

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-11-023447-044
500-11-023448-042

DATE : JANUARY 19, 2005

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

In the matter of
GLOBE-X MANAGEMENT LIMITED, and
GLOBE-X CANADIANA LIMITED (Collectively "Globe-X")
Debtors

and
MR. CLIFFORD A. JOHNSON, and
MR. WAYNE J. ARANHA ("Joint Liquidators")
Joint Liquidators

and
MONTREAL GAZETTE GROUP INC. ("The Gazette"), and
LA PRESSE LTEE ("La Presse"), and
CINAR CORPORATION ("Cinar")
Respondents

and
JOHN XANTHOUDAKIS
Petitioner

REASONS FOR JUDGMENT GIVEN ORALLY
ON PETITIONER'S MOTION TO REMOVE TRANSCRIPTS FROM THE COURT
RECORDS AND TO ORDER THE DESTRUCTION OF ALL COPIES THEREOF

INTRODUCTION

[1] Notwithstanding how some readers may qualify the consequences of the answer to the question, this case raises in essence nothing more than the following limited legal issue:

- Pursuant to an application under Subsection 271(5) of the B.I.A., does the Foreign Representative have either the obligation or the right to file in the public records of the Quebec Superior Court the transcripts of the examination authorized to be conducted in this province?

[2] It is recognized by everyone involved that, apparently, this issue has never been decided before. No less than ten (10) experienced litigators, many of whom specialized in commercial and insolvency matters, were present or made representations at the hearing. None of them, and neither the Court, found any decision, be it reported or unreported, on this specific issue.

THE FACTS

[3] The factual context in which this issue arose is the following.

[4] In July 2002, Cinar Corporation filed petitions to wind up two (2) companies in the Supreme Court of the Commonwealth of the Bahamas, namely the Debtors herein which will be referred to collectively as Globe-X. At the date of Cinar's petitions, both were incorporated and domiciled in the Bahamas.

[5] As a result of the petitions, the Supreme Court of the Bahamas issued orders to wind up Globe-X in September 2002, and notably appointed Mr. Clifford A. Johnson and Mr. Wayne J. Aranha, both chartered accountants domiciled in its jurisdiction, to act as Joint Official Liquidators (see Exhibit P-1 to the Motion filed as Exhibit R-1).

[6] As part of their responsibilities, the Joint Liquidators proceeded to an investigation of the estate, effects and affairs of Globe-X. During this investigative process, the Joint Liquidators discovered that various persons residing in Canada may have had knowledge of the estate, effects and affairs of Globe-X, and may have received payments of money on a preferential basis, hence payments that were potentially voidable by the Supreme Court of the Bahamas.

[7] Thus, in July 2004, the Joint Liquidators presented to the Registrar of the Commercial Division of the Montreal Superior Court an *ex parte* Motion pursuant to what they then described as Sections 267, 271(5), 271, 272 and 163(1) of the B.I.A. This is Exhibit R-1. By that Motion, they asked the authorization to examine in Canada ten (10) persons that they reasonably thought to have knowledge of the affairs, dealings and property of Globe-X.

[8] On July 9, 2004, the Registrar granted the Motion of the Joint Liquidators under these Sections in accordance with its conclusions, with special emphasis upon Subsection 271(5), and issued an Order accordingly. This is Exhibit R-2.

[9] One of the persons listed to be so examined was a Mr. Daviault. The Joint Liquidators fixed the latter's examination on December 7, 8 and 9, at his attorneys' offices in Montreal.

[10] Upon learning of the scheduling of that examination, the attorneys for Mr. John Xanthoudakis, another one of the ten (10) persons listed in the Registrar Order, indicated to the Joint Liquidators' counsel that they wished to be present. This is Exhibit R-3.

[11] Following an exchange of correspondence where counsel for both sides expressed why they disagreed with each other, the Joint Liquidators' counsel filed, on December 6, 2004, a Desistment from the Order allowing them to examine Mr. Xanthoudakis. They apparently did so indeed with respect to all the other persons mentioned in the Registrar Order whose attorneys had expressed the wish to be present at Mr. Daviault's examination.

[12] It seems that neither the counsel for the Joint Liquidators, nor the counsel for these other persons, including Mr. Xanthoudakis, realized then that the Desistment was invalid for a simple reason. While there are no specific rules on a desistment from a judgment in the B.I.A., there is however one in the Code of Civil Procedure at Article 476.

[13] Here, contrary to the requirements of that article which imposes that a total or partial renunciation to rights arising from a judgment be signed by the party itself or by its special attorney, no resolution confirming the special powers of counsel to do so was attached to the Desistment.

[14] Still, consistent with that requirement, the Quebec Court of Appeal had said twice before that an attorney could not, as part of his general mandate, desist from a judgment without a special power of attorney to do so. Without it, a desistment is of no effect. I refer in this respect to *Assurance-vie Desjardins Inc. -c.- Succession de Proulx* (1995) R.D.J. 479 and *Laval Fortin Ltée -c.- Lavoie* (1989) R.D.J. 434.

[15] On December 6, 2004, this escaped everyone, including counsel for Mr. Xanthoudakis who did not insist further upon their request to be present at the Daviault's examination, even though some authorities from this Court recognized them that right in situations where counsel acts for a person who may be later called as witness in the context of a Section 163 examination. I refer to the judgment of *In re Marion Thibault* of Mr. Justice Georges Savoie, in Court file number 450-11-00103-881, May 19, 1989, unreported.

[16] After having been told of the above by the Court during argument, the Joint Liquidators' attorneys filed, on January 15, 2005, a new Desistment of the judgment rendered in their favour inasmuch as Mr. Xanthoudakis was concerned, this time with a resolution of the same date of their client confirming their special powers of attorney to do so.

[17] The impact, if any, of that new Desistment, filed after the Motion of which this Court is now seized was served, filed and almost completely argued, will be discussed later in these reasons.

[18] Be that as it may, after the completion of the Daviault's examination, Mr. Xanthoudakis' attorneys advised the Joint Liquidators' attorneys on December 23, 2004 that they had no obligation or right to file the transcripts thereof in the present Montreal Superior Court records. This is Exhibit R-8.

[19] On the same day, the Joint Liquidators' attorneys replied that they did not agree with that position (Exhibit R-9).

[20] It is worth noting that, unbeknownst to the attorneys of Mr. Xanthoudakis at that time, the following exchange had taken place at the very beginning of Mr. Daviault's examination between the latter attorney and the Joint Liquidators' counsel. I quote the exchange from pages 5, 6 and 7 :

"Me JACQUES DARCHE
on behalf of the witness:

Before we start, I'll make a general objection. We're here pursuant to two (2) judgments rendered on July 9, 2004 which allowed, among other things, for the examination of Robert Daviault. Mr. Daviault was served with a subpoena issued by the Court on November 30, 2004. Notwithstanding all this, I would like to make a general objection pursuant to Section 5 of the Canada Evidence Act, as well as Section 309 of the Code of Civil Procedure of the Province of Quebec, as well as pursuant to article 6 of the Alberta Evidence Act, so that none of the answers that might be given by Mr. Daviault might incriminate him.

Me NEIL STEIN
on behalf of the Petitioners:

No problem.

Me JACQUES DARCHE:

And I also remind you, and possibly your client, Maître Stein, the provisions of the decision of the Supreme Court in *Lac d'amiante du Québec -vs- 2858-0702 Québec Inc.* rendered by the Court of Appeal in 2001 which clearly provides that in Quebec, there's an implied rule of confidentiality of examinations, unless they're filed in the Court Records. But my understanding is that the testimony of Mr. Daviault will be filed in the Court Record.

Me NEIL STEIN:

Well, my understanding of Section 163 is that following the examination, the Trustee Receiver has the obligation to file it in the Court Record. Are you objecting to the filing in the Court Record?

Me JACQUES DARCHE:

No, no, I just want to make sure that you will be filing it.

Me NEIL STEIN:

Yes, absolutely.

Me JACQUES DARCHE:

Okay, you'll be filing it, perfect.

Me NEIL STEIN:

Yes.

Me JACQUES DARCHE:

I have no problem."

[21] On January 5, 2005, the Joint Liquidators' attorneys filed the transcripts of the Daviault's examination in the present Montreal Superior Court records, considering that such was, in their view, a Section 163 examination that had to be filed in the Court pursuant to Subsection 163(3) B.I.A.

[22] Subsequently, and precisely because of that filing in the public records of this Court, they sent by e-mail an electronic copy of the transcripts to a journalist of The Gazette, Mr. Don McDonald. They also apparently provided another copy thereof to Cinar.

[23] In addition, The Gazette and La Presse took steps to retrieve copies of the Daviault's examination transcripts so filed directly from the Court records, which La Presse was indeed successful in obtaining.

[24] There is no evidence, nor any allegations of facts for that matter, which suggest that The Gazette, La Presse or Cinar received a copy of the transcripts for any reasons other than those having been filed in the public records of this Court.

[25] Upon learning of all of this, and after having been contacted by Mr. McDonald who indicated that he was writing a newspaper article on the transcripts of the Daviault's examination, the Petitioner, Mr. Xanthoudakis, served his present Motion to remove these transcripts from this Court records and to order the destruction of all copies thereof.

[26] The conclusions sought go very far. They do not only ask for the removal of the transcripts from this Court records on the basis that the Joint Liquidators had no right or obligation to file them herein. They also request the issuance of orders enjoining the Joint Liquidators from providing a copy of the transcripts to anyone, unless authorized to do so by the Supreme Court of the Bahamas.

[27] They further ask that Cinar, The Gazette and La Presse be enjoined from using for any reason whatsoever the transcripts of the Daviault's examination, no matter how obtained.

[28] At the hearing, the attorney for another person listed in the Order of the Registrar, Mr. Panju, was present and indicated to the Court that the latter fully supported the Motion presented by Mr. Xanthoudakis. Similarly, the attorney for Mr. Daviault also indicated to the Court that he supported the conclusions sought and that he was making those conclusions his as well.

[29] Even though the Court raised the question, no one requested at the hearing that those verbal interventions in support of Mr. Xanthoudakis' Motion be formalized in a written proceeding.

[30] At a later point during the hearing, an attorney representing a Mr. Thomas Muir also asked to be heard by the Court. As the attorney indicated that his representations were to be very short and since discussing whether or not Mr. Muir had any interest herein would take longer, the Court heard him under reserve of ruling on his interest in the debate.

[31] Mr. Muir is not one person listed in the Registrar Order, contrary, for instance, to Mr. Xanthoudakis, Mr. Panju or Mr. Daviault. His attorney justified his interest on the mere assertion that he is allegedly referred to in the Daviault's examination transcripts. The Court fails to see how he can justify of a legal interest to intervene on that sole basis, and as a result, disregards any of the representations made by this attorney at hearing.

[32] To complete this factual context, it is necessary to add that to allow the Court the necessary time to render a judgment that would not be purely academic, a Safeguard Order was issued at the beginning of the hearing on January 13, 2005.

[33] Up until this Court's judgment, it was ordered that the transcripts be kept under seal, that the Joint Liquidators be enjoined from filing any other copy thereof and from providing any copies to anyone else, and that The Gazette, La Presse and Cinar be enjoined from communicating or disclosing in any manner the contents of these transcripts.

THE PARTIES' POSITIONS

[34] On the one hand, the position of Mr. Xanthoudakis, supported by Mr. Panju and Mr. Daviault, can be summarized as follows:

- a) The Daviault's examination was conducted in the context of the winding-up proceedings pending against Globe-X before the Supreme Court of the Bahamas.
- b) Globe-X are not bankrupts under the B.I.A. and there are no estates here subject to or governed by the B.I.A., nor any proceedings in bankruptcy pending before this Court relating to Globe-X.
- c) Subsection 163(3) B.I.A. does not apply to an examination authorized under Subsection 271(5) and there are no obligations to file the transcripts in this Court records, contrary to the position taken by the Joint Liquidators' attorneys.
- d) The filing of the Daviault's examination transcripts in the Court records serves no legitimate purpose and is rather an attempt by the Joint Liquidators to do indirectly what they could not do directly under the laws of the Bahamas.
- e) Under such laws, the information obtained by the Joint Liquidators in these kinds of examinations is confidential, not open to public inspection and, before filing, subject to the prior control and authorization of the Supreme Court of the Bahamas.

[35] On the other hand, the position of the Joint Liquidators, Cinar, The Gazette and La Presse can be summarized as follows:

- a) Neither one of Mr. Xanthoudakis, Mr. Panju or Mr. Daviault have an interest to contest the filing of the transcripts. For the first two (2), because of the Desistments filed and their status as mere witnesses; for the third one, because of the renunciation or waiver given at the beginning of the examination.
- b) Under Subsections 271(5) and 163(3) B.I.A., the Joint Liquidators had an obligation to file the transcripts in the Court records, and this is why they did so.
- c) Even if Subsection 163(3) B.I.A. were not to apply here, under Rules 3, 14 and 115 B.I.A. and, by analogy, under article 404 C.C.P., the Joint Liquidators had the right to file in this Court records the transcripts of the examination they conducted.

- d) Short of a specific prohibition to do so, the party conducting an examination out of Court in Quebec always has the right to file the transcript thereof in the relevant Court records, mostly in a situation like this one where the only person with an interest to raise the confidentiality, Mr. Daviault, waived any opposition to the filing.
- e) The laws of the Bahamas are irrelevant as this is a matter of procedure governed by the laws of Quebec. In any event, it is not true to affirm that the filing of the transcripts in the Montreal Superior Court records violates Bahamian law when there is either an obligation or a right to do so under the laws of Quebec.
- f) There is here an overriding public interest justifying to make the transcripts public.
- g) The conclusions sought go too far and are tantamount to a publication ban under circumstances where no reasons and no prejudice have been established, let alone alleged.

ANALYSIS AND DISCUSSION

[36] It is the Court's conclusion that a limited order must be issued here:

- 1) compelling the Joint Liquidators to remove the transcripts of Mr. Daviault's examination from this Court records;
- 2) ordering the Joint Liquidators not to file any other copy thereof in this Court records, nor to provide any such copy to anyone under the pretence that they are documents of public record duly filed with this Court; and
- 3) ordering The Gazette and La Presse to destroy and not to use any copies of the transcripts received by them under such pretence, or obtained by them directly from this Court records.

[37] This conclusion is based upon the following six (6) findings that the Court will now explain and develop:

- 1) In view of the wording of the Registrar Order of July 9, 2004 and the invalid Desistments of the Joint Liquidators, Mr. Xanthoudakis had an interest to present his Motion and Mr. Panju, an interest to intervene and support it. The interest of Mr. Daviault is obvious.
- 2) Subsection 163(3) does not apply to an examination conducted under the authority of Subsection 271(5) B.I.A.

- 3) The Joint Liquidators cannot now rely upon Rules 3, 14 or 115 of the B.I.A., or upon article 404 C.C.P., to justify *a posteriori* their request for an examination and their alleged right to file it. In any event, these provisions do not apply here and the analogies inferred from the Code of Civil Procedure are ill-founded.
- 4) The alleged right to file the transcripts in this Court records short of a prohibition to do so is, in the Court's opinion, an unsound reasoning as it ignores both the context and the purpose of the filing of the Daviault's examination.
- 5) The issue in front of this Court has nothing to do with the question of the overriding public interest to know, or with the freedom of expression of the medias, but only concerns rather one's obligation and one's right to file transcripts of examination in the public records of this Court.
- 6) Based on the evidence presented, the orders sought are too large for anything that goes beyond the use of the transcripts either provided under the pretence that they are documents of public records filed with this Court, or obtained directly from this Court records.

1. THE INTEREST

[38] The main argument raised by the Joint Liquidators to dispute the interest of Petitioner or of Mr. Panju in the conclusions sought is their Desistments from the Registrar Order inasmuch as these two (2) are concerned.

[39] The Court expressed earlier why the Desistments filed prior to January 15, 2005 were invalid and of no effect. While it appears that the Joint Liquidators tried, for strategic reasons, to potentially deprive Mr. Xanthoudakis and Mr. Panju of any standing, they were not successful in doing so, since what they filed prior to the Motion was of no value.

[40] Consequently, when Mr. Xanthoudakis served this Motion and Mr. Panju presented his verbal intervention in support thereof, both were named individuals in the Registrar Order and both were thus the subject of an Order for an examination process similar to that conducted for Mr. Daviault.

[41] As already stated, had they realized the invalid character of the Desistments filed, they could have had a very strong argument to insist upon the right of their attorneys to be present at the Daviault's examination on the basis of a prior judgment of this Court.

[42] It appears obvious that save for the filing of these invalid Desistments, they would have then been made aware of the position taken by the Joint Liquidators at the

start of the examination, namely that this was allegedly, in their view, an examination they were obliged to file in the Court records under Section 163 B.I.A. No doubt, a debate similar to the present one would have immediately arose then.

[43] In this context, it is very difficult to conclude that they had no interest in raising the argument that they submit, when on the basis of the exact same Order of the Registrar, they were subject to the same process. If anything, they definitely had an interest in ensuring that no precedent that could be opposed to them be created as a result of the Joint Liquidators' counsel position.

[44] The situation is no different today for both of them. The Desistments filed on January 15, 2005 do not change anything to that situation. They are not retroactive and cannot change the fact that when Mr. Xanthoudakis served his Motion, and Mr. Panju made his verbal intervention in support thereof, their interest to do so was there. It cannot be erased by subsequent Desistments.

[45] One could also add that once rights have so accrued in favour of others as a result of a judgment like in this situation, a subsequent desistment by a party cannot have any impact upon such rights. I make reference to *Etzin -vs- Tremblay* (1943) 73 B.R. 74 and *Gilbert -vs- Gilbert* (1978) C.S. 902.

[46] As for Mr. Daviault, being the person examined, his legal interest in making a similar verbal intervention in support of Mr. Xanthoudakis' Motion is obvious. Indeed, if he, the person examined, has no such interest as some argued, one has to wonder how could anyone be in a position to control the legality of the process of filing the transcripts that was followed by the Joint Liquidators. Clearly, someone, somewhere must have such an interest.

[47] The argument that the Joint Liquidators and others have raised as to the alleged renunciation or waiver of Mr. Daviault under the circumstances has to do with the merits of his opposition, not with his interest in raising it.

[48] That said, the Court adds a last comment on the interest issue. Even though this was argued by Mr. Xanthoudakis and Mr. Panju, the alleged prejudice, impact or embarrassment that the contents of the transcripts might potentially have upon them has simply no bearing in the Court's conclusion on the interest issue and, for that matter, on any of the Court's conclusions.

[49] At the moment, to affirm that they could suffer such prejudice or such embarrassment is, at best, pure speculation. No evidence supports it. On purpose, the Court has not read the transcripts at issue, so as not to be influenced in his decision by what some may say is the crispy, shocking or public interest nature of the contents of the transcripts, or by what others may reply is the defamatory, prejudicial and private nature of same.

[50] What the transcripts show is simply not relevant to the issue to be decided here.

2. SUBSECTIONS 163(3) AND 271(5) B.I.A.

[51] Turning now to the filing itself, when they applied to this Court and obtained the Registrar Order on July 9, 2004, the Joint Liquidators framed their demand very clearly. They relied upon Subsections 271(5) and 163(1) of the B.I.A. to justify their request and the Order they got was issued on that basis and with this understanding.

[52] When they started the Daviault's examination that they conducted as a result of the Registrar Order, they confirmed that they were proceeding under these provisions and that they were consequently obliged to file the transcripts in the Court records because of Subsection 163(3).

[53] The three (3) Subsections that are relevant here, namely 163(1), 163(3) and 271(5), say the following, and I quote:

"163(1). Examination of Bankrupt and Others by Trustee. The Trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the Registrar of the Court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

163(3). Examination to be filed. The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

271(5). Examination may be authorized. On application of a foreign representative in respect of a debtor, the court may authorize the examination under oath by the foreign representative of the debtor or of any person in relation to the debtor who, if the debtor were a bankrupt referred to in subsection 163(1), would be a person who could be examined under that subsection.

[54] The Debtor and the Foreign Representative referred to in Subsection 271(5) are defined in Section 267 of Part XIII of the B.I.A. dealing with International Insolvencies. Here, applying these definitions, the Debtors are persons, with the status of bankrupts under foreign law, in foreign proceedings and who have property in Canada. This refers to Globe-X because of the winding-up proceedings pending in the Bahamas.

[55] Still applying these definitions, the Foreign Representatives here are persons holding offices under the laws of a jurisdiction outside Canada, who are assigned functions in connection to foreign proceedings, similar to those performed by a liquidator appointed by the Court in Canada. This refers to the Joint Liquidators because of the powers given to them by the Supreme Court of the Bahamas.

[56] Thus, in both situations, their status as Debtors or Foreign Representatives under Part XIII of the B.I.A. relates solely to the foreign law, the foreign jurisdiction and the foreign proceedings.

[57] In this case, because of these status, the Joint Liquidators were authorized, on their application pursuant to Subsection 271(5), to examine persons other than the Debtor, who were persons that could be examined under Subsection 163(1) if the Debtors were bankrupts under that Subsection.

[58] The Joint Liquidators conclude that because of this reference to Subsection 163(1) in Subsection 271(5), it implies that, as a result, they were conducting here a Subsection 163(1) examination with Mr. Daviault.

[59] The Court disagrees.

[60] This is not what Subsection 271(5) says. What it merely does is to incorporate, by referencing to Subsection 163(1), the quality of the various persons that could be examined under Subsection 271(5).

[61] Subsection 271(5) could have repeated the wording of Subsection 163(1). Instead, Parliament merely referred to the Subsection (163(1)) that already said it. No doubt, a more efficient way of drafting statutes.

[62] An examination under Subsection 271(5) does not become, as a result, a Subsection 163(1) examination. It rather remains nothing more than an examination under Subsection 271(5), pursuant to an application by a Foreign Representative under that provision.

[63] Thus, when the Joint Liquidators maintained that they filed the Daviault's examination transcripts in the Court records because they were obliged to do so under Subsection 163(3) B.I.A., they were simply wrong.

[64] For an obligation to file transcripts in the Court under Subsection 163(3) B.I.A. to exist, it has to be in relation to, and I quote, "*the evidence of a person examined under this section*", namely under Section 163. This is not the case with the Daviault's examination which is rather an examination under Subsection 271(5).

[65] This is the only logical conclusion to draw from the wording of these two (2) Subsections. It is furthermore the only logical conclusion to draw from the purpose behind each of these two (2) Subsections.

[66] On the one hand, Subsection 271(5) is found in Part XIII added to the B.I.A. in 1997 to deal with the situation of international insolvencies involving foreign jurisdictions. The objective of that rather new part is to notably assist foreign jurisdictions in the conduct of their own proceedings, which may involve, like here, situations where the foreign Debtors likely have property in Canada and where persons knowledgeable about the foreign Debtors, their dealings, affairs or property, are domiciled.

[67] However, that Part XIII specifically says, at Section 272, that in bringing an application under that Part, the Foreign Representative does not submit to the jurisdiction of our Courts for any other purpose. As the authors say (Houlden & Morawetz, *2004 Annotated Bankruptcy and Insolvency Act*, at page 894), this permits the Foreign Representative to make use of Part XIII without being subject to the full jurisdiction of the Canadian Courts (see also Jacques Deslauriers, *La faillite et l'insolvabilité au Québec*, 2004, at page 631).

[68] To extend the nature of the examination conducted by the Foreign Representative under Subsection 271(5) by making it a Section 163 examination like the Joint Liquidators argue, with all the consequences this entails, would, in the Court's opinion, defeat one of the specific purpose that this Part XIII intends to protect. Namely, that by making an application under that Part, the Foreign Representative does not attorn to the jurisdiction of the Canadian Courts for any other reason but the application itself.

[69] Making the transcripts part of this Court records by applying Subsection 163(3) to Subsection 271(5) would extend the jurisdiction of this Court beyond the scope contemplated by the mere request for authorization, which was the sole object of the Joint Liquidators' application.

[70] On the other hand, to extend the applicability of Subsection 163(3) to the examination of a Foreign Representative under Subsection 271(5) bears simply no logic with the purpose of the Court filing that Subsection 163(3) imposes.

[71] If examinations under Section 163 must be filed in Court when transcribed, it is because they concern a bankrupt under the B.I.A. In other words, because they concern one who made an assignment or one who is the subject of a receiving order under the B.I.A.

[72] In such situations, these examinations, once transcribed, must be filed in the Court because there is here, in this jurisdiction, an estate that is subject to the jurisdiction of the Canadian Court.

[73] Such a purpose is totally absent when one talks about an examination made by Foreign Representatives concerning the affairs, dealings or property of foreign Debtors, subject to a foreign jurisdiction and to foreign proceedings.

[74] In answer to a question of the Court, the attorneys for the Joint Liquidators said that their position was the following. Whenever a Foreign Representative, no matter from which foreign jurisdiction, makes an application for an examination under Subsection 271(5) B.I.A., the transcripts thereof must be filed in the Canadian Court records because it is then a Section 163 examination subject to the Subsection 163(3) mandatory filing.

[75] The Court knows of no authority that goes as far as that very far reaching statement and with all due respect, strongly disagrees with it. If Parliament intended to do that in 1997, it would have used a much clearer language to that effect. It has simply not done so. In the Court's opinion, the wording and purpose of both Subsections 163(3) and 271(5) clearly indicate that Parliament meant otherwise.

[76] As the Joint Liquidators obtained here the Registrar Order simply on the basis of these provisions, this would normally be sufficient to dismiss the position of the Joint Liquidators who relied on their alleged obligation to file the transcripts in the Court records to explain what they did. However, and somehow surprisingly, the Joint Liquidators' arguments do not stop there.

3. RULES 3, 14 AND 115 B.I.A., AND THE CODE OF CIVIL PROCEDURE

[77] They argue further that if they had no obligation to file the transcripts pursuant to Subsection 163(3), they nevertheless had the right to file the transcripts in the Court records, since their examination could be considered as one conducted under Rules 14 and 115 B.I.A. and pursuant to Rule 3, therefore analogous to an examination out of Court under Article 404 C.C.P.

[78] They also pleaded that even if none of these provisions applied, as there were no prohibitions to file the transcripts of the examination here, they were entitled to file them under the normal rules of Civil Procedure governing examinations out of Court in the Province of Quebec.

[79] Before addressing the merits of these other arguments, some preliminary remarks, in the form of a serie of questions, are necessary.

[80] How can you, Foreign Representatives, apply to this Court under Subsection 271(5), obtain an Order of this Court Registrar under the pretence that it is a Section

163 examination, conduct that examination under that same understanding, file the transcripts in the Court records under that same belief and, once you realize that you were wrong, then turn around and pretend that you were really conducting yourselves under other provisions of the B.I.A Rules or the Code of Civil Procedure that you had never mentioned before?

[81] How can you, Foreign Representatives, so modify the meaning of the Court Registrar Order that you obtained under the representations that you then made, without giving that Registrar or that Court the courtesy of deciding whether they agree or not with your position, and whether or not you are still entitled, on that basis, to the Order you obtained?

[82] How can you, Foreign Representatives, assume that you would have indeed obtained from this Court Registrar the right to conduct an examination under these Rules that now rely upon to justify your actions?

[83] The mere fact of raising these questions provides the obvious answers. In my view, the Joint Liquidators cannot now turn around and pretend that they were really doing here something else than what they announced and represented to the Registrar to obtain their Order, simply because what they wanted to do does not work. But that is not all. There is more.

[84] Firstly, Rule 115 of the B.I.A. that the Joint Liquidators now claim refers to the fact that examinations under the Act must be "conducted" - in French "*tenu*" - in accordance with the Rules of Court in civil cases. The issue of the filing of a transcript is not part of the "conduct" of an examination, and this provision is of no help to them to that extent. Neither does Rule 14 of the B.I.A., also relied upon by the Joint Liquidators, refer to anything pertaining to the filing of a transcript of an examination.

[85] Secondly, relying this time upon Rule 3 of the B.I.A., the Joint Liquidators further argue now that the Daviault's examination is really analogous to an examination out of Court under Article 404 C.C.P. Accordingly, under this Article and Article 396 C.C.P., the transcripts thereof are automatically part of the Court records in Quebec, and this principle should be applied here.

[86] Again, the Court disagrees.

[87] An examination out of Court under Article 404 C.C.P. must be either agreed to by the parties, or authorized by the Court, as defined under the Code of Civil Procedure. It does not apply here, failing such an agreement and without such a prior authorization of a Court. A Registrar is not included in the definition of a Court under the Code of Civil Procedure, and I refer to Article 22.

[88] Moreover, and perhaps more importantly, there is here no instance or suit - in French "*instance*" - between parties where Book II of the Code of Civil Procedure, which

includes this Article 404, would apply. The Daviault's examination is not part of an *instance*. It is rather part of an investigative process carried on by Foreign Representatives in the context of the winding up of foreign Debtors, subject to a foreign jurisdiction. Very far indeed from anything that Book II of the Code of Civil Procedure is concerned with.

[89] Despite their efforts, the Joint Liquidators could not draw any other analogy to the Rules of this Court in civil cases.

[90] Still, the closest analogy that one could find to the situation at hand, but which they discarded, is that of the Special Procedures Act, R.S.Q., Chapter P-27. This Act is included in the Related Statutes and Regulations section of the Quebec Code of Civil Procedure. Interestingly enough, Section 9 and following of that Act is Division VI, dealing with Evidence Taken in Quebec at the Request of a Court of an other British Possession or of a Foreign Country. No provision of that Act refers to the filing of any transcripts of the evidence so taken in the Quebec Court records, contrary, for example, to the specific rules that exist to that end in situations involving an examination out of Court in an *instance* in Quebec, as per Article 396 C.C.P.

[91] This Act is the closest analogy to the situation at hand that exists in this Court rules in civil cases. Similarly to the interpretation one must draw from a reading of Sections 271(5), 272 and 163(3) of the B.I.A., it does not require nor allow the filing in this jurisdiction of the transcripts of the examination made, be it at the request of the Foreign Representative or of the Foreign Court.

[92] The rationale appears obvious. It concerns their jurisdiction, not ours. We merely assist them; we do not make ours what concerns them.

[93] As a last resort, and notwithstanding all of the above, the Joint Liquidators raised two (2) other arguments to justify their alleged right to file the transcripts of the Daviault's examination in this Court records.

[94] The first one is the waiver or renunciation of Mr. Daviault. The second one is their alleged absolute right to do so in Quebec, short of a prohibition preventing it.

[95] The waiver or renunciation of Mr. Daviault is, in the Court's opinion, a red herring. If the Joint Liquidators have either an obligation to file the transcripts or a right to file the transcripts, the approval or consent of Mr. Daviault is irrelevant and meaningless.

[96] In addition here, at best, the waiver and renunciation alleged was made in a limited and specific context, as the cited extracts from the examination show. It was made upon the representation that this was a Section 163 examination, and upon the representation that as a result, it was an examination the Joint Liquidators were obliged to file.

[97] As noted above, this was incorrect and whatever was said in this context is of no real value or consequence. It would not be appropriate for this Court to extend the meaning or scope of that alleged waiver or renunciation given in that situation. Mostly here, where Mr. Daviault's attorney emphasized that the scope of the discussion in question was limited to the context of the Section 163 examination, where that attorney represented that his client alleged waiver did not go beyond that, and where that attorney submitted that if any doubt remained, he was withdrawing the comments he made due to what the Court takes was his misunderstanding at the time of the scope of Section 163 B.I.A. in the context of the Daviault's examination.

[98] In any event, such an alleged waiver would not create a right to file for the Joint Liquidators where none exists. And this leads to the last argument of the Joint Liquidators on that issue, namely that short of a prohibition to do so, the party conducting an examination out of Court in Quebec always has a right to file the transcripts in the Court records.

[99] The Court will confess that it is an appealing argument at first sight. However, it does not resist a thorough analysis, because it forgets that the filing of an examination out of Court is always done in a context and for a purpose. Here, the context and the purpose, for which the filing of the Daviault's examination transcripts in this Court records would be warranted, are simply both absent.

4. THE CONTEXT AND PURPOSE OF THE FILING

[100] A right to file the transcripts of an examination out of Court in the public records of this Court does not exist in a vacuum. First, it exists in a context. Second, it exists for a purpose.

[101] For example, under the Code of Civil Procedure, the right to file examinations out of Court is governed by Article 396. In essence, it indicates that all examinations out of Court are part of the record, subject to the right of the parties conducting those made under Articles 397, 398 or 93, to decide whether to file them or not. This is so, however, because when these provisions apply, there is an *instance* in Quebec to which Book II of the Code of Civil Procedure applies.

[102] Similarly, under Subsection 163(3) B.I.A., there is an obligation to file the transcript of an examination carried on, this time, not in an *instance per se*, but in an investigative process of the affairs, dealings or property of a bankrupt. This is so because it is carried on in the context of a bankruptcy or of the administration of an estate subject to the jurisdiction of this Court.

[103] Here, no such context exists. There is no *instance* or suit between parties in Quebec, and there is no investigative process subject to the jurisdiction of this Court. What the Joint Liquidators are pursuing is not a concern of the Canadian Courts. It is

not a Canadian investigation. It is not part of a Canadian *instance*. It does not concern Canadian debtors. It does not concern Canadian estates. It does not concern Canadian liquidators. It does not concern Canadian laws.

[104] It is rather an investigative process part of a Bahamian winding up, which concerns Bahamian debtors, Bahamian liquidators appointed by the Supreme Court of the Bahamas, in proceedings supervised by the Supreme Court of the Bahamas. So much for the context.

[105] There is neither a purpose to justify a right to file the Daviault's examination transcripts here. Again, in Quebec, a right to file transcripts in Court records exists for a purpose. It may be because it is part of an *instance* governed by the Court under the Code of Civil Procedure. It may be because it is part of an investigative process subject to the jurisdiction of the Court under the B.I.A.

[106] Here, the question was asked to the Joint Liquidators counsel. Why do you file the transcripts here? What is the purpose? The best answer was that they may need to refer to it in future demands to conduct other examinations.

[107] This answer is not convincing at all. The Order to conduct the examinations is already there, and is very large indeed for that matter.

[108] Also, the mere fact that further applications may be necessary cannot justify the filing of the transcripts. Here, the objective and purpose of the application of the Joint Liquidators under Subsection 271(5) has been attained. The assistance was asked, the assistance was provided, the examination was conducted. The Joint Liquidators can, therefore, return to their jurisdiction with the results. If they have other applications later on, they will be dealt with in due course, in accordance with what they allege then.

[109] It is the Court's view that the real answer to the purpose for filing is not that at all. It is rather what Cinar has expressed to the Court in very clear terms. There is here allegedly an overriding public interest to make the content of the transcripts known. Many are interested in knowing what they reveal.

[110] That may well be, but this is not something that concerns this Court records.

[111] The Joint Liquidators and their counsel cannot wrap themselves in the clothing of the otherwise public character of the records of the Commercial Division of this Superior Court to justify their decision to render public the Daviault's examination transcripts.

[112] They could not, and should not, be entitled to disguise their actions in that fashion. Court records are not to be used for purposes other than what they are supposed to be, namely records of those *instances* or investigations that they are concerned with.

[113] The Joint Liquidators and their counsel should not be entitled to claim that the transcripts are public, merely because they are filed in an otherwise public Court record on the basis of an obligation or a right to file that is here inexistent.

[114] If they believe that they are justified or entitled to render the transcripts public, then they will have to do so themselves, and assume the risks and consequences, if any, that may result. They will, however, not be allowed to do it under the false pretence of an obligation or a right to file the transcripts in this Court records.

[115] Lastly, there is an additional reason that warrants such a finding, and that cannot escape the Court's attention. The belief of the Court that there is no context or purpose justifying the filing, here, of these transcripts is reinforced by the following.

[116] The evidence indicates that on the balance of probabilities, Bahamian law and Bahamian Courts exercise a control over the public character of the examinations conducted in the context of an investigation process carried on by their liquidators.

[117] Bahamian law was the subject of much debate in front of the Court. For Petitioner, Mr. Scott filed three (3) Affidavits, Exhibits R-10, R-10(A) and R-10(B). For the Joint Liquidators, Mr. Knowles filed two (2) Affidavits, Exhibits IJL-1 and IJL-1(A). For Cinar, Mr. Barnett filed one Affidavit, Exhibit IC-1.

[118] The Court considers that Mr. Scott's Affidavits best express what appears to be the status of Bahamian law on what is at issue, here.

[119] Mr. Barnett's Affidavit starts with a premise that the Court considers incorrect, namely that there is an obligation to file the transcripts under Canadian law, and his opinion is, therefore, discarded. Mr. Knowles' Affidavits put a lot of emphasis 1) on Mr. Daviault's waiver to deny the confidential character of the transcripts under Bahamian law, and 2) on the lack of *locus standi* of other witnesses on the issue of the use of the transcripts by the Liquidators. This is, however, not the issue, here.

[120] The Court retains the following from his reading of Mr. Scott's Affidavits:

- a) Under Bahamian law, without prior leave of the Bahamian Supreme Court, evidence obtained by a liquidator is subject to an implied undertaking that the liquidator will not use the evidence obtained for any purpose other than the Bahamas winding up.
- b) Under Bahamian law, the liquidator is obligated to keep the information so obtained by them confidential, unless waived by an Order of the Bahamian Supreme Court.
- c) Absent an order of the Supreme Court of the Bahamas, and short of a Canadian statutory provision requiring the Liquidators to file Mr. Daviault's

examination transcripts in the Canadian Court records, it was in violation of Bahamian law to do so.

- d) In the Bahamas, the Court file relating to the liquidation of Globe-X is generally not accessible to the general public and not open to public inspection.

[121] All of this indicates to the Court much more than a simple issue of procedure here. It indicates that a serious concern exists over the conditions for production and the administration of evidence, like the Daviault's examination, obtained in the context of a Bahamian liquidation proceeding.

[122] Either this is an issue of evidence, and because of Article 3130 of the Civil Code of Quebec, this should be an additional reason for this Court to be prudent, as the laws of the Bahamas would be applicable to the issue.

[123] If not, this is an issue of procedure and this time, because of Article 3079 of the Civil Code of Quebec, this Court is compelled not to ignore the foreign law in a situation like this one, where

- 1) there appears to be a mandatory provision for confidentiality, unless waived by Order of the Bahamian Courts;
- 2) there is a direct link between that provision and the filing of the examination at stake; and
- 3) there are legitimate and manifestly preponderant interests that require this Court not to ignore that foreign law. That is, the rule of international comity, which warrants here that the Courts of this jurisdiction, out of mutual deference and respect to the other jurisdiction, give effect to the Bahamian laws in an investigative process that relates to their laws, their proceedings, their liquidators, and their debtors.

[124] Either way, this is indicative, at the very least, of a delicate issue that is best kept in the hands of those directly responsible for the proceedings in which it arose.

[125] All in all, no matter from which angle this situation is therefore analysed, the conclusion remains the same. Not only are there no basis here to justify an obligation or a right to file the transcripts in these Court records, there are also compelling reasons not to allow it, considering the context and purpose of the examination held.

5. THE OVERRIDING PUBLIC INTEREST AND THE MEDIAS

[126] That said, according to the evidence, all the copies of the transcripts obtained by Cinar, *The Gazette*, or *La Presse* were a) obtained from the Joint Liquidators on the

grounds that they were documents of public record filed with this Court or, b) obtained from the Office of the Clerk of this Court because they were filed in these records.

[127] Neither *The Gazette* nor *La Presse* can be blamed for that. They were told, albeit incorrectly, that these were documents of public record and they so obtained them. Nothing suggests that their intention was anything other than to report fairly and with professionalism on the contents of the transcripts, and the Court accepts that.

[128] However, what they so obtained for that reason did not belong in the public records of this Court. As it is the sole reason why they got it, they should not be entitled to consequently make use of it. This is the only justification for the Order against them. If they were to obtain the transcripts otherwise, it would raise numerous other legal issues that this Court is not seized of, and that this Court does not rule upon in the absence of any allegations or facts to justify its intervention.

[129] It has been alleged that it is too late for an Order against *The Gazette* and *La Presse*, because "*the horse is already out of the barn*".

[130] Maybe the horse is out, but it escaped through a door that was improperly opened. The Court cannot erase its sight from the memory of those who have seen it, but it can order the horse to be brought back where it was before. It can order to close that door that was improperly opened. And it can order those who have seen the horse to refrain from sharing with others what they have seen as a result of this improper escape. No more, but certainly no less.

6. THE CONCLUSIONS SOUGHT

[131] In closing, and along the same lines of what was just said, the conclusions sought go too far. They will be limited to what is the real issue here, namely to the impact of having improperly filed in this Court records transcripts that did not belong there.

[132] Consequently, the Court will order the removal of the transcripts from the Court records, and will enjoin the Joint Liquidators from filing them again. The Court will also order the Joint Liquidators not to provide anymore a copy of the transcripts to anyone on the grounds that they are documents of public record, duly filed in the Court records.

[133] However, no allegation nor any evidence submitted suggest that a copy of the transcripts have been transmitted by the Joint Liquidators to anyone for any other reasons. No allegation nor any evidence submitted suggest that the Joint Liquidators have remitted copies of the transcripts to others outside of that specific context.

[134] The key allegations of Petitioner's Motion, namely paragraphs 19 and 21 to 26, merely refer to the improper filing of the transcripts in this Court records, and to either

the Joint Liquidators providing copies thereof to Cinar, *The Gazette* or *La Presse* as a result, or the latter obtaining a copy themselves directly from the Court records.

[135] The orders sought that go beyond what this Court is ready to issue against the Joint Liquidators for the control of its records are of an injunctive nature; they involve much more than the mere control of the content and use of its records by the Court.

[136] To justify the issuance of these other orders, it was Petitioner's burden to allege specific facts establishing an urgency and an apparent right to the conclusions sought. Short of mere suspicions that the Joint Liquidators may well provide copies to others for unexplained reasons, they have failed to meet this burden. This Court will not issue injunctive orders of that nature on the basis of mere suspicions.

[137] The same is true for *The Gazette* and *La Presse*. Nothing in the allegations and evidence submitted suggests that they have received the transcripts for any reason other than they were documents of public record filed in the Court. Again, the Order to which they will be bound will be limited merely to that, in the absence of any factual allegation suggesting otherwise and which the Petitioner had also the burden of proving.

[138] As to the order sought against Cinar, because of the wording of paragraph 9 of Mr. Scott's Affidavit, Exhibit R-10, there is simply no apparent right to justify it. In that context, the mere allegations that they have received a copy of the transcripts from the Joint Liquidators is clearly insufficient, inasmuch as they are concerned, to justify the conclusions sought as worded.

[139] **FOR THESE REASONS GIVEN ORALLY AND REGISTERED, THE COURT:**

[140] **GRANTS** Petitioner's Motion in part;

[141] **ORDERS** the Joint Liquidators and their attorneys to immediately remove from the Court Records numbered 500-11-023447-044 and 500-11-023448-042 (the "Court Records") any and all copies of the transcripts of the Daviault's examination held on December 7, 8 and 9, 2004 (the "Transcripts");

[142] **ORDERS** the office of the clerk of the Commercial Division of the Superior Court to strike from the relevant "plumitifs" of the Court Records any entry referring to the filing of the Transcripts in these Court Records;

[143] **ORDERS** the Joint Liquidators and their attorneys not to file any other original or copy of the Transcripts in the Court Records;

[144] **ORDERS** the Joint Liquidators, their employees, representatives and agents, as well as their attorneys, not to provide to any person a copy of the Transcripts:

- a) on the grounds that they are documents of public record filed in the Court Records; or
- b) as having been filed in the Court Records;

[145] **ORDERS** The Gazette and La Presse, their respective officers, directors, employees, representatives and agents, to immediately destroy any and all copies of the Transcripts still in their possession, whether on computer disks or hard copies:

- a) received by them from the Joint Liquidators' attorneys on the grounds that they are documents of public record filed in the Court Records or as having been filed in the Court Records; or
- b) obtained by them directly from the Court Records;

[146] **ORDERS** The Gazette and La Presse, their respective officers, directors, employees, representatives and agents, not to refer to, cite from or comment on in their respective newspapers, on their website or otherwise, nor to communicate, divulge or disclose to any person, any of the contents of the Transcripts:

- a) received by them from the Joint Liquidators' attorneys on the grounds that they are documents of public record filed in the Court Records or as having been filed in the Court Records; or
- b) obtained by them directly from the Court Records;

[147] **EXEMPTS** Petitioner from any obligation to serve this Judgment upon any of the parties represented herein, namely the Joint Liquidators, Cinar, The Gazette and La Presse, in view of the presence of their respective attorneys at the hearing;

[148] **WITH COSTS** in favour of Petitioner, including the costs of the stenographer requested by the Court for the transcript of the reasons for this Judgment.

CLÉMENT GASCON, J.S.C.

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Dates of hearing: January 13,14 and 17, 2005
Reasons transcribed and revised January 21, 2005