIFT did. The contractual language between the banks and SWIFT clearly places responsibility for responding to such subpoenas in the hands of SWIFT; the banks notify their customers of the possibility of such disclosures by way of their respective privacy policies.
- Given that SWIFT was responsible for the disclosures, not the banks, the issues of the purpose for the disclosures and the lack of consent are dealt with in the Commissioner-initiated complaint against SWIFT in the Report of Findings (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2007/swift_rep_070402/).

Accordingly, she concluded that the complaints were not well-founded (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/def-pipeda/).

The Assistant Commissioner concluded her remarks by noting that Canada must respect the legal frameworks of other countries. The Act cannot prevent foreign authorities from lawfully accessing the personal information of Canadians held by organizations within their jurisdiction. Likewise, the *Act*cannot force Canadian companies to stop outsourcing to foreign-based service providers (or service providers that operate in several jurisdictions). What the Act does demand is that organizations be transparent about their personal information handling practices and protect customer personal information in the hands of third-party service providers to the extent possible by contractual or other means. In these cases, such requirements have been met.

Date modified:

2007-04-02

TAB 12

Office of the Privacy Commissioner of Canada
Commissariat à la protection de la vie privée du Canada

Bank's notification to customers triggers *PATRIOT Act* concerns

PIPEDA Case Summary #2005-313

(Principles 4.1.3 and 4.8)

Complaint

The Office of the Privacy Commissioner of Canada received a number of complaints after the Canadian Imperial Bank of Commerce (the CIBC) sent a notification to its VISA customers in the fall of 2004, amending its credit cardholder agreement. The notification referred to the use of a service provider located in the United States and the possibility that U.S. law enforcement or regulatory agencies might be able to obtain access to cardholders' personal information under U.S. law.

The allegations made by the complainants can be summarized as follows:

- That as a condition of service, CIBC was requiring VISA customers to consent to the disclosure of their personal information to U.S. regulatory authorities;
- That they were being required to share their personal information with a U.S.-based company as a condition of service;
- That they were being required to consent to overly broad collection practices;
- That the CIBC would not allow them to opt-out of having their personal information sent to the third-party service provider; and
- That the bank was not properly safeguarding their personal information.

While each complainant raised slightly different issues, all complainants primarily objected to the possible scrutiny of their personal information by U.S. authorities within the context of foreign intelligence gathering.

The Privacy Commissioner of Canada has gone on record stating that the privacy implications of anti-terrorism legislation and outsourcing need to be the focus of continued public debate. The central issue to be decided in these complaints, however, was whether the bank acted in accordance with its obligations under the *Personal Information Protection and Electronic Documents Act* (the Act).

Summary of Investigation

In September 2004, the complainants received a Notice of Changes to their CIBC VISA cardholder agreement. The section that was of particular concern stated in part:

> *I acknowledge that in the event that a Service Provider is located in the United States, my information may be processed and stored in the United States and that United States governments, courts or law enforcement or regulatory agencies may be able to obtain disclosure of my information through the laws of the United States....*
>
> *I acknowledge and agree that the ... paragraphs above constitute prior written notice to me of, and my consent to the collection, use and disclosure of my personal information as described above....*

Outsourcing of financial services to the United States

The CIBC states that, as part of the process of updating its credit card portfolio, it decided to provide further information to customers about the processing and storing of information in the United States. Since 1994, the CIBC has maintained a business relationship with a U.S.-based data processing company. CIBC's third-party service provider has software that facilitates the authorization of payment transactions, risk assessment and fraud monitoring. All of the personal information that approved credit cardholders provide is entered into the third-party service provider's system, and is available to CIBC employees who interact with the cardholder regarding account information, disputes over charges, and any collection activity.

Subsection 245(1) of the *Bank Act* requires banks to maintain and process in Canada any information or data relating to the preparation and maintenance of bank records, including customer account records. Banks can be exempted from this requirement but they must apply for and receive the approval of the Office of the Superintendent of Financial Institutions (OSFI). OSFI deals with an application for approval from a bank on its merits, and without this approval, the bank cannot proceed with its outsourcing arrangement. The CIBC has received OSFI approvals for its business relationship with the third-party service provider six times — most recently in 2002.

OSFI issues guidelines to all federally regulated entities regarding their outsourcing practices. These guidelines specifically identify confidentiality and the security of information as key considerations in an outsourcing arrangement, and outline OSFI's requirement that banks undertake a due diligence process that fully assesses all risks associated with the outsourcing arrangement and ensures compliance with all applicable regulatory requirements. The guidelines state, in part:

> *In selecting a service provider, or renewing a contract or outsourcing arrangement, FREs (federally regulated entities) are also expected to undertake a due diligence process that fully assesses the risks associated with the outsourcing arrangement, and addresses all relevant aspects of the service provider, including qualitative (i.e., operational) and quantitative (i.e., financial) factors... when out-of-Canada outsourcing is being contemplated, the FRE should pay particular attention to the legal requirements of that jurisdiction, as well as the potential foreign political, economic and social conditions, and events that may conspire to reduce the foreign service provider's ability to provide the service, as well as any additional risk factors that may require adjustment to the risk management program.*

The Office reviewed CIBC's contract with the U.S.-based third-party service provider. It sets out detailed requirements regarding the safeguarding, confidentiality and security of customer account information. The contract affirms that CIBC owns the data that is processed by the service provider, that the service provider is to maintain safeguards to protect that data, and that the CIBC retains a right of access and audit. The third party provider's security policy includes

administrative, technical and physical protections to safeguard against, inter alia, unauthorized usage, modification, copying, accessing or other unauthorized processing of CIBC data. The policy is designed with the objectives of ensuring the security and confidentiality of all records and data, protecting against anticipated threats or hazards to the security or integrity of information, and protecting against unauthorized access to or use of information. The policy incorporates various guidelines, including the European Union Data Directive, VISA Association guidelines, and others.

CIBC controls the destruction of the data and manages all aspects of its relationship with its customers. All information and data transmitted between CIBC and the service provider is encrypted and transmitted through a dedicated transmission line. OSFI has a right to audit, inspect, and monitor the provision of services. There are also contractual controls with respect to the subcontracting of services and audits.

Access of U.S. authorities to personal information of Canadian residents

The possibility of U.S. authorities accessing Canadians' personal information has been raised frequently since the passage of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 2001* (*USA PATRIOT Act*). Prior to the passage of this Act, U.S. authorities were able to access records held by U.S.-based firms relating to foreign intelligence gathering in a number of ways.

What has changed with the passage of *USA PATRIOT Act* is that certain U.S. intelligence and police surveillance and information collection tools have been expanded, and procedural hurdles for U.S. law enforcement agencies have been minimized. Under section 215 of the *USA PATRIOT Act*, the Federal Bureau of Investigation (FBI) can access records held in the United States by applying for an order of the Foreign Intelligence Surveillance Act Court. A company subject to a section 215 order cannot reveal that the FBI has sought or obtained information from it.

The risk of personal information being disclosed to government authorities is not a risk unique to U.S. organizations. In the national security and anti-terrorism context, Canadian organizations are subject to similar types of orders to disclose personal information held in Canada to Canadian authorities. Despite the objections of the Office of the Privacy Commissioner, the *Personal Information Protection and Electronic Documents Act* has been amended since the events of September 11th, 2001, so as to permit organizations to collect and use personal information without consent for the purpose of disclosing this information to government institutions, if the information relates to national security, the defence of Canada or the conduct of international affairs.

In addition to these measures, there are longstanding formal bilateral agreements between the U.S. and Canadian government agencies that provide for mutual cooperation and for the exchange of relevant information. These mechanisms are still available.

Issue of consent

With respect to the Notice, the bank's view was that it was prudent to confirm cardholder consent to the sharing of information with a U.S.-based service provider since the bank was unsure whether any of the exceptions to consent set out in the Act would apply, in the event that customer information held by the bank's third-party processor was accessed by U.S. authorities.

Based on the language of the Notice ("I acknowledge and agree that the ... paragraphs above constitute prior written notice to me of, and my consent to the collection, use and disclosure of my personal information as described above..."), some of the complainants concluded that they had the right to opt-out of this use of their personal information.

In the section of the Notice entitled "Privacy Issues," two paragraphs deal with privacy issues. One describes the information that CIBC collects, and a second states, in part:

> *My information may be used and disclosed in accordance with CIBC's privacy policies, as set out in its brochure "Your Privacy is Protected"...*

We examined the privacy brochure in question. It includes a section that outlines CIBC's practices with regard to the sharing of information with third parties. It states, in part:

> *We don't share information about you within the CIBC group, or release it to anyone outside of the CIBC group, without your consent. For example, we give information to a credit bureau only with your consent.*
>
> *There are some exceptions to the above rules. For example, we may collect, use or disclose information without your consent if we:*
>
> > *Use an outside company to process information.*
> >
> > *At times we may use the expertise of an outside company to do work for us involving some of your information — for example, the printing of cheque books. When we do, we select the company carefully and confirm that it uses security standards comparable to those of CIBC.*

The language of the privacy brochure would appear to advise customers that they do not have the right to opt-out where CIBC uses an outside company to process personal information. CIBC has confirmed that there is no right to opt-out from this situation.

Findings

Issued October 19, 2005

Application: Principle 4.1.3 of Schedule 1 states that an organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party. Principle 4.8 provides that an organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

The Assistant Privacy Commissioner recognized that many Canadians are concerned about the flow of their personal information outside of our country's borders and its accessibility by foreign governments. In order to determine whether these complaints are founded or not, however, it is the obligations imposed by the Act on Canadian-based organizations, and how well CIBC met them, that are the primary considerations.

In making her determinations, she deliberated as follows:

- While the Act does not prohibit the use of foreign-based third-party service providers, it does oblige Canadian-based organizations to have provisions in place, when using third-party service providers, to ensure a comparable level of protection.

- In keeping with its obligations under Principle 4.1.3 of the *Act* and in accordance with OSFI's guidelines (which are also consistent with this Principle), CIBC has in place a contract with its third-party service provider that provides guarantees of confidentiality and security of personal information.
- The contract allows for oversight, monitoring, and an audit of the services being provided. CIBC maintains custody and control of the information that is processed by the third-party service provider.
- The Assistant Commissioner noted, however, that while customer personal information is in the hands of a foreign third-party service provider, it is subject to the laws of that country and no contract or contractual provision can override those laws.
- In short, an organization with a presence in Canada that outsources the processing of personal information to a U.S. firm cannot prevent its customers' personal information from being lawfully accessed by U.S. authorities.
- Furthermore, even if one were to consider the issue of "comparable protection" from the perspective of U.S. versus Canadian anti-terrorism legislation, it was clear to the Assistant Commissioner that there is a comparable legal risk that the personal information of Canadians held by any organization and its service provider — be it Canadian or American — can be obtained by government agencies, whether through the provisions of U.S. law or Canadian law.
- The Assistant Commissioner therefore determined that CIBC was in compliance with Principle 4.1.3.
- She went on to reaffirm this Office's publicly stated position: that, at the very least, a company in Canada that outsources information processing to the United States should notify its customers that the information may be available to the U.S. government or its agencies under a lawful order made in that country.
- In keeping with this direction, CIBC notified its customers of the risk that their personal information might be accessed under the provisions of the *USA PATRIOT Act* whilst in the hands of a U.S.-based third-party service provider.
- Thus, by providing such information, the bank was informing its customers about its policies and practices related to the management of their personal information, in accordance with Principle 4.8.
- In the Assistant Commissioner's view, the real concern underlying these complaints is the prospect of a foreign government accessing Canadians' personal information.
- She concluded, however, that the Act cannot prevent U.S. authorities from lawfully accessing the personal information of Canadians held by organizations in Canada or in the United States, nor can it force Canadian companies to stop outsourcing to foreign-based service providers. What the Act does demand is that organizations be transparent about their personal information handling practices and protect customer personal information in the hands of foreign-based third-party service providers to the extent possible by contractual means. This Office's role is to ensure that organizations meet these requirements. In the case of these complaints, these requirements have been met.

The Assistant Commissioner therefore concluded that these complaints were not well-founded (/en/opc-actions-and-decisions/investigations/investigations-into-businesses/def-pipeda/).

Further Considerations

The bank's notice of amendment of the cardholder agreement triggered complaints to the Office, many of which centred on the complainants' views that they could opt-out of having their information sent to the U.S. or that they were being required to consent to the sharing of their personal information with the U.S. government.

The Assistant Commissioner was of the view that the language used by the bank in the notice was problematic in that it appeared to have left the impression that a customer could opt-out of having their personal information sent to the third-party service provider. This contradicted the language of the bank's privacy policy, which states that customers cannot opt-out of having CIBC share their personal information with third-party service providers.

CIBC's third-party service provider is offering services (data processing to maintain an account) that are directly related to the primary purposes for which customers provided their personal information (to obtain a credit card). This Office has taken the position that companies are not required to provide customers with the choice of opting-out where the third-

party service provider is offering services directly related to the primary purposes for which the personal information was collected. A customer provides consent to the primary uses of personal information when he or she initially signs the application form or when he or she continues to use the service after being advised of substantive changes to the service agreement.

Principle 4.3 requires organizations to obtain the meaningful consent of an individual to its actual and *proposed* collection, use and disclosure practices. CIBC was not, however, *proposing* to release customer information to U.S. regulatory authorities, nor was it proposing that its U.S.-based data processor do so. Similarly, CIBC was not notifying customers that it was collecting, using or disclosing more personal information than before, nor was it requiring customers to consent to the collection of their personal information by U.S. authorities as a condition of service. It was clear to the Assistant Commissioner that it was notifying customers of the *risk* that their personal information could be lawfully accessed by U.S. authorities because of where it is processed. In short, CIBC was making information available to its customers about its policies and practices related to the management of personal information.

The Assistant Commissioner was of the view that CIBC's notification did not offend any provisions of the Act. The bank took the appropriate step of being transparent about its practices of using a U.S.-based third-party service provider for processing and about the possible risk that customer personal information might be lawfully accessed by U.S. authorities.

She nevertheless encouraged CIBC to review the language of its cardholder agreements to ensure that its customers clearly understand that they do not have the right to opt out of having their personal information processed by a third-party service provider.

Date modified:

2005-10-19

Court File No. CV-16-11290-00CL

IN THE MATTER OF MAPLE BANK GmbH
AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED
AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF THE LIQUIDATOR KPMG INC. (Motion returnable December 13, 2017)

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3

Alex MacFarlane (LSUC No. 28133Q)
Tel: 416.367.6305
amacfarlane@blg.com

Bevan Brooksbank (LSUC No. 56717U)
Tel: 416.367.6604
bbrooksbank@blg.com

Lawyers for KPMG Inc., in its capacity as Liquidator of the business in Canada of Maple Bank GmbH and its assets