File No. CI 23-01- 41869

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

THE CITY OF WINNIPEG,

applicant,

- and -

CAMBRIA HARRIS, KASYN RAPKE, MELISSA (NORMAND) ROBINSON, GEORGE ROBINSON, TRE LENNOX DELARONDE, JOSEPH ALEXANDER MUNRO, JOHN DOE, JANE DOE, and OTHER UNKNOWN INDIVIDUALS,

respondents.

APPLICATION UNDER: Section 188 of *The City of Winnipeg Charter* SM 2002, c 39

FILED JUL 11 2023

APPLICATION BRIEF OF THE APPLICANT

DOUGLAS BROWN
Director of Legal Services and City Solicitor
The City of Winnipeg
Legal Services Department
3rd Floor, 185 King Street
Winnipeg, Manitoba, R3B 1J1

Telephone: (204) 986-2599
Facsimile: (204) 947-9155
Email: apledger@winnipeg.ca

[File No. CL.1-2022 (249)]

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APPLICATION BRIEF OF THE APPLICANT

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LIST OF DOCUMENTS TO BE RELIED UPON

1. Affidavit of Michael Gordichuk, affirmed July 11, 2023.

INTRODUCTION and FACTS

1. The Applicant, the City of Winnipeg (the "City") is a municipal corporation continued under *The City of Winnipeg Charter*, S.M. 2002, c. 39.

2. The Respondents are groups and/or individuals engaged in blocking access to the City's solid waste operations at the Brady Road Resources Management Facility ("Brady Landfill") and the Brady 4R Winnipeg Deport located at 1777 Brady Road in Winnipeg, and abutting lands in the Rural Municipality of McDonald, Manitoba (the "Brady Solid Waste Operations").

3. The Brady Solid Waste Operations is owned and operated by the City of Winnipeg, pursuant to environmental licence number 3081R issued on December 23, 2013 by the Province of Manitoba (the "Licence").

4. The Brady Landfill is the City's only active landfill.

5. The Brady Solid Waste Operations are accessed by the public, including the City's employees and contractors by way of the Waverly Street near the South Perimeter Highway (Trans Canada Highway 101), by turning in a westerly direction onto Ethan Boyer Way and continuing until Ethan Boyer Way becomes Brady Road (the "Entranceway").

6. The distance of the Entranceway from Waverly Street and Ethan Boyer Way to the entrance of the Brady Solid Waste Operations on Brady Road is approximately four kilometres (4 km).

7. As part of the Brady Solid Waste Operations, the City receives approximately 1,000 to 1,500 tonnes of solid waste per day

8. On December 11, 2022, some of the Respondents attended and conducted protests near the Facility. During that time, some of the Respondents blocked roadway access to the Facility.

9. Due to the blockade, several Contractors and commercial customers traveling in large vehicles were lined up and unable to turn around on Brady Road.

10. Thereafter, due to the blockade and concerns with safe access to and from the Facility, the closure of the Facility was authorized. The City notified customers via signage at Ethan Boyer Way and Waverley Street, and diverted waste to other landfills.

11. On December 16, 2022, some of the Respondents attended near the Facility and caused interruptions to roadway access to the Facility. Due to concerns with safe access to and from the Facility, the diversion of solid waste to alternate landfills outside of Winnipeg was authorized.

12. In the afternoon on December 18, 2022, some of the Respondents attended near the Facility and blocked roadway access to the Facility. The closure of the Facility was again authorized.

13. On most occasions, after a closure of the Facility, to avoid any confrontation or escalation, City employees and contractors exited through an emergency access to the Facility. The emergency access is not suitable for customer traffic or large vehicles.

14. On December 23, 2022, representatives from the City took over 20 guests, including family members of Morgan Harris and Marcedes Myran for a tour of the Facility. The City also provided education related to the Facility operations and confirmation that the City was no longer operating in Cell 32. Also, the guests participated in a smudging ceremony near Cell 32.

15. Between the period of December 18, 2022 and January 5, 2023, some or all of the Respondents stood in the roadway, formed a blockade using vehicles, a tent or other similar structures, and other objects, or otherwise supported the blockade at Brady Road near the entrance to the Facility preventing traffic to flow to and from the Facility.

16. During this time, the Facility was closed and the residential waste collected by the Contractors was diverted. The City was able to negotiate with some of the Respondents to permit the City to access and remove leachate from the Facility. Also, City employees

were able to access the Facility via the emergency access to attend to other safety sensitive operations.

17. On January 5, 2022, City representatives had discussions with Indigenous stakeholders to facilitate clearing the blockade. Later that day, the City received confirmation that the blockade would be cleared to permit the Facility to open on January 6, 2023.

18. On January 6, 2023, operations at the Facility resumed. Some of the Respondents remained on City lands near the Facility and maintained an encampment near the Facility, which was named Camp Morgan. The encampment has continued to date, and several Respondents have maintained an ongoing presence at the encampment throughout the winter, spring and summer.

19. Aside from initial disputes between some of the Respondents and customers accessing the Facility, there were no major issues impacting the ongoing operation of the Facility until April 2023, when the remains of Linda Beardy were found at the Landfill.

20. On or about April 3, 2023, the Facility was closed temporarily and remained closed until April 10, 2023. During this time, some of the Respondents promoted a permanent shut down of the Facility.

21. The blockades caused or supported by the Respondents on Brady Road for between December 13, 2022 and January 6, 2023 cost the City approximately $1.5 Million, including lost revenue and out-of-pocket expenses.

22. In addition, the City has incurred security and traffic related expenses of approximately $600 per day or approximately $125,000 this year.

23. On or about December 14, 2022, the Federal government committed to fund a study to assess the feasibility of a potential search at the PG Landfill for the remains of the Indigenous women. The scope of the study did not include a search at the Brady Landfill.

24. In or about May 2023, the feasibility study was completed. The report included a finding that a search is feasible, but cautioned considerable risks due to exposure to toxic chemicals and asbestos. The report also noted that if a search is conducted, a successful outcome is not guaranteed, and it could take 12 to 36 months and costs between $84 Million and $184 Million.

25. On or about July 5, 2023, Premier Heather Stefanson and Eileen Clarke, the Minister for Indigenous Reconciliation and Northern Relations issued a statement regarding the search for human remains at the PG Landfill.

26. On July 6, 2023, some of the Respondents attended or supported a partial blockade on Ethan Boyer Way. City representatives attended the blockade with members of the WPS neutral police liaison team (PLT) to engage in a dialogue.

27. Later in the day, some of the Respondents attended, maintained or supported a full blockade across the road on Ethan Boyer Way. Members of the WPS PLT again attended the blockade and spoke to some of the Respondents.

28. To mitigate against further interruption of the operations at the Facility, the construction of an alternative route to the Facility via Waverley Street and rue des Trappistes was authorized. However, the alternative route is not an all-weather road and is susceptible to precipitation. Despite the blockade, the Facility remained open on July 6th, as customers were able to access and exit through the alternative route.

29. In the evening on July 6th it rained rendering the alternative route unusable. While leaving the Facility via the alternative route, two customers got stuck and City employees had to assist the customers to leave the Facility.

30. On July 7, 2023, with the alternative route unusable, and some of the Respondents continuing to block access to the Facility via Ethan Boyer Way, the closure of the Facility was again authorized.

31. Work was authorized to reinforce the alternative route to try to maintain operations and access to the Facility. To date, the cost of construction and maintenance of the alternate route is approximately $124,000.

32. In the afternoon on July 7th, the Chief Administrative Officer (“CAO”) of the City issued a notice ordering the blockade on the roadway to be cleared (“Order”). City personnel attended the blockade with the Director of the Water and Waste Department and members of the WPS PLT and attempted to serve the Order on Trey Lennox Delaronde and the other Respondents present. The Respondents who were present would not accept the Order, so the Order was left on the ground near them and advised them of the Order to vacate the roadway by July 10th at 12:00 PM.

33. Shortly thereafter, one or more of the Respondents started a fire and burned the Order and other materials on the roadway at Ethan Boyer Way.

34. On July 8, 2023, the Facility reopened with access via the reinforced alternative route. Some of the Respondents continued the blockade at the roadway on Ethan Boyer Way.

35. Some of the Respondents, have informed me and I verily believe that the recent blockade on the roadway was initiated in response to Manitoba’s decision to not support a search at the PG Landfill.

36. Despite statements in the media from some of the Respondents on July 8, 2023 that the blockade would be removed prior to the July 10th deadline, on July 9, 2023, a number of activities occurred which may be viewed as increasing activity and conflict near the blockade, including:

a) the City’s digital sign located near the intersection of Ethan Boyer Way and Waverley Street was flipped over;

b) an unknown individual attended the blockade and dumped wood chips on the roadway and engaged in a heated exchange with Respondents at the blockade.

c) And unknown individual attended the Facility through the alternative route in a truck and yelled at customers to leave;

d) the entrance sign for the Facility was defaced.

e) a post was made on the Facebook page of Kyra Wilson, the Chief of the Long Plain First Nation, soliciting support for Camp Morgan.

f) the number of individuals present at the blockade was increasing.

37. On July 10, 2023, several Respondents attended and maintained a blockade on Ethan Boyer Way despite the Order and after the 12:00 PM deadline. Over the course of the day, several videos and photos were posted on Facebook showing larger numbers of individuals present, and more materials in the roadway on Ethan Boyer Way.

Affidavit of Michael Gordichuk, affirmed J Affidavit of Michael Gordichuk, affirmed July 11, 2023,* (the "Gordichuk Affidavit") *at para. 58

38. As a result of the Respondents' actions which are set out in detail in the City's supporting affidavit materials, the City has suffered damages and will almost certainly continue to suffer damage and loss if the injunctive relief sought is not granted.

39. The City seeks the following injunctive relief as against the Respondents

a) an interim and/or interlocutory injunction strictly enjoining, restraining and prohibiting the Respondents and all other persons having knowledge of the Court's Order from, directly or indirectly continuing or joining in a blockade or occupation, of any portion of Ethan Boyer Way, Brady Road and other nearby streets, that limits ingress and egress of the Brady Road Resource Management Facility and Brady 4R Winnipeg Depot (collectively known as the "Brady Solid Waste Operations"); and

b) an interim and/or interlocutory injunction strictly enjoining, restraining and prohibiting the Respondents from accessing the lands beyond the fenced entrances of the Brady Solid Waste Operations, unless such access is for the limited purpose of using the services provided at the Brady Solid Waste Operations, in such places and during such times that are open to the public, or unless express consent is provided by the Applicant to access some or all of the Brady Solid Waste Operations;

Injunctive Relief – The Law

40. Section 188 of the *City of Winnipeg Charter*, S.M. 20, c. 39 (the "Charter") states that:

> **Application to court to enforce by-law**
>
> *188 The city may apply to the Court of Queen's Bench for an injunction or other order to enforce a by-law or to restrain a contravention of a by-law or of this or any other Act without initiating a prosecution in respect thereof, and the court may grant or refuse to grant the injunction or other order or make any other order that the court considers fair and just.*

The Charter, s. 188 (Tab 1)

41. The City relies upon s. 188 of the Charter in accordance with the modified test set out in greater detail below.

42. In addition and/or the alternative, the City relies upon the common law principles pertaining to the granting of injunctions. When considering an application for an interim or interlocutory injunction, the Supreme Court of Canada has applied a three-stage test:

a) First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried;

b) Secondly, it must be determined whether the Applicant would suffer irreparable harm if the application were refused;

c) Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

***R.J.R. MacDonald Inc. v. Attorney General of Canada* (1994), [1994] 1 S.C.R. 311, at para 48 (Tab 2)**

***See also: Apotex Fermentation Inc. v. Novopharm Ltd.*, [1994] 7 W.W.R. 420 (Man. C.A.) (Tab 3)**

43. However, the usual standard that needs to be demonstrated for most prohibitive injunctions is that of a serious issue to be tried. A serious issue to be tried is a low threshold that is reached where the plaintiff demonstrates that its case is not frivolous or vexatious.

***R.J.R. MacDonald Inc.*, *supra,* at para. 49 (Tab 2)**

44. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

R.J.R. MacDonald Inc., supra, at para. 64 (Tab 2)

45. Finally, the balance of convenience test the court must make "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".

***R.J.R. MacDonald Inc., supra,* at para 62 (Tab 2)**

46. It is respectfully submitted that the Ontario Superior Court of Justice decision in *Automotive Parts Manufacturers' Association v. Jim Boak*, 2022 ONSC 1001 ("APMA") (**Tab 4)** is quite analogous to the one here.

47. In that case, commencing on February 22,2022, a protest had obstructed an intersection leading to the Ambassador Bridge connecting Windsor, Ontario to Detroit, Michigan. This was achieved by parking multiple vehicles on city streets and blocking traffic from crossing the bridge through the primary entrance.

***APMA, supra,* para. 3 (Tab 4)**

48. Similarly, the matters there related to the obtaining of immediate injunctive relief to restrain the establishment of a blockade, or in any way impeding access both to and from the bridge.

***APMA, supra,* para. 11 (Tab 4)**

49. In AMPA the evidence clearly established that:

(i) the use of the Bridge was of vital importance to the residents and businesses in the immediate geographic area;

(ii) in the days leading up to the filing of the application for an Injunction, the protest has escalated to the point where the blockade has resulted in the closure of and severe limitation of traffic across the Bridge;

(iii) the protests and the blockade had a significant negative impact on the residents and businesses in the immediate geographic area and numerous by-laws of the City have been breached; and

(iv) the protests and the blockade have had a significant negative and far-reaching impacts beyond the Windsor area.

***APMA, supra,* para 31 (Tab 4)**

50. In the *APMA* decision, the Court found that:

a) A serious issue had been raised, and that a number of causes of action had been demonstrated that were neither trivial nor vexatious including:

   i. a claim in public nuisance;

   ii. a claim in intentional interference with economic relations;

   iii. and whether damages had been suffered, and will continue to be suffered as a result thereof and as a result of other torts.

b) Injunctions enforcing public rights and public laws, including municipal by-laws, are readily granted.

***APMA, supra,* paras 37-40 (Tab 4)**

c) The Court was satisfied that "there is no question that the Protestors' illegal blockade of the Bridge has caused and will continue to cause irreparable harm to the City, the residents of the City…if their unlawful conduct is permitted to continue".

***APMA, supra*, para. 22 (Tab 4)**

***See also: Canadian National Railway v. Chippewa of Sarnia First Nation Band,* 2012 ONSC 7348 ("CNR"), at paras. 20-25 (Tab 5)**

d) In that case, the plaintiffs did not seek to prohibit the Protestors from expressing their views or exercising their rights. They sought to prohibit unlawful activity, including the obstruction of public access to the Bridge in that case.

e) The Court states at paragraphs 51-53 of *AMPA* that:

> *51 There is no doubt that freedom of expression, as guaranteed by s. 2(b) of the Charter, and the related rights of freedom of conscience, peaceful assembly and association are some of the most important rights of a free and democratic society. However, freedom of expression, like all other Charter rights, is not an absolute right nor an unqualified one. The Charter does not give any person the legal right to unlawfully trample on the legal rights of others. Every Charter right must be balanced against other important values and rights.*
>
> *52 Simply put, freedom of expression does not extend to the point that the Protesters' activities can result in the denial of fundamental rights and freedoms to all those detrimentally affected by the blockade.*
>
> *53 While the Protesters involved in the blockade of the Bridge have every right to voice their criticism of government public health restrictions and/or vaccine mandates, they do not have the legal right, under the Charter or otherwise, to unilaterally block and impede access to the Bridge.*

***AMPA, supra,* paras 51-53 (Tab 4)**

***See also: Produits Forestiers Arbec S.E.N.C. v. John Doe*, 2010 NBBR 361, at paras. 20-22 ("Arbec") (Tab 6)**

f) On this basis, the Court found that, the balance of convenience favoured the granting of the Injunction.

51. The Court also addressed statutory powers of a municipality to seek an injunction restraining a person (or persons) from contravening its by-laws.

52. In AMPA, the Court held that:

> *57 I note that where a municipal authority seeks an injunction to enforce a by-law which it establishes is being breached, the courts will refuse the application only in exceptional circumstances: see Newcastle Recycling Ltd., at para. 32.*
>
> *58 I agree with the submission of the Attorney General that absent a constitutional challenge to the by-laws in question, they are presumptively valid and remain in force and in effect. A consideration of the Protesters' Charter rights is therefore not required.*
>
> *59 It has been held that where an injunction is sought for the purpose of enforcing a municipal by-law, the traditional test for an injunction as set out above should be modified so that the first criterion (serious question to be tried) will be strongly emphasized to the exclusion of the other two criteria (irreparable harm and balance of inconvenience): see Hamilton (City), at paras. 24, 28 and 31; The Township of Amaranth, at paras. 52-55.*
>
> *60 In this modified test, there is no need for the City to prove that it will suffer irreparable harm and there is no need to consider the balance of convenience because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest: see The Township of Amaranth, at para. 54. However, in this modified test, the first criteria (serious issue to be tried) should be higher than the standard required when all three criteria are considered under the RJR-MacDonald test. A strong prima facie case must be established: Hamilton (City), at para. 37.*
>
> *61 I find that a strong prima facie case has been established. It is clear that the unlawful actions of the Protesters, which include obstructing roads and the Bridge with vehicles, leaving their vehicles idling and blocking and impeding the public's access to the Bridge, are breaches of the City's by-laws. City By-law number 9148 (ss. 7 and 12) regulates traffic within City limits and prohibits people from obstructing roads with their vehicles and more generally prevents people from obstructing any highway. The parking of multiple vehicles and the presence of many persons whose express intent is to block traffic is a clear violation of that by-law.*

53. Following the analysis in R.J.R. MacDonald, the Court found that the criteria for an injunction both based in statute and at common law had been met. Specifically, the Order did not prevent the protesters from lawfully expressing their message, as long as they did not prevent the free flow of traffic.

***AMPA, supra*, para 63 (Tab 4)**

54. It is worth nothing that the decision in *The Corporation of the City of Windsor v. Persons Unknown*, 2022 ONSC 1168 ("Windsor"), addressed violations of the Injunction Order granted in AMPA and held that the plaintiff had made out a *prima facie* case that the defendants had deliberately and continuously breached municipal by-laws in that case in the following circumstances:

a) Violating a Court Order for an Injunction to end a blockade

b) The protestors were expressing intent to continue their blockade despite the Court Order;

c) There being evidence that the Protesters planned to continue to protest on roadways, causing interception of traffic intended for those roadways;

d) Traffic on the subject roadway continued to be disrupted as a result of the blockades and/or the threat of further blockades.

***Windsor, supra*, at para. 47 (Tab 7)**

55. In the Windsor case, a permanent injunction was granted, reiterating the words "Simply put, freedom of expression does not extend to the point that the protesters' activities can result in the denial of fundamental rights and freedoms to all those detrimentally affected by the blockade."

***Windsor, supra,* at para. 68 (Tab 7)**

Analysis

56. The City says that based upon the evidence filed in Court, the City has a strong *prima facie* case, on the balance of probabilities, that the Respondents have breached municipal by-laws and that there is a risk that they will continue to do so.

***Windsor, supra* at para. 46-49 (Tab 7)**

Statutory Injunction under s. 188 of the Charter

57. The City respectfully relies upon s. 188 of the Charter, and seeks to enforce its by-laws and various Acts which have been breached by the Respondents, including but not limited to:

a) the *Streets By-law* 1481/77;

b) the *Solid Waste By-law* 110/2012;

c) the *Winnipeg Parking By-law* 86/2016;

d) the *Neighbourhood Liveability By-law* 1/2008;

e) *The Highway Traffic Act* CCSM c H60; and

f) *The City of Winnipeg Charter* SM 2002 c 39.

58. On Friday, July 7, 2023, the City's Chief Administrative Officer issued Notice to the Respondents of their violations of City By-laws and provisions of provincial legislation. That Notice also advised as to how the recent actions of the Respondents have placed the City as risk of violating the environmental licence required to operate the Facility.

59. That Notice indicated that the actions had been determined to constitute an emergency to the health and safety of the citizens of Winnipeg and users of the Facility as defined in the Charter and the Emergency Management By-law 59/2020.

60. The Notice required Immediate Action in the form of the individuals blocking the roadway to vacate the roadway and permit full access to the Facility by no later than Monday, July 10, 2023 at 12:00 p.m.

61. The Notice did not require that the individuals refrain from lawfully expressing their message.

Gordichuk Affidavit, *at para. 53*

62. Since that time, the individuals blocking the roadway have:

a) Burned the Notice

b) Expressed their refusal to vacate the roadway, thereby continuing to block access to the Facility;

c) Have not vacated the roadway; and

d) Have expressed their intent to continue blocking the roadway.

63. The blocking of the roadway is a violation of the afore-mentioned by-laws.

64. Consistent with the modified test for an injunction as set out in in *AMPA*, as applies to statutory injunctions sought by municipalities, the Strong Prima Facie Case test ought to be strongly emphasized to the exclusion of the Irreparable Harm and Balance of Convenience tests.

65. Despite this, however, and for completeness and for the Court's assistance, the within brief addresses all 3 of the Strong *Prima Facie* case test, the Irreparable Harm test, and the Balance of Convenience test as derived from common law herein.

66. Indeed, also consistent with *AMPA*, Injunctions enforcing public rights and public laws, including municipal by-laws, are readily granted.

There is a Strong *Prima Facie* Case

67. In addition to the serious issue of the clear violations of the City's by-laws and of provincial legislation, the City respectfully submits that are number of causes of action can be demonstrated that are neither trivial nor vexatious. However, in the interests of expediency and with the intent is to address the impact of the existing blockade at the Facility site by way of the within Application.

68. Access to the Facility is of critical importance, and engages a number of significant environmental health and safety activities. In order to comply with its environmental licence and Facility Operating plan, the City requires access to the site to:

a) Capture and burn toxic methane on a daily basis;

b) Capture and transport toxic leachate to City water treatment facilities on a daily basis;

c) Perform periodic ground water and air monitoring and sampling;

d) Perform periodic nuisance management to reduce odours, litter and pests at the facility;

e) Rotate compostable material to prevent combustion on a periodic basis;

f) Perform excavation of dedicated pits for animal remains and other materials on a periodic basis; and

g) Plant trees and shrubs and re-locate barriers around the facility on a periodic basis.

***Gordichuk Affidavit,* at para 16**

69. If the City is unable to operate the Facility:

a) The City will have to divert its solid waste to landfills outside of the City;

b) The City will incur expenses of approximately $42,100 per day

c) The City will lose potential revenue of approximately $36,800 per day in tipping fees and revenue on recyclable materials

d) The City may have to reduce its collection services, including that for residential yard waste;

e) The City's employees and independent contractors will not be able to report for work, potentially impacting the City's contractual relations

***Gordichuk Affidavit,* at para 18**

70. When the Brady Road Facility was closed by the City due to safety concerns arising from the protests and blockades between December 2022 and January 2023, the cost to the City was approximately $1.5 Million dollars.

71. The City has also incurred security and traffic related expenses of approximately $600 per day or approximately $125,000 this year.

72. To date, the cost of construction and maintenance of an alternate route into the Facility is approximately $124,000.

***Gordichuk Affidavit*, at para 52**

73. The Brady Road Facility is the only active landfill in Winnipeg. Extended diversion of City waste to smaller landfills in Manitoba is projected to be unsustainable in the long-term. The results would be a devastating impact to not just the Brady Road Facility, but to the City and surrounding areas at large, including:

a) The City not having a place to dispose of its waste

b) The near immediate halting of residential collection

c) The resulting large-scale development of illegal dumping, pest control issues, civil unrest, and other health and safety concerns.

***Gordichuk Affidavit,* at para 20**

74. The City respectfully submits that the evidence clearly establishes that:

(i) Access to and operation of the Facility is of vital importance to the residents and businesses of Manitoba and the surrounding area

(ii) in the days leading up to the filing of the within Application for an Injunction, the protest has escalated to the point where the blockade has resulted in the closure of the Facility and severe limitation of access to the Facility;

(iii) the protests and the blockade have had and are expected to have a continuing significant negative impact on the residents and businesses in Winnipeg and surrounding areas;

(iv) the protests and the blockade have had a significant negative and far-reaching impacts beyond the Facility itself, and have impacted upon the City of Winnipeg at large, as well as the locales which contain landfills to which solid waste from the Brady Road Facility has been diverted;

(v) the protestors have expressed their intent to continue their blockade despite the July 7, 2023 Notice from the City Chief Administrative Officer;

(vi) the protestors have continued blockading the roadway at the Facility, causing interception and disruption of traffic;

(v) numerous by-laws of the City have been breached

75. In addition to the violations of City By-Laws and Provincial Legislation, the City claims that the actions of the Respondents also can found demonstrable causes of action. Although those are not being pursued in the within application, the evidence supports that the City does have a number of causes of action including but not limited to:

a) Nuisance

b) Unlawful interference in contractual relations of the City and its ability to administer solid waste related to Winnipeggers; and

c) Unlawful interference in the City's obligations under Environment Act Licence number 3081 R issued by the Government of Manitoba pursuant to the *Environment Act*, CCSM c E125.

76. The City submits that there is a strong *prima facie* case that these causes of action are well founded and constitute serious issues for determination.

Irreparable Harm

77. In addition to what is set out above, the Brady Road Facility plays a vital role in servicing the City of Winnipeg. The blockade significantly impacts its operations, causes economic disruption, and poses long-term risks, all in the form of an irreparable nature.

78. It is submitted that, in addition, the closure of the facility is necessitated by the health and safety risks that have been presented by the human barrier that has been erected by the Respondents.

***Arbec, supra,* at paras 16-18 (Tab 5)**

***CNR, supra*, at paras 20-22 (Tab 6)**

79. The City submits that is has suffered and will continue to suffer irreparable harm if the injunctive relief sought is not granted.

Balance of Convenience

80. The issue of "balance of convenience" involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending decision on the merits".

***R.J.R. MacDonald Inc. v. Attorney General of Canada (supra)* at para 67 (Tab 7)**

81. The City has not sought to prohibit the protestors from expressing their views or exercising their rights. The City seeks to bring an end to significant and far-reaching effects of the obstruction of access to and resulting closure of the Brady Road Facility.

82. As was the case in *AMPA* and *Arbec*, there is no dispute that freedom of expression, and the related rights of freedom of conscience, peaceful assembly and association are fundamental rights in a free and democratic society.

83. However, freedom of expression is neither absolute, nor unqualified. Every Charter right must be balanced against other important values and rights.

***AMPA, supra,* paras 51-53 (Tab 4)**

***Arbec, supra*, at paras. 20-22 (Tab 5)**

84. The balance of convenience favours the granting of the injunction.

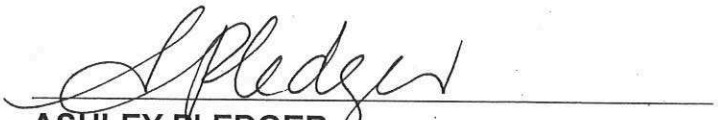
Concluding Comments

85. Based upon the foregoing, the applicant submits that the conduct of the respondents should be restrained and that the respondents should be compelled to immediately vacate their blockade of the roadway leading into the Facility.

Costs

86. The City says that it is entitled to costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th DAY of July, 2023.



ASHLEY PLEDGER

DOUGLAS BROWN
City Solicitor/Director of Legal Services
City of Winnipeg Legal Services Department
3rd Floor, 185 King Street
Winnipeg, MB R3B 1J1

AUTHORITIES

TAB 1

S.M. 2002, c. 39

Bill 39, 3rd Session, 37th Legislature

The City of Winnipeg Charter Act

INSPECTIONS AND ORDERS

Inspections

180(1)

If this Act, another enactment or a by-law authorizes or requires anything to be inspected, remedied, enforced or done by the city, a designated employee may, after giving reasonable notice to the owner or occupant of the land or building to be inspected or tested, or in which the thing to be inspected or tested or in respect of which the remedy, enforcement or action is authorized or required is located,

(a) enter the land or building at any reasonable time, and carry out the inspection, enforcement or action authorized or required by the Act or by-law;

(b) request that anything be produced to assist in the inspection, remedy, enforcement or action;

(c) make copies of a record, document, or thing related to the inspection, remedy, enforcement or action; and

(d) on providing a receipt, remove a record, document, or thing, if it is relevant to the inspection.

Identification of designated employee

180(2)

A designated employee exercising any authority under subsection (1) or section 182 must, upon request, display or produce identification showing that he or she has been designated as an employee who may exercise that authority.

No notice in emergencies

181

In an emergency, or in extraordinary circumstances, a designated employee need not give reasonable or any notice to enter land or a building and may do any of the things referred to in subsection 180(1) without the consent of the owner or occupier of the land or building and without a warrant.

Inspection programs conducted by public notice

182(1)

Council may by by-law appoint designated employees who may, at reasonable times, and in accordance with a public notice of an inspection program, enter on and inspect land in the city to determine whether by-laws authorized by the following provisions are being complied with:

(a) clause 130(a) (nuisance);

(b) section 131 (property adjacent to streets);

(c) section 134 (health, safety and well-being);

(d) clause 150(d) (inspections of construction and construction activity);

(e) section 159 (waterways);

(f) subsection 160(4) (by-law respecting water supply);

(g) section 161 (waste);

(h) section 165 (fire protection).

Public notice of inspections

182(2)

A public notice of an inspection program must include a general description of

(a) the purpose of the inspection;

(b) when the inspections may take place; and

(c) the neighbourhood, district or area of the city in which the inspections will occur.

Council may reappoint employee

182(3)

A by-law appointing an employee under subsection (1) expires one year after it is passed, but council may by by-law reappoint the employee.

Entry for inspection under public notice

182(4)

In accordance with a public notice under this section, a designated employee may enter and inspect land.

Liability for damages

182(5)

The city is liable for any damage arising from the entry of a designated employee upon land under the authority of this section.

Application for warrant

183(1)

If the owner or occupier refuses to allow or interferes with the entry, inspection, enforcement or action referred to in section 180 or 182, a justice who is satisfied by information under oath that entry to the land or building is necessary in the circumstances shall, on application of the city, issue a warrant authorizing the individual named in the warrant to enter the land or building.

Application before entry attempted

183(2)

The city may apply for, and a justice may issue, a warrant under this section before any attempt is made to enter the land or building affected.

Daytime execution of warrant

183(3)

A warrant issued under subsection (1) shall be executed during daylight hours unless the warrant authorizes it to be executed during the night.

Order to remedy contravention

184(1)

A designated employee who finds that this Act, another enactment that the city is authorized or required to enforce, or a by-law is being contravened, may, by written order, require the person responsible for the contravention to remedy it and shall serve the order on the person.

Content of order

184(2)

An order under subsection (1) may

(a) direct the person to stop doing something, or to change the way in which the person is doing it;

(b) direct the person to take any action or measure necessary to remedy the contravention, including the demolition or removal of a building;

(c) direct the person to vacate a premises and forbid its use or occupancy;

(d) specify a time within which the person must comply with the order; and

(e) state that if the person does not comply with the order within the specified time, the city will take the action or measure ordered at the expense of the person.

Registration of order

184(3)

If an order made under subsection (1) or 158(7) (variation of floodproofing criteria) relates to a parcel of land or to a building on a parcel of land, the city may register the order by way of caveat against the parcel in the land titles office.

Content of registered order

184(4)

An order under this section may be registered only if it includes

(a) a description of the parcel of land that the order relates to; and

(b) a statement that the land, or a building or structure on the land, does not comply with this Act, another enactment that the city is authorized or required to enforce, or a by-law.

District registrar to register order

184(5)

The district registrar shall register the order against the title or abstract of title of the land described in the order.

Subsequent purchasers are deemed served

184(6)

A person who acquires an interest in land on or after the date on which an order is registered under subsection (3) is deemed to have been personally served with the order on the date of registration.

Discharge of order

184(7)

Where an order registered under this section is no longer relevant, the city shall register a notice of discharge in the land titles office in a form prescribed under *The Real Property Act*.

City remedying contravention etc.

185(1)

Where

(a) a person has been served with an order under section 184;

(b) the person to whom the order was directed has not complied with the order within the time specified in it; and

(c) the time within which an appeal against the order may be taken has expired or, if an appeal against the order was taken, the appeal has been decided and the decision

(i) confirms the order, or

(ii) varies the order, but the person has not complied with the order as varied;

the city may, subject to subsection (3), take any action or measure that is referred to in the order and that is reasonable to remedy the contravention, and in so doing the city may do any work on adjoining land or buildings that is necessitated by the city remedying the contravention.

Closure of building and removal of occupants

185(2)

If the actions or measures taken by the city under subsection (1) are for the purpose of removing or demolishing a building, eliminating a danger to public safety or property or putting a building into a sanitary or a safe condition, the city may close the building and use reasonable force to remove the occupants of the building and restrict entry to the building except for the purpose of carrying out the actions and measures.

Notice before removal or demolition

185(3)

The city must not remove or demolish a habitable building, or a structure that is an accessory to a habitable building, under subsection (1) unless

(a) the order is issued under clause 184(2)(b) and includes a statement that the building or structure could be removed or demolished if the order is not complied with; and

(b) the order is served on the owner of the building or structure personally or by such substitutional service as the Court of Queen's Bench may order on application by the city.

Emergencies

186(1)

Despite any other provision of this Act, when an emergency arises that affects the health or safety of persons or affects property,

(a) the city may take whatever actions and measures are necessary to meet the emergency and to eliminate or reduce its effects; and

(b) no appeal may be taken under section 189 from a decision made to enforce or carry out any action or measure taken under this section or from an order mentioned in subsection (3).

Application

186(2)

This section applies whether or not the emergency involves a contravention of this Act, another enactment or a by-law that the city is authorized or required to administer or enforce.

Compliance with order

186(3)

A person who receives an oral or written order under this section requiring the person to provide labour, services, equipment or materials must comply with the order.

Remuneration for compliance

186(4)

A person who, in compliance with an order received under this section, provides labour, services, equipment or materials and who did not cause or contribute to the emergency is entitled to reasonable remuneration from the city.

Costs

187(1)

The costs incurred by the city in taking actions or measures under section 185 or 186, including remuneration referred to in subsection 186(4), are a debt due and owing to the city

(a) in the case of actions and measures taken under section 185 to remedy a contravention of an Act or by-law, by the person contravening the Act or by-law or responsible for the contravention; and

(b) in the case of actions or measures taken under section 186 to meet or eliminate an emergency, by the person, if any, who caused the emergency;

and, if that person is the owner of real property in the city, may be added to the real property taxes on the property and collected by the city in the same manner and with the same priorities as those taxes.

Proceeds of sale

187(2)

Where the city takes actions or measures to remove or demolish a building and sells all or part of the building or any equipment or materials that remain after the removal or demolition, the proceeds of the sale must be used to offset the costs incurred by the city in taking the actions or measures, and any balance remaining must be paid

(a) to the person who would be liable under subsection (1) to pay those costs; or

(b) if another person claims the balance, into the Court of Queen's Bench to be paid out as the court orders.

Application to court to enforce by-law

188

The city may apply to the Court of Queen's Bench for an injunction or other order to enforce a by-law or to restrain a contravention of a by-law or of this or any other Act without initiating a prosecution in respect thereof, and the court may grant or refuse to grant the injunction or other order or make any other order that the court considers fair and just.

TAB 2

1994 CarswellQue 120
Supreme Court of Canada

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

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

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

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

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

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

Proceedings: Applications for Interlocutory Relief

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

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

Related Abridgment Classifications

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

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

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

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

Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions

Injunctions --- Availability of injunctions — Public interest

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

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

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

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

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

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

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

balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

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

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

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

I. Factual Background

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

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

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

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

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

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

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

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

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

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

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions

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

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

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

II. Relevant Statutory Provisions

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

14

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

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

15

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

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

16

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

III. Courts Below

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

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

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

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

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

Court of Appeal (on the application for a stay)

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

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

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

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . . . .

> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 , 127, 135). [Emphasis in original.]

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

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

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

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

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

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

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

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

IV. Jurisdiction

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

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

can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

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

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

Supreme Court Act

31

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

Rules of the Supreme Court of Canada

32

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

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

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

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

34 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant

stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

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

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

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

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

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

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

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s.

24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

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

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

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

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

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

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

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

VI. Analysis

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

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

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

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

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

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

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

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

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

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

B. The Strength of the Plaintiff's Case

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

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

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

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

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

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of

> the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant

who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

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

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

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

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

D. The Balance of Inconvenience and Public Interest Considerations

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

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

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

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

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

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

1. The Public Interest

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

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

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

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

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

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

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

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

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

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

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

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

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

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

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

2. The Status Quo

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

E. Summary

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

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

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

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

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

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

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

B. Irreparable Harm

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

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

C. Balance of Inconvenience

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

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

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

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

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

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

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

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

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

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

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

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

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

Applications dismissed.

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

TAB 3

1994 CarswellMan 142
Manitoba Court of Appeal

Apotex Fermentation Inc. v. Novopharm Ltd.

1994 CarswellMan 142, [1994] 7 W.W.R. 420, [1994] M.J. No. 357, 29 C.P.C. (3d) 48, 29 C.P.C. (3d) 58, 48 A.C.W.S. (3d) 1231, 56 C.P.R. (3d) 20, 70 W.A.C. 241, 95 Man. R. (2d) 241

APOTEX FERMENTATION INC. and APOTEX INC. v. NOVOPHARM LTD., ALBERT D. FRIESEN, JAGROOP DAHIYA, LESLIE DAN, SYDNEY SMITH, RAFIK HENEIN and KRKA P.O.

Huband, Philp and Kroft JJ.A.

Heard: May 27, 1994
Judgment: June 13, 1994
Docket: Doc. AI 94-30-01691

Counsel: *D.C.H. McCaffrey, Q.C.*, *G.P.S. Riley* and *J.A. Myers*, for appellants.
E.W. Olson, Q.C., and *L.C. Mitchell*, for respondent Dahiya.
D.T. Stockwood, Q.C., and *R.S. Literovich*, for remaining respondents.

Subject: Intellectual Property; Civil Practice and Procedure; Property

Related Abridgment Classifications

Civil practice and procedure
XX Trials
XX.4 Conduct of trial
XX.4.d Exclusion of persons from hearing
XX.4.d.iii Public

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.B Irreparable harm

Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.f Restrictive covenants
II.7.f.v Miscellaneous

Headnote

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

Practice --- Trials — Conduct of trial — Exclusion of persons from hearing — Public

Injunctions — Interlocutory or interim injunctions — Availability — Plaintiff drug company's ex-employee being hired by

defendant competitor — Plaintiff alleging that ex-employee breaching restrictive covenant not to divulge confidential information — Alleged breach of restrictive covenant entitling plaintiff to interim injunction against ex-employee and corporate defendant, in circumstances.

Judges and courts — Administration of courts — Plaintiff drug company's ex-employee being hired by defendant competitor — Plaintiff alleging that ex-employee breaching restrictive covenant not to divulge confidential information — Plaintiff seeking interim injunction — Both parties consenting to locked courtroom — Court of Appeal ruling that future proceedings should be open except where absolutely necessary to preserve confidential information.

Employment law — Contract of employment — Enforceability — Restrictive covenants — Plaintiff drug company's ex-employee being hired by defendant competitor — Plaintiff alleging that ex-employee breaching restrictive covenant not to divulge confidential information — Alleged breach of restrictive covenant entitling plaintiff to interim injunction against ex-employee and corporate defendant, in circumstances.

Civil procedure — Trial — In camera proceedings — Plaintiff drug company's ex-employee being hired by defendant competitor — Plaintiff alleging that ex-employee breaching restrictive covenant not to divulge confidential information — Alleged breach of restrictive covenant entitling plaintiff to interim injunction against ex-employee and corporate defendant, in circumstances.

The plaintiff and the corporate defendant were both drug companies. Dr. D. covenanted that he would not disclose any of the plaintiff's confidential information during or after his employment with the plaintiff. He later left the plaintiff and joined the corporate defendant. The plaintiff sued the corporate defendant and Dr. D. alleging breach of the non-disclosure covenant. It obtained an interim injunction restraining the defendants from working on certain drugs which Dr. D. had worked on for the plaintiff. Later, the trial date was postponed for eight months. The corporate defendant applied for variation of the interim injunction to allow it (but not Dr. D.) to work on two named drugs. The motions judge granted the application. He decided that no irreparable harm before trial was likely, and that it was thus unnecessary to consider either the balance of convenience or the strength of the plaintiff's case. The courtroom had been locked during the application, with the consent of both counsel. Moreover, the court file was not open to public scrutiny, and was not in the court's computer listing. The plaintiff appealed.

Held:

Appeal allowed; majority of court file and proceedings to be open to public.

Ordinarily, the three requirements for injunctive relief are not separate hurdles but interrelated considerations. Where there is some doubt whether damages will prove adequate, that issue should not be determined separately from the other factors. However, where damages are obviously an adequate remedy, it will be unnecessary to continue the inquiry. Here consideration of the other factors should not be avoided. The reasonableness of the restrictive covenant was not contested. In such cases irreparable harm is assumed. It would be a strange result if Dr. D. was restrained by an injunction, but those to whom he allegedly gave confidential information were free to use it. With valuable information being used by the corporate defendant, it was questionable whether injury could be prevented before trial. The restrictive covenant resolved the issue for the plaintiff. If injury occurred, it would be very difficult to quantify damages.

The courts generally must be open to all. Sections 76 and 77 of the *Court of Queen's Bench Act* allow exceptions where there is a "possibility of serious harm or injustice." One exception which has developed relates to trade secrets. Public access should be denied only to the extent necessary to ensure the protection of secret information. The onus is on the party requesting secrecy. Here there was no evidence that either party was required to justify a closed hearing. Future proceedings should be open, except that documents containing confidential information should be sealed and the parties might request the judge to conduct part of the proceedings in private to preserve confidentiality.

Table of Authorities

Cases considered:

Hampstead & Suburban Properties Ltd. v. Diomedous, [1969] 1 Ch. 248, [1968] 3 All E.R. 545 — *applied*

McPherson v. McPherson, [1936] A.C. 177 — *applied*

Miller v. Toews (1990), [1991] 2 W.W.R. 604, 49 B.L.R. 316, 70 Man. R. (2d) 4, 40 C.P.R. (3d) 424 (C.A.) — *applied*

Pereira v. Smith, [1993] 8 W.W.R. 607, 88 Man. R. (2d) 171, 22 C.P.C. (3d) 369 (C.A.) — *distinguished*

Scott v. Scott, [1913] A.C. 417 (H.L.) — *applied*

Statutes considered:

Court of Queen's Bench Act, S.M. 1988-89, c. 4 (also C.C.S.M., c. C280)

s. 76*considered*

s. 77*considered*

Appeal by plaintiff from order of Oliphant A.C.J.Q.B., granting defendants' application to vary interim injunction. For related proceedings, see [1994] 5 W.W.R. 49, affirmed [1994] 7 W.W.R. 429.

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

1 The plaintiff companies ("Apotex") and the defendant Novopharm Ltd. ("Novopharm") are in the same business; the development, manufacture and sale of generic drugs. The material which forms part of the record before us indicates that the process of obtaining approval is a long and arduous one, but if a drug is developed, and is blessed with approval by the federal government, the rewards can be very significant.

2 The individual defendants other than Jagroop Dahiya ("Dr. Dahiya") are part of the Novopharm management team.

3 Dr. Dahiya was employed as a scientist by Apotex. Commencing in June of 1988 he entered into an employment contract containing a covenant that he would not disclose any secret or confidential information during or subsequent to his employment with Apotex. He entered into further contracts with Apotex in December of 1989 and February of 1991. The latter agreement, containing the same negative covenant as the first agreement, was in effect when Dr. Dahiya ended his employment at Apotex. Soon thereafter he joined Novopharm.

4 Apotex claims in its statement of claim that Dr. Dahiya breached his covenant of non-disclosure of secret and confidential information. All of the defendants deny the breach.

5 On August 12, 1993 Apotex applied for and obtained an interim injunction and an Anton Piller order on an ex parte basis. In early September a flurry of affidavits had been filed and Oliphant A.C.J.Q.B. heard a contested motion by the plaintiffs to convert the ex parte injunction into an interim injunction pending trial. On September 9, 1993 Oliphant A.C.J.Q.B. granted the order, the effect of which was to restrain Dr. Dahiya and Novopharm from any further research and development work with respect to certain drugs which Dr. Dahiya had been working on while employed by Apotex. In his reasons for decision he concluded that the plaintiffs had established a strong prima facie case, that the balance of convenience favoured them, and that they would suffer irreparable harm if the order was not granted. No appeal was taken from that order.

6 The expectation was that the trial would take place in January of 1994. But as the January date approached, it became evident that the case could not proceed on such an early date. The parties have agreed to, and the court can accommodate, a trial in September of 1994.

7 Given the delay in the scheduled trial, all of the defendants, save for Dr. Dahiya, brought a motion before Oliphant A.C.J.Q.B. seeking a variation of his order of September 9, 1993, and in particular seeking the right to proceed with work on two drugs called Lovastatin and Cyclosporin. The interim injunction would remain in effect with respect to Dr. Dahiya.

8 The court granted the motion. In the course of his reasons for decision Oliphant A.C.J.Q.B. referred to and relied upon the reasons for decision of Twaddle J.A. in *Pereira v. Smith*, [1993] 8 W.W.R. 607 (Man. C.A.), as support for his conclusion that proof of irreparable harm (proof that damages will not be an adequate remedy) is a condition precedent to the granting of or maintenance of an injunction. The defendant Novopharm was able to satisfy Oliphant A.C.J.Q.B. that, with certain safeguards in place, no irreparable harm was likely. Oliphant A.C.J.Q.B. noted that it takes several years of dealings with the federal bureaucracy before a new drug comes onto the market — long after the intended trial in September of this year.

9 Having decided that no irreparable harm prior to trial was likely, Oliphant A.C.J.Q.B. concluded that it was not necessary to go further and consider either balance of convenience or the strength of the plaintiffs' case.

10 Apotex now appeals contending that while the risk of irreparable harm is a necessary element, it is normally to be considered and determined along with the other elements which are required to sustain injunctive relief, namely, the balance of convenience and the potential merits of the case. Apotex argues that the learned motions judge misinterpreted the reasons of Twaddle J.A. in *Pereira v. Smith*, and that the entire matter must now be referred back to him for further consideration.

11 We agree with the submission by counsel for Apotex that this Court was not intending any dramatic alteration in the law as a result of the decision in *Pereira v. Smith*.

12 The *Pereira* case was one where, as Twaddle J.A. remarked, "damages would clearly be an inadequate remedy for the plaintiff." Thus he was able to deal with that element first, as a condition precedent, and then move on to a consideration of the other factors. Where there is some doubt or argument whether damages will prove an adequate remedy, it was not intended that a determination of that issue should be severed and determined separately from a consideration of the other factors.

13 I have no doubt that there will be cases in the future where it will be self-evident, without reference either to the merits of the case or the balance of convenience, that damages either are or are not an adequate remedy, and it will make sense to deal with that issue first. Where, as in *Pereira v. Smith*, it is obvious that there will be irreparable harm, the court can then concentrate on the remaining elements. Where it is obvious that damages are an adequate remedy, it will be unnecessary to continue the inquiry.

14 Similarly, there will be cases where on the face of it the merits of the plaintiff's case are so wanting that the judge at the outset of the hearing will have no difficulty rejecting an application for injunction on that ground alone. Ordinarily, however, the three requirements which are usually necessary to support injunctive relief are to be considered, not as separate hurdles but as interrelated considerations. The approach which will normally be taken by the court in considering an interlocutory injunction is well set forth in R.J. Sharpe, *Injunctions and Specific Performance* (2nd ed., 1992), at pp. 2-32-34:

> The terms "irreparable harm", "*status quo*" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another. It is not clear that the *Cyanamid* [[1975] A.C. 396] approach allows for this and the decision suggests a misleadingly mechanical approach. The Manitoba Court of Appeal has quite properly held that "it is not necessary ... to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor is it necessary to treat the relative strength of each party's case only as a last step in the process." ...
>
> The checklist of factors which the courts have developed — relative strength of the case, irreparable harm and balance of convenience — should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.

15 Counsel for Novopharm acknowledged that the decision in *Pereira v. Smith* was not an attempt to make a fundamental change in the law. Rather, he argued that there are cases, this being one of them, where the approach taken by Oliphant A.C.J.Q.B. is both justified and desirable. When it is determined that damages are a sufficient remedy, there is no point in a lengthy examination of the merits of the case and the balance of convenience which will only result in the parties incurring

unnecessary costs.

16 That may be so in some cases, but I do not think that consideration of the other factors should be avoided in the present case. Apotex seeks to enforce a restrictive covenant. The reasonableness of it has not been contested. These are the kinds of cases where irreparable harm is assumed. In *Miller v. Toews*, [1991] 2 W.W.R. 604, this Court upheld an interlocutory injunction restraining the defendants from operating a business in contravention of a covenant given to a purchaser on the sale of a previous business. Among other cases, Twaddle J.A. referred to the judgment of Megarry J. in *Hampstead & Suburban Properties Ltd. v. Diomedous*, [1969] 1 Ch. 248, [1968] 3 All E.R. 545 at 550, who wrote in these terms:

> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better ... I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligation until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there be such authority; and now there is.

17 In the *Miller v. Toews* decision itself Twaddle J.A. went on to state at pp. 607-608:

> ... when a negative covenant of this kind is reasonable on its face, the person who gave it will have a heavy burden to show that his escape from the bargain will not cause irreparable harm to the covenantee and that the balance of convenience so substantially favours him (the person who gave the covenant) that it would be unjust to restrain his activities until the trial.

18 As has been noted, the injunction has remained in effect with respect to Dr. Dahiya. It would be a strange result indeed if Dr. Dahiya was restrained by an injunction, but those to whom he may have already passed on confidential information in breach of a covenant are free to use that information pending a trial.

19 Given the existence of the restrictive covenant, I am of the view that the issue of irreparable harm is not as clear as it appeared to the learned motions judge, even taking into account the dilatorious government approval process. The inquiry on the motion to vary the interim injunction ended prematurely without a full vetting of all factors.

20 The argument for Novopharm was *not* that damages would be an adequate remedy if a wrong has been committed causing injury to Apotex. Rather, the argument was that no injury is likely to occur prior to trial. However, with valuable confidential information in the possession of and being used by Novopharm's employees, it becomes highly questionable whether injury can be prevented during the period leading to trial. The restrictive covenant resolves the issue in favour of Apotex. If injury did occur, the quantification of damages would be extremely difficult.

21 I would allow the appeal with costs. The interim injunction is reinstated pending trial or until a further consideration of the application to vary is again brought before the learned motions judge.

22 There is another aspect of this case which requires comment.

23 Part of the record before this Court consists of a transcript of the hearing before Oliphant A.C.J.Q.B.

24 At the outset, the learned judge indicates that there are some housekeeping matters to be addressed:

> The Court: The number one: Is the door locked?
>
> The Clerk: Yes, it is, My Lord.

25 Thus assured, the hearing proceeded for four days. Presumably the door was locked for that duration.

26 The order ultimately granted was not attacked by the appellant Apotex as invalid by reason of the closed court room.

Apotex was not in a position to raise the argument since, we are now told, earlier proceedings had been handled in precisely the same way. This particular file has not been open to any public scrutiny, and is not listed in the Court of Queen's Bench computer listing.

27 This Court has deep concerns about these practices even if the parties do not, and so the matter was raised by the Court itself.

28 The starting point must be the statement of Lord Halsbury in the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417 at 440, "I am of opinion that every Court of justice is open to every subject of the King."

29 That specific statement was subsequently endorsed and expanded upon by Lord Blanesburgh in the reasons for decision of the Privy Council on appeal from the Supreme Court of Alberta in *McPherson v. McPherson*, [1936] A.C. 177. The *McPherson* case considered the validity of a divorce decree which was granted after a hearing in a judges' library where the word "private" was affixed to the door. The Privy Council concluded that the decree which was granted was voidable by reason of the private nature of the hearing (at p. 200):

> ... there was no actual exclusion of the public, although there was no actual public attendance. No such exclusion was intended nor, possibly, even desired. The learned judge would probably have been gratified by the presence of a small audience. But, even although it emerges in the last analysis that their actual exclusion resulted only from that word "private" on the outer door, the learned judge on this occasion, albeit unconsciously, was, their Lordships think, denying his Court to the public in breach of their right to be present, a right thus expressed by Lord Halsbury in *Scott v. Scott*: "Every Court of justice is open to every subject of the King."
>
> To this rule, there are, it need hardly be stated, certain strictly defined exceptions. Applications properly made in chambers, and infant cases, may be particularized. But publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.
>
> The actual presence of the public is never of course necessary. Where Courts are held in remote parts of the Province, as they frequently must be, there may be no members of the public available to attend. But even so, the Court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.

30 Both the *McPherson* case and the *Scott* case make it clear that there are exceptions to the general rule that the courts must be open to all.

31 This is all consistent with the provisions of ss. 76 and 77 of *The Court of Queen's Bench Act*, which calls for open public hearings and open court files, but allows exceptions where there is a "possibility of serious harm or injustice" were the hearing to be open to the public.

32 Not surprisingly, one of the exceptions which has developed (and there are few of them) relates to trade or manufacturing secrets. In his reasons for judgment in *Scott v. Scott*, Earl Loreburn made this observation (at p. 445):

> It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

33 The present case involves secret formula, and I can well appreciate that the parties will not wish to share their secrets with the outside world.

34 But steps can be taken to protect the parties from the loss of confidential information without necessarily closing the court room, or the court records, entirely to public access. The starting point should be that the court room is open and public access denied only to the extent necessary to ensure the protection of the secret information. In the hearing which took place before this Court, no part of the record contained secret formulas, and argument could and did take place in open court without concern.

35 Moreover, the onus is upon the party or parties to satisfy the court that the closure of the court room, and/or the court records, to public access in whole or in part is justified as an exception to the general rule. In his reasons in the *Scott* case, the Earl of Halsbury states that a hearing open to the public must be insisted upon (at p. 442):

> ... and that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment.

36 In the instant case there is nothing on the record indicating that either party was put to the test of justifying a hearing behind locked doors on the motion to vary the prior order of the court. It would seem that no justification existed.

37 Where a party does request an in camera hearing, and it falls within a traditional exception to the rule of an open court room, the court should impose as few restrictions as possible on public access, while still preserving the ability to do justice in the case before it. So, it may be practical to keep secure certain documents or certain affidavits, or parts of them. The court room might be closed while certain witnesses testify within a sensitive area. The approach should be to minimize, as much as possible, the exclusion of the public.

38 Having raised its concerns, counsel for the parties were invited to consider the matter and return with their own proposals as to how the trial or other pre-trial proceedings might be conducted. We are pleased to have received a joint brief containing a list of recommendations which the parties agree should be applied to their case. We are glad to endorse those recommendations, which are attached as App. A to these reasons, except that the fifth recommendation should not apply to documents which contain no confidential material.

Order accordingly.

APPENDIX A

1. The proceedings should be listed in the computer registry.
2. When the parties are in court for a hearing, the fact that there is a proceeding should be posted on the bulletin boards at the Law Courts Building.
3. Subject to the remaining recommendations, the court room should be open to the public.
4. The pleadings (statement of claim, amended statement of claim, statements of defence, reply and motions) ought to be available to the public.
5. Affidavits filed for the various motions, exhibits, answers to undertakings and expert reports should continue to be sealed to protect the confidential information contained therein.
6. During the course of future motions and the trial, the parties may request the presiding Justice to conduct a part of the motion or trial in camera, if required, to preserve the confidential nature of the secret processes that are at issue.
7. The parties may also request that the court order a publication ban in relation to certain evidence to protect the proprietary information and trade secrets of the parties.
8. The parties may also request that the court be cautious in the wording of its reasons for decision to prevent public disclosure of secret processes.

TAB 4

2022 ONSC 1001
Ontario Superior Court of Justice

AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION v. JIM BOAK

2022 CarswellOnt 2091, 2022 ONSC 1001, 2022 A.C.W.S. 1054, 28 M.P.L.R. (6th) 329, 504 C.R.R. (2d) 89, 85 C.P.C. (8th) 405

AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION (Plaintiff / Moving Party) and JIM BOAK, JOANNE CALLAWAY, HILDA FISHER, LORI INVERARITY, LEO LUCIO, GIL PONTE, MANBAE SINGH-GALL, DARLENE THOMPSON and JOHN DOE (Defendants / Responding Parties) and THE CORPORATION OF THE CITY OF WINDSOR, ATTORNEY GENERAL FOR ONTARIO and THE DEMOCRACY FUND (Intervenors)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: February 11, 2022
Judgment: February 14, 2022
Docket: CV-22-00030791-0000

Counsel: Michael A. Wills, Darwin E. Harasym, for Plaintiff
Jennifer King, Michael Finley, Bevin Shores, for Intervenor, Corporation of the City of Windsor
Joshua Hunter, Padraic Ryan, for Intervenor, Attorney General of Ontario
Alan Honner, Daniel Santoro, for Democracy Fund
Antoine d'Ailly, James Kitchen, for Citizens for Freedom
Kristian Langenfeld, for himself
Lyall Tryst, for himself

Subject: Civil Practice and Procedure; Constitutional; Public; Municipal; Human Rights

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.ii Miscellaneous

Headnote

Civil practice and procedure

Constitutional law

Municipal law

Remedies

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 At the conclusion of the hearing of this motion on February 11, 2022, I released the following endorsement:

> [1] I am satisfied that the test for an interim interlocutory injunction has been met such that an injunction is granted, effective February 11, 2022 at 7:00 p.m., pursuant to s. 101 of the *Courts of Justice Act*, Rule 40.01 of the *Rules of Civil Procedure* and s. 440 of the *Municipal Act, 2001*.
>
> [2] An order to give effect to the foregoing is being prepared for my review and signature. Detailed reasons will follow.

2 These are the reasons.

3 Commencing on February 7, 2022, a protest has obstructed the intersection of Huron Church Road and College Avenue leading to the Ambassador Bridge (the "Bridge") in Windsor, Ontario. The Protesters have parked multiple vehicles on city streets, blocking traffic from crossing the Bridge through the primary entrance. Since approximately February 9, 2022, Protesters have also blocked the secondary Bridge entrance located on Wyandotte Street West. The Protest is said to be "in solidarity with similar protests in Ottawa" and relates to COVID-19 restrictions.

4 The Plaintiff, the Automotive Parts Manufacturers' Association ("APMA"), supported by the Intervenors, the Corporation of the City of Windsor (the "City") and the Attorney General of Ontario ("Attorney General") bring this motion for an interim interlocutory injunction pursuant to s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43 and/or a statutory injunction under s. 440 of the Municipal Act, 2001, S.O. 2001, c. 25 to restrain and enjoin the Defendants and any person having notice of the Order from impeding or blocking access to and from the Bridge.

5 This motion was originally returnable on February 10, 2022, on a without notice basis. I adjourned the matter until 12 noon on February 11, 2022 so that the matter could be brought to the attention of the Defendants.

6 I directed the Plaintiff and the City to issue a press release, providing details with respect to the scheduled time of this motion and details enabling the Defendants to access this virtual court hearing. I am satisfied that there has been sufficient publicity such that this matter has been brought to the attention of the Defendants.

7 The named Defendants did not attend the motion. Other interested parties made submissions in opposition to the motion, though they were not added as intervenors.

8 The issue to be decided on this motion is as follows.

9 Should an interim interlocutory injunction under s. 101 of the Courts of Justice Act and/or a statutory injunction under s. 440 of the Municipal Act, 2001 be granted to prevent the Defendants and the other Protesters from impeding access to the Bridge?

10 At the outset, it is necessary to set out what this proceeding is about and, perhaps more importantly, what this proceeding is *not* about.

11 This proceeding concerns a request for immediate injunctive relief to restrain the Defendants from establishing a blockade, or in any way impeding access both to and from the Bridge.

12 This proceeding does not concern the actions of the Federal Government or the Ontario Government with respect to COVID-19 restrictions. In addition, this proceeding does not concern any issue relating to the efficacy of any COVID-19 vaccine or the appropriateness of any COVID-19 mandate.

13 It is also necessary to state that Canada is a democratic society that is governed by the rule of law. The *Canadian Charter of Rights and Freedoms* sets out various rights and freedoms that all of us in Canada enjoy. It does not provide constitutional protection for illegal activity or conduct, nor are the rights and freedoms set out in the Charter absolute. The extent of an individual right or freedom has to be measured against its effect on other members of the community and *their*

rights and freedoms.

14 The APMA, the City and the Attorney General do not suggest that the Protesters have no right to protest or express their views. They argue that the Protesters' rights to freedom of expression, assembly and association do not include blocking or impeding one of the main critical economic arteries between Windsor and Detroit, causing significant economic harm to the automotive industry and a profound negative impact on Windsor and its community, schools, residents, students and businesses.

15 In an urgent case, a motion may be made before the commencement of proceedings on the moving party's undertaking to commence the proceeding forthwith.

16 I am satisfied that this is an urgent matter and the Plaintiff has provided such an undertaking.

Evidence

17 The Plaintiff and the City have filed numerous affidavits.

18 Mr. Flavio Volpe, President-elect of the APMA, states that the APMA is a national association representing original equipment manufacturer ("OEM") producers of parts, equipment, tools, supplies, technology and services for the worldwide automotive industry. Mr. Volpe states that as of 2020, the automotive sector accounted for $16 billion worth of investment in Canada and provided 117,000 direct employment jobs and approximately 370,000 in indirect jobs. He also states that the Detroit-Windsor crossing represents the highest number of loaded truck containers crossings annually. He estimates that approximately $100 million worth of parts cross the border every day between the United States and Canada. He estimates that the blockade is costing $50 million per day and that this cost will be directly felt by Canadian/Ontario/Windsor companies and has already resulted in shutdowns and partial layoffs at companies that APMA represents. Mr. Volpe also states that the APMA represents 178 members and specifically represents 19 taxpayers directly in the City of Windsor, and in total 15 additional companies in the surrounding region. Mr. Volpe concludes by stating that the APMA undertakes to forthwith commence an action for damages against the Defendants and any other persons that may be subsequently identified.

19 Mr. Brian Kingston, President and Chief Executive Officer of the Canadian Vehicle Manufacturers Association ("CVMA") also filed an affidavit. The CVMA represents automotive manufacturers with operations in Canada, including General Motors of Canada Co., Ford Motor Co. of Canada, Limited and Stellantis (FCA Canada, Inc.). Mr. Kingston states that CVMA members use the Bridge every day for vehicle and parts manufacturing operations. Mr. Kingston states that the current blockade has significantly disrupted, reduced and in some cases has stopped vehicle assembly operations at multiple assembly plants in Canada and the United States. Further, plants in Windsor and Oakville are currently running at reduced capacity because of parts shortages caused by the blockade. At Stellantis, shifts were negatively affected in both Brampton and Windsor. He states that the disruptions in plant shortages caused by the blockade at the Bridge have cost and continue to cost CVMA members immeasurable sums of money.

20 Mr. Brayden Boughner, an articling student at McTague Law Firm LLP, lawyers for the Plaintiff, stated that he commenced a search for individuals who had been identified as participants in the Protest at the Bridge. He confirmed the following individuals to be participants: Manbae Singh-Gall, Leo Lucio, Lori Inverarity, Jim Boak, Darlene Thompson, Joanne Callaway, Hilda Fisher and Gil Ponte.

21 Mr. Jason Reynar also swore an affidavit. Mr. Reynar is the Chief Administrative Officer of the City. Mr. Reynar states that by-law number 9148 is a by-law to regulate traffic within the limits of the City. Sections 7(1)(a) and 12 of this by-law provide as follows:

> 7(1)
>
> (a) No operator of the vehicle shall permit such vehicle to remain upon or be driven upon or along any street so as to block or obstruct traffic.

12. No person shall obstruct, encumber, injure or foul any highway or portion thereof.

22 In a supplementary affidavit, Mr. Reynar comments on the impact of the Protest:

(i) There are over 1,000 automotive manufacturers in the Windsor-Essex region representing more than $4.5 billion in annual GDP (30% of regional GDP). The manufacturing sector employs some 36,800 people.

(ii) These businesses rely on trans-border shipping across the Bridge.

(iii) These businesses are part of the Windsor community and in addition to providing employment, they support charities and sponsor local events and activities.

(iv) The Bridge serves as an important travel corridor for many Windsor residents.

(v) Access routes to the Bridge pass through streets lined with small businesses as well as residential areas.

(vi) In the immediate 2 km radius surrounding the blockade, there were 24,925 residents as of 2016. The campus of the University of Windsor is adjacent to Bridge Plaza and Huron Church Road. Two schools are less than 2 km from the Bridge and Hotel Dieu Grace Hospital is 3 km away.

(vii) At the time he swore the affidavit, the Protest has blocked all Canada bound traffic and severely limited US bound traffic.

(viii) The Protest has resulted in business closures, layoffs and school closures and has impeded the City's ability to deliver crucial services, including fire and Emergency Medical Services.

23 Mr. Jason Bellaire, Deputy Chief of the Windsor Police Service, states that from Monday, February 7, 2022 through to Thursday, February 10, 2022, he attended, as part of his official police duties, a public demonstration at the intersection of College Avenue and Huron Church Road in the City. This location forms the primary entrance and exit from the Bridge from Detroit (the "primary location").

24 Deputy Chief Bellaire attended at this location and also reviewed the location remotely by live video footage on multiple occasions and observed numerous unknown and unnamed persons who he referred to as the "Protesters" and stationary vehicles occupy and block the primary entrance and exit from the Bridge. He states that the Protesters and vehicles parked on the roadways effectively formed a blockade of the primary entrance and exit of the Bridge. The blockade resulted in the complete closure of all Canada-bound vehicular traffic from the Bridge and severely limited U.S.-bound vehicular traffic on the Bridge to only the secondary Bridge entrance located on Wyandotte Street West in the City. Deputy Chief Bellaire went on to state that at some point during the evening hours of February 9, 2022 or the early hours of February 10, 2022, unnamed persons and vehicles intermittently blocked the secondary bridge entrance on Wyandotte Street (the "secondary location"). As of the time that he swore the affidavit on February 10, 2022, Deputy Chief Bellaire states that all access and exit to and from the Bridge had been obstructed by the Protesters.

25 In addition, Deputy Chief Bellaire states that he and other Windsor Police Service officers have attended at both the primary and secondary location access points on multiple occasions from February 7, 2022 through to February 10, 2022 and asked the protesters blockading the Bridge entrances and exits to disperse to end the blockade of the highway and access to the Bridge. These efforts have been unsuccessful and the blockade was in effect at the time of his swearing of the affidavit.

26 Deputy Chief Bellaire concludes by stating that the Protesters at both the primary and secondary locations are blocking a highway, namely the intersection of College Avenue and Huron Church Road, and Wyandotte Street West immediately adjacent to the Bridge and are thereby causing a disturbance by impeding members of the public and vehicular traffic to and from the Bridge. Deputy Chief Bellaire states that he believes that the actions of the protesters are contrary to provisions of the Criminal Code, R.S.C. 1985, c. C–46, specifically ss. 175(1), 180(2), 430(1)(c)(d), and 423(1)(g).

27 In response, The Democracy Fund filed the affidavit of Adam Blake-Gallipeau, who is a lawyer with The Democracy

Fund. The mandate of The Democracy Fund includes protecting and preserving constitutional rights in Canada through public education and litigation. Mr. Blake-Gallipeau observed the secondary entrance to the Bridge on the morning of February 11, 2022 and stated that it is impeded by two or three motor vehicles.

28 Further, during argument, I was asked to relax certain rules of evidence and to permit reference being made to the affidavit of Dr. Clifford Rosen, to which was attached a number of photographs purporting to have been taken on February 11, 2022 between 2:00 p.m. and 3:15 p.m. at the intersection of Huron Church Road and College Avenue.

29 I then asked Ms. King, as an officer of the court, to see if she could provide assistance to the court in response to representations being made to the effect that there was no complete blockade. Ms. King made inquiries and reported that, save and except for allowing emergency vehicles to pass, the Protesters continued to block the primary location and the Wyandotte Street West location was only open intermittently.

Analysis

30 In preparing these reasons, I have reviewed and considered the following cases: *Attorney General of Ontario v. Trinity Bible Chapel et al.*, 2021 ONSC 740; *Batty v. Toronto (City)*, 2011 ONSC 6862; *Caledon (Town) v. Darzi Holdings Ltd.*, 2019 ONSC 5255; *Canadian National Railway Company v. John Doe*, 2020 ONSC 3998; *Canadian National Railway Company v. Doe*, 2020 ONSC 4152; *Canadian National Railway Company v. Doe et al.*, 2013 ONSC 115; *Canadian National Railway Company v. Plain et al.*, 2012 ONSC 7356; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; Cytrynbaum v. Look Communications Inc.2013 ONCA 455; *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175; *Hamilton (City) v. Loucks* (2003), 232 D.L.R. (4th) 362 (Ont. S.C.); *MacMillan Bloedel Ltd. v. Simpson* (1994), 113 D.L.R. (4th) 368 (B.C.C.A.); *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62; *Newcastle Recycling Ltd. v. Clarington (Municipality)*, [2005] O.J. No. 5344 (C.A.); *Oglaza v. J.A.K.K. Tuesdays Sports Pub Inc.*, 2021 ONSC 7473; *Ontario (Attorney) v. Paul Magder Furs Ltd.* (1992), 10 O.R. (3d) 46 (C.A.); *R. v. Banks*, 2007 ONCA 19; *R. v. The Church of God (Restoration) Aylmer*, 2021 ONSC 3452; *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17; Ryan v. Victoria (City)[1991] 1 S.C.R. 201; Sobeys Capital Inc. v. Sentinel (Sherbourne) Land Corp.[2014] O.J. No. 5998(S.C.); *The Corporation of the City of Brantford v. Montour et al.* [indexed as *Brantford (City) v.* Montour], 2010 ONSC 6253; *The Township of Amaranth v. Ramdas*, 2020 ONSC 2428; *Township of King v. 2424155 Ontario Inc.*, 2018 ONSC 1415; *Zexi Li v. Chris Barber et al.* (7 February 2022), Ottawa, CV-22-00088514-00CP (Ont. S.C.).

31 The evidence provided by the moving parties is overwhelming and clearly establishes that:

(i) the use of the Bridge is of vital importance to the residents and businesses in the immediate geographic area;

(ii) since Monday, February 7, 2022 and continuing up to and including Friday, February 11, 2022, the protest has escalated to the point where the blockade has resulted in the closure of Canada-bound traffic and has severely limited U.S.-bound traffic;

(iii) the protests and the blockade have had a significant negative impact on the residents and businesses in the immediate geographic area and numerous by-laws of the City have been breached; and

(iv) the protests and the blockade have had a significant negative impact on the automotive sector in a geographic range that is far beyond the Windsor area.

32 The evidence provided by Mr. Blake-Gallipeau and Dr. Rosen falls far short of establishing that there is no blockade.

33 Section 101 of the Courts of Justice Act provides that an interlocutory injunction or mandatory order may be granted where it appears to a judge of the court to be just or convenient to do so.

34 The test for an interim injunction is clearly set out by the Supreme Court of Canada in RJR MacDonald Inc. v. Canada

(Attorney-General) at paras. 77-80. The test requires the moving party to demonstrate that:

(a) there is a serious issue to be tried;

(b) irreparable harm will result if the relief is not granted; and

(c) the balance of convenience favours the moving party.

35 With respect to injunctive relief under s. 440 of the Municipal Act, 2001, the statutory injunction test is different. It is narrower. Municipalities are often given statutory authorization to seek an injunction to restrain breaches of by-laws. The nature and extent of the court's discretion will turn on the terms of the statute. In such cases, the moving party will not ordinarily have to establish inadequacy of damages or irreparable harm and that the balance of convenience favours the granting of the injunctive relief.

36 In this case, the moving parties have satisfied the broader *RJR-MacDonald* test for an injunction under s. 101 of the Courts of Justice Act and consequently, it is not necessary to address issues relating to the statutory test in detail.

A. Interim Injunction Under Section 101 of the Courts of Justice Act

a. Serious issue to be tried

37 The threshold to satisfy this requirement is low and should be determined on the basis of common sense and an extremely limited review of the case on the merits: *RJR-MacDonald Inc.*, at para. 78. So long as the claim is not frivolous or vexatious, this factor of the test will generally be satisfied: *RJR-MacDonald Inc.*, at paras. 44-56, 78.

38 The APMA, the City and the Attorney General have raised a serious issue to be tried by demonstrating that the Protesters have blocked and impeded access to the Bridge. The moving parties have demonstrated a number of causes of action that are neither trivial nor vexatious, including:

(i) A claim in public nuisance. An individual may bring a private action in public nuisance by pleading and proving special damage. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway: see *Ryan*, at para 52; *Chessie v. J. D. Irving Ltd.* (1982), 140 D.L.R. (3d) 501(N.B.C.A.). I accept the evidence submitted by the APMA and find that they have raised a serious issue as to whether the Protesters' conduct has caused special damage in the approximate sum of $600 million to the automotive industry in Canada.

(ii) A claim in intentional interference with economic relations, also known as the "unlawful means" tort. The three elements of the test for this tort, as set out in *Grand Financial Management Inc.* at para. 62, are seriously raised. I accept the evidence submitted by APMA and find that they have raised a serious issue as to whether a tort has been committed, namely, that by blockading and impeding access to the Ambassador Bridge, there is a serious issue with respect to whether the Protestors have intended to injure APMA's economic interest by unlawful means through violations of the City of Windsor's by-laws, including but not limited to ss. 7(1)(a) and 12 of by-law number 9148. s. 426 of the Municipal Act, 2001, s. 132 of the Highway Traffic Act, R.S.O. 1990, c. H.8 and various provisions of the *Criminal Code*, including ss. 175(1)(a)(iii), 180(2)(b), 430(1)(c) and (d), and 423(1)(g).

39 The APMA, the City and the Attorney General have clearly demonstrated that there is a serious issue to be tried with respect to whether damages have been suffered, and will continue to be suffered, as a result of the Protesters' nuisance, intentional interference with economic/contractual relations, and other potential torts. The suggestion that the APMA, the City and the Attorney General have failed to demonstrate a serious issue to be tried was not credibly advanced by the parties opposing the motion.

40 Injunctions enforcing public rights and public laws, including municipal by-laws, are readily granted: see *Caledon (Town)*.

b. Irreparable harm

41 The second element of the *RJR-MacDonald* test, whether the moving parties will suffer irreparable harm if the injunction is not granted, has also been clearly met.

42 What must be established on this part of the test is whether refusing to grant an injunction will cause harm that cannot be remedied at some later stage. "Irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. "It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald Inc.*, at para. 59.

43 The parties arguing on behalf of the Protesters argue that granting the injunction would result in irreparable harm being suffered by the Protesters by striking at their fundamental rights to freedom of expression, freedom of peaceful assembly and freedom of association under the *Canadian Charter of Rights and Freedoms*. I disagree.

44 The APMA, the City and the Attorney General have clearly demonstrated the irreparable harm they have already suffered and that they will continue to suffer if the injunction is not granted.

45 A review of the evidence clearly establishes the extent of the irreparable harm already caused, which has put the economy at risk. I accept the submissions of counsel to APMA and the Attorney General that, in these circumstances, it will be virtually impossible to recover damages from the Protesters. Beyond the specific irreparable harm to the automotive industry, the evidence establishes adverse impacts on the employment of members of the community, children's education, the community's access to critical services, the community's ability to access work, education and family in Detroit and the reputation of the City as a place to live, work and invest.

46 There is no question that the Protesters' illegal blockade of the Bridge has caused and will continue to cause irreparable harm to the City, the residents of the City, the automotive industry, the businesses of Windsor and our economy if their unlawful conduct is permitted to continue.

c. Balance of convenience

47 The third factor, the balance of convenience, considers which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits.

48 The APMA, the City and the Attorney General do not seek to prohibit the right of the Protesters to express their views or exercise their rights. They are seeking to prohibit the Protesters' unlawful activity, which includes preventing and obstructing the public's access to the Bridge.

49 The Protesters' claim of irreparable harm to their *Charter* rights if they are enjoined from committing unlawful acts does not outweigh the harm caused by those unlawful acts. The Protesters have no legal right to block or impede access to the Bridge. As Brown, J. (as he then was) said of the protesters blockading a Toronto-Montreal main railway line in Canadian National Railway Co. v. Doe2013 ONSC 115, at para. 11:

> . . . While expressive conduct by lawful means enjoys strong protection in our system of governance and law, expressive conduct by unlawful means does not. No one can seriously suggest that a person can block freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression. The Canadian Charter of Rights and Freedoms does not offer such protection . . .

50 This statement is equally applicable to this blockade.

51 There is no doubt that freedom of expression, as guaranteed by s. 2(b) of the Charter, and the related rights of freedom of conscience, peaceful assembly and association are some of the most important rights of a free and democratic society. However, freedom of expression, like all other *Charter* rights, is not an absolute right nor an unqualified one. The Charter

does not give any person the legal right to unlawfully trample on the legal rights of others. Every Charter right must be balanced against other important values and rights.

52 Simply put, freedom of expression does not extend to the point that the Protesters' activities can result in the denial of fundamental rights and freedoms to all those detrimentally affected by the blockade.

53 While the Protesters involved in the blockade of the Bridge have every right to voice their criticism of government public health restrictions and/or vaccine mandates, they do not have the legal right, under the Charter or otherwise, to unilaterally block and impede access to the Bridge.

54 Having reviewed the evidence and after hearing oral submissions, I have no hesitation in concluding that the harm caused by the Protesters' demonstrations and blockade far outweighs the value of the Protesters' right to express their views by illegal means. The Protesters' right to freedom of expression, assembly and association does not include violating the law or harming the people and businesses who reside and make a living in Windsor and everyone else who relies on the Bridge for those purposes.

B. Modified Test for a Statutory Interlocutory Injunction to Enforce Municipal By-Laws

55 The APMA and the City also rely on s. 440 of the Municipal Act, 2001 to enjoin the Protesters from continuing to violate the City's by-laws. Section 440, under the section "General Enforcement Powers," provides as follows:

> **Power to restrain**
>
> 440 If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

56 This section allows a municipality to bring an Application to restrain a person (or persons) from contravening its by-laws.

57 I note that where a municipal authority seeks an injunction to enforce a by-law which it establishes is being breached, the courts will refuse the application only in exceptional circumstances: see *Newcastle Recycling Ltd.*, at para. 32.

58 I agree with the submission of the Attorney General that absent a constitutional challenge to the by-laws in question, they are presumptively valid and remain in force and in effect. A consideration of the Protesters' Charter rights is therefore not required.

59 It has been held that where an injunction is sought for the purpose of enforcing a municipal by-law, the traditional test for an injunction as set out above should be modified so that the first criterion (serious question to be tried) will be strongly emphasized to the exclusion of the other two criteria (irreparable harm and balance of inconvenience): see *Hamilton (City)*, at paras. 24, 28 and 31; *The Township of Amaranth*, at paras. 52-55.

60 In this modified test, there is no need for the City to prove that it will suffer irreparable harm and there is no need to consider the balance of convenience because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest: see The *Township of Amaranth*, at para. 54. However, in this modified test, the first criteria (serious issue to be tried) should be higher than the standard required when all three criteria are considered under the *RJR-MacDonald* test. A strong *prima facie* case must be established: *Hamilton (City)*, at para. 37.

61 I find that a strong *prima facie* case has been established. It is clear that the unlawful actions of the Protesters, which include obstructing roads and the Bridge with vehicles, leaving their vehicles idling and blocking and impeding the public's access to the Bridge, are breaches of the City's by-laws. City By-law number 9148 (ss. 7 and 12) regulates traffic within City limits and prohibits people from obstructing roads with their vehicles and more generally prevents people from obstructing

any highway. The parking of multiple vehicles and the presence of many persons whose express intent is to block traffic is a clear violation of that by-law. Vehicles left idling by the Protesters is also a clear violation of City By-law 233-2001, s. 2:

> 2. (1) No person shall cause or permit a Motor Vehicle, a Commercial Motor Vehicle or a Boat to idle for more than three (3) continuous minutes (180 seconds);

Conclusion

62 I find that the APMA, the City and the Attorney General have established the criteria for an injunction both on the modified test applied for statutory injunctions and the traditional test for a common law injunction to prohibit the Protesters from establishing a blockade or in any way impeding access to the Bridge in Windsor, Ontario.

63 This Order does not in any way prevent the Protesters from lawfully expressing their message and views as long as they do not prevent the free flow of traffic across the Bridge.

64 Respecting the rights of others to use the Bridge while allowing the Protesters to express their message in a way that does not prevent or impede others from using the Bridge is what is required in a society governed by the rule of law.

TAB 5

2012 ONSC 7348
Ontario Superior Court of Justice

Canadian National Railway v. Chippewa of Sarnia First Nation Band

2012 CarswellOnt 16859, 2012 ONSC 7348, 228 A.C.W.S. (3d) 827

Canadian National Railway Company, Plaintiff and Chief Chris Plain, The Chippewa of Sarnia First Nation Band, John Doe, Jane Doe and Persons Unknown, Defendants

D.M. Brown J.

Heard: December 21, 2012
Judgment: December 21, 2012
Docket: 12-CV-470817-0000

Counsel: H. Pessione, for Plaintiff

Subject: Civil Practice and Procedure; Property; Public

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.b Ex parte injunctions
II.2.b.iii Threshold test
II.2.b.iii.B Irreparable harm

Headnote

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Ex parte injunctions — Threshold test — Irreparable harm
Motion by plaintiff, on ex parte basis, for interim injunction restraining defendants from trespassing on plaintiff`s right of way over land, intefering with plaintiff`s business or threatening plaintiff`s employees — Plaintiff operated rail line — Right of way was over defendants`reserve — Defendants had set up blockade on right of way, preventing passage of trains — Plaintiff`s representative stated that blockade would cause significant economic damage to plaintiff, its customers and others — Motion granted — Court was prepared to hear motion on ex parte basis because protestors refused to identify themselves and given exigent circumstances caused by blockade — There was serious issue to be tried based on trespass and obstruction — Plaintiff demonstrated that it would suffer irreparable harm if injunction were not granted — There would be widespread economic harm to industries in area — Balance of convenience favoured plaintiff — Persons were free to engage in political protest of public nature, but law did not permit them to do so by engaging in civil disobedience through trespassing on private property of others, such as plaintiff — Since motion was brought on ex parte basis, injunction must be limited in duration — Injunction was to expire on December 27, 2012 .

Table of Authorities

Cases considered by *D.M. Brown J.*:

Batty v. Toronto (City) (2011), 90 M.P.L.R. (4th) 250, 2011 ONSC 6862, 2011 CarswellOnt 12581, 248 C.R.R. (2d) 175, 12 R.P.R. (5th) 26, 108 O.R. (3d) 571, 342 D.L.R. (4th) 129 (Ont. S.C.J.) — considered

Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council (2006), 277 D.L.R. (4th) 274, 240 O.A.C. 119, 2006 CarswellOnt 7812, 82 O.R. (3d) 721, 36 C.P.C. (6th) 199 (Ont. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

***D.M. Brown J.*:**

1 Canadian National Railway Company moves, on an *ex parte* basis, for interim injunctive relief of the following nature:

(a) an interim injunction restraining, enjoining and prohibiting the Defendants and any person having notice of the order sought herein from, directly or indirectly, by any means whatsoever:

(i) trespassing on the Plaintiff's right-of-way at Milepost 2.37, at the railway crossing at Degurse Drive ("the Degurse Crossing"), on the Plaintiff's St. Clair Industrial Spur rail line (the "Spur Line") located on the Chippewa of Sarnia First Nation Reserve, or anywhere else on the Spur Line;

(ii) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to impede, restrict or in any way physically interfere with, the Plaintiff's carrying on of its business and in particular its right to operate trains on the Spur Line;

(iii) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to prevent, impede, restrict or in any way physically interfere with the removal of any objects from the Spur Line or the maintenance, reconstruction or alteration of the Spur Line;

(iv) threatening or intimidating the Plaintiff's employees, servants, agents or other persons having business with the Plaintiff;

(v) physically interfering with or counselling others to physically interfere with the performance by the Plaintiff of its contractual relations with its employees, servants, agents, customers or other persons having business with the Plaintiff;

(vi) physically obstructing or otherwise impeding, or counselling others to physically obstruct or impede, the movement or operation of the Plaintiff's trains on the Spur Line or anything connected with its railway operations; and,

(vii) creating a nuisance by physically obstructing the Plaintiff from carrying on its railway operations.

(b) an Order requiring the Defendants and any persons having notice of the order sought herein to forthwith remove any and all obstructions placed or created or imposed by them to the Plaintiff's full use of its lands, premises, facilities and equipment on the Spur Line.

CNR also seeks related relief concerning the enforcement of the injunction sought.

2 This motion was brought *ex parte* on an emergency basis long after the Court had closed this Friday evening.

II. The events alleged

3 Mr. Greg Curtis, CNR's Regional Superintendent, Operations, swore an affidavit in support of the motion. In the following paragraphs I simply reproduce the evidence provided by Mr. Curtis.

4 Mr. Curtis stated that CN's St. Clair River Industrial Spur Line is an approximately 14.2 mile single track line that extends from Sarnia, Ontario, to Cortright, Ontario. The Spur line passes through the towns of Corunna and Mooretown, two south western Ontario communities. Sarnia is the largest city on Lake Huron with a mainstay petrochemical production industry. The town of Corunna is known as "Chemical Valley" because of the numerous chemical and other industrial plants in the area, many of which rely on the Spur Line to transport their cargo.

5 The Spur Line services chemical companies, ethanol plants, plastic plants, fertilizer companies and rail car repair facilities. CN carries many types of freight on the Spur Line between Sarnia and Cortright. CN's clients that use the Spur Line include, among others, Imperial Oil, Terra International (Canada) Inc., Nova Chemicals and St. Clair Ethanol. Each of these companies typically relies on the Spur Line to transport on average 450 cars of cargo (by way of 4 CN and 2 CSX trains) daily, 7 days a week. Materials carried by CN on the Spur Line include: plastics, ethylene, polyethylene, butane, ammonium nitrate, nitric acid, methanol, manufactured goods, electronics, raw materials, and numerous other types of chemical, industrial and other rail freight, heavily tied to the petrochemical industry.

6 CN also has operating agreements with CSX Transportation ("CSX"), a U.S. railroad company that operates the largest railroad in the eastern United States. CSX uses the Spur Line on a daily basis as an interchange point for delivery of its rail cars.

7 Mr. Curtis learned earlier today from Mr. Raymond Currier, CN Police Inspector, Sarnia Yards that:

(a) At or about 9:00 a.m. on Friday, December 21, 2012, he was advised that the Spur Line was being blocked by a number of individuals at Milepoint 2.37, at the railway crossing at Degurse Drive ("the Degurse Crossing");

(b) Degurse Drive is a paved road in the Chippewa of Sarnia First Nation Reserve. The CN right-of-way for the Spur Line passes through the Reserve at this point;

(c) At approximately 4:55 p.m. Mr. Currier attended at the Degurse Crossing. At that time there were approximately 12 individuals blocking the Spur Line ("the Blockade"). A truck with a snow plow was parked over the two CN tracks, a tent and fire had been erected over the tracks, and a number of lawn chairs were set-up across and beside the tracks, along with fire wood;

(e) The individuals participating in the Blockade refused to identify themselves, but advised him that the reason for the Blockade was to apply pressure on the Federal Government with respect to its recent passing of Bill C-45, and that they did not have any issue with CN;

(f) Mr. Currier requested that the people at the Blockade leave, advised that they were trespassing on CN railway lines, and was advised by them that they were not prepared to leave at that time.

(g) Constable Patrick Nahmabin (Badge #135), a General Duty Constable of the Sarnia City Police, which has jurisdiction over the area in question, attended at the Blockade at approximately the same time, but went off duty at 5:30 p.m. Constable Nahmabian is a member of the Chippewa of Sarnia First Nation Band, ("the Band") and he recognized members of the Band as the individuals participating in the Blockade.

8 Mr. Curtis was advised by Brent Ballingall, CN's Aboriginal Affairs Manager, that at approximately 6:15 p.m. EST he was on a telephone call with Inspector Raymond Currier, CN Police, when the telephone was handed to an individual at the blockade who had refused to identify himself. Mr. Currier was advised by Brent Ballingall that he spoke to this person who identified himself to Brent as Chief Chris Plain, Chief of the Chippewa of Sarnia First Nation Band. Brent requested that Chief Plain leave and have the other protesters leave the Blockade so that CN could carry on with its business, and Chief Plain refused, indicating that he did not control the people at the Blockade. He indicated to Brent that they would leave at some point but refused to indicate when that would be.

9 As to the impact of this blockade on CN's operations on the Spur Line, Mr. Curtis deposed that the blockade is preventing the movement of CN's and CSX's trains on the Spur Line. As of approximately 9:00 a.m. on December 21, 2012, CN made the decision, in the interests of public safety, not to run any trains through the Degurse Crossing until a Court Order was obtained, and steps were taken to remove the Blockade. By 8:00 p.m. on December 21, 2012, 2 CN freight trains and 1 CSX freight train that were otherwise scheduled to deliver cargo would have been held at origin. These trains contain a combination of chemical and other industrial products.

10 Mr. Curtis stated that the Blockade will cause significant economic damage to CN, its customers and others. There is a CSX Transportation rail line in the vicinity, however, it is his understanding that the CSX line does not have the connections or capacity to deliver the traffic carried on the Spur Line. There is no other work-around to avoid the Blockade. Therefore, all the traffic between Sarnia and Cortright will quickly become backlogged. The result will be delays to customers which delays will exceed the time of the actual blockade. This is because start-up problems mount for every hour the Spur Line is blocked — customers simply cannot process two days' worth of traffic in one day, resulting in further backlogs. In turn, this will produce a shortage of empty equipment for subsequent loading, creating a further compounding effect. By the time the backlog is cleared, the costs of these compounded delays will be much greater than the sum of the costs of the individual train delays.

11 According to Mr. Curtis, CN contracts with its customers to deliver goods within specified periods of time. Many of the shipments are extremely time sensitive, "just-in-time", deliveries and CN's customers have very limited capacity for on-site storage where CN fails to transport cargo as scheduled.

12 Mr. Curtis deposed that a significant number of CN customers in the "Chemical Valley" area and elsewhere across Canada and the U.S. will be affected by the interruption in rail service. As CN's flow of traffic is disrupted, other service in the CN system will quickly start to decrease due to an imbalance of motive power, crews and freight equipment.

13 Mr. Curtis stated that the Blockade of CN's train operations will also have a significant impact on CN's employees. CN employs significant numbers of persons in immediate train service as crews, in train and yard operations, as well as in the mechanical department who inspect the trains and persons in the engineering group who are responsible for inspecting and repairing track. A cessation of rail service, beyond even a day, may result in CN laying off some of these employees.

14 Mr. Curtis expressed the view that the resulting impact on CN's operations will cause irreparable harm to CN and others, including the following harm:

(a) the layoff of employees, as well as a loss of productivity associated with the disruptions;

(b) delays in the delivery of commodities and goods and extended yard or line holding of such goods, including chemicals and hazardous commodities, and manufactured goods;

(c) increased yard congestion at CN's facilities including increased costs of yard crew activities;

(d) disruption of motive power (engine) cycles from a normal balanced use and routings affecting CN's operations; and,

(e) loss of revenue to CN and increased costs to CN's customers.

Mr. Curtis deposed that the scale and extent of these losses would be extremely difficult, if not impossible, to quantify in monetary terms.

15 Mr. Curtis stated that he was authorized on behalf of CN to depose that CN will abide by any order concerning damages that the Court might make if it is found that the granting of the order sought causes compensable damages to the defendants.

III. The general principles

16 The test for obtaining an interlocutory injunction is well known and was articulated by the Supreme Court of Canada

in *RJR-MacDonald Inc. v. Canada (Attorney General)*:

> (i) The moving party must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test;
>
> (ii) The moving party must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm, rather than its magnitude; and,
>
> (iii)The third branch of the test requires an assessment of the balance of inconvenience. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party.[1]

17 On a motion such as the one which CNR has brought, the court must also scrutinize the evidence in light of the duty of an *ex parte* moving party to make full and frank disclosure of all material facts, including putting before the court the arguments the responding party likely would make, to the extent known by the moving party.

18 Further, the Court of Appeal emphasized, in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*,[2] that when injunction motions involve aboriginal communities, certain principles must be kept in mind:

> (i) Negotiation, not litigation, is the best way for the country to reconcile the claims of aboriginal communities with the rights of the Crown; and,
>
> (ii) The rule of law is "highly textured", with one dimension of the principle involving the respect for minority rights and the reconciliation of aboriginal and non-aboriginal interests through negotiations.

19 Finally, the protestors in the present case are exercising expressive freedoms enjoyed under the *Canadian Charter of Rights and Freedoms*, but as I examined at length in *Batty v. Toronto (City)*,[3] expressive rights are not absolute and are subject to reasonable limits.

IV. Analysis

20 CN brought this motion on an *ex parte* basis. Given that the protestors refused to identify themselves and given the exigent circumstances caused by the blockage, I am prepared to consider the motion on that basis.

21 I am satisfied that CN has demonstrated a serious issue to be tried. The protestors are trespassing on CN's Spur Line and are blocking rail traffic. During oral argument counsel showed me a photograph of the blockade of the rail line by a truck with a snow-plough which appeared today in the Sarnia Observer. The trespass and obstruction were obvious.

22 I am also satisfied that CN has demonstrated that it will suffer irreparable harm if an injunction were not granted. Mr. Curtis described the important role played by the Spur Line in servicing local industries and the economic disruption a continued blockade would have. Such widespread economic harm to industries in an area constitutes harm of an irreparable nature.

23 Turning to the balance of convenience, again CN has demonstrated that unless an injunction restraining the blockade is granted, its operations will be significantly disrupted and third parties will suffer economic harm. The protestors obviously are engaged in a form of expressive activity, but according to the information learned by Mr. Curtis, the protestors do not have a complaint against CN, the property owner; their ire is directed toward the federal Parliament which passed legislation to which they object. Persons are free to engage in political protest of that public nature, but the law does not permit them to

do so by engaging in civil disobedience through trespassing on the private property of others, such as CN. Given the alternative locations for expressive conduct open to the protestors, and the economic disruption their expressive activity most probably will have on other industries, the political nature of the message expressed by the protestors carries little weight in the balance of convenience analysis in the particular circumstances of this case.

24 Moreover, from the information learned by Mr. Curtis, the protest does not involve a claim to aboriginal title or aboriginal rights in connection with the property upon which the protest is taking place. The protest is more in the nature of an expression of opposition by one group of Canadian citizens to legislation which they oppose. As a result, the factors identified by the Court of Appeal in the *Haudenosaunee Six Nations Confederacy Council* play little role in the circumstances of this case.

25 In sum, the balance of convenience favours CN.

V. Conclusion

26 For the reasons set out above, I am satisfied that an injunction should issue in the form sought by CN. Since the motion was brought on an *ex parte* basis, the injunction must be limited in duration. I limit the duration of the order until Thursday, December 27, 2012. If CN wishes to continue the order, it may move before me on December 27, 2012, at 10:30 a.m. in courtroom 8-6, 330 University Avenue, Toronto. In addition, I have included in the order a provision entitling any affected person to move to vary this order on 24 hours' notice. I have signed the order.

Footnotes

1 [1994] 1 S.C.R. 311 (S.C.C.).

2 (2006), 82 O.R. (3d) 721 (Ont. C.A.)

3 2011 ONSC 6862 (Ont. S.C.J.)

TAB 6

2013 NBBR 361, 2013 NBQB 361
New Brunswick Court of Queen's Bench

Produits Forestiers Arbec S.E.N.C v. John Doe

2013 CarswellNB 649, 2013 CarswellNB 650, 2013 NBBR 361, 2013 NBQB 361, [2013] N.B.J. No. 361, 1075 A.P.R. 357, 235 A.C.W.S. (3d) 794, 414 N.B.R. (2d) 357

Produits Forestiers Arbec S.E.N.C, Intended Plaintiff and John Doe, Jane Doe and Persons Unknown, Intended Defendants

Fred Ferguson J.

Heard: October 28, 2013
Judgment: October 28, 2013
Docket: NC-97-2013

Counsel: Pascale Cloutier, Ryan Burgoyne, for Intended Plaintiff
No one for Intended Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.A Serious issue to be tried

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.B Irreparable harm

Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.C Balance of convenience

Headnote

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Strength of applicant's case
A Inc. scheduled two week shutdown to complete maintenance work on mill — **Protest** of unknown origin began early Monday October 28 when large number of demonstrators blocked access to both plant entrances; physical and verbal confrontations ensued but ended without injury to anyone — Protesters were upset with A Inc.'s decision to use out of

province workers during plant shutdown since area of New Brunswick suffered from high unemployment — A Inc. brought application for interim **injunction** to remove protesters — Application granted — There was serious issue to be tried; suit was not frivolous or vexatious — Conduct complained of involved allegations of nuisance and interference with economic relations — **Protest** was effective in preventing A Inc. from carrying on its maintenance work as part of scheduled shutdown.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Irreparable harm
A Inc. scheduled two week shutdown to complete maintenance work on mill — **Protest** of unknown origin began early Monday October 28 when large number of demonstrators blocked access to both plant entrances; physical and verbal confrontations ensued but ended without injury to anyone — Protesters were upset with A Inc.'s decision to use out of province workers during plant shutdown since area of New Brunswick suffered from high unemployment — A Inc. brought application for interim **injunction** to remove protesters — Application granted — Irreparable harm occurred in form of economic damage and possible physical harm — Possibly both full time plant workers and subcontractors suffered economic loss because of inability to get into plant to do work — Physical injury may have resulted had workers and/or subcontractors tried to cross protesters' line; court should not have had to wait for injury to occur before acting to protect those attempting to pursue livelihood.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Balance of convenience
A Inc. scheduled two week shutdown to complete maintenance work on mill — **Protest** of unknown origin began early Monday October 28 when large number of demonstrators blocked access to both plant entrances; physical and verbal confrontations ensued but ended without injury to anyone — Protesters were upset with A Inc.'s decision to use out of province workers during plant shutdown since area of New Brunswick suffered from high unemployment — A Inc. brought application for interim **injunction** to remove protesters — Application granted — Balance of convenience favoured granting **injunction** to A Inc. — Lawful operation of A Inc. was stifled by protesters — **Injunction** would not prevent lawful **protest** of out of province workers, but would simply prohibit interference with A Inc.'s lawful pursuit of economic goals.

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Interforest Ltd. v. Weber (1999), 180 D.L.R. (4th) 176, 1999 CarswellOnt 3041 (Ont. S.C.J.) — referred to

MacMillan Bloedel Ltd. v. Simpson (1996), [1996] 2 S.C.R. 1048, (sub nom. *MacMillan Bloedel Ltd. v. Greenpeace Canada)* 79 B.C.A.C. 135, (sub nom. *MacMillan Bloedel Ltd. v. Greenpeace Canada)* 129 W.A.C. 135, 2 C.P.C. (4th) 161, [1996] 8 W.W.R. 305, 22 B.C.L.R. (3d) 201, 137 D.L.R. (4th) 633, 109 C.C.C. (3d) 259, (sub nom. *MacMillan Bloedel Ltd. v. Greenpeace Canada)* 199 N.R. 279, 22 C.E.L.R. (N.S.) 1, 1996 CarswellBC 2301, 1996 CarswellBC 2302 (S.C.C.) — referred to

Metz Farms 2 Ltd. v. Committee Against Hog Factories (2001), 37 C.E.L.R. (N.S.) 106, 6 C.P.C. (5th) 83, 236 N.B.R. (2d) 4, 611 A.P.R. 4, 2001 NBCA 11, 2001 CarswellNB 56 (N.B. C.A.) — referred to

Partition Components Inc. v. Rintamaki (2003), 2003 CarswellOnt 3161 (Ont. S.C.J.) — referred to

Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558 (2002), (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* 2002 SCC 8, 2002 CarswellSask 22, 2002 CarswellSask 23, 217 Sask. R. 22, 265 W.A.C. 22, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* [2002] 1 S.C.R. 156, 2002 C.L.L.C. 220-008, 280 N.R. 333, [2002] 4 W.W.R. 205, 208 D.L.R. (4th) 385, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* 90 C.R.R. (2d) 189, 78 C.L.R.B.R. (2d) 161 (S.C.C.) — considered

Photo Engravers & Electrotypers Ltd. v. Fell (1989), 1989 CarswellOnt 2344, 90 C.L.L.C. 14,002, 90 C.L.L.C. 12005 (Ont. H.C.) — referred to

R. v. Beare (1987), [1989] 1 W.W.R. 97, [1988] 2 S.C.R. 387, 55 D.L.R. (4th) 481, 88 N.R. 205, 71 Sask. R. 1, 45 C.C.C. (3d) 57, 66 C.R. (3d) 97, 36 C.R.R. 90, 1987 CarswellSask 674, 1987 CarswellSask 675 (S.C.C.) — referred to

R. v. Buckingham (1943), 1943 CarswellBC 100, [1946] 1 W.W.R. 425, 86 C.C.C. 76 (B.C. S.C.) — referred to

R. v. Gibbons (2012), 2012 SCC 28, 2012 CarswellOnt 7031, 2012 CarswellOnt 7032, 92 C.R. (6th) 290, 283 C.C.C. (3d) 295, 430 N.R. 228, 114 O.R. (3d) 80 (note), 348 D.L.R. (4th) 214, 292 O.A.C. 1, 24 C.P.C. (7th) 225, [2012] 2 S.C.R. 92 (S.C.C.) — considered

R. v. Hayward (1957), 1957 CarswellNB 34, 118 C.C.C. 365 (N.B. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 127 — considered

s. 127(1) — considered

s. 145(5.1) [en. 1997, c. 18, s. 3(2)] — considered

s. 430(1)(d) — considered

s. 495 — considered

s. 503(2) — considered

s. 503(2.1) [en. 1994, c. 44, s. 42] — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 34 — referred to

Judicature Act, R.S.N.B. 1973, c. J-2
s. 33 — considered

s. 73 — considered

s. 73.11 [en. 1978, c. 32, s. 33] — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 60.11 — considered

R. 60.12 — considered

R. 76 — considered

Rules of Court, N.B. Reg. 82-73
R. 40.01(a) — considered

APPLICATION by A Inc. for interim injunction to remove protesters from vicinity of its mill.

***Fred Ferguson J.*:**

Introduction

1 The intended Plaintiff (Arbec) applied to this court on October 28th, 2013 for an *ex parte* interim **injunction** to remove a rather large number of protestors from the vicinity of its oriented strand board (OSB) mill in the City of Miramichi early that morning. The reason for the **protest** was the hiring by Arbec of a Quebec based company to do a small but important part of the maintenance work at the mill during a scheduled annual shutdown for repairs. The protestors stationed themselves on both sides of the public street that divides the Arbec mill from its wood yard. The human barrier effectively prevented 118 Arbec employees, a number of local subcontractors and the Quebec company from beginning work on a scheduled two week shut down at the mill site for annual maintenance.

2 Specifically, the protest appears to have been motivated by the presence of a number of employees of a Quebec based company, Desco, brought in to do specialty work on the press used to make the OSB. It is a product used in residential and commercial housing and other types of construction.

3 Arbec's counsel requested in their Notice of Preliminary Motion that an *ex parte* interim injunction be issued for a period of ten days effective immediately. After a short hearing an interim injunction was granted for the period from October 28th, 2013 to October 31st, 2013 at 1:30 p.m. At the time, I indicated that reasons for judgment would follow. These are those reasons.

The Backgound

4 Arbec operates an OSB mill in Miramichi producing oriented strand board for the construction industry. It employs 118 people at its Miramichi facility. Each year there is a scheduled shutdown during which time maintenance is carried out to assure the continued mechanical good health of the mill.

5 The Company bought the OSB mill in the City of Miramichi in December of 2011, five years after it had been shuttered by its former owner. It was reopened in the fall of 2012 and has been in production seven days per week since that time except for one twelve hour scheduled maintenance period every two weeks to deal with pressing maintenance issues.

6 This year's annual two week shutdown was scheduled to begin on October 28th, 2013. At the time, the 118 regular employees of the mill were to be joined by subcontractors, principally from the local area, to do the necessary work. It seems clear that a high number of local contract workers would be employed temporarily as a result. However, the shutdown crew of workers also included a small group of workers from the Quebec based company, Desco, that was to perform work on the press used to make the OSB product. According to the affidavit evidence filed, the press is an "integral part" of the manufacturing process and the company deposes that it has done quality work for Arbec in the past.

7 A protest of unknown origin began early on Monday October 28th at the mill site. A large number of demonstrators arrived at the mill between 7 and 8:00 a.m., numbering approximately fifty, and blocked access to both the plant entrances on the north side of Water Street in the City as well as an access on the south side which functions as the entrance to the wood yard. A confrontation ensued between one of the protestors and a local contractor who attempted to drive through the line and onto the mill site. A verbal confrontation ensued and eventually ended, fortunately without injury to anyone.

8 The protestors have not been identified to any labor group or union and appear to have come together in the days

leading up to the shutdown by unknown means.

The Issues

9 The principal issue is whether an interim **injunction** enjoining the, as yet unnamed, protestors from impeding access to the mill site or the wood yard of those whose work requires them to be on Arbec property as part of the labor force on the shutdown. In conjunction with that request is a request for an abridgement of time to hear the matter and an order dispensing with service on the protestors who, at the time of the Application, remained unidentified. The latter request is granted on the basis that Arbec could not have known until the **protest** began that it would in fact take place. Remedial action by Arbec's counsel in filing the Application was exigent in the circumstances.

Analysis

General

10 This case is not about a dispute between an employer and a union. Nor is it a strike by employees of Arbec. It is not a dispute between Arbec and any other identifiable legal entity. It is, plainly and simply, a case involving picketing by a loosely organized group of protestors upset with a company's decision to use out of province workers during a plant shutdown in an area of New Brunswick that suffers from high unemployment.

11 Their grievance is one that everyone in this community can relate to because of the unemployment issue. However, the labor laws of the Province and the terms under which Arbec and the Province of New Brunswick agreed to partner in reopening the plant surely must be such as to preclude government or organized labor from intervening to prevent out of province workers from participating in a scheduled annual shut down at the local Arbec plant. Otherwise lawful means might have been taken by one or both to prevent the use of out of the province workers during the annual Arbec mill maintenance shut down.

12 The statutory authority for issuing an interim injunction is found in the *Judicature Act* S.N.B. ch. J-2, Section 33 as well as *Rule 40.01(a)* of the *Rules of Court of New Brunswick* and Regulation 82-73 of the *Rules*.

13 The principles that determine whether an injunction should issue in the current circumstances are set out in the seminal decision of the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 (S.C.C.) The criteria were itemized at paragraph 43 to be:

> (a) There is a serious issue to be tried;
>
> (b) It (Arbec) will suffer irreparable harm or harm not compensable by an award of damages, if the injunction is not granted; and
>
> (c) The balance of convenience favours the plaintiff, in the sense that the harm to the plaintiff if the injunction is not granted must exceed the harm to the defendant if the injunction is granted.

14 It is beyond dispute that if the circumstances warrant an injunction can be issued against persons unknown or unidentified. *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 (S.C.C.)

Serious Issue to be Tried

15 Based upon the affidavit evidence filed, this is not a frivolous or vexatious suit and thus it is reasonable to conclude that there is a serious issue to be tried. *RJR-MacDonald Inc.* at paragraph 49. The conduct complained of involves allegations of nuisance and interference with economic relations that are readily apparent in the affidavit evidence filed. The protest was effective, according to the affidavits, in preventing Arbec from carrying on its maintenance work as part of a scheduled

shutdown.

Irreparable Harm

16 Irreparable harm occurs when damage to the business reputation of a company is incapable of quantification or lost forever. *RJR-MacDonald Inc.* at paragraph 59. Where conduct is criminal in nature, for example when there is obstruction, interruption or interference with a person in the lawful enjoyment of property as prohibited by Section 430(1)(d) Of the Criminal Code of Canada, or there is tortious conduct, damages may not be adequate and irreparable harm is inferable. *Aramark Canada Ltd. v. Keating*, [2002] O.J. No. 3505 (Ont. S.C.J.), at paragraph 44; *Interforest Ltd. v. Weber*, [1999] O.J. No. 3637 (Ont. S.C.J.) at paragraph 27; *Photo Engravers & Electrotypers Ltd. v. Fell*, [1989] O.J. No. 1442 (Ont. H.C.), at pp. 3 - 4.

17 Loss of customers and potential loss of good will also qualify as irreparable harm. *Partition Components Inc. v. Rintamaki*, [2003] O.J. No. 3315 (Ont. S.C.J.) at paragraphs 8-13; *Church & Dwight Ltd./Ltée v. Sifto Canada Inc.*, [1994] O.J. No. 2139 (Ont. Gen. Div.) at paragraphs 9, 15-18.

18 The risk of physical injury through confrontation is also sufficient to establish irreparable harm especially if there exists a possibility that its likelihood will escalate. *Metz Farms 2 Ltd. v. Committee Against Hog Factories*, [2001] N.B.J. No. 62 (N.B. C.A.) at paragraph 21. There is evidence here that a confrontation between certain of the protesters and one of the subcontractors trying to enter the site did take place. The truck was stopped and a verbal altercation occurred. The decision by Arbec to keep everyone else from trying to enter the site by crossing the human barrier erected by protesters is likely the only reason more confrontations did not occur.

19 That economic damage occurred here is beyond dispute. The shutdown was delayed for one day. It is unclear if subcontractors would be remunerated by Arbec for their lost time even though no work could be carried out. Nor is it clear whether the full time plant workers who were scheduled to work would have to be paid by Arbec even though they, too, could not get in to the plant to work. What is clear is that one or the other or both would suffer economic loss because of the inability to get into the plant to do the work. However, that loss is a less serious result than had the workers and/or the subcontractors tried to cross the protesters line and physical injury had resulted as appeared to be the next step in escalation after the first subcontractor tried to enter the mill site and a physical and verbal confrontation occurred. The Court should not have to wait for injury or serious injury to occur before acting to protect those who were attempting to lawfully pursue their livelihood.

The Balance of Convenience

20 Finally, the balance of convenience involves weighing which of the parties would suffer a greater harm from the granting of an **injunction**. *RJR-MacDonald Inc.* at paragraph 62. The granting of the **injunction** in this case clearly favors Arbec. Its lawful operation is effectively stifled by the protesters. Issuing an **injunction** will not prevent lawful **protest** of the use of Quebec workers at the mill site. It will simply prohibit interference with Arbec's lawful pursuit of the economic goals that it was in the process of assuring by its scheduled maintenance shutdown. See, for example, in this regard: *Metz Farms 2 Ltd.* at paragraph 22.

21 In *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, the Supreme Court of Canada held that "[p]icketing which breaches criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation, will be impermissible regardless of where it occurs." *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558* (2002), 208 D.L.R. (4th) 385 (S.C.C.) at paragraph 77. In this instance, there is compelling evidence of a violation of section 430(1)(d) of the *Criminal Code of Canada* by the protesters for having obstructed, interrupted or interfered with the employees of Arbec as well as the subcontractors in their lawful enjoyment of property.

Conclusions

The Request for an Interim Injunction

22 For the foregoing reasons the *ex parte* request for an interim injunction is granted. The following orders are hereby granted:

> 1. The Intended Defendants, its officers, members, agents, servants, directors, shareholders, representatives or substitutes, anyone acting upon their instructions or on their behalf, and anyone having notice and/or knowledge of this Order, be and they are hereby restrained and enjoined for a period of today, October 28, 2013, until Thursday, October 31, 2013, at 1:30 p.m. or further order of this Court, from:
>
> > (a) interfering or attempting to interfere with any person or persons or vehicle approaching or entering upon or leaving the premises and/or property of the Intended Plaintiff located at 1101 Water Street, (the "premises") by force, threat of force, intimidation, or by any other means whatsoever;
> >
> > (b) interfering or attempting to interfere with, or inducing or procuring, or attempting to procure the breach, by force, threat of force, intimidation, coercion, or by any other means whatsoever, of any contract between the Intended Plaintiff and any third party, including suppliers and customers having contractual relations with the Intended Plaintiff;
> >
> > (c) watching, besetting, trespassing, mass picketing, loitering, parading or patrolling on, at, or adjacent to or at the approaches, entrances, or exits to and from the premises;;
> >
> > (d) causing a nuisance adjacent to or in the vicinity of the premises;
> >
> > (e) trespassing, entering or attempting to enter on the premises;
> >
> > (f) interfering in the economic relations of the Plaintiff;
> >
> > (g) ordering aiding, abetting, assisting counselling, procuring or conspiring in any manner whatsoever, whether directly or indirectly to commit any act herein before described or to cause any person or persons to commit any such act.
>
> 2. This court further orders an abridgment of the notice time requirements.
>
> 3. This court further orders that this matter be brought back before the Court of Queen's Bench of new Brunswick, at 673 King George highway, Miramichi, New Brunswick, on Thursday, October 31, 2013, at 1:30 p.m. and that any party impacted by this Order may appear at that time to address the Court.

The Request for Arrest, Remand and Release Powers as an Adjunct to the Issuance of an Injunction

23 Counsel for Arbec proposed that in addition to the broadly worded series of injunction orders that police be given the power to arrest, detain, release on written undertakings and remand until court appearance in appropriate case anyone found to have contravened the injunction orders should they be issued. The powers they proposed that should be vested in the police were fairly comprehensive. However, they were not as comprehensive as those contained in the *Criminal Code.* The availability of the *Criminal Code* procedures in the absence of the alleged commission of a substantive crime such as, for example, mischief under Section 430(1)(d) might have been questionable until the recent decision by the Supreme Court in *R. v. Gibbons*, [2012] 2 S.C.R. 92 (S.C.C.) The case involved an alleged offence pursuant to Section 127 of the Criminal Code. It reads:

> 127. (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of
>
> > (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
> >
> > (b) an offence punishable on summary conviction.

24 The factual background was unique. In 1994 an Ontario superior court judge issued an interlocutory injunction preventing protesters from picketing within a certain distance of an abortion clinic. The injunction was never made permanent but was still in place in 2008 when Ms. Gibbons was charged for picketing in violation of the injunction. Her defence was that Section 127 was not available to police as a potential charge because "another mode of proceeding [was] expressly provided by law", namely, contempt of court under the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Specifically, that defence was brought by way of a pre-trial motion to quash the information on the ground that the exception set out in s. 127(1) applied to preclude her prosecution because the Ontario contempt of court rules, specifically Rules 60.11 and 60.12 precluded the application of s. 127(1).

25 In upholding the dismissal of her motion to quash Deschamps J. disposed of the argument at paragraphs 14-15 saying:

> The Ontario Rules do not define contempt or specify the circumstances in which a person will be found in contempt. A judge must thus rely on the "common law substratum" in issuing an order for contempt under Rule 60.11. Nor do the Ontario Rules establish the legal foundation for a contempt proceeding. They simply circumscribe, in the same way as the Manitoba Rules in *Clement*, the judge's power to make orders on finding a person in contempt.
>
> The common law must also be relied on in deciding on the offender's punishment. Rule 60.11(5) lays down no maximum terms of imprisonment, fines or costs, and it leaves the judge with a great deal of discretion. Rules 60.11 and 60.12 set out in considerable detail the procedure to be followed on a motion for a contempt order, but in light of the Court's reasoning in *Clement*, procedure alone is insufficient to trigger the exception in s. 127.

26 The *Rules of Court* of this province found in Reg. 82-73 made pursuant to Section 73 and 73.11 of the *Judicature Act* S.N.B., ch. J-2 provide for much the same statutory regime as Rule 76 of the Ontario legislation. Thus, the mere existence of a statutory contempt of court regime is insufficient, based upon *Gibbons*, to oust the availability of Section 127 for an alleged violation of the interim injunction set out above.

27 Thus, an alleged violation of the interim injunction could lead to arrest pursuant to Section 127 of the *Criminal Code*. Section 127 is a hybrid offence. That is, that the offence is prosecutable by way of indictment or summary conviction at the instance of the Crown. Until the mode of proceeding is determined by the Crown, the alleged offence is presumed to be proceeding by way of indictment. See: Section 34 of the *Interpretation Act*, R.S.C., 1985, c. I-21. All of the processes available on a proceeding by indictment, prior to that making of that decision, are available to the police and the Crown, including fingerprinting. *R. v. Buckingham* (1943), [1946] 1 W.W.R. 425 (B.C. S.C.); *R. v. Hayward* (1957), 118 C.C.C. 365 (N.B. C.A.). See, also, generally: *R. v. Beare* (1987), [1988] 2 S.C.R. 387 (S.C.C.)

28 Thus, any arrest could be based upon reasonable and probable grounds pursuant to Section 495 of the *Criminal Code*. Moreover, a peace officer who did arrest anyone on that basis would, in appropriate circumstances, have the right to release the person: on a Promise to Appear, or on a recognizance under section 503(2) or on an undertaking with conditions pursuant to Section 503(2.1). Any alleged violation of a release by way of a written undertaking to a peace officer would be prosecutable under Section 145(5.1) as a substantive offence. It is clear that the preventative nature of the processes available under the *Criminal Code* would likely be much more effective than any series of judge made orders intended to assist in the carrying out of any orders made as part of an interim injunction.

29 Incidentally, the availability of the provisions of the *Criminal Code*, for any alleged violations of the court orders, also injects into the process the Public Prosecutions branch of the Office of the Attorney General of New Brunswick. That eliminates the possibility of this court taking on an inquisitorial role in the event protesters are brought before it on contempt allegations or turning counsel for the Intended Plaintiff into a quasi-prosecutor in such circumstances.

30 Thus, the requested arrest, remand and release orders are denied as not necessary in the circumstances.

Application granted.

End of Document

TAB 7

2022 ONSC 1168
Ontario Superior Court of Justice

THE CORPORATION OF THE CITY OF WINDSOR v. PERSONS UNKNOWN

2022 CarswellOnt 2186, 2022 ONSC 1168, 2022 A.C.W.S. 1186, 31 M.P.L.R. (6th) 334, 504 C.R.R. (2d) 112, 85 C.P.C. (8th) 388

THE CORPORATION OF THE CITY OF WINDSOR (Applicant) and PERSONS UNKNOWN (Respondents) and ATTORNEY GENERAL OF ONTARIO and AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION (Intervening Parties) and THE DEMOCRACY FUND (Intervener as a Friend of the Court)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: February 18, 2022
Judgment: February 22, 2022
Docket: CV-22-00030791-0000

Counsel: Jennifer King, Michael Finley, Bevin Shores, Annamaria Enenajor, for Applicant, Corporation of the City of Windsor
Michael A. Wills, Darwin E. Harasym, for Intervener, Automotive Parts Manufacturers' Association
Joshua Hunter, Padraic Ryan, for Intervener, Attorney General of Ontario
Alan Honner, for Intervener, The Democracy Fund
Antoine d'Ailly, James Kitchen, for Citizens for Freedom

Subject: Civil Practice and Procedure; Constitutional; Public; Municipal; Human Rights

Related Abridgment Classifications

Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.c Enforcement of by-laws and statutes

Headnote

Remedies --- Injunctions — Injunctions in specific contexts — Enforcement of by-laws and statutes
On application by association, supported by city, **injunction** was granted to end blockade of bridge in city — City claimed that protesters defied court order with increasing numbers; police arrested 43 people on charges of mischief and/or disobeying order; protesters continued to violate city by-laws; and there was evidence that protesters planned to continue to **protest** on roadways approaching bridge — City applied to continue **injunction** — Application granted — City was effectively switching places with association, and in view of its request to continue **injunction** pursuant to s. 440 of Municipal Act, 2001, it was logical for city to be named applicant — City established strong prima facie case, on balance of probabilities, that protesters had breached multiple municipal by-laws and there was risk that they would continue to do so — Evidence clearly established that even after being informed of terms of order, protesters chose to ignore it and continued to impede and obstruct access to bridge — City established strong prima facie case that there had been deliberate and continuing breach of municipal by-laws and order, and there was risk that protesters would reassert presence on roadways thereby impeding or blocking access to bridge — City sought permanent **injunction** pursuant to s. 440 of Act, and city only needed to establish, on balance of probabilities, that there was strong prima facie case and that there was breach of by-law — Court retained residual discretion as to whether to grant **injunction** even if there was clear breach of statute, but its residual

discretion was narrow and arose only in circumstances that were truly exceptional — No exceptional circumstances had been credibly advanced here — There were no other enforcement remedies available to address unlawful conduct committed by protesters — No constitutional challenge was advanced, and in any event Canadian Charter of Rights and Freedoms did not protect expressive conduct by unlawful means — Record amply demonstrated not only that protesters had committed clear breaches of municipal by-laws and order, but there remained risk that they would continue to do so — City met test for permanent **injunction** pursuant to s. 440 of Act, and there had been no credible exceptional circumstances advanced to warrant exercising court's discretion to refuse to grant **injunction** — It was in public interest that permanent **injunction** be granted, particularly where there had been persistent and deliberate flouting of law — Time-limited **injunction** would not provide city and its residents with required degree of certainty that by-law breaches would cease.

Table of Authorities

Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION v. JIM BOAK (2022), 2022 ONSC 1001, 2022 CarswellOnt 2091, 28 M.P.L.R. (6th) 329 (Ont. S.C.J.) — referred to

Canadian National Railway Company v. Doe (2020), 2020 ONSC 4152, 2020 CarswellOnt 9244 (Ont. S.C.J.) — referred to

Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms ("ARC") et al (2018), 2018 ONSC 128, 2018 CarswellOnt 239 (Ont. S.C.J.) — referred to

Hamilton (City) v. Loucks (2003), 2003 CarswellOnt 3663, 42 M.P.L.R. (3d) 71, 40 C.P.C. (5th) 368, 232 D.L.R. (4th) 362, 42 M.P.L.R. (3d) 70, [2003] O.T.C. 848 (Ont. S.C.J.) — referred to

Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Limited (2020), 2020 ONSC 7679, 2020 CarswellOnt 18338, 13 M.P.L.R. (6th) 122 (Ont. S.C.J.) — referred to

Newcastle Recycling Ltd. v. Clarington (Municipality) (2005), 2005 CarswellOnt 7237, 204 O.A.C. 389, 16 M.P.L.R. (4th) 157 (Ont. C.A.) — referred to

Paul Magder Furs Ltd. v. Ontario (Attorney General) (1991), 3 C.P.C. (3d) 240, 85 D.L.R. (4th) 694, (sub nom. *Magder (Paul) Furs Ltd. v. Ontario (Attorney General))* 52 O.A.C. 151, (sub nom. *Ontario (Attorney General) v. Paul Magder Furs Ltd.)* 6 O.R. (3d) 188, 1991 CarswellOnt 403 (Ont. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Retirement Homes Regulatory Authority v. In Touch Retirement Living for Vegetarians/Vegans Inc. (2019), 2019 ONSC 3401, 2019 CarswellOnt 8772 (Ont. S.C.J.) — referred to

The Township of Amaranth v. Ramdas (2020), 2020 ONSC 2428, 2020 CarswellOnt 6129, 99 M.P.L.R. (5th) 228 (Ont. S.C.J.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — referred to

s. 2(c) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 101 — referred to

Criminal Code, R.S.C. 1985, c. C-46
s. 127 — referred to

s. 430(1) — referred to

Emergencies Act, R.S.C. 1985, c. 22 (4th Supp.)
Generally — referred to

Municipal Act, 2001, S.O. 2001, c. 25
s. 440 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 40.01 — referred to

R. 40.02(3) — referred to

APPLICATION by city to continue injunction.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 At the conclusion of the hearing on February 18, 2022, the record was endorsed as follows:

> [1] The Application brought by the City of Windsor is granted.
>
> [2] Two orders will issue today.
>
> [3] The first is the Order to Consolidate and the second is the Order to continue the injunctive relief granted on February 11, 2022.
>
> [4] The Orders will be signed in the form proposed by the City.
>
> [5] Reasons will follow.

2 These are the reasons.

Overview

3 On February 11, 2022, on application by the Plaintiff, the Automotive Parts Manufacturers' Association ("APMA"), and supported by the Interveners, the Corporation of the City of Windsor ("City") and the Attorney General of Ontario ("AG"), I granted an injunction to end the blockade of the Ambassador Bridge ("the Bridge") in the City of Windsor, finding that the test for an interim interlocutory injunction had been met pursuant to s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA"), r. 40.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 and s. 440 of the Municipal Act, 2001, S.O. 2001, c. 25 (see Automotive Parts Manufacturers' Association v. Jim Boak, 2022 ONSC 1001).

4 I ordered the injunction to be effective as of February 11, 2022 at 7:00 p.m.

5 On February 18, 2022, the City sought to continue the injunction, on varied terms, until such time as it is varied or discharged, pursuant to s. 440 of the Municipal Act, 2001. At this hearing, the City also sought to continue the injunction as the Applicant, with the APMA and AG as party interveners.

6 For the following reasons, the requested relief was granted.

7 In the days since the injunction was granted, the City asserts the following:

(a) protesters defied the court order of February 11, 2022 (”the “February 11 Order”), with numbers increasing and peaking at between 600 and 800 individuals during the evening of Saturday, February 12, 2022;

(b) police arrested 43 individuals on Sunday, February 13, 2022 on charges of mischief exceeding $5,000 and/or disobeying the February 11 Order contrary to ss. 430(1) and 127 of the Criminal Code, R.S.C. 1985, c. C–46;

(c) protesters continue to violate City by-laws — on Saturday, February 12, 2022, Provincial Offence Officers issued 28 tickets for by-law infractions and at least seven vehicles were towed from the protest area;

(d) protesters have continued to breach municipal by-laws, including but not limited to:

(i) By-law 9148 (traffic by-law),

(ii) By-law 233-2001 (vehicle idling by-law),

(iii) By-law 25-2010 (protection of highways by-law),

(iv) By-law 6716 (noise by-law), and

(v) By-law 9023 (parking by-law);

(e) there is evidence that the protesters plan to continue to protest on roadways approaching the Bridge;

(f) on Tuesday, February 15, 2022, police successfully intercepted a convoy of several transport trucks from Ottawa, with the suspected intention of heading to Windsor; and

(g) as a result of the continued threat of a new blockade, police continue to control traffic flow on Huron Church Road to protect access to the Bridge.

Preliminary Issue

8 The request of the City to be the named applicant was addressed as a preliminary issue. The City takes the position that this procedure will streamline and simplify the proceedings, reduce the burden on the court and the parties and reflect the court’s finding that “it will be virtually impossible to recover damages from the protesters.”

9 The City requested that the court exercise its discretion to accept its Notice of Application as the underlying proceeding in this matter, or, in the alternative, consolidate the City’s application with the present proceeding.

10 The request of the City was supported by the APMA and the AG.

11 The request was opposed by counsel representing The Democracy Fund, and Citizens for Freedom. The arguments in opposition focused on form, not substance. Counsel for The Democracy Fund submitted that the APMA had not taken the formal step of issuing an action. Counsel suggested that the APMA was not honouring its undertaking to commence an action. I reject these suggestions. The record contains a draft Notice of Action and there is no evidence to indicate that

APMA is resiling from its undertaking.

12 The issues before the court are real. The February 11 Order is in effect for 10 days and the motion to continue the injunction must be addressed on a timely basis.

13 There was no jurisdictional challenge to the court's authority to grant the relief requested by the City.

14 Rule 1.04 of the Rules of Civil Procedure reads as follows:

> **General Principle**
>
> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

15 This rule has application in these circumstances. The City is, in effect, switching places with the APMA. In view of the City's request to continue the injunction pursuant to s. 440 of the Municipal Act, 2001, it is logical for the City to be the named applicant. In my view, it is appropriate to grant the order reflecting that the City is now the applicant in these proceedings, with the APMA and the AG as party interveners and The Democracy Fund as a friend of the court.

16 The order giving effect to the foregoing has been signed.

Evidence

17 The City and the APMA gave notice in accordance with the requirements of the February 11 Order. The City issued a press release on February 12, 2022 containing a URL link to the February 11 Order, as well as the date, time and location of this motion. The City also took steps to give notice by posting a link to the February 11 Order on the front-page banner of the City's website, issuing further press releases and posting large-format copies of the February 11 Order at various locations along Huron Church Road.

18 Press releases were also circulated by the APMA.

19 The City contends that on February 11, 2022, Windsor police issued a news update to the protesters to make them aware that anyone blocking the streets at or near the Bridge constituted public mischief and that anyone blocking streets or assisting others in doing so may be committing a criminal offence and be subject to arrest.

20 Mr. Jason Reynar, Chief Administrative Officer of the City, provided evidence in his affidavit of February 17, 2022 of the steps the City took to publicize the February 11 Order. He made specific reference to press releases, links to the webpage and the signage that was distributed.

21 Deputy Chief Bellaire stated in his affidavit of February 17, 2022, that he is responsible for implementing the response to any incident involving the Bridge. He also stated that the Critical Incident Commanders have kept him informed about what has been occurring in the area of the Bridge and the police response to any problems or threats to that area.

22 Deputy Chief Bellaire stated in his affidavit of February 17, 2022 that after the February 11 Order came into effect, officers observed increased demonstrator presence in the Huron Church Road area. He states that he was advised by command personnel that on the evening of February 11, 2022, at the intersection of Huron Church Road and Tecumseh Road West, there were over 200 protesters present; there were 50 to 60 vehicles present; a tent and food tables had been set up; a camper trailer was blocking the northbound lane; children were on the scene who appeared to be under the age of 14 years old; and there was excessive honking.

23 At the intersection of Huron Church Road and College Avenue, there were over 300 protesters present; there were numerous vehicles north of College Avenue, including tractor-trailers and large trucks, travel trailers and passenger vehicles; there were numerous vehicles south of College Avenue, including tractor-trailers in large trucks; there were children on the

scene; there were several tents with food tables; and there were generators, gas cans and barbecues.

24 Deputy Chief Bellaire stated that on the morning of February 12, Windsor police, supported by their policing partners, moved to direct protesters away the primary entrance to the Bridge at the north end of Huron Church Road. However, rather than dispersing, Deputy Chief Bellaire stated that more individuals were observed to arrive on scene. Police operations were paused and police set up concrete barriers on Huron Church Road.

25 At 6 a.m. on February 12 at Huron Church Road and Tecumseh Road West, there remained 25-30 support vehicles in nearby parking lots with people sleeping inside and numerous vehicles remaining in the northbound lanes blocking traffic. At the intersection of Huron Church Road and College Avenue, there was a crowd of approximately 75 people; large tents were still present around the roadway and surrounding parking lot; people were sleeping in vehicles on side streets; and vehicles continue to block all Bridge traffic except one emergency lane, with people believed to be sleeping inside some of the vehicles.

26 By 2 p.m. on Saturday, February 12, 2022, Deputy Chief Bellaire stated that Windsor police observed that at the intersection of Huron Church Road and Tecumseh Road West, there were approximately 600 protesters on scene crowding the scene at the cement barriers and children were observed with their families. At the intersection of Huron Church Road and College Avenue, police were able to control the intersection.

27 By Saturday evening, February 12, protester numbers increased to between approximately 600 and 800 individuals, with the majority of protesters located at the intersection of Huron Church Road and Tecumseh Road West. Deputy Chief Bellaire stated that vehicles supporting the protest filled parking lots and plazas along Tecumseh Road West and varying numbers of protesters and vehicles were also observed at the intersection of Huron Church Road and College Avenue and at the secondary entrance to the Bridge.

28 Deputy Chief Bellaire stated that on Sunday, February 13, protesters and vehicles remained in the area and police once again gathered to disperse the protesters blocking the Bridge. Police made over 40 arrests over the course of the day and continued to engage with protesters to clear them from private property in the area.

29 Early in the morning of Monday, February 14, 2022, Deputy Chief Bellaire stated that police announced the Bridge was open to traffic.

30 Deputy Chief Bellaire stated that since the beginning of the protest, police have:

(a) made 44 arrests;

(b) laid a total of 86 charges, including 43 charges for breach of a court order; and

(c) seized and towed at least 18 vehicles.

31 Most of those individuals who were arrested have been released.

32 Deputy Chief Bellaire added that throughout the operations, the Windsor Police Services' primary goal was to ensure public safety and to bring the protest to a peaceful conclusion.

33 Deputy Chief Bellaire concluded his affidavit by noting that, based on police monitoring of social media both during and after the protest, there is a risk that the protesters may return. Police are also aware of a poster advertising for protesters to regroup on Saturday, February 19, 2022 in the City. His concerns are detailed at paragraphs 45-53 of his affidavit. Of note, Deputy Chief Bellaire stated that on February 15, 2022, police learned of a convoy of several transport trucks from Ottawa with the suspected intention of heading to Windsor. The convoy was intercepted by police at approximately 8:30 p.m. that day. As a result of these developments and the risk that protesters may return, police have maintained an elevated presence in the area, setting up traffic controls on roads surrounding the Bridge.

34 Deputy Chief Bellaire stated that as of 6 p.m. on February 17, 2022, police continued to maintain a presence in the area

and that various physical and human resources to control traffic were still in place.

35 Mr. Fabio Costante, City Councillor for Ward 2 of the City, noted that residents and businesses in Ward 2 have been particularly impacted by the disruption caused by the protest, which occurred in the central part of the Ward. The residents have had to endure not only the nuisances and business disruptions caused by the protest, but also traffic and public transit disruptions that have isolated them from the rest of the City.

36 Affidavits in response were submitted by a lawyer, a paralegal and a legal assistant at the firm representing the Citizens for Freedom.

37 Mr. Stephen Heimann stated that over the past five years, he has travelled in the area of the Bridge and has experienced traffic delays for a variety of reasons.

38 In my view, the statements of Mr. Heimann are irrelevant for the purposes of this motion.

39 Ms. Sherri Peroni attached two photographs to her first affidavit of February 18, 2022 “which purports to show law enforcement enforcing the injunction dated February 11, 2022.”

40 It is not possible to draw any conclusions from these photographs. The context in which they were taken is unknown. Ms. Peroni also references a number of media articles that are not relevant to the issues before the court. Examples are statements about global chip shortages, supply chain issues and the impact of vaccine mandates on laid-off, unvaccinated workers. This affidavit was not helpful.

41 A second affidavit from Ms. Peroni provided comment with respect to events which occurred in 2011 and 2012 and their impact on border crossings. These statements are irrelevant to this motion as are references to the border crossing in Coutts, Alberta, the Windsor and Detroit Tunnel and the Blue Water Bridge. The motion before the court relates to the Ambassador Bridge. References to Canadian Border Service Agency Reports that the Bridge is “Temporarily Closed” do not assist the position of the Democracy Fund, as it indicates that traffic at the Bridge is being impeded. References that on February 14, 2022 and February 17, 2022 there was no delay at the Bridge is only indicative that, at that point in time, the traffic at the Bridge was not impeded.

42 Mr. Nicholas Wansbutter made statements that he has been contacted by several persons described as “protesters” who were now facing criminal charges in relation to the February 11 Order for activities which occurred in Windsor, a number of whom were arrested despite having been physically located on the sidewalk, grass or other locations that are not in the vicinity of the entrance to the Bridge. He also referenced online video evidence of “peaceful individuals protesting in a manner appearing to be consistent with the rights as guaranteed by the *Canadian Charter of Rights and Freedoms* . . . .” He referenced another video showing “a peaceful protester being ambushed from behind by police in a violent arrest.” He also stated that he had been informed that videos exist “on social media which depict abuse of power by the Windsor police and their arrest and treatment of protesters.” Mr. Wansbutter’s affidavit is not helpful. It consists of statements of his opinion, his own interpretation of facts, reference to “charges” with no accompanying statement of what those charges are and references to video evidence that are not of any assistance because they do not provide any context.

43 In my view, the evidence provided by the parties associated with Citizens for Freedom is of no assistance and carries no weight.

44 To the extent that there is any conflict in the evidence, I accept the evidence of James Rayner, Fabio Costante, Cheryl McKinnon and Deputy Chief Bellaire.

Analysis

45 In preparing these reasons, I have reviewed and considered the following cases:

Newcastle Recycling Ltd. v. Clarington (Municipality), [2005] O.J. No. 5344 (C.A.) (”*Newcastle*”); *Amaranth (Township) v. Ramdas*, 2020 ONSC 2428(”*Amaranth*”); *Retirement Homes Regulatory Authority v. In Touch Retirement*

Living for Vegetarians/Vegans Inc., 2019 ONSC 3401("*Retirement Homes*"); *Ontario v. Adamson Barbecue Ltd.*, 2020 ONSC 7679("*Adamson*"); *Canadian National Railway Company v. Doe*, 2020 ONSC 4152; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*"); *Hamilton (City) v. Loucks* (2003), 232 D.L.R. (4th) 362 (Ont. S.C.) ("*Hamilton*"); *Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms ("ARC") et al.*, 2018 ONSC 128 ("*Downing*"); *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1991), 6 O.R. (3d) 188 (C.A.) ("*Magder*").

46 The issues for this Court to decide are:

(a) Has the City established a strong *prima facie* case that the protesters have breached municipal by-laws and will continue to do so?

(b) Is a permanent statutory injunction under s. 440 of the Municipal Act, 2001 the appropriate remedy? Alternatively, should an extension of the February 11 Order be granted under r. 40.02(3) of the Rules of Civil Procedure and s. 101 of the CJA?

a. Has the City established a strong prima facie case that the protesters have breached municipal by-laws and will continue to do so?

47 I find that the City has established a strong *prima facie* case, on a balance of probabilities, that the protesters have breached multiple municipal by-laws and that there is a risk they will continue to do so based on the following uncontroverted evidence:

(i) Between the February 11 Order coming into effect at 7:00 pm on February 11, 2022 and into Sunday, February 13, 2022, the protesters continued to breach multiple municipal by-laws, as is evidenced by multiple tickets issued for by-law infractions including the need to have multiple vehicles towed from the roadways approaching the Bridge. Protesters also breached the February 11 Order, as is evidenced by multiple arrests of individuals for *Criminal Code* charges, including disobeying the February 11 Order. Further, I note that after the February 11 Order came into effect, the number of protesters obstructing the Bridge increased over the course of the evening and into the following evening.

(ii) There is evidence of the protesters' expressed intent to continue their blockade despite the February 11 Order.

(iii) There is evidence that the protesters plan to continue to protest on roadways approaching the Bridge. This includes the successful interception of a convoy of several transport trucks from Ottawa with the suspected intention of heading to Windsor, as well as police monitoring of social media which identifies calls for protesters to regroup, including messages of "it's not over," "we are not done" and "Civil war time."

(iv) As a result of the continued threat of a new blockade, police continue to control traffic flow onto Huron Church Road to protect access to the Bridge. In other words, traffic in the area is not flowing normally due to the threat of further blockades.

48 The evidence clearly establishes that even after being informed of the terms of the February 11 Order, the protesters chose to ignore it and continue to impede and obstruct access to the Bridge.

49 I find that the City has established a strong *prima facie* case, on a balance of probabilities, that there has been a deliberate and continuing breach of municipal by-laws and the February 11 Order. I also find that there is a risk that protesters will reassert a presence on the roadways, thereby impeding or blocking access to the Bridge.

b. Is a permanent injunction the appropriate remedy?

50 Having found that the City has established a strong *prima facie* case that protesters breached municipal by-laws and

the February 11 Order, and that there is a risk they will continue to do so, the next issue is whether permanent injunctive relief is the appropriate remedy.

51 The City is seeking a *permanent* injunction pursuant to s. 440 of the Municipal Act, 2001, to enjoin the protesters from continuing to violate the City's by-laws. Section 440, under the section "General Enforcement Powers," provides the City with the authority to seek an injunction to restrain a person (or persons) from contravening its by-laws. In particular, it provides as follows:

> **Power to restrain**
>
> **440** If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

52 As I discussed in my Reasons of February 14, 2022, the granting of a statutory injunction involves a different analysis than the granting of an equitable injunction under the common law. The three-part test for an interim injunction set out in *RJR-MacDonald Inc.* at paras. 77-80 does not strictly apply in applications for a statutory injunction pursuant to s. 440 of the Municipal Act, 2001. The test for injunctive relief to restrain breaches of by-laws is narrower. In such cases, the moving party will not ordinarily have to establish inadequacy of damages or irreparable harm and that the balance of convenience favours the granting of the injunctive relief because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest: see *Newcastle*, at para. 32; *Amaranth*, at para. 54; and *Adamson*, at para. 17.

53 Accordingly, on an application for a statutory injunction, the applicant need only demonstrate that there is a serious issue to be tried and this must be demonstrated by establishing a strong *prima facie* case on a balance of probabilities: *Newcastle*, at para. 32; *Hamilton*, at para. 37; *Amaranth*, at paras. 51-55; and, *Adamson*, at para. 16.

54 Based on a review of the authorities cited by the City, the following general principles apply when an injunction is authorized by statute:

> (i) The applicant need only to establish a strong *prima facie* case, on a balance of probabilities, that there is a breach of the applicable statute. There is no obligation on the municipality to provide "compelling evidence" that an injunction is warranted: see *Newcastle*, at para. 32.
>
> (ii) Proof of actual damages suffered or proof of harm to the public is not an element of the legal test.
>
> (iii) There is no need for other enforcement remedies to have been pursued.
>
> (iv) The factors considered by a court when considering equitable relief will have a more limited application. For example, hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed.
>
> (v) There is a strong public interest in ensuring that all citizens in our society obey the law. Therefore, there is a presumption that the courts will grant interlocutory injunctions to compel compliance with the law as opposed to denying the injunction so that a defendant may continue to break the law. Any court tolerance of a continuing breach of the law will be extremely rare.

55 The Court does maintain a residual discretion as to whether to grant the injunction even if there is a clear breach of the statute. However, the Court's residual discretion is limited. Where a municipal authority seeks an injunction to enforce a by-law that it establishes is being breached, any discretion the court may have to permit unlawful conduct is narrow and arises only in circumstances that are truly exceptional: see *Newcastle*, at para. 32; and *Amaranth*, at para. 55.

56 The onus to raise the exceptional circumstances lies with the respondent, and those circumstances are limited: *Retirement Homes*, at para. 48. These "exceptional circumstances" could include: the offending party has ceased the activity;

the injunction is moot and would serve no purpose; the offending party has provided clear and unequivocal evidence that the unlawful conduct will cease; there is a right that pre-existed the enactment that was breached; there is uncertainty that the offending party is flouting the law or where the conduct is not what the enactment was intended to prevent: *Downing*, at para. 113.

57 None of the exceptional circumstances were credibly advanced by the Interveners, The Democracy Fund or Citizens for Freedom. I also parenthetically note that none of the Defendants who were provided notice of this motion chose to participate.

58 In his submissions, Mr. d'Ailly conceded that the protesters continued to commit breaches of municipal by-laws even after the February 11 Order came into effect on February 11, 2022 at 7:00 pm. He submits that protesters committed unlawful acts only because the police chose to use their discretion to not immediately arrest any of the protesters. I do not accept the submissions of Mr. d'Ailly or of Mr. Kitchen that this injunction should not be granted because the February 11 Order gave police officers discretion as to how and when the February 11 Order would be enforced by the arrest or removal of the protesters breaching the law.

59 Court orders are not recommendations or suggestions to be followed at the discretion of those to whom it applies. The rule of law requires that everyone obey the law. Significant, organized, deliberate and persistent defiance of the law and court orders is a serious threat to the rule of law which is one of the foundations of a functioning democracy. The protesters are obliged, as is every Canadian citizen, to follow the law and not breach municipal by-laws or court orders that prohibit unlawful conduct regardless of whether or not police choose to enforce the law by arresting them.

60 I also do not accept their submissions, or the submissions of Mr. Honner, that there are other enforcement remedies available to address unlawful conduct committed by the protesters, such as the Emergencies Act, R.S.C. 1985, c. 22 (4th Supp.) and/or the Criminal Code, and therefore an injunction is not warranted. As set out earlier, the test for a statutory injunction does not require consideration of the availability of other enforcement remedies.

61 Finally, Mr. Kitchen again raises the issue of the protesters' rights under ss. 2(b) and (c) the *Canadian Charter of Rights and Freedoms*. I re-iterate from my Reasons of February 14, 2022, that absent a constitutional challenge to the by-laws in question, they are presumptively valid and remain in force and in effect. A consideration of the protesters' *Charter* rights is therefore not required.

62 No constitutional challenge has been advanced by anyone on this motion - either to the municipal by-laws in question or to the February 11 Order. As I stated in my Reasons of February 14, 2022, neither the municipal by-laws nor the injunction granted on February 11, 2022 prevent the protesters from lawfully expressing their message and exercising their ss. 2(b) and (c) *Charter* rights. However, the Charter does not protect expressive conduct by unlawful means, which includes breaching presumptively valid laws or court orders. One of the court's most important rules is that if it makes an order, unless and until that order is either stayed or reversed, or an exception to the order is specifically granted, the order must be respected and obeyed.

63 In *Magder*, the appellant took the position that he could continue to defy the law and court orders prohibiting him from opening his retail establishment on Sundays and holidays because, in his opinion, the Act in question infringed his *Charter* rights. In making the trite point of law that one cannot ignore the law or a court order simply because one held the opinion that it was ineffective on constitutional grounds, or on any other grounds, the court said the following at para. 12:

> . . . But the Charter is no licence to break the law or defy an order of the court. It is elementary that so long as a law or an order of the court remains in force it must be obeyed. In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, while the majority found it unnecessary to deal with the issue, McLachlin J. said at p. 974 S.C.R., p. 635 D.L.R.:
>
> > In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the Charter violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

64 The same principle applies in this case. It is no answer to the issue on this motion that the continuation of the injunction sought is not warranted because protesters have the right to freedom of expression and freedom of assembly. The protesters must comply with the law and the issue on this motion is whether the City has established that an injunction is warranted because the protesters have breached the law and will likely continue to do so.

65 The record before the court amply demonstrates not only that the protesters have committed "clear breaches" of the municipal by-laws and the February 11 Order, 2022 but that there remains a risk that they will continue to do so.

66 I find that the City has met the test for a permanent injunction pursuant to s. 440 of the Municipal Act, 2001 and that there have been no credible exceptional circumstances advanced to warrant exercising my discretion to refuse to grant the injunction sought by the City. Indeed, it is in the public interest that a permanent injunction be granted particularly where there has been a persistent and deliberate flouting of the law.

67 Given my conclusion that a permanent injunctive order is warranted under the provisions of s. 440 of the Municipal Act, 2001, I need not determine if a similar order is justified under s. 101 of the CJA. I make no finding on whether such an order can or should be granted under the *CJA*.

68 Finally, I repeat what I stated in the February 14, 2022 Reasons, namely: "Simply put, freedom of expression does not extend to the point that the protesters' activities can result in the denial of fundamental rights and freedoms to all those detrimentally affected by the blockade."

69 This type of activity must cease. Based on my assessment of the evidence, a time-limited injunction would not provide the City and its residents with the required degree of certainty that by-law breaches will cease. The City and its residents are entitled to have this certainty. In my view, a time-limited injunction, as suggested by counsel to The Democracy Fund and Citizens for Freedom, would not provide the necessary assurances to the City and its residents.

Conclusion

70 In the result, the February 11 Order is extended under s. 440 of the Municipal Act, 2001 on the terms set out in the draft order submitted by counsel to the City. The Order has been signed in this form.

Application granted.