

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: November 14, 2018
CT-2017-008

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

-and-

HUDSON'S BAY COMPANY

Applicant

Respondent

OTTAWA, ONT.

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**BOOK OF AUTHORITIES FOR THE COMMISSIONER'S
RESPONDING MEMORANDUM OF FACT AND LAW**

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TAB 1

Indexed as:

Blank v. Canada (Minister of Justice)

Minister of Justice, Appellant

v.

**Sheldon Blank, Respondent, and
Attorney General of Ontario, The Advocates' Society and
Information Commissioner of Canada, Intervenors**

[2006] 2 S.C.R. 319

[2006] 2 R.C.S. 319

[2006] S.C.J. No. 39

[2006] A.C.S. no 39

2006 SCC 39

File No.: 30553.

Supreme Court of Canada

Heard: December 13, 2005;

Judgment: September 8, 2006.

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

(75 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

*Access to information -- Exemptions -- Solicitor-client privilege -- Distinction between
solicitor-client privilege and litigation privilege -- Claimant requesting documents relating to
prosecutions of himself and a company for federal regulatory offences -- Charges subsequently*

quashed or stayed -- Request for access denied by government on various grounds including solicitor-client privilege exemption set out in s. 23 of Access to Information Act -- Whether documents once subject to litigation privilege remain privileged when litigation ends -- Access to Information Act, R.S.C. 1985, c. A-1, s. 23.

Law of professions -- Barristers and solicitors -- Solicitor-client privilege -- Litigation privilege -- Distinction between solicitor-client privilege and litigation privilege -- Nature, scope and duration of litigation privilege.

Summary:

In 1995, the Crown laid 13 charges against B and a company for regulatory offences; the charges were quashed, some of them in 1997 and the others in 2001. [page320] In 2002, the Crown laid new charges by way of indictment, but stayed them prior to trial. B and the company sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. In 1997 and again in 1999, B requested all records pertaining to the prosecutions of himself and the company, but only some of the requested documents were furnished. His requests for information in the penal proceedings and under the *Access to Information Act* were denied by the government on various grounds, including the "solicitor-client privilege" exemption set out in s. 23 of the Act. Additional materials were released after B lodged a complaint with the Information Commissioner. The vast majority of the remaining documents were found to be properly exempted from disclosure under the solicitor-client privilege. On application for review under s. 41 of the Act, the motions judge held that documents excluded from disclosure pursuant to the litigation privilege should be released if the litigation to which the record relates has ended. On appeal, the majority of the Federal Court of Appeal on this issue found that the litigation privilege, unlike the legal advice privilege, expires with the end of the litigation that gave rise to the privilege, subject to the possibility of defining "litigation" broadly.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Fish, and Abella JJ.: The Minister's claim of litigation privilege under s. 23 of the *Access to Information Act* fails. The privilege has expired because the files to which B seeks access relate to penal proceedings that have terminated. [para. 9]

The litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences. Litigation privilege is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. The purpose of the litigation privilege is to create a zone of privacy in relation to pending or apprehended litigation. The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client [page321] privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that

gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well. [para. 27] [paras. 33-39]

The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground. [paras. 44-45]

Litigation privilege should attach to documents created for the dominant purpose of litigation. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard is consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. [paras. 59-60]

Per Bastarache and Charron JJ.: Litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either litigation privilege must be read into s. 23 of the *Access to Information Act* or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the Act. An exemption for litigation privilege should be read into s. 23 because litigation privilege has always been considered a branch of solicitor-client privilege. The two-branches approach to solicitor-client privilege should subsist, even accepting [page322] that solicitor-client privilege and litigation privilege have distinct rationales. [para. 67] [paras. 69-71] [para. 73]

Once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation, the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist. In this case, the Minister's claim of litigation privilege fails because the privilege has expired. [para. 72] [para. 74]

Cases Cited

By Fish J.

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney*

General), [2002] 3 S.C.R. 209, 2002 SCC 61; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129; *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167; *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321; *In re L. (A Minor)*, [1997] A.C. 16; *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218; *Hickman v. Taylor*, 329 U.S. 495 (1947); *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407; *Boulianne v. Flynn*, [1970] 3 O.R. 84; *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476; *Meaney v. Busby* (1977), 15 O.R. (2d) 71; *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134; *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323; *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169; *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347; [page323] *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44 Board of School Trustees* (1981), 29 B.C.L.R. 114; *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724; *Nova, an Alberta Corporation v. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755; *Lyell v. Kennedy* (1884), 27 Ch. D. 1.

By Bastarache J.

Referred to: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 F.C. 367; *Amato v. The Queen*, [1982] 2 S.C.R. 418; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321.

Statutes and Regulations Cited

Access to Information Act, R.S.C. 1985, c. A-1, ss. 16(1)(b), (c), 17, 23, 41.

Fisheries Act, R.S.C. 1985, c. F-14.

Pulp and Paper Effluent Regulations, SOR/92-269.

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Wilson, J. Douglas. "Privilege: Watson & Au (1998) *77 Can. Bar Rev.* 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), *77 Can. Bar Rev.* 549.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Décary, Létourneau and Pelletier JJ.A.), [2005] 1 F.C.R. 403, 244 D.L.R. (4th) 80, 325 N.R. 315, 21 Admin. L.R. (4th) 225, 34 C.P.R. (4th) 385, [2004] F.C.J. No. 1455 (QL), 2004 FCA 287, affirming in part an order of Campbell J., 2003 CarswellNat 5040, 2003 FCT 462. Appeal dismissed.

[page324]

Counsel:

Graham Garton, Q.C., and Christopher M. Rupar, for the appellant.

Sheldon Blank, on his own behalf.

Luba Kowal, Malliha Wilson and Christopher P. Thompson, for the intervener the Attorney General of Ontario.

Wendy Matheson and David Outerbridge, for the intervener The Advocates' Society.

Raynold Langlois, Q.C., and Daniel Brunet, for the intervener the Information Commissioner of Canada.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish and Abella JJ. was delivered by

FISH J.:--

I

1 This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the *solicitor-client privilege* and the *litigation privilege*. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.

2 More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), but with prudent regard for its broader implications on the conduct of legal proceedings generally.

3 This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the *Access Act*, to include the litigation privilege which is not elsewhere mentioned in the Act. [page325] Both parties and the judges below have all assumed that it does.

4 As a matter of statutory interpretation, I would proceed on the same basis. The Act was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the Act. And it explains as well why, despite the Act's silence in this regard, I agree with the parties and the courts below that the *Access Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the Act, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

5 In short, we are not asked in this case to decide whether the government can invoke litigation privilege. Quite properly, the parties agree that it can. Our task, rather, is to examine the defining characteristics of that privilege and, more particularly, to determine its lifespan.

6 The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".

7 Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, [page326] to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases -- solicitor-client privilege and legal advice privilege -- synonymously and interchangeably, except where otherwise indicated.

8 As a matter of substance and not mere terminology, the distinction between litigation privilege

and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

9 The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

10 I would therefore dismiss the appeal.

II

11 The respondent is a self-represented litigant who, though not trained in the law, is no stranger to the courts. He has accumulated more than ten years of legal experience first-hand, initially as a defendant and then as a petitioner and plaintiff. In his resourceful and persistent quest for information and redress, he has personally instituted and conducted a plethora of related proceedings, at first instance and on appeal, in federal and provincial courts alike.

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12 This saga began in July 1995, when the Crown laid 13 charges against the respondent and Gateway Industries Ltd. ("Gateway") for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Pulp and Paper Effluent Regulations*, SOR/92-269. The respondent was a director of Gateway. Five of the charges alleged pollution of the Red River and another eight alleged breaches of reporting requirements.

13 The counts relating to reporting requirements were quashed in 1997 and the pollution charges were quashed in 2001. In 2002, the Crown laid new charges by way of indictment -- and stayed them prior to trial. The respondent and Gateway then sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers.

14 This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the *Access Act* were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the *Access Act* proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. And in the record before us, we would in any event be unable to do so.

15 In October 1997, and again in May 1999, the respondent requested from the Access to

Information and Privacy Office of the Department of Justice all records pertaining to his prosecution and the prosecution of Gateway. [page328] Only some of the requested documents were furnished.

16 Additional materials were released after the respondent lodged a complaint with the Information Commissioner. The Director of Investigation found that the vast majority of the remaining documents were properly exempted from disclosure under the solicitor-client privilege.

17 The respondent pursued the matter further by way of an application for review pursuant to s. 41 of the *Access Act*. Although the appellant relied on various exemptions from disclosure in the *Access Act*, proceedings before the motions judge focussed on the appellant's claims of solicitor-client privilege in reliance on s. 23 of the *Access Act*.

18 On the respondent's application, Campbell J. held that documents excluded from disclosure pursuant to litigation privilege should be released if the litigation to which the record relates has ended (2003 CarswellNat 5040, 2003 FCT 462).

19 On appeal, the Federal Court of Appeal divided on the duration of the privilege. Pelletier J.A., for the majority on this point, found that litigation privilege, unlike legal advice privilege, expires with the end of the litigation that gave rise to the privilege, "subject to the possibility of defining ... litigation ... broadly" ([2005] 1 F.C.R. 403, 2004 FCA 287, at para. 89). He therefore held that s. 23 of the *Access Act* did not apply to the documents for which a claim of litigation privilege is made in this case because the criminal prosecution had ended.

20 Létourneau J.A., dissenting on this point, found that the privilege did not necessarily end with the termination of the litigation that gave rise to it. He would have upheld the privilege in this case.

III

21 Section 23 of the *Access Act* provides:

[page329]

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

22 The narrow issue before us is whether documents once subject to the litigation privilege remain privileged when the litigation ends.

23 According to the appellant, this Court has determined that litigation privilege is a branch of the solicitor-client privilege and benefits from the same near-absolute protection, including permanency. But none of the cases relied on by the Crown support this assertion. The Court has addressed the solicitor-client privilege on numerous occasions and repeatedly underlined its

paramount significance, but never yet considered the nature, scope or duration of the litigation privilege.

24 Thus, the Court explained in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; and *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31. In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).

25 It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.

26 Much has been said in these cases, and others, regarding the origin and rationale of the [page330] solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the

solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is [page331] very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

("Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65)

29 With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 ("Big Canoe"); *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; [page332] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321.

30 American and English authorities are to the same effect: see *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*,

[2004] Q.B. 916, [2004] EWCA Civ 218, and *Hickman v. Taylor*, 329 U.S. 495 (1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G. D. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev.* 315. For the opposing view, see J. D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev.* 346, and "Privilege: Watson & Au (1998) 77 *Can. Bar Rev.* 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), 77 *Can. Bar Rev.* 549.

31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

32 Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or [page333] "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

36 I therefore agree with the majority in the Federal Court of Appeal and others who share their

view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the [page334] privilege: *Lifford*; *Chrusz*; *Big Canoe*; *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (Q.B.). See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.

37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

38 As mentioned earlier, however, the privilege may retain its purpose -- and, therefore, its effect -- where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).

39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

40 As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, at p. 165). This purpose, in the context of s. 23 of the *Access Act* must take into account the nature of much government litigation. In the 1980s, for example, the federal government [page335] confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.

41 In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the *Access Act*. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation

of the adversarial process.

IV

42 In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.

[page336]

43 The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

46 Finally, in the Court of Appeal, Létourneau J.A., dissenting on the cross-appeal, found that the government's status as a "recurring litigant" could justify a litigation privilege that outlives its common law equivalent. In his view, the "[a]utomatic and uncontrolled access to the government lawyer's brief, once the first litigation is over, may impede the possibility of effectively adopting and implementing [general policies and strategies]" (para. 42).

47 I hesitate to characterize as "[a]utomatic and uncontrolled" access to the government lawyer's brief once the subject proceedings have ended. In my respectful view, access will in fact be neither automatic nor uncontrolled.

[page337]

48 First, as mentioned earlier, it will not be automatic because all subsequent litigation will remain subject to a claim of privilege if it involves the same or related parties and the same or related source. It will fall within the protective orbit of the *same litigation defined broadly*.

49 Second, access will not be uncontrolled because many of the documents in the lawyer's brief will, in any event, remain exempt from disclosure by virtue of the legal advice privilege. In practice, a lawyer's brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.

50 Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

51 I hasten to add that the *Access Act* is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.

52 The language of s. 23 is, moreover, permissive. It provides that the Minister *may* invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*.

[page338]

53 The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the *Access Act*, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when the original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the *Access Act* to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice. Should that possibility materialize -- should related proceedings in fact later be instituted -- the government may well have been required in the interim, in virtue of the *Access Act*, to disclose information that would have otherwise been privileged under the extended definition of litigation. This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the *Access Act*. Other provisions of the *Access Act* suggest, moreover, that Parliament has in fact recognized this consequence of the Act on the government as litigator, potential litigant and guardian of personal safety and public security.

54 For example, pursuant to s. 16(1)(b) and (c), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to

threaten the safety of individuals. The special status of the government as a "recurring litigant" is more properly addressed by these provisions and other legislated solutions. In addition, as mentioned earlier, the nature of government litigation [page339] may be relevant when determining the boundaries of related litigation where multiple proceedings involving the government relate to common issues with closely related causes of action. But a wholesale expansion of the litigation privilege is neither necessary nor desirable.

55 Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's right to discovery is constitutionally guaranteed. The prosecution is obliged under *Stinchcombe* to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence" (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.

56 I am not unmindful of the fact that *Stinchcombe* does not require the prosecution to disclose everything in its file, privileged or not. Materials that might in civil proceedings be covered by one privilege or another will nonetheless be subject, in the criminal context, to the "innocence at stake" exception -- at the very least: see *McClure*. In criminal proceedings, as the Court noted in *Stinchcombe*:

The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]

57 On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from [page340] the disclosure it was bound but failed to provide in criminal proceedings that have ended.

V

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169. It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44 Board of School Trustees* (1981), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta*

Corporation v. Guelph Engineering Co. (1984), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales & Rentals*; *Chrusz*; *Lifford*; *Mitsui*; *College of Physicians*; *Gower*.

60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

[TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend [page341] to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

Or, as Carthy J.A. stated in *Chrusz*:

The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

61 While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

62 A related issue is whether the litigation privilege attaches to documents gathered or copied -- but not *created* -- for the purpose of litigation. This issue arose in *Hodgkinson*, where a majority of the British Columbia Court of Appeal, relying on *Lyell v. Kennedy* (1884), 27 Ch. D. 1 (C.A.), concluded that copies of public documents gathered by a solicitor were privileged. McEachern C.J.B.C. stated:

It is my conclusion that the law has always been, and, in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production. [p. 142]

63 This approach was rejected by the majority of the Ontario Court of Appeal in *Chrusz*.

64 The conflict of appellate opinion on this issue should be left to be resolved in a case where it

is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting [page342] from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

VI

65 For all of these reasons, I would dismiss the appeal. The respondent shall be awarded his disbursements in this Court.

The reasons of Bastarache and Charron JJ. were delivered
by

66 BASTARACHE J.:-- I have read the reasons of Fish J. and concur in the result. I think it is necessary to provide a more definitive and comprehensive interpretation of s. 23 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), however, so as not to leave open the possibility of a parallel application of the common law rule regarding litigation privilege in cases where the *Access Act* is invoked. I therefore propose to determine the scope of s. 23 and rule out the application of the common law in this case.

67 Here, the government institution has attempted to refuse disclosure by claiming litigation privilege pursuant to s. 23 of the *Access Act*. The question of whether these documents are covered by litigation privilege only arises once it is decided that s. 23 includes litigation privilege within its scope. The question is whether Parliament intended that the expression "solicitor-client privilege" in s. 23 also be taken to include litigation privilege. Whether s. 23 is interpreted so as to include litigation privilege or not does not constitute a departure from litigation privilege *per se*. Either way, the privilege is left unaffected by the [page343] legislation. In my view, litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either Parliament intended to include litigation privilege within the phrase "solicitor-client privilege" or litigation privilege cannot be invoked.

68 It is unclear, from a legal standpoint, why the government would be able to refuse a statutory duty to disclose information by claiming litigation privilege as a matter of common law. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, this Court held that legislation may infringe solicitor-client privilege (let alone litigation privilege), though such legislation would be interpreted restrictively. The *Access Act* is such legislation and it is not unique in mandating disclosure of certain information. Corporations' legislation, legislation governing certain professions, securities legislation, to name but a few examples, include statutory provisions that require certain persons to disclose information/documentation to directors, tribunals or governing bodies. It has not been open to those persons to resist disclosure on the basis of solicitor-client or

litigation privilege. However, where related litigation arises, those persons will often argue that the compulsory disclosure to an auditor (for example) does not amount to a waiver of the privilege (see *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 F.C. 367 (T.D.)). In that case, the appellants had disclosed legal advice to their auditors pursuant to s. 170 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Before the Federal Court, they argued that this did not constitute a waiver of the privilege. The judge cited the following passage from this Court's decision in *Descôteaux*, at p. 875:

[page344]

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [Emphasis added; p. 377.]

69 It is my view, however, that as a matter of statutory interpretation an exemption for litigation privilege should be read into s. 23. In 1983, litigation privilege was merely viewed as a branch of solicitor-client privilege. This means that Parliament most likely intended to include litigation privilege within the ambit of "solicitor-client privilege". *Amato v. The Queen*, [1982] 2 S.C.R. 418 (*per* Estey J., dissenting), and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 358-60, suggest that the incorporation of the common law concept of solicitor-client privilege into the *Access Act* does not freeze the development of the common law for the purposes of s. 23 at its 1983 state.

70 Nonetheless, my view is that the two-branches approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales. The Advocates' Society, intervener, suggests at para. 2 of its factum that:

[page345]

At an overarching level, litigation privilege and legal advice privilege

share a common purpose: they both serve the goal of the effective administration of justice. Litigation privilege does so by ensuring privacy to litigants against their opponents in preparing their cases for trial, while legal advice privilege does so by ensuring that individuals have the professional assistance required to interact effectively with the legal system.

71 Reading litigation privilege into s. 23 of the *Access Act* is the better approach because, in fact, litigation privilege has always been considered a branch of solicitor-client privilege. As the reasons of my colleague acknowledge, at para. 31, "[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation."

72 Second, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), at p. 336, Carthy J.A. commented that "[w]hile solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation." Thus, even if litigation privilege is read into s. 23 of the *Access Act*, it is not clear that the Crown could properly invoke it as against a third party, such as the media. This is also a question to be dealt with as a matter of statutory interpretation. In my view, once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation (*Chrusz*), the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist.

[page346]

73 I would also disagree with the reasons of Fish J., at para. 5, that "we are not asked in this case to decide whether the government can invoke litigation privilege." This appeal turns on the proper interpretation of s. 23 of the *Access Act*. Either litigation privilege must be read into s. 23 or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the *Access Act*. The consequences of this latter option would have to be considered in the context of the other exemptions provided for by the Act -- including those contained in ss. 16 and 17 and outlined at para. 54 of the reasons of my colleague:

For example, pursuant to s. 16(1)(b) and (c), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals.

74 For the reasons expressed by Fish J., I agree that the Minister's claim of litigation privilege fails in this case because the privilege has expired.

75 I would dismiss the appeal.

Solicitors:

Solicitor for the appellant: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener The Advocates' Society: Torys, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

TAB 2

Case Name:

Canada (Commissioner of Competition) v. Sears Canada Inc.

Reasons for Order

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

**AND IN THE MATTER OF an inquiry pursuant to subparagraph
10(1)(b)(ii) of the Competition Act relating to certain
marketing practices of Sears Canada Inc.;**

**AND IN THE MATTER OF an application by the Commissioner
of Competition for an order pursuant to section 74.01 of
the Competition Act**

Between:

**The Commissioner of Competition, applicant, and
Sears Canada Inc., respondent**

[2005] C.C.T.D. No. 1

[2005] D.T.C.C. no 1

2005 Comp. Trib. 2

File no.: CT-2002-004

Registry document no.: 158b

Also reported at: 37 C.P.R. (4th) 65

Canada Competition Tribunal
Edmonton, Alberta

Before: Dawson J., Presiding Judicial Member

Heard: October 20-24 and 27-31, November 3-7 and
12-14, 2003, January 16 and 19-22, February 2, 3, June
28, 29 and August 19 and 20, 2004.

Final written submissions filed: September 10, 24 and

October 1, 2004.
Decision: January 11, 2005.

(391 paras.)

Appearances:

Counsel for the applicant:

The Commissioner of Competition

John L. Syme Leslie Milton Arsalaan Hyder Geneviève Léveillé

Counsel for the respondent:

Sears Canada Inc.

William W. McNamara Philip J. Kennedy Martin J. Huberman Teresa J. Walsh Stephen A. Scholtz
Martha A. Healey Susan Rothfels

.....

REASONS FOR ORDER

Public

I. INTRODUCTION

1 The Commissioner of Competition ("Commissioner") alleges that, during three sales events held in November and December of 1999, Sears Canada Inc. ("Sears") employed deceptive marketing practices in connection with price representations Sears made concerning five kinds, or lines, of all-season tires that Sears promoted and sold to the public. The Commissioner asserts that this constituted reviewable conduct contrary to subsection 74.01(3) of the Competition Act, R.S.C. 1985, c. C-34 ("Act").

2 Specifically at issue are representations made in advertisements about the regular selling price of the five lines of tires. The advertisements contained "save" and "percentage off" statements. For example, Sears advertised "Save 45% Our lowest prices of the year on Response RST Touring '2000' tires", and advertised comparisons between Sears' regular prices and its sale prices. The Commissioner asserts that the prices referred to by Sears as being its regular prices were inflated because: i) Sears did not sell a substantial volume of these tires at the regular price featured in the

advertisements within a reasonable period of time before making the representations; and, ii) Sears did not offer these tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

3 The Commissioner states that Sears did not offer the tires at its regular prices in good faith because Sears had no expectation that it would sell a substantial volume of the tires at its regular prices, and because Sears' regular prices for the tires were not comparable to, and were much higher than, the regular prices for comparable tires offered by Sears competitors. The Commissioner says that the regular prices were set by Sears at inflated levels with the ulterior motive of attracting customers and generating sales by creating the impression that, when promoted as being "on sale", the tires represented a greater value than was really the case.

4 The remedies sought by the Commissioner include an order prohibiting such reviewable conduct for a period of 10 years, the publication of corrective notices, and the payment of an administrative monetary penalty in the amount of \$500,000.00.

5 Sears contests the Commissioner's application with vigour. Sears asserts that the representations contained in its advertisements with respect to its regular or ordinary selling prices were not misleading in any, or in any material, respect. Sears says that the regular prices referred to in the advertisements were reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area where Sears competed. As well, Sears argues that the remedies sought by the Commissioner are unavailable at law and inappropriate. Finally, Sears says that subsection 74.01(3) of the Act is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(b) of the Canadian Charter of Rights and Freedoms ("Charter"). Sears seeks a determination that subsection 74.01(3) of the Act is inconsistent with the Charter and, therefore, of no force or effect.

6 The Commissioner has conceded that subsection 74.01(3) of the Act ("impugned legislation") infringes Sears' constitutionally guaranteed right of commercial speech. The Commissioner submits, however, that this infringement is justified under section 1 of the Charter as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

7 These reasons are lengthy. In them I find that: (i) subsection 74.01(3) of the Act is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society; (ii) Sears conceded that it failed to comply with the volume test ; (iii) Sears' regular prices for the Tires were not offered in good faith as required by the time test; (iv) Sears did not meet the frequency requirement of the time test for 4 of the 5 lines of tires; (v) Sears failed to establish that its OSP representations were not false or misleading in a material respect; (vi) a prohibition order should issue; and (vii) no order should issue requiring publication of a corrective notice. The issues of payment of an administrative monetary penalty and costs are reserved pending further submissions. The following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

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II. BACKGROUND FACTS

8 The parties agree that Sears is one of Canada's largest and most trusted retailers. It sells general merchandise to the public through various business channels, including retail outlets located across Canada. In 1999, Sears supplied 28 lines of tires to the public through 67 Retail Automotive Centres

located across Canada.

(i) The Tires

9 At issue are the following five tire lines (together the "Tires"):

- i) RoadHandler "T" Plus (manufactured by Michelin)
- ii) BF Goodrich Plus (manufactured by BF Goodrich)
- iii) Weatherwise R H Sport (manufactured by Michelin)
- iv) Response RST Touring '2000' (manufactured by Cooper)
- v) Silverguard Ultra IV (manufactured by Bridgestone)

10 The Tires are all-season passenger tires. Together they represented approximately [CONFIDENTIAL] % of the all-season passenger tire sold by Sears in 1999 and about [CONFIDENTIAL] % of the passenger vehicle tires sold by Sears in 1999. In dollar terms, the Tires represented approximately [CONFIDENTIAL] % of the total sales generated by Sears with respect to the sale of all of its tires. No other retailer in Canada promoted the Tires or supplied the Tires to the public in 1999. Each line was exclusive to Sears.

(ii) Sears' pricing strategy

11 Sears is an "off-price" (also called a "high-low") retailer, which means that Sears relies on discounting and promotions to build in-store traffic and generate sales. An off-price or high-low retailer typically charges a higher "regular" price for its merchandise and then, from time to time, offers merchandise "on-sale" at event-driven discount sales.

12 During 1999, Sears offered the Tires for sale at the following four price points:

- a) Sears' "regular" price was the price of a single unit of any Tire offered by Sears, when that particular tire was not promoted as being "on sale". This was the price used as the reference price in advertisements when the Tires were promoted as being "on sale" by Sears.
- b) Sears' "2For" price was the price at which Sears would sell two or more of a given tire to consumers when that tire was not being offered at a "sale" price. In 1999, Sears' "2For" price for a given tire was always lower than its regular price for a single unit. Sears did not use its "2For" price as a reference price in any of the sales representations at issue and did not advertise its "2For" price when promoting retail sales. The "2For" price came into effect when a customer bought more than one tire and the customer was only informed of the discount on a purchase of multiple tires by the sales associate at the store.
- c) Sears' "normal promotional" price was the usual sale price advertised by Sears, which was a set percentage off the "regular" price for each tire. The

amount of the discount depended on the line of tire. When "normal promotional" prices were advertised in 1999, they were always compared to the "regular" price for the relevant tire, and not to the "2For" price. These discounts were referred to by Sears as "Save Stories".

- d) Sears' "Great Item", "Big News", "Lowest Prices of the Year" or other similar expressions refer to a further discounted promotional price where the discount consumers received was greater than the discount obtained with the "normal promotional" price. When "Great Item" style promotional prices were advertised in 1999, they were always compared to the "regular" price for a single relevant tire and not the "2For" price.

13 The following illustrates the relationship between the four price levels. For the Response RST Touring '2000' tire (size P215/70R14), Sears' pricing in 1999 was as follows:

- i) Regular (single unit) price - \$133.99;
- ii) 2For price - \$87.99 (each);
- iii) Normal promotional price - \$79.99 (each, representing a 40 % discount off the regular single unit price);
- iv) Great Item price - \$72.99 (each, representing a 45 % discount off the regular single unit price).

14 Sears' regular single unit prices for tires in 1999 were set in the Fall of 1998 and were not altered in 1999. Sears' 2For, normal promotional, and Great Item prices were also set in the Fall of 1998 and those prices remained largely unchanged in 1999. As a general rule, Sears' prices were set nationally so that the Tires sold for the same price at each Sears Retail Automotive Centre.

(iii) The promotion of the Tires

15 Throughout 1999, Sears advertised the Tires through various media, including flyers (or "pre-prints"), newspapers, in-store leaflets, and corporate-wide, national events, which were advertised in various newspapers across Canada. Sears' advertisements contained representations of the price at which the Tires were ordinarily sold by Sears, compared with the sale prices on the Tires being promoted. The advertisements were placed in newspapers published across the country including, for example, the Vancouver Sun, the Montreal Gazette and the Calgary Sun.

16 This application puts in issue the ordinary selling price representations made during three different national sales events in 1999, the first in effect between November 8 and November 14, the second in effect between November 22 and November 28, and the final event in effect on December 18 and 19.

17 For the first sales event, Sears distributed nationally a flyer entitled "SEARS Shop Wish and Win" that advertised sale prices on the Response RST Touring '2000' and the Michelin RoadHandler "T" Plus tires. The following is an example of the advertisement found in the flyer

promoting the sale:

MICHELIN(R)

RoadHandler T Plus Tires

| Size | Sears reg. | Sale, each |
|------------|---------------|---------------|
| P175/70R13 | 153.99 | 91.99 |
| P185/70R14 | 168.99 | 99.99 |
| P205/70R14 | 190.99 | 113.99 |
| P205/70R15 | 203.99 | 121.99 |
| P185/65R14 | 179.99 | 107.99 |
| P195/65R15 | 188.99 | 112.99 |
| P205/65R15 | 199.99 | 119.99 |
| P225/60R16 | 219.99 | 131.99 |

Other sizes also on sale

save 40%

ALL MICHELIN ALL-SEASON PASSENGER TIRES Shown:
RoadHandler(R) T Plus tire is made for Sears by Michelin.
Backed by a 6-year unlimited mileage Tread Wearout
Warranty; details in store. #51000 series

18 In support of the first sales event, Sears also published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring '2000' in a number of large circulation newspapers across the country (including, for example, the Vancouver Sun and the Montreal Gazette). These newspaper advertisements were 5.625" x 9.625" in size or larger.

19 The second sales event ran between November 22 and November 28, 1999. The event promoted a sale on Silverguard Ultra IV tires which was advertised in a weekly flyer, in newspaper advertisements and in leaflets distributed in-store at all Sears Retail Automotive Centres. The weekly flyer contained the following advertisement:

Silverguard Ultra IV Tires

| Size | Sears reg. | Sale, each |
|--------------|---------------|---------------|
| P185/75R14 | 109.99 | 54.99 |
| P195/75R14 | 116.99 | 58.49 |
| P235/75R15XL | 149.99 | 74.49 |
| P175/70R13 | 99.99 | 49.99 |
| P185/70R14 | 113.99 | 56.99 |
| P195/70R14 | 119.99 | 59.99 |
| P205/70R14 | 123.99 | 61.99 |
| P215/70R14 | 129.99 | 64.99 |
| P205/70R15 | 133.99 | 66.99 |
| P205/65R15 | 139.99 | 69.99 |

Other sizes also on sale

1/2 PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km Tread Wearout Warranty: details in store. #68000 ser. From 4549 each. P155/80R13. Sears reg. 90.99

20 The third sales event was held on December 18 and 19, 1999. The BF Goodrich Plus and Weatherwise tires were promoted during this event. The event was advertised in a weekend flyer which was distributed nationally. The BF Goodrich Plus tire was advertised as "save 25%" while the flyer described the Weatherwise tire price as "save 40%".

(iv) Tire sales

21 The parties agree that the following table represents the sales numbers and percentages of the Tires sold at Sears' regular selling price in the 12 month period preceding the relevant regular selling price representations:

Table 1: Summary of Sales volumes

| | | 1 | 2 | 3 | 4 | 5 |
|-------------------------------|---------------------|--|--|--|--|--|
| Line | Time-frame | Total number of the Tires sold by Sears in the year before the relevant Representation | Tires sold as "singles", that is, not as a part of a bundle of two or more | Percentage of the total number of Tires sold, which were sold singly (col. 2 as a % of col. 1) | Of all singles sold, the number sold at the Regular, Single Unit Selling Price | Percentage of the total Tires sold at the Regular, Single Unit Selling Price (col. 4 as a % of col. 1) |
| BF Goodrich Plus | 12/18/98 - 12/18/99 | [CONFIDENTIAL] | [CONFIDENTIAL] | 6.53% | [CONFIDENTIAL] | 2.29% |
| Michelin Roadhandler 'T' Plus | 11/08/98 - 11/08/99 | [CONFIDENTIAL] | [CONFIDENTIAL] | 3.84% | [CONFIDENTIAL] | 1.30% |
| Michelin Weatherwise RH Sport | 12/18/98 - 12/18/99 | [CONFIDENTIAL] | [CONFIDENTIAL] | 3.81% | [CONFIDENTIAL] | 0.82% |
| Response RST Touring 2000 | 11/08/98 - 11/08/99 | [CONFIDENTIAL] | [CONFIDENTIAL] | 2.19% | [CONFIDENTIAL] | 0.51% |
| Silverguard Ultra IV | 11/22/98 - 11/22/99 | [CONFIDENTIAL] | [CONFIDENTIAL] | 3.22% | [CONFIDENTIAL] | 1.21% |
| Totals | | [CONFIDENTIAL] | [CONFIDENTIAL] | 4.03% | [CONFIDENTIAL] | 1.28% |

22 The following two tables show the number of days that the Tires were offered by Sears at Sears' regular price, compared to the number of days the Tires were offered at a price below Sears' regular price. The first table reflects the six month period that preceded the representations, the second table reflects the prior twelve month period.

Table 2: Summary of Time Analysis
(For the Six Month Period Preceding the Relevant Representations)

| | BF Goodrich Plus | RoadHandler "T" Plus | Weatherwise /RH Sport | Response RST Touring '2000' | Silverguard Ultra IV |
|----------------------------------|--------------------------|-----------------------|--------------------------|-----------------------------|-------------------------|
| Date of Representation | Dec. 18, 1999 | Nov. 8, 1999 | Dec. 18, 1999 | Nov. 8, 1999 | Nov. 22, 1999 |
| Start and End of 6 month period | June 18 to Dec. 17, 1999 | May 9 to Nov. 7, 1999 | June 18 to Dec. 17, 1999 | May 9 to Nov. 7, 1999 | May 23 to Nov. 21, 1999 |
| Total of Days | 183 | 183 | 183 | 183 | 183 |
| Number of days at reduced prices | 100 | 113 | 148 | 99 | 73 |
| % of days at reduced prices | 55% | 62% | 81% | 54%* or 50.35% | 40% |
| Number of days at Regular Prices | 83 | 70 | 35 | 84 | 110 |
| % of Time at Regular Prices | 45% | 38% | 19% | 46%* or 49.65% | 60% |

* Sears argues that the correct figures are the second ones shown with respect to the Response RST Touring '2000'.

Table 3: Summary of Time Analysis
(For the Twelve Month Period Preceding the Relevant Representations)

| | BF Goodrich | RoadHandler "T" Plus | Weatherwise /RH Sport | Response RST Touring 2000 | Silverguard Ultra IV |
|----------------------------------|--------------------------------|------------------------------|--------------------------------|------------------------------|--------------------------------|
| Date of Representation | Dec. 18, 1999 | Nov. 8, 1999 | Dec. 18, 1999 | Nov. 8, 1999 | Nov. 22, 1999 |
| Start and End of 12 month period | Dec. 19, 1998 to Dec. 17, 1999 | Nov. 9, 1998 to Nov. 7, 1999 | Dec. 19, 1998 to Dec. 17, 1999 | Nov. 9, 1998 to Nov. 7, 1999 | Nov. 23, 1998 to Nov. 21, 1999 |
| Total of Days | 365 | 365 | 365 | 365 | 365 |
| Number of days at reduced prices | 181 | 246 | 283 | 121 | 184 |
| % of days at reduced prices | 49.59% | 67.40% | 77.53% | 33.15% | 50.41% |
| Number of days at Regular Prices | 184 | 119 | 82 | 244 | 181 |
| % of Time at Regular Prices | 50.41% | 32.60% | 22.47% | 66.85% | 49.59% |

III. THE APPLICABLE LEGISLATION

23 Subsection 74.01(3) of the Act is found in Part VII.1 of the Act which is entitled "Deceptive Marketing Practices". Part VII.1 of the Act permits the Commissioner to pursue administrative remedies, rather than criminal prosecution, in relation to deceptive marketing practices including misleading advertising.

24 Under section 74.01 of the Act, a person engages in reviewable conduct where the person, for the purpose of promoting any product or business interest, makes a representation to the public that is false or misleading in a material respect. The general impression conveyed by a representation as well as its literal meaning is to be taken into account when determining whether or not the representation is false or misleading in a material respect.

25 Subsection 74.01(3) of the Act deals with misleading representations with respect to a seller's own ordinary selling price. Subsection 74.01(3) reads as follows:

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

- (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
- (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

* * *

74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

- a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
- b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

26 An ordinary selling price ("OSP") representation will not constitute reviewable conduct under subsection 74.01(3) if either one of the following tests is satisfied:

- (a) a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation ("volume test"); or
- (b) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation ("time test").

In the present case, the period of time to be considered is the period before the making of the representations at issue because the representations relate to the price at which the Tires were previously sold (subsection 74.01(4) of the Act).

27 The requirement that any false or misleading representation must be material is found in subsection 74.01(5) of the Act which provides:

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

* * *

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

28 The remedies available for a breach of subsection 74.01(3) of the Act are prescribed in section 74.1 of the Act. Subsection 74.1(1) provides that a court (defined to include the Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

- (a) not to engage in the conduct or substantially similar reviewable conduct;
- (b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

29 No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

30 Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. THE CONSTITUTIONAL CHALLENGE

31 As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(b) of the Charter. In my view, this is an appropriate concession.

32 The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

- (i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).
- (ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, particularly at pages 967-979.

33 Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(b) of the Charter. See: *RJR Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paragraph 58.

34 In the present case, Sears' OSP representations convey or attempt to convey meaning. Those representations therefore have expressive content so as to fall, prima facie, within the sphere of conduct protected by subsection 2(b) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

35 It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(b) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

36 To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

37 The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103. There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.
2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:
 - a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.
 - b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.
 - c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's negative impact.

See also: *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

38 Relevant considerations when conducting the analysis articulated in *Oakes*, supra are that:

1. The onus of proving that a limit on a right or freedom protected by the Charter is reasonable and demonstrably justified is borne by the party seeking to uphold the limitation. See: *Oakes* at page 137.
2. The standard of proof is the civil standard. Where evidence is required in order to prove the constituent elements of the section 1 analysis, the test

for the existence of a balance of probabilities must be applied rigorously, recognizing, however, that within the civil standard of proof there exist different degrees of probability depending upon the case. See: Oakes at page 137.

3. The analysis taught in Oakes is not to be applied in a rigid or mechanical fashion. It is to be applied flexibly. See: RJR Macdonald, supra, at paragraph 63.
4. The analysis must be undertaken with close attention to the contextual factors. This is because the objective of the impugned measure can only be established by canvassing the nature of the problem it addresses, and the proportionality of the means used can only be evaluated in the context of the entire factual setting. See: Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877 at paragraph 87.
5. The context will also impact upon the nature of the proof required to justify the measure. While some matters are capable of empirical proof, others (for example, matters involving philosophical or social considerations) are not. In those latter cases, "it is sufficient to satisfy the reasonable person looking at all of the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". Common sense and inferential reasoning may be applied to supplement the evidence. See: Sauvé, supra, at paragraph 18.
6. With respect to the minimal impairment test, where a legislative provision is challenged, the Supreme Court of Canada has held that Parliament need not choose the absolutely least intrusive means to attain its objectives, but rather must come within a range of means which impair guaranteed rights as little as reasonably possible.

(ii) A limit prescribed by law

39 Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

40 Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms "substantial volume", "reasonable period of time", "substantial period of time" or "recently", which are all used in the impugned legislation. While subsection 74.01(3) provides that the nature of the product and the relevant geographic market are factors to be considered in determining whether a person engages in reviewable conduct, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors

affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament's intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

41 With respect to the Information Bulletin entitled "Ordinary Price Claims", published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act ("Guidelines"), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears' contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

42 In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

43 Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears' submissions.

44 In *Irwin Toy*, supra, at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, "if at all". He said that the question to be asked is whether the legislation at issue provides an "intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies". However, where there is "no intelligible standard" and a "plenary discretion" has been given to do what "seems best", there is no limit prescribed by law.

45 Subsequently, in *Nova Scotia Pharmaceutical Society*, supra, the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

1. Vagueness can be raised under s. 7 of the Charter, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the Charter in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler*, *Irwin Toy* and the *Prostitution Reference*).
2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*).
3. Factors to be considered in determining whether a law is too vague include

- (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (Morgentaler, Irwin Toy, Prostitution Reference, Taylor and Osborne).
4. Vagueness, when raised under s. 7 or under s. 1 in limine, involves similar considerations (Prostitution Reference and Committee for the Commonwealth of Canada). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of over breadth (Committee for the Commonwealth of Canada and Osborne).
 5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 in limine, and will rather consider the scope of the disposition under the "minimal impairment" test (Taylor and Osborne).

46 Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a "law" is relatively high.

47 With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

48 The Court concluded its comments about vagueness in the following terms at pages 638-640:

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an

unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times*, supra, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone*, supra, at pp.32-33.

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. [underlining added]

49 With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a "law". Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

50 As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word "substantial" has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just de minimus. (See: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Tribunal); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.)). As the Commissioner argues, there is no reason to conclude that the Tribunal is not equally capable of interpreting and applying the meaning of "substantial" in the context of subsection 74.01.(3). The word "reasonable" is widely used in Canadian statutes and has an understood meaning at common

law. Similarly, the word "recently" has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Canada (Minister of National Revenue)* (1994), 78 F.T.R. 259 at paragraph 12 "an inherently present tense connotation". It is defined in the Oxford English Dictionary to mean "at a recent date; not long before or ago; lately, newly". Thus, the terms about which Sears complains do carry commonly understood meanings.

51 Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society*, supra, the Supreme Court considered whether paragraph 32(1)(c) of the Combines Investigation Act, R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to "prevent, or lessen, unduly, competition". The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

52 In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is "to maintain and encourage competition in Canada" in order, among other things, "to provide consumers with competitive prices and product choices". Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

53 Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

54 While Sears argues that neither the term "nature of the product" nor the term "relevant geographic market" are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

55 It follows, in my view, that the words used in the impugned legislation, when considered in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently

precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society*, supra, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

56 Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the "Report of the Consultative Panel on Amendments to the Competition Act" ("Consultative Panel") and in the legislation from other jurisdictions, put in evidence before the Tribunal.

57 On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the Competition Act. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 ("report").

58 The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.

However, those supporting a time test generally were concerned that the offered price be bona fide. They believe a retailer should be required to demonstrate that it made bona fide efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a product.

Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

59 After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions "should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty". In its report, the Consultative Panel went on to say at page 26:

Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, or the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.

[...]

The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms. [underlining added]

60 The following model provision was recommended by the Consultative Panel at page 28 of its report:

- (ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:
 - (A) recently sold a substantial volume of the product, or
 - (B) recently offered the product for sale in good faith for a substantial period of time prior to the sale. [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

61 In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view that the use of terms such as "recently", "substantial volume", and "substantial period of time" provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society*, supra at pages 626-627).

62 With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

63 Over the Commissioner's objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka's expertise within the federal sphere.

64 Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising

of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida's Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were "repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute".

65 New York's General Business Law makes false advertising in the conduct of any business unlawful. "False advertising" is defined as advertising that is misleading in a material respect.

66 Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a "substantial number of sales" were made in the "recent regular course of business"; (2) the former price was the price at which such goods or services or "substantially similar" goods or services were openly and actively offered for sale for a "reasonably substantial period of time" in the "recent regular course of business" honestly, in good faith and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which "substantial sales" were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner. Mr. Mahinka testified that the term "substantial sales" is further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison in the supplier's trade area" but that the other terms used are not further defined.

67 I find this evidence to confirm that other legislators have recognized the need for flexibility in regulating deceptive trade practices in general and OSP representations in particular. This less specific legislation establishes general boundaries of non-permissible conduct which is adequate for enforcement purposes. The existence of such general legislation in my view supports the view that the impugned legislation is capable of adequately giving rise to legal debate.

68 It is true that Mr. Mahinka's evidence included examples of very specific state legislation. However, the fact that some legislation attaches consequences to more precisely-defined acts does not lead to the conclusion that more general provisions are not capable of constituting a limit prescribed by law.

69 In rejecting Sears' position that the legislation is not a limit prescribed by law, I have also considered its submission based on the existence of the Guidelines. In *Irwin Toy*, supra at page 983, the majority of the Supreme Court noted that one could not infer from the existence of guidelines, (in that case, promulgated by the Quebec Office of Consumer Protection in order to help advertisers comply with advertising restrictions) that there was no intelligible standard to apply. In the view of the majority, one could only infer that the Office of Consumer Protection found it reasonable, as

part of its mandate, to provide a voluntary pre-clearance mechanism. Similarly, I do not infer from the existence of the Guidelines that there are no intelligible standards for a court or the Tribunal to apply. I note that the report of the Consultative Panel included a recommendation that the Competition Bureau issue enforcement guidelines in draft form at the same time as the new legislation was introduced. One can infer that the Commissioner considered this recommendation to be reasonable and the Guidelines helpful.

(iii) Is the infringement reasonable and demonstrably justified?

70 Having found the impugned legislation to be a limit prescribed by law, the next step is to apply the principles articulated in *Oakes* to the evidence before the Tribunal.

(a) Contextual considerations

71 As already noted, in *Oakes*, the Supreme Court noted that the analysis is to be conducted with close attention to the contextual factors. The contextual factors are relevant to establishing the objective of the impugned legislation and to evaluating the proportionality of the means used to fulfil the pressing and substantial objectives of the legislation. Characterizing the context of the impugned provision also touches upon the nature of the evidence required at each stage of the analysis in order to establish demonstrable justification.

72 I believe that the relevant contextual considerations are as follows.

73 First, it is relevant to consider the nature of the activity which is infringed. This is necessary because, where the right to expression is violated, the value of the expression that is limited affects the degree of constitutional protection (*Thomson Newspapers*, supra at paragraph 91).

74 Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.

75 The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald*, supra at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.

76 In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(b) of the Charter is intended to protect. In the result, a lower standard of justification is required.

77 Second, it is a relevant contextual factor to consider the vulnerability of the group the

legislation seeks to protect: Thomson Newspapers, at paragraphs 90 and 112.

78 Both the Consultative Panel and the Guidelines recognize that OSP claims are a powerful and legitimate marketing tool. Sears, in its own document entitled "Guidelines for Savings Claims", notes that "[s]avings claims, properly used, are a powerful selling tool".

79 Dr. Donald Lichtenstein testified as an expert for the Commissioner. He is a Professor of Marketing at the Leeds School of Business at the University of Colorado in Boulder. He holds a Ph. D. with a major in Marketing obtained in 1984 from the University of South Carolina. Dr. Lichtenstein has lectured extensively about Marketing at the graduate and undergraduate level. He has served on the Editorial Review Board of the Journal of Marketing, the Journal of Consumer Research, and the Journal of Business Research. He is a member of the Editorial Review Board for the Journal of Policy and Marketing. In 2001, he received the Outstanding Reviewer Award from the Journal of Consumer Research. Dr. Lichtenstein continues to be an ad hoc reviewer for the Journal of Marketing and other publications. As well, has presented numerous papers relating to marketing at conferences, has applied research experience, and has been published extensively in refereed publications and nationally refereed proceedings.

80 The Tribunal ruled that Dr. Lichtenstein was qualified to provide opinion evidence on two topics. The first was marketing matters, and particularly consumer behaviour as it relates to pricing and other stimuli. The second topic was research design and methodology within the social sciences. Dr. Lichtenstein provided two separate written opinions, one pertaining to the constitutional question, the other pertaining to the Commissioner's deceptive marketing allegations. He testified with respect to both issues.

81 I was impressed by Dr. Lichtenstein's expertise. Much of his testimony with respect to marketing matters was unchallenged and I accept his testimony given with respect to the constitutional issue. Relevant to the contextual factors at issue was his evidence that:

- OSPs have a powerful influence on consumers.
- OSP advertising creates a general impression of savings for the average consumer, positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.
- The average consumer has low levels of price knowledge and engages in very little pre-purchase search to gain this knowledge, even for expensive items. Thus, the average consumer is vulnerable to deceptive OSP advertising.
- By signalling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some customers into the market sooner than otherwise would be the case.
- Misleading OSP advertising can lead consumers to believe that, by purchasing

- the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.
- The average consumer who purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that he or she was misled, and thus, he or she remains susceptible to subsequent reference price deceptions.
 - Receiving a "good deal" in and of itself is a significant motivation for purchase for many consumers who purchase OSP advertised items. This is referred to as "transaction utility".
 - Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.
 - The deceptive OSP advertisements from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner. In Dr. Lichtenstein's words:

For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from [whom] they purchased.

- A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the beneficial effect also extends to other non-promoted product/service categories. When the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on the item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but for all items that the consumer purchases.
- When advertiser behaviour results in consumers purchasing products that provide less value for money, it motivates manufacturers to allocate factors of production to those items instead of to items that would otherwise be produced (i.e., those that "truly" provide higher value for money). This harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased.

82 A third related contextual factor, conceded in oral argument by Sears to be relevant, is the

objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

83 Sears argues that a centrally important contextual factor is that, prior to the enactment of the impugned legislation, stakeholders had "explicitly and forcefully lamented the vagueness and lack of precision, certainty and understanding relating to the ordinary selling price legislation". I agree that clarity of legislation is relevant to considerations of vagueness (as that relates both to the "prescribed by law" and minimal impairment requirements) and, in that sense, clarity touches on the proportionality of the legislation. I am not satisfied on the evidence that clarity and certainty are otherwise relevant contextual factors, or that clarity is an over-arching contextual factor.

(b) Does the infringement achieve a constitutionally valid purpose or objective?

84 Having set out the relevant contextual considerations, I move to the first step of the Oakes analysis. The question to be answered at this stage is whether the objective of the impugned legislation is sufficiently important that it is, in principle, capable of justifying a limitation on Sears' freedom of expression.

85 Sears concedes that the objective is sufficiently important. Notwithstanding that concession, it is important at this stage to properly state, and not over-state, the objective of the impugned legislation. Improperly stating the objective of the legislation will compromise the analysis.

86 Sears describes the objectives of the impugned legislation as follows:

The evidence before the Tribunal in this proceeding has confirmed that the objectives of the Act include, inter alia, setting and making known the rules or parameters governing competition in Canada and, importantly, having the Act judicially enforced in a manner that is fair to all and in accordance with the rules previously established. Other objectives include the improvement of the quality and accuracy of marketplace information and discouraging deceptive marketing practices.

87 In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation. It is described below.

88 In 1960, a criminal prohibition on the making of misleading ordinary price representations was added to what was then the Combines Investigation Act. The initial provision read as follows:

33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means

whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.

- (2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

* * *

33c.(1) Quiconque, afin de favoriser la vente ou l'emploi d'un article fait au public un exposé essentiellement trompeur, de quelque façon que ce soit, en ce qui concerne le prix auquel ledit article ou des articles, semblables ont été, sont ou seront ordinairement vendus, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.

- (2) Le paragraphe (1) ne s'applique pas à une personne qui fait paraître une annonce publicitaire qu'elle accepte de bonne foi en vue de la publication dans le cours de son entreprise.

89 An explanation of the purpose of the criminal prohibition is found in remarks made to the House of Commons by the then Minister of Justice when he moved the second reading of the bill to amend the Combines Investigation Act to add the criminal prohibition. He said:

The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.

In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a

manufacturer some right to prevent his product from being abused or used as a come-on device; and finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself.
[underlining added]

House of Commons Debates, Vol. IV (30 May 1960) at 4349 (Mr. Fulton).

90 In 1976, the criminal prohibition was amended to read as follows:

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

[...]

- (d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.

* * *

36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.

[...]

- (d) donner au public des indications notablement trompeuses sur le prix auquel un produit, ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au

nom de laquelle elles sont données.

It was subsequently re-enacted as paragraph 52(1)(d) of the Act.

91 As described in detail above, a discussion paper was released in 1995 seeking comments from interested persons with respect to amendments to the Act, including the appropriate definition of OSP. The Consultative Panel which was created to review the responses to the discussion paper made recommendations. Those recommendations are largely reflected in subsection 74.01(3) of the Act, which was originally contained in Bill C-20, An Act to amend the Competition Act and to make consequential and related amendments to other Acts, 1st Sess., 36th Parl., 1997, (1st reading 20 November 1997). A dual track regime of civil and criminal enforcement procedures and remedies was created.

92 The summary to Bill C-20 specifically provided that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity". The then Minister of Industry described the amendments in more detail in the following terms when he moved second reading to the bill:

The regular price claims provisions of the Act will be amended for greater clarity and to better reflect what consumers and retailers understand by them. The legitimacy of regular price claims would be determined by an objective standard, a test based either on sales volume or the pricing of an article over time.

Consumers will benefit from this clarification of the rules and merchants will have more freedom of choice in selecting pricing strategies and will be encouraged to innovate in ways beneficial to consumers and retailers alike.

House of Commons Debates, Edited Hansard, No. 074 (16 March 1998) (Hon. John Manley).

93 On the basis of the legislative history and the evidence before the Tribunal, I am satisfied that the Commissioner has established, on a balance of probabilities, that the objectives of subsection 74.01(3) of the Act are to: i) protect consumers from deceptive ordinary selling price representations; ii) protect businesses from the anti-competitive effects of deceptive ordinary selling price representations; and, iii) protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These were the expressed objectives of the original criminal prohibitions and I am satisfied that the original purpose remained pressing when the civil remedy was enacted. As Sears noted in its written argument, since the 1970's concerns were expressed about the inefficiencies associated with the criminal prosecution of misleading advertising. The Consultative Panel recommended that misleading advertising should normally be addressed through a civil regime but that a criminal regime should exist for egregious cases. Both regimes were directed at the same purpose.

94 These legislative objectives are to be viewed in light of the evidence before the Tribunal concerning the significant harm caused to consumers, business and competition by deceptive OSP advertising (particularly the evidence of Dr. Lichtenstein described above).

95 I conclude, on the totality of the evidence before the Tribunal, that Sears has fairly and properly conceded that the objectives of the impugned legislation are of sufficient importance that, in principle, they are capable of justifying a limitation on Sears' freedom of expression.

(c) The rational connection

96 The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required. In *RJR Macdonald*, supra at paragraphs 86, 156-158, and 184, the Supreme Court held that a causal relationship between advertising and tobacco consumption could be established based upon common sense, reason or logic.

97 In *Irwin Toy*, supra at page 991, Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

98 In finding the impugned legislation to be rationally connected to the objectives of the legislation, I also rely upon the opinion of Dr. Lichtenstein. As noted above, I generally accept his testimony. I found him to be extremely knowledgeable on the subject of marketing and particularly consumer behaviour as it relates to pricing and other stimuli. I also found that he gave his testimony in an unhesitating, candid, clear and even-handed manner. His obvious enthusiasm for the subject matter left no suggestion of partisanship. His opinion, as it related to marketing in the context of the constitutional question, was not, in my view, effectively challenged or limited on cross-examination.

99 Sears' expert, Mr. Mahinka, dealt with a review of the scope of U.S. legislation and the factors to be considered at law by sellers when making OSP representations. However, since Mr. Mahinka was not qualified to opine, and did not opine, on marketing matters, his evidence did not contradict that of Dr. Lichtenstein.

100 The following evidence, taken from Dr. Lichtenstein's written expert report, is relevant to the

issue of rational connection:

62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price [is] relate to two factors: (1) how long the product [has] been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus). Consequently, in my opinion, there is definitely a rational [connection] between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.
63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumers were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real bona fide "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.
64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as bona fide selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective. [footnotes omitted]

101 In finding there to be a rational connection between the impugned legislation and its objectives, I reject Sears' submission that the impugned legislation fails the rational connection test because it is excessively vague, uncertain and imprecise, and has application to an unnecessary broad range of activity. In my view, those arguments are better considered when determining whether the legislation is over broad so that it does not minimally impair Sears' rights. Indeed, in oral argument, counsel for Sears dealt with the evidence that supported his submission that unclear legislation defeats the objective of accurate marketplace information (and so was not rationally

connected to the legislative purpose) in the context of his submission on minimal impairment.

102 I am satisfied that the impugned legislation, on its face, cannot be viewed as being so vague or arbitrary that it is not rationally connected to its objectives.

(d) Minimal impairment

103 The next stage of the Oakes analysis requires consideration of whether the impugned legislation, while rationally connected to its objectives, impairs Sears' freedom of expression as little as reasonably possible in order to achieve the legislative objectives.

104 The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 95. In *Sharpe*, the majority of the Court described the required analysis in the following terms:

96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].

97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the Oakes test is consistent with a more nuanced approach to the minimal impairment inquiry -- one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...]. [emphasis in original] [jurisprudence and citations omitted]

105 Sears argues that the impugned legislation fails the minimal impairment test in two respects. First, Sears says that the legislation is over broad because it uses excessively vague, imprecise and broad terms (including "substantial volume", "reasonable period of time", "substantial period of

time" and "recently"). Further, the legislation fails to include specific guidelines, standards, criteria or definitions concerning the volume of product sold or offered for sale, and the periods of time to be considered for the volume and time tests. The scope of the impugned legislation will, it is said, therefore frustrate or defeat its objectives. Second, Sears says that subsection 74.01(3) of the Act does not minimally impair its freedom of expression because there are practical legislative alternatives to the impugned legislation as it is now drafted. Those alternatives would, Sears argues, give greater clarity, advance the objectives of the legislation more effectively, and interfere less with Sears' right to commercial free speech.

106 Turning to the first ground advanced by Sears in support of its argument that the impugned legislation will frustrate or defeat the objectives sought to be achieved, Sears points to the evidence of the Commissioner's expert, Dr. Lichtenstein, that:

- a) Placing the percentage requirement for sales and time tests at 51 % or higher (as the Guidelines do) is objectionable as a per se or equivalent per se rule;
- b) Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some customers from receiving non-deceptive information that they may, in fact, value in making decisions. In turn, retailing efficiency would be adversely affected because retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers;
- c) Requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to the price may deprive some customers of important information about both the product and the retailer;
- d) If consumers believed that there was a time test at 51 % or higher, that test is objectionable;
- e) Uncertain or unclear OSP advertising rules hinder OSP price advertising;
- f) If the regulations are not clear, some retailers may choose not to engage in OSP advertising as much or at all;
- g) If retailers chose not to engage in OSP advertising as much or at all, that could hinder price reduction;
- h) If price reduction is hindered, that could result in competitors not having any pressure to lower their prices; and
- i) If competitors do not lower their prices, the consumer will be harmed by higher prices.

107 One legislative option available to deal with OSP claims is legislation that imposes specific per se standards, for example, the number of days a product must be on sale at a regular price, or the percentage of sales accepted as "substantial" for the volume test. Mr. Mahinka identified a number of state enactments in the U.S. which contained per se standards. It was Dr. Lichtenstein's opinion

that such per se rules are not effective in addressing deception. He endorsed the following statement:

"Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost? Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice."

108 Dr. Lichtenstein advanced a "Rule of Reason" analysis of a retailer's prices and advertising and effect on consumers, described as follows:

"Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive".

109 Dr. Lichtenstein went on to state:

The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement

theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following [of] per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

110 Noting that, under the impugned legislation, the volume and time tests are not determined in a vacuum, but rather recognize both the market-based attributes of the product and the geographic market, Dr. Lichtenstein concluded that, in his opinion, subsection 74.01(3) of the Act could not be less burdensome and still be effective.

111 In this context, I do not find that the portions of Dr. Lichtenstein's testimony relied upon by Sears fundamentally undermine his expert opinion that the legislation could not be less burdensome and still be effective, or his opinion that clearer per se rules will neither detect all deception nor exculpate all non-deceptive OSP advertising. Because the impugned legislation is not per se legislation but rather requires consideration of good faith and materiality, I believe the impugned legislation meets the concerns of Dr. Lichtenstein articulated at points (a) through (d) in paragraph 106 above.

112 Put another way, Sears relied on the portions of Dr. Lichtenstein's evidence which criticised the enactment of per se rules. However, his views do not support the conclusion that the impugned legislation, which is not per se legislation, is over broad.

113 To the extent that Dr. Lichtenstein agreed that uncertain or unclear OSP advertising regulations hinder and discourage OSP advertising, the evidence before the Tribunal does not in my view establish that the impugned legislation has prevented or discouraged accurate OSP advertising.

114 Turning to Sears' argument that there are other, more effective legislative options, Sears points to the legislation of 12 American states and argues orally as follows:

Now, in terms of the 12 states that are highlighted here, it is set out, Your Honour - - I can tell you that, in terms of the criteria that are set out here, it really is a menu of alternative ways to enact a provision like the impugned legislation and, from that menu, Your Honour will note that there are various tests that are enunciated here, set out, which involve different volume tests, different time tests.

You have got percentages that vary. You have got "reasonable" set at 5 per cent. You have got "reasonably substantial" set at 10 per cent. You have got time periods and volume periods anywhere from more than 10 per cent to - - well, it runs to 31.1 per cent, which is 28 out of 90 days in a few cases that is required to have it at that regular price.

And you have got 51.6 per cent in the case of Ohio, which is 31 out of 60 days, and you have got South Dakota, for example, 7 out of 60 days, 11.6 per cent.

The point of it is, is that I am not suggesting you have to pick a percentage here or a criteria that you feel should be imposed here. That is not your job and, frankly, it is not my job either.

What the point here is is that there are other legislative alternatives which do provide for that certainty and clarity and that also provide for that flexibility that we are looking for here, in that there are also exceptions to these fixed criteria.

There are exceptions for clearance sales, for example. There are exceptions for providing for rebuttable presumptions and that, therefore, Your Honour has before you clear evidence that Parliament could have done the same and that, had it done the same, Sears' rights would not have infringed as much as they have been.

115 However, there was no evidence before the Tribunal that such legislation was either less intrusive or more effective in targeting OSP representations. With respect to whether more precise legislation is less intrusive, it was Mr. Mahinka's evidence that it has been his experience (which has formed the basis of his advice to clients) that, where sellers carry on business in more than one jurisdiction, sellers will "commonly seek to comply with a more specific, relevant state statute or regulation governing price comparisons as this practice can be expected to result in compliance with more general state statutes". This evidence leads me to conclude that either the general and specific legislation are co-extensive, or the specific legislation is more intrusive. Otherwise, compliance with the specific legislation would not result in compliance with the more general legislation. Mr. Mahinka's evidence does not support Sears' contention that more specific legislation is less intrusive.

116 With respect to the effectiveness of legislation regulating OSP claims, the following exchange in oral argument is illustrative. In response to a question from the Tribunal as to how the

evidence of Mr. Mahinka, and particularly the state legislation he referenced, supports the submission that more precise legislation is more effective, counsel for Sears ultimately acknowledged that Mr. Mahinka's evidence did not say that precise legislation was more effective. The transcript on this point is as follows:

MR. M.J. HUBERMAN: Well, if you are asking: Is that the approach he uses when he is dealing with a general statute only? He did not address that but, again, the general approach is illustrative and, I think, helpful in the sense that he is using precise standards and criteria to shape his advice to sellers who want to know what to do.

The idea is that, if they know what to do, if they are going to comply with the specific standards, they are likely going to comply with the more general ones also.

So to the extent that that advice would be appropriate in those circumstances, I take it that that is what the advice would be as well.

THE CHAIRPERSON: But I don't recall his evidence to say that specific legislation is more effective than general legislation.

MR. M.J. HUBERMAN: Well, it's more effective in letting the sellers know what to do in the sense of advertising. It is more effective in that sense.

THE CHAIRPERSON: But he doesn't touch on whether it is more effective in discouraging objectionable advertising that is misleading with respect to ordinary selling price.

MR. M.J. HUBERMAN: No.

His point was a different point. His point was, I would suggest, the first branch of the unintelligible standard rationale, which is the fair notice part that we talked about yesterday.

His point was, by looking at the more specific standards criteria tests, the citizen, i.e. the seller, would have greater guidance and knowledge of the law so that it could comply better with it. That was the gist of what he was saying and,

in fact, that would, in my submission, show its effectiveness in accomplishing some of the objectives, certainly, of the Act that we talked about. [underlining added]

117 Sears also complains that the Commissioner failed to explain why the model provision recommended by the Consultative Panel was not enacted. It is said by Sears to have been less intrusive and equally effective because of its "clarity and brevity".

118 The model proposed by the Consultative Panel is set out at paragraph 60 above. The model provision proposed the use of terms such as "recently sold a substantial volume", "recently" and "substantial period of time". Regard was to be had to the nature of the product and the relevant market. I am not satisfied that the "clarity and brevity" of this model provision shows it to be less intrusive or more effective than the impugned legislation.

119 Returning to the dicta of the Supreme Court of Canada in Sharpe quoted above, Parliament need not adopt the least restrictive measure. It is sufficient that the means adopted fall within a range of reasonable solutions, and the law must be reasonably tailored to its objectives.

120 The evidence of Dr. Lichtenstein and the wording of the impugned legislation persuade me that the impugned legislation is reasonably tailored to its objectives. The legislation sets out time and volume tests which relate to consumer perceptions of a seller's ordinary price. An affirmative defence is provided whereby any representation that is not false or misleading in a material respect does not constitute reviewable conduct. There is a due diligence defence to most of the remedial measures.

121 I am satisfied, on a balance of probabilities, that the impugned legislation falls within a range of reasonable alternatives. While the Act does not establish with precision whether any particular OSP representation will satisfy the time and volume test, the impugned legislation provides the necessary flexibility to ensure that it neither captures non-deceptive OSP advertising nor fails to capture deceptive OSP advertising.

(e) Proportionality of effects

122 The final stage of the Oakes analysis requires:

... there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

See: Dagenais v. CBC, [1994] 3 S.C.R. 835 at page 889; and Thomson Newspapers, supra at paragraph 59.

123 I accept, based upon the report of the Consultative Panel, the evidence of Dr. Lichtenstein, and the existence of legislation in numerous American jurisdictions restricting OSP advertising, that subsection 74.01(3) of the Act addresses the pressing and substantial objective preventing of harm caused by deceptive ordinary price claims. False OSP claims, on the evidence of Dr. Lichtenstein, (unchallenged on this point) can harm consumers, business competitors and competition in general.

124 In comparison, the negative effects of the restrictions which result from subsection 74.01(3) of the Act are not great. The speech that is restricted is commercial speech that is materially false or misleading.

125 Sears points to its experience when it eliminated its "2-For" price as evidence of the deleterious effect of the impugned legislation. At that time, when Sears lowered and set its regular single unit price at the "2-For" price, sales declined. When Sears then increased its regular prices, its promotional sales substantially increased. I do not understand this to be evidence of a chill caused by the regulation of OSP claims, as Sears argues, particularly since Sears continued to use OSP claims.

126 I therefore conclude that the negative effects of the restriction on commercial speech are outweighed by the benefits that ensue from sanctioning deceptive OSP representations.

(f) Conclusion

127 For the reasons set out above, I have concluded that subsection 74.01(3) of the Act is: i) a limit "prescribed by law"; ii) addresses pressing and substantial objectives; iii) is rationally connected to its objectives; iv) restricts freedom of expression as little as is reasonably possible; and, v) carries salutary benefits that outweigh the restriction on freedom of expression.

128 It follows that, while it is conceded that subsection 74.01(3) does infringe subsection 2(b) of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.

129 Sears' request for constitutional remedies will, therefore, be dismissed.

V. THE ALLEGATION OF REVIEWABLE CONDUCT

(i) Standard of proof

130 Having dismissed Sears' request for constitutional remedies, I now turn to consider whether the Commissioner has met the onus upon her to establish that Sears employed deceptive marketing practises which constitute reviewable conduct under subsection 74.01(3) of the Act.

131 Neither party, in their written arguments, addressed submissions to the Tribunal with respect to the standard of proof. In oral argument, counsel agreed that the Commissioner must prove her case on a balance of probabilities, and acknowledged that within the civil standard of proof there

exist different degrees of probability, depending upon the nature of the case. See also: Oakes, supra, at page 137. Counsel for the Commissioner agreed that, within the civil standard, the Commissioner would be obliged to prove her case at the higher end of the balance of probabilities.

132 In light of the serious nature of the conduct alleged against Sears I am satisfied that, within the balance of probabilities, I should scrutinize the evidence with greater care and consider carefully the cogency of the evidence. See: Continental Insurance Co. v. Dalton Cartage Co., [1982] 1 S.C.R. 164 at page 170.

(ii) The elements of reviewable conduct and the issues to be determined

133 For ease of reference, I repeat subsections 74.01(3) and 74.01(5) here :

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

- (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
- (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

[...]

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

* * *

74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel

elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:

- a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
- b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

[...]

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

134 Sears acknowledges that the evidence before the Tribunal establishes Sears to be: (i) a person; (ii) who, for the purpose of promoting, directly or indirectly, the supply or use of tires and for the purpose of promoting, directly or indirectly, its business interests generally; (iii) in 1999, made representations to the public as to tire prices that were clearly specified to be the prices at which the Tires were ordinarily supplied.

135 Sears also acknowledges that the evidence establishes that Sears did not comply with the volume test contained in paragraph 74.01(3)(a) of the Act.

136 Accordingly, the issues to be determined are:

- i) Were Sears' regular prices for the Tires offered in good faith as required by the time test?
- ii) Did Sears meet the frequency requirement of the time test?
- iii) If Sears did not meet the good faith or frequency requirements of the time test, has Sears established that the representations were not false or misleading in a material respect?
- iv) If Sears engaged in reviewable conduct, what administrative remedies should be ordered?

(iii) The witnesses

137 Before turning to the substance of the deceptive marketing case, it will be helpful to introduce and describe briefly the witnesses who testified before the Tribunal.

(a) The expert witnesses

138 Seven individuals testified as experts before the Tribunal, three on behalf of the Commissioner and four on behalf of Sears. The Commissioner's experts were Dr. Donald Lichtenstein, Dr. Sridhar Moorthy and Mr. Donald Gauthier.

139 Dr. Lichtenstein's qualifications and area of expertise have already been described. When Dr. Lichtenstein re-attended to give his opinion with respect to the deceptive marketing case, Sears agreed that he need not be re-qualified and that he could provide expert testimony with respect to "marketing and consumer behaviour and response to pricing advertised stimuli" and "research design and methodology within social sciences".

140 Dr. Moorthy is the Manny Rotman Professor of Marketing at the Rotman School of Management, University of Toronto, and is a Research Associate at the Institute for Policy Analysis, University of Toronto. Sears did not challenge Dr. Moorthy's expertise to testify about "marketing and the use of economic principles and/or theory to understand marketing", "consumer response to marketing stimuli" and "marketing study design and implementation".

141 Mr. Gauthier has worked in the tire industry in Canada since 1984 when he joined a company that was the predecessor corporation of Uniroyal Goodrich Canada Inc. He worked from 1984 to 1990 as its National Advertising Manager. In his later years with the company, he took on the additional role of Sales Manager for Atlantic Canada. From 1990 through 1995, Mr. Gauthier was with Michelin Tires Canada Inc. (after it acquired Uniroyal Goodrich), initially as National Advertising and Promotions Manager, then as Ontario Sales Manager for the Uniroyal Goodrich sales team, and finally as a Sales Manager in Ontario for the merged Michelin, Uniroyal and Goodrich lines. From 1995 to 2000, Mr. Gauthier was with Bridgestone/Firestone Canada Inc. successively as Director of Sales and Marketing, Vice- President Sales and Marketing, and Senior Vice-President Sales. From 2001, and at the time he testified before the Tribunal, Mr. Gauthier worked as the Sales and Marketing Manager/Vice- President of Retread Division of AI's Tire Service. Mr. Gauthier was found by the Tribunal to be qualified to provide opinion evidence touching upon "the practical application of marketing and retail strategies in the Canadian tire industry and Canadian tire market", "the marketing and sale of original equipment and replacement tires in Canada" and "the structure of the tire market in general in Canada", such expertise being recognized as being in existence as of 1999.

142 While Sears did not challenge Mr. Gauthier's knowledge or expertise, it did object that Mr. Gauthier lacked the necessary independence because he now works for a company that sells tires in Ontario where Sears also sells tires.

143 Without doubt, expert evidence must be seen as the independent product of an expert who is

uninfluenced by the litigation, and an expert should provide independent assistance by objective, unbiased opinion. While Mr. Gauthier's employer does sell tires, Mr. Gauthier testified that he is paid a straight salary without performance bonuses, that he did not know where Sears Auto Centres were located, that, in his time with AI's Tires, no operator of any of its stores cited Sears as a competitor, and that, while he had dealt with some competitive situations (one example being competition from a Canadian Tire store), none of the competitive situations he had dealt with involved Sears.

144 On that evidence, and on the basis of observing how Mr. Gauthier gave his evidence touching on his qualifications, I concluded that Mr. Gauthier had the required independence in order to provide expert testimony. It was, and remains, my view that it is too tenuous for Sears to argue that Mr. Gauthier's testimony would be or was biased or coloured by the potential benefit to his employer of having Sears restricted in the content of its OSP advertising. My assessment of Mr. Gauthier's objectivity did not change, and was reinforced, as I observed his testimony in chief and his later testimony as a rebuttal witness.

145 Sears' expert witnesses were Denis DesRosiers, John Winter, Dr. Kenneth Deal and Professor Michael Trebilcock.

146 Mr. DesRosiers is the President of DesRosiers Automotive Consultants Inc. ("DAC"), an automotive market research and consulting group. The Commissioner argued that Mr. DesRosiers was not qualified to provide expert testimony. After hearing the examination and cross-examination of Mr. DesRosiers upon his qualifications, the Tribunal ordered that Mr. DesRosiers could testify and give opinion evidence touching upon "survey methodology and analysis relating to the Canadian after tire market", but that the Tribunal would reserve its decision as to whether he was properly qualified to give such testimony.

147 In this regard, Mr. DesRosiers worked from 1974 to 1976 doing economic analysis for the Ontario Government related to the automotive sector. From 1976 to 1979, Mr. DesRosiers was the Senior Automotive Industry Analyst with the Economic Policy Branch of the Ministry of Treasury and Economics in Ontario. From 1979 to 1986, he was the Director of Research at the Automotive Parts Manufacturers Association of Canada. In 1985, Mr. DesRosiers started DAC. Since 1989, DAC has conducted annually a "Light Vehicle Study" in which 2,500 people across Canada are surveyed with respect to their automotive maintenance practices. Mr. DesRosiers wrote the original questionnaire used in this survey, with some professional advice as to how to properly ask a question for the purpose of a survey. Mr. DesRosiers testified that he understands the automotive industry "cold" so that he is able to design the "Light Vehicle Survey" and other surveys and to interpret the information collected. The interpretation he personally provides may include complex, strategic reports as to how a client company should respond to the market. Since its inception, DAC has conducted upwards of 200 surveys relating to the automotive sector, and every year, or second year, 3 or 4 tire companies buy tire survey data collected by DAC.

148 Mr. DesRosiers initially provided an expert opinion for the Commissioner in this proceeding but, when the Commissioner decided not to call Mr. DesRosiers, Sears subpoenaed him and later commissioned a second expert report from him.

149 I am satisfied that Mr. DesRosiers' involvement in the automotive sector, and specifically his involvement in the creation of surveys relevant to the automotive market and the interpretation of the results generated, allows Mr. DesRosiers to provide expert advice to the Tribunal based upon his own knowledge of Canadian consumers' buying habits and preferences, relating primarily to the Canadian after market for tires. I am satisfied that Mr. DesRosiers is, on the basis of his experience, a properly qualified expert to opine upon survey methodology and analysis relating to the Canadian automotive industry, and specifically the after market for tires.

150 John Winter is a retail consultant with expertise in advising retailers, institutions and governmental bodies on retail, development and commercial strategies. He has been previously qualified as an expert in these areas and has testified on at least 50 occasions before numerous tribunals, regulatory bodies and the Ontario Court of Justice. The Commissioner conceded that Mr. Winter's qualifications enabled him to provide expert evidence on "issues relating to retailing in Canada, including pricing strategies employed by retailers".

151 Dr. Kenneth Deal is the Chairman of Marketing, Business Policy and International Business in the Michael G. DeGroot School of Business at McMaster University. He is also the President of marketPOWER research inc., a market research company. The Commissioner accepted the qualifications of Dr. Deal to provide expert testimony in the area of "the methodology and conduct of market research surveys and the analysis of data resulting from such surveys".

152 Professor Michael Trebilcock is the Director of the Law and Economics Program, Professor of Law and cross-appointed to the Department of Economics at the University of Toronto. He has written extensively on competition policy, trade and economic regulation during his career. For the past 20 years, he has consulted widely to government and the private sector on matters of competition policy and economic and social regulations. The Commissioner accepted Professor Trebilcock to be qualified to give testimony as an expert on competition policy and economic regulation.

(b) The lay witnesses

153 Each party called 3 lay witnesses. The Commissioner's lay witnesses were Mr. Christian Warren, Mr. Jim King and Mr. William Merkley. Sears called Mr. Paul Cathcart, Mr. Harry McKenna and Mr. William McMahon.

154 Mr. Warren is a Competition Bureau Officer, through whom the Commissioner tendered documents gathered in her investigation.

155 Mr. King was first employed by Bridgestone/Firestone Canada Inc. in October of 1997 as its

Sales Manager for associate brands. In August of 1999, he became the Sales Manager for Corporate Accounts and Original Equipment. The corporate accounts he was responsible for were mass merchandisers such as Sears, Canadian Tire, Costco and Wal-Mart. Mr. King had provided an affidavit in response to an order obtained by the Commissioner under section 11 of the Act which was directed to Bridgestone/Firestone Canada Inc.

156 Mr. Merkley has been employed by Michelin Canada since 1977, and in 1999, he was its National Director of Sales for the Corporate Accounts Group. Mr. Merkley provided an affidavit in response to a section 11 order obtained by the Commissioner directed to Michelin North America (Canada) Inc.

157 Mr. Cathcart has been employed by Sears since 1973. From 1997 through 2000, he served as the Retail Marketing Manager and 190 Service Operations Manager. As such, he was responsible for building a marketing plan for the Tires. At the time he testified, Mr. Cathcart was the Group Operations Manager and Process Improvement Manager for Sears Canada Home and Hardline.

158 Mr. McKenna has been employed by Sears since 1981. From 1998 through to 2000, he was the Category Logistics Manager/Inventory Analyst for the Automotive Department. As such, he was responsible for supporting the buyer in visits to tire manufacturers and other vendors, and was responsible for ensuring the flow of merchandise to Sears Automotive Centres and the maintenance of proper inventory levels. When he testified, he was the Manager of Sales and Promotions for the off-mall channel of Sears.

159 Mr. McMahon has been employed by Sears since 1977. In 1999, he was the Group Retail Marketing Manager of Group 700 - 2 at Sears. As such, he worked with the Corporate Marketing and Advertising Department and the Business Team in order to develop marketing strategies and events for merchandise which included the Tires at issue. At the time he testified, Mr. McMahon was the General Manager of Sears Automotive.

160 Having introduced the witnesses, this may be the most convenient point to provide the Tribunal's reasons for its oral order, given during the course of the hearing, with respect to the Commissioner's request to adduce certain rebuttal evidence.

VI. RULING WITH RESPECT TO NON-EXPERT REBUTTAL EVIDENCE

161 Near the conclusion of the evidence adduced by Sears in response to the Commissioner's allegations, the Commissioner advised Sears that, upon the close of Sears' case, she intended to introduce non-expert rebuttal evidence through Mr. Warren. Sears responded that it objected to such evidence being given and the Tribunal was advised of this dispute. In consequence, the Tribunal directed that the Commissioner serve Sears with a rebuttal will-say statement before Sears closed its case and advised that the Tribunal would hear argument on the issue of the admissibility of the proposed non-expert rebuttal evidence after Sears closed its case when the Commissioner endeavoured to call such evidence.

162 The rebuttal will-say statement was served on Sears on January 27, 2004. On Monday, February 2, 2004 Sears closed its case and the Tribunal then heard submissions as to whether the proposed rebuttal evidence should be received. For reasons to be delivered later in writing, the Tribunal ruled during the hearing that a portion of the proposed rebuttal evidence could be admitted and a portion could not. What follows are the reasons for that ruling.

(i) The proposed rebuttal evidence

163 The Commissioner sought to respond to two portions of the testimony of Mr. Cathcart.

164 The first portion of Mr. Cathcart's testimony which the Commissioner sought to rebut was as follows ("the timing explanation"):

MR. McNAMARA: Turning back to the checkerboards, there has been evidence before the Tribunal that some of the five tires that we are talking about were offered at regular prices for less than 50 per cent of the time, or were offered at sales prices for more than 50 per cent of the time.

I am referring specifically to the RoadHandler T Plus and the Weatherwise tire.

Can you offer any explanation as to why that would have been the case?

And I am talking about 1999, of course.

MR. CATH-
CART: Yes, I can.

About mid-year of 1999 I began to receive communication from the field that when we advertised the Michelin T Plus it was not available in an 80 aspect ratio size. So beginning in about the third quarter, I chose to advertise the Weatherwise, not necessarily at the same price but at the same time as the T Plus.

There were a number of customers who were coming in. We would advertise the Michelin tire, and in our advertising we could not indicate every size that was available in those tires. So they would come into our auto centres expecting to buy a Michelin tire, although if they had an 80 aspect ratio size

requirement we were unable to sell them the AT Plus. It just was not available in that size.

In a response to that, I offered the Weatherwise as a "go to" in the 80 aspect size for our sales associates and our customers.

I knew very well that I would sell some. It certainly wasn't going to be the driving number of tires. Our T Plus would historically outsell the Weatherwise.

What it did was it responded to the customer's request to have a Michelin tire in an 80 aspect ratio when we advertised it. That was my choice, and I did that for that reason.

Second, there was in the fourth quarter of 1999 a situation around service and supply. What I mean by that is on snow tires we would place our orders and stagger our shipments, because on the Bridgestone snow tires they were made in the Orient. So we would have the first shipment arrive in August-September, a second shipment in October and a third shipment in November.

In the fourth quarter of 1999 there were some labour issues in the Orient where we were unable to receive our third shipment, our promotional shipment -- because the deeper you get into that year obviously that is when the promotions start to happen of these snow tires.

We found out very late in the year that we were not going to be able to get them because of labour issues in the Orient.

The problem was I had already booked space, newspaper space, preprint space. These were all completed programs in essence. So even in the preprints, if we were to pull out of there we would in essence be running a company-wide vehicle with a blank page.

What we did was I approached Stan and asked if he would approach Michelin, because they were the only other supplier that could give us a quantity of tires. That was our hope. They did respond and were able to switch the tires,

the snow tire ads to Michelin.

What I mean when I say switch, when we advertise tires we would have a feature item on the page and then we would have sub-features. Historically the feature item, the lion's share of sales were created from that.

But because we had some snow tires in stock from our first and second shipment, we moved the feature item to a sub-feature, being the snow tire, and then featured the Michelin tires. That ran us over frequency in that fourth quarter.

It was purely in response to an offshore issue.

165 The Commissioner proposed to rebut the timing explanation through testimony that the RoadHandler T Plus and the Weatherwise tires were on sale over 50 per cent of the time in each six-month period which preceded every day from July 3, 1999 to December 31, 1999. The Commissioner also sought to introduce into evidence a table entitled "Time Analysis-1999-Substantial Period" which illustrated this.

166 The second portion of Mr. Cathcart's testimony the Commissioner sought to rebut was as follows ("the third week of May advertising and promotions testimony"):

MR. McNAMARA: I would ask you to turn to Tab 9, to the checkerboard for the month of May.

MR. CATHCART: I am there, sir.

MR. McNAMARA: I would ask you to look at the Michelin T Plus tire and the Week 3 time column.

MR. CATHCART: Yes, sir.

MR. McNAMARA: Can you tell us what is going on there.

MR. CATHCART: In Week 3 the Michelin T Plus --

MR. McNAMARA: There is a reference there that says "NP" and then "ALB/BC" and the same thing for the Weatherwise.

MR. CATHCART: Yes. That was referring to a newspaper ad in Alberta and B.C. for those two lines of tires. But it was a newspaper ad only for those two provinces during that week.

MR. McNAMARA: Why was that?

MR. CATHCART: We would have promotions that would differ coast to coast depending on the market and the seasons.

We would have snow tires running in Quebec in a newspaper ad in the fall, where we would have passenger tires in B.C. We wouldn't advertise snow tires in the Lower Mainland of B.C., although in northern B.C. and in Prince George we would have snow tires.

We called them alts. We would alt our advertising, depending on the geographics of the product and of the country, weather and that.

In this time frame we advertised these two tires only in Alberta and B.C. at these prices.

167 The Commissioner proposed to rebut the third week of May advertising and promotions testimony by tendering, through the competition law officer, newspaper proofs and Sears pre-prints and flyers, all relating to the advertising and promotion of tires by Sears during the third week of May, 1999.

(ii) The objection to the rebuttal evidence

168 Sears argued that the proposed rebuttal evidence should not be permitted because:

1. The Commissioner had failed to follow the procedure mandated by the rules of the Tribunal.
2. The proposed evidence was not proper rebuttal evidence.
3. The Commissioner had failed to cross-examine Mr. Cathcart upon that portion of his evidence which the Commissioner sought to rebut.

(iii) The ruling

169 After hearing argument, the Tribunal ruled that the Commissioner would not be permitted to lead rebuttal evidence with respect to the timing explanation, but would be entitled to lead as rebuttal evidence Sears' newspaper proofs, pre-prints and flyers in order to rebut the third week of May advertising and promotions testimony.

(iv) The procedural objection

170 Sears argued that before delivering the rebuttal will-say statement, which was in substance an amended will-say statement of the competition law officer, the Commissioner was obliged to bring a motion for leave to amend her disclosure statement. It was argued that, as the respondent, Sears puts in its case on the basis of the evidence adduced by the Commissioner as disclosed in her disclosure statement and in her rebuttal expert reports. Sears had adduced the bulk of its lay and expert evidence before it learned that the Commissioner sought to adduce rebuttal fact evidence. Requiring the Commissioner to move to amend her disclosure statement in this circumstance was said to be in accordance with the regulatory objectives of the Tribunal's rules, particularly the objective that the Commissioner's investigation be completed and her case be in final form at the time her application is filed with the Tribunal and the objective that the issues be clearly defined at the outset by having them set out in the parties' respective disclosure statements.

171 In my view, the Commissioner was not obliged to move to amend her disclosure statement in order to adduce non-expert rebuttal evidence. The obligation of the Commissioner to file a disclosure statement is contained in section 4.1 of the Competition Tribunal Rules, SOR/94-290 which is as follows:

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).

(2) The disclosure statement shall set out

- (a) a list of the records on which the Commissioner intends to rely;
- (b) the will-say statements of non-expert witnesses; and
- (c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

- (3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).
- (4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.

* * *

4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.

- (2) La déclaration relative à la communication de renseignements comporte :
 - a) la liste des documents sur lesquels le commissaire entend se fonder;
 - b) un sommaire de la déposition des témoins non experts;
 - c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.
- (3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.
- (4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

172 The obligation to apply for leave to amend the Commissioner's disclosure statement is contained in subsection 4.1(3) of the Competition Tribunal Rules which provides that leave shall be sought where "new information that is relevant to the issues in the application arises before the hearing" [underlining added].

173 The parallel obligation upon a respondent to file a disclosure statement is contained in section 5.1 of the Competition Tribunal Rules, which similarly provides that the obligation to apply for leave to amend the disclosure statement arises when new information arises before the hearing.

174 Together, these rules function to ensure that, prior to the commencement of the hearing, each side knows both the documents and the factual, non-expert testimony upon which the opposite side intends to rely. Section 47 of the Competition Tribunal Rules operates to ensure that, prior to the commencement of the hearing, each side knows the expert testimony the opposite party intends to rely upon, including any expert rebuttal evidence.

175 With respect to non-expert rebuttal evidence, as discussed in more detail below, as a matter of law an applicant may only call rebuttal evidence after completion of the respondent's case where the respondent has raised some new matter which the applicant had no opportunity to deal with and which the applicant could not reasonably have anticipated. The fact that the need for rebuttal evidence becomes apparent only after the Commissioner has closed her case makes it inappropriate, in my view, to require amendment of the applicant Commissioner's disclosure statement.

176 Instead, in my view, the right of the Commissioner to adduce rebuttal evidence is properly governed by application of the common-law rules governing rebuttal evidence.

177 Further, in the present case the Tribunal's direction that the Commissioner serve Sears with a rebuttal will-say statement prior to Sears closing its case prevented any element of improper surprise or prejudice to Sears. In my view it does not follow, however, that in another case the failure to provide such a will-say statement on a timely basis would, by itself, preclude calling what would otherwise be proper rebuttal evidence.

(v) Applicable principles of law with respect to rebuttal evidence

178 The general principles applicable to rebuttal evidence were set out by Mr. Justice McIntyre for the Supreme Court of Canada in *R. v. Krause*, [1986] 2 S.C.R. 466 at paragraphs 15, 16 and 17. There, Mr. Justice McIntyre wrote:

15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster

the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page 74] the full case for the Crown so that it is known from the outset what must be met in response.

16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. [underlining added]

179 In *Halford v. Seed Hawk Inc.*, 2003 FCT 141; 24 C.P.R. (4th) 220 Mr. Justice Pelletier, then sitting in what was the Trial Division of the Federal Court, re-stated the principles governing the admissibility of rebuttal evidence. At paragraph 16, Mr. Justice Pelletier noted that evidence, which otherwise would be excluded because it should have been led as part of a plaintiff's case in chief, would nonetheless be examined in order to determine if it should be admitted in the exercise of the judge's discretion.

180 Similarly, in *DRG v. Datafile Ltd.* (1987), 16 C.P.R. (3d) 155 (F.C.T.) Mr. Justice McNair observed that a judge has discretion to admit further confirmatory evidence in rebuttal either for the judge's own enlightenment or where the interests of justice require it.

(vi) Proposed rebuttal of the timing explanation

181 Turning to the application of these principles to the proposed evidence, the nature of the proposed rebuttal evidence with respect to the timing explanation did not purport to contradict Mr. Cathcart's evidence that there was an issue in the last half of 1999 with respect to the availability of Michelin tires in an 80 aspect ratio size. Nor did it directly contradict his evidence that in the last quarter of 1999 there were labour issues which prevented Sears from receiving a promotional shipment. Rather, the Commissioner sought to adduce evidence with respect to the frequency with which RoadHandler T Plus and Weatherwise tires were on sale in the first two quarters of 1999 in order to attack Mr. Cathcart's conclusion that, in the last half of 1999, those tires were offered at sale prices for more than 50 per cent of the time because of the 80 aspect ratio size issue and the labour issues.

182 With respect to the length of time tires were offered at sale prices, it is an essential element of the Commissioner's case to establish that Sears did not offer the Tires at the regular single unit price in good faith for substantial period of time recently before or immediately after making the representations in issue. The parties substantially agreed about the volume of tires sold by Sears both in the six months preceding the representations and in the 12 months preceding the representations. As part of her case the Commissioner adduced evidence (see for example Exhibits A-97 and CA98 - 102) with respect to the period of time each relevant tire was on sale.

183 The evidence which the Commissioner wished to adduce in rebuttal was described by counsel for the Commissioner as an analysis of that data. Counsel further advised that there was "admittedly some overlap between what is on the record" and the proposed evidence, but stated that there "is added value [in the rebuttal evidence] in the sense that it explains and articulates in greater detail, significantly greater detail, what is, in a sense, beneath the documents that are now [in evidence]". Counsel for the Commissioner also noted that more evidence had not been adduced by the Commissioner in chief because of the agreement between the parties as to the volume of tires sold and the times the Tires were on promotion.

184 In my view, the nature of the evidence which the Commissioner proposed to call to rebut the timing explanation is the type of evidence which should not be permitted as rebuttal evidence. When calling evidence in chief, the Commissioner was obliged to exhaust her evidence with respect to the length of time that the Tires were offered at sale prices. She ought not split her case by relying on some evidence with respect to when the Tires were on sale and closing her case, and then after Sears adduces evidence, seek to introduce further evidence confirming the time the Tires were offered for sale at sale prices.

185 To the extent that there is, or may be, a discretion to allow confirmatory evidence in rebuttal, there is one significant factor which militates against the exercise of such discretion. That factor is the failure of the Commissioner to cross-examine Mr. Cathcart upon the evidence which the Commissioner sought to rebut. If the Commissioner sought to contradict Mr. Cathcart's testimony,

fairness required that he be cross-examined on his testimony so that he could provide any available explanation.

- (vii) Proposed rebuttal of the third week of May advertising and promotions testimony

186 The representations at issue in this application were made in November and December of 1999. Whether two lines of tires were promoted as being on sale only in Alberta and British Columbia in the third week of May of 1999 is relevant to the issue of the appropriate geographic market. As noted below, the Commissioner asserts that Sears marketed its tires nationally, while Sears asserts that it marketed tires in local, geographic markets.

187 In its pleading, Sears asserts that:

56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
57. Generally, there were no regional variations in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.

[...]

59. Sears Automotive offered the Tires for sale at the same prices in each specific market area in which a Retail Automotive Centre competed.

188 I am satisfied that, on the state of its pleading where Sears admitted that generally there were no regional variations in its advertisements, it was not incumbent upon the Commissioner to lead evidence as part of her own case with respect to the advertisement and promotion of two specific lines of tires in the third week of May, 1999. Further, the Commissioner argued, and Sears did not dispute, that there was nothing in the will-say statement of Mr. Cathcart to suggest that the Commissioner ought to have reasonably anticipated that the advertising and promotion of two lines of tires in the third week of May would be disputatious. Thus, subject to one concern addressed in the next paragraph, I was satisfied that rebuttal evidence ought to be received on this issue in order to ensure that, at the end of the hearing, each party would have the same opportunity to hear and respond to the full case of the other.

189 The one remaining concern arose from the failure of the Commissioner to cross-examine Mr. Cathcart upon his evidence that the two specific tire lines were only advertised on sale in Alberta and British Columbia and that different promotions were offered during that week. This concern

arose because the rule in *Browne v. Dunn* (1893), 6 R 67 at pages 70-71 requires that where a party intends to contradict an opponent's witness by presenting contradictory evidence, such evidence should be put to the witness. It is unfair to a witness for a court or tribunal to receive evidence that casts doubt on his or her veracity when the witness has not been given an opportunity to deal with the contradictory evidence and offer any explanation. Requiring that a witness be challenged with contradictory evidence also assists the trier of fact in the process of weighing the evidence.

190 I have no doubt that the Commissioner ought to have put the newspaper proofs, pre-prints and flyers she sought leave to adduce as rebuttal evidence to Mr. Cathcart when he was cross-examined.

191 Notwithstanding, the failure to comply with the rule in *Browne v. Dunn* is not necessarily determinative of the right to tender contradictory evidence. The extent and manner to which the rule is applied is to be determined by the trier of fact in light of all of the circumstances. See, for example, *Palmer v. R.*, [1980] 1 S.C.R. 759 at pp. 781-72.

192 In the present case, the circumstances which I considered to be significant with respect to this rebuttal evidence are the nature of the rebuttal evidence (Sears' own advertising material) and the fact that the documents were disclosed in both parties' disclosure statements. In my view allowing Sears' own advertising documents, previously disclosed in this proceeding, to be tendered would not be prejudicial to Sears, would clarify testimony which was somewhat unclear, and would be in the interests of justice.

193 For these reasons, the Commissioner was permitted to introduce into evidence the newspaper proofs, pre-prints and flyers relating to the third week of May, 1999.

VII. ANALYSIS OF THE ISSUES

194 As discussed above, subsection 74.01(3) of the Act specifies two factors to be considered when applying the volume and the time tests. Therefore, before considering whether Sears' regular prices for the Tires were offered in good faith as required by the time test, one must consider the nature of the product and the relevant geographic market.

VIII. THE NATURE OF THE PRODUCT

195 The Commissioner argues that the Tires have certain characteristics that are relevant to the analysis under subsection 74.01(3). Those characteristics are said to be:

- i) Almost all tires are sold in multiples.
- ii) Tire sales are fairly stable over time.
- iii) Consumers do not spend much time searching for tires or evaluating alternative products.
- iv) Consumers have a limited ability to evaluate the intrinsic qualities of tires.

v) Consumers engage in a passive search over time for tires.

196 Each factor will be considered in turn.

(i) How tires are sold

197 Tires are complementary goods in the sense that, for passenger cars, one tire must be used with three others. The following, in my view uncontroversial, facts flow from this:

- Tires are typically purchased in pairs, either one pair or two pairs at a time.

Mr. DesRosiers expert report, paragraph 13 Mr. Gauthier expert report, paragraph 38

- Survey data showed that in 1999, 89% of consumers purchased either two or four tires at the same time.

Mr. DesRosiers expert report, paragraph 13

- Within the tire industry, at most, between 5% and 10% of tires are sold singly.

Mr. Gauthier expert report, paragraph 38

- In 1999, Sears knew that it would sell between 5% and 10% of the Tires as single units.

Mr. Cathcart, volume 14 at page 2486

- Consumers purchase a single tire for reasons that include tire failure (due to blow out, road hazard or defect) and the replacement of a space saver (or dummy) spare tire.

Mr. DesRosiers expert report, paragraph 15 Mr. McKenna, volume 19 page 3055 Mr. Merkley, volume 10 page 1713

- Consumers who purchase single tires are typically constrained to purchase a model of tire that matches the tire which is on the same axle because, for safe handling, it is important to maintain the same traction capability on the axle.

Dr. Lichtenstein expert report, paragraph 17 Mr. Gauthier expert report, paragraph 38

- Where a tire is to be replaced due to a blow out or other damage, there may be a sense of urgency about replacing the tire.

Mr. McKenna, volume 19, page 3055 Dr. Lichtenstein expert report, paragraph 17.

(ii) Are tire sales stable over time?

198 Dr. Lichtenstein testified that:

- by their nature, sales of "all-season" tires (such as those at issue) are less sensitive to seasonal variation.

expert report paragraph 21

- tires are not a product category which people typically buy in advance to stockpile.

expert report paragraphs 18 and 19

- while a sale price may pull a consumer into the market sooner than they would otherwise enter the market, a sale price will not lead to increased tire consumption.

expert report paragraphs 18 and 19.

199 This evidence was essentially unchallenged and I accept it.

200 At the same time, as Dr. Lichtenstein acknowledged, there is an increase in tire sales in the

Spring and Fall seasons. Mr. McKenna described this as a moderate increase in March, April and May, and a more dramatic shift in October and November.

201 Mr. Winter also described a distinctive seasonal pattern based upon his analysis of Sears' retail daily tire sales data and from an analysis of a monthly retail trade survey conducted by Statistics Canada. It is important to note, however, that Mr. Winter's analysis of Sears' daily tire sales data included data with respect to the sale of winter tires, and that the Statistics Canada survey was based upon sales of tires, batteries, parts and accessories. Mr. Winter agreed that the sale of winter tires is more seasonal and he did not know if batteries exhibit a seasonal selling pattern. In consequence, while I accept Mr. Winter's evidence generally that tire sales increase in the Spring and Fall, I am concerned that his conclusion as to the magnitude of the fluctuation is flawed because it included data related to winter tires and non-tire products.

202 On the whole, from all of this, I find that the sales of all-season tires are relatively stable and predictable, with some predictable seasonal pattern.

(iii) Do consumers spend much time searching for tires or evaluating alternate products?

203 In asserting that consumers do not spend much time searching for tires or evaluating alternatives, the Commissioner relies upon the evidence of Dr. Lichtenstein. Dr. Lichtenstein testified that consumers spend different amounts of time and effort searching for products, considering brand alternatives and comparing prices, depending on the nature of the item to be purchased. He said that items described as "convenience goods" are found at one end of a continuum and their purchases involve relatively little investigation. The purchase of "specialty goods", which are found at the other end of the continuum, involves a great deal of investigation. He describes tires as "shopping goods" and says that they fall at the mid-point of the continuum. This means, in his opinion, that many consumers of "shopping goods" have a pre-disposition for low levels of search and effort which means that a large number of consumers are not vigilant shoppers even when the shopping goods are expensive.

204 Sears rejects this opinion and asserts that the best evidence on this point is that of Mr. DesRosiers and Dr. Deal. In Mr. DesRosiers' opinion, there is a significant opportunity for consumers to shop around for tire replacements. From August 27, 2003 to September 3, 2003, Dr. Deal surveyed Sears' customers who bought new replacement tires from Sears in 1999 in order to: survey their behaviour when buying tires in 1999 from Sears and when buying tires in general; determine their attitude toward purchasing tires; and, assess their perception of value of the 1999 tire purchases, their satisfaction with their purchases and their intention to consider Sears for future tire purchases. Dr. Deal's survey found that 57% of survey respondents said that they compared tire prices prior to purchasing their tires at Sears.

205 I do not find Mr. DesRosiers' evidence to be of assistance on this point because the research he relied upon did not examine whether consumers actually exercised any opportunity available to

them to shop around.

206 When I compare the evidence of Drs. Lichtenstein and Deal, I am not satisfied that their evidence is that divergent. Dr. Lichtenstein does not quantify the proportion of consumers who, in his view, engage in a low level of search effort for goods such as tires. Dr. Deal's study would suggest that 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears.

207 Dr. Deal's study results must, in my view, be approached with some caution for the following reasons. At the time Dr. Deal conducted his survey and swore his first expert affidavit, he believed that the persons surveyed were selected from among all the persons who bought the Tires in 1999. Put another way, the target population intended to be surveyed was consumers from all 67 Sears Retail Automotive Centres and Dr. Deal assumed that he had received data from all or almost all of the centres. By "all or almost all" of the centres, Dr. Deal believed he had received data from 90 to 95% of the Sears stores that sold the Tires. Dr. Deal later became aware that he had only received data from the 28 stores that kept electronic records. Thus, the survey was not based upon a random probability sample of purchasers from all 67 Retail Automotive Centres.

208 Dr. Deal agreed that results based upon non-probability sampling were less generalizable to the parent population but observed that sometimes one does obtain an accurate representation of the target population even when one does not abide by the strict rules of statistical inference and takes a non-random sample.

209 In the present case, Dr. Deal did not undertake a formal analysis to determine whether the customers from the 28 stores were similar to or different from the customers of the other 39 stores (although such an analysis could have been performed). In his view, based upon a large number of other surveys he has done, there would not likely be significant differences between the customers. Thus, while, pursuant to principles of statistics, his survey would have to be limited to be representative of Sears' customers who bought tires in 1999 from the 28 stores for which he received records, in Dr. Deal's view, the findings between the 28 stores and the other 39 stores would not be significantly different.

210 Obviously, the fact that the data provided to Dr. Deal emanated from only 28 of the 67 stores (and not from all or almost all of the stores) impairs the ability of Dr. Deal to scientifically generalize the survey results. I accept, however, his general expertise to provide an opinion as to whether it was more or less likely that the survey results would have been different had consumers from all, or almost all, of the Sears stores that sold the Tires been included as part of the target sample.

211 Thus, while I approach Dr. Deal's survey results with caution, and am prepared to accept that the overall accuracy of the survey's findings may not be accurate within plus or minus four percentage points in 19 out of 20 samples, I do generally accept Dr. Deal's conclusions.

212 I am therefore satisfied by the evidence of Drs. Lichtenstein and Deal that a very significant percentage of consumers, in the order of 42% (plus or minus at least 4%), do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores.

(iv) Do consumers have a limited ability to evaluate the intrinsic qualities of tires?

213 The intrinsic attributes of tires are their physical attributes such as tread pattern and tire construction. It was Dr. Lichtenstein's opinion that most consumers do not have the ability to evaluate the quality of tires based on their intrinsic attributes. His opinion was based upon his experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. He believed that he could reasonably generalize that experience to tires. His opinion was also supported, in his view, by reference to the evidence of both Mr. Cathcart (given during his examination conducted under section 12 of the Act) and Mr. McMahon (given in his affidavit filed pursuant to section 11 of the Act).

214 Mr. McMahon explained in his affidavit how Sears set its prices for its private label and flag brand tires. Flag brand tires are tires made by a manufacturer whose name appears on the sidewall of the tire (for example, the BF Goodrich Plus). A private label tire does not show the name of the manufacturer, but only shows the trade name owned by the retailer (for example, Silverguard Ultra IV and Response RST Touring). A tire is dual branded when it bears both the name of the manufacturer and the retailer's private name (for example, Michelin Weatherwise and Michelin RoadHandler T Plus). In the context of describing how private label prices were set, Mr. McMahon swore that:

251. For example, Sears Automotive compared its "BF Goodrich Plus" Relevant Product with [CONFIDENTIAL] "[CONFIDENTIAL]" tire. The BF Goodrich Plus tire was superior to the [CONFIDENTIAL] tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than [CONFIDENTIAL] for the inferior [CONFIDENTIAL] tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of [CONFIDENTIAL] tire.

215 During Mr. Cathcart's examination, he confirmed that what had happened with the BF Goodrich Plus was that, even though Sears perceived, and he believed, the tire to be a superior tire to the comparable Canadian Tire offering, consumers were unable to perceive the qualities that justified the greater price for the superior tire.

216 Mr. Cathcart also diminished the importance of needing to refresh Sears' tire product line, stating that people would not stop shopping because Sears was selling the same lines of tires. In Mr. Cathcart's words, "In tires, it -- -- you know, they are black and they are round, and there is not a lot of exciting tires". This is consistent with the view that consumers have a limited ability to evaluate tire's intrinsic qualities.

217 In my view, Sears did not seriously impeach Dr. Lichtenstein's opinion as to the ability of consumers to evaluate tire quality for money based on the intrinsic qualities of the tire. Supported as it was by the evidence of Messrs. McMahon and Cathcart where they referred to Sears' own experience that consumers were unable to appreciate the intrinsic qualities of a specific tire and therefore compare true value for money, I accept Dr. Lichtenstein's opinion that consumers have a limited ability to evaluate the intrinsic attributes of tires.

218 Before leaving this point, I also note that Sears tendered as an exhibit its Fall 2000 Automotive Review. When describing Sears' private label or brand structure, the Review described the assortment as "A quality private Brand structure that is totally Sears, allowing little comparison with competitor product". For this to be true, Sears must have been of the view that consumers lack the ability to assess the intrinsic qualities of non-identical tires.

(v) Do consumers engage in a passive search over time for tires?

219 Dr. Lichtenstein opined that tires are usually replaced only when a consumer's existing tires become worn so that, except for the case of the purchase of a single tire, the timing of new tire purchases occurs on a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Dr. Lichtenstein further opined that as consumers notice that their tires are becoming worn, they would likely go into a passive search mode during which they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

220 This opinion was not challenged and I accept it.

IX. RELEVANT GEOGRAPHIC MARKET

221 Subsection 74.01(3) requires the Tribunal to have regard to the relevant geographic market when applying the time and volume tests. While the Commissioner asserts that the relevant geographic market for assessing the representation is Canada, Sears argues that, in the retail tire business, competition occurs at the local level so that the geographic market should be defined on no more than a regional basis.

222 In support of this argument, Sears relies upon the evidence of a number of witnesses that, in 1999, the Canadian after tire market was highly competitive, with various channels of distribution, and the competitive nature of the after tire market varied across the country. Sears also relies upon the expert opinion of Professor Trebilcock to the effect that markets are more appropriately determined by considering the alternatives available to consumers, or by adopting a demand-side perspective. By asking what range of choices any given consumer would consider he or she had available to them, Professor Trebilcock concluded that the relevant geographic market for tires is a local, regional market. The analysis that led to this conclusion was based upon: a review of regional newspaper advertising that showed that the list of tire retailers is very different from one city to the next; a review of yellow pages listings for tire retailers in different regions which showed that retailers differed radically from one market to another; the DesRosiers' tire market study which

showed that independent tire retailers are the most common source of tires and those retailers varied dramatically from one local market to the next; and information from Bridgestone/Firestone and Michelin that shows that the top dealers to vary significantly from one region to the next. Thus, the question of "where can I go to buy tires" is answered differently from one local market to the next.

223 In considering the interpretation to be given to the term "relevant geographic market", I begin from the premise that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

224 I have previously found, at paragraph 93, that the objectives of subsection 74.01(3) are: to protect consumers from deceptive OSP representations; to protect businesses from the anti-competitive effects of such misrepresentations; and to protect competition from the anti-competitive effects and inefficiencies that result from such misrepresentations. The provision is designed to effect those objectives on the basis that, if acting in good faith, meeting the time or volume test will bring retailer practices in line with consumer expectations that an advertised OSP would relate to the seller's own ordinary selling price. The time and volume tests are to be applied having regard to the relevant geographic market.

225 In light of the objectives of the provision, it is relevant to look at where Sears marketed the Tires and how Sears marketed the Tires in that geographic area so as to inform the view of whether an advertised OSP was really Sears' ordinary selling price. Because this is a misleading advertising case in which it is Sears' conduct that is at issue, I do not find, with respect, that Professor Trebilcock's traditional competition law approach to the definition of geographic market is relevant.

226 In the traditional competition law context, geographic markets are defined as part of a determination about whether there has been a substantial lessening of competition. Dr. Trebilcock agreed, on cross-examination, that the concept of substantial lessening of competition is not relevant to the assessment of whether a representation is misleading.

227 Turning to Sears' own conduct, I find the following to be relevant to the determination of the relevant geographic market:

- Sears' regular and promotional prices were set on a national basis without regional variation;
- Sears' internal documents, particularly its Spring and Fall Automotive Reviews, contained no discussion relating to local markets. These reviews were produced twice a year in order to present Sears' marketing strategy and tire product line to Sears' Chief Executive Officer and other executive officers;
- Sears did not produce or distribute separate marketing and promotional material for each region (with the exception of material relating to snow tires);

- The representations in issue were contained in flyers that were distributed nationally, without regional variation;
- Sears published advertisements in newspapers and there was no regional variation in the advertisements, except with respect to snow tires. The advertisements were distributed nationally through different newspapers;
- Sears tracked its pre-print distribution rates on a national basis; it could not track pre- prints on a regional basis;
- Sears determined what tires to offer for sale in a Sears' pre-print based upon factors which included "the current market trends and consumer preferences in Canada with respect to the sale of tires" [underlining added];
- Mr. Cathcart created "checkerboards" to, among other things, monitor the frequency with which tires were on promotion. Those checkerboards tracked sales volumes and promotional periods on a national basis only.

228 In light of that evidence as to how Sears priced and marketed the Tires, and, in particular, that the regular prices for the Tires were set and advertised on a national basis, I find that it is most appropriate to consider Sears' compliance with the time test in the context of a geographic market that is Canada.

229 This was also the conclusion reached by Drs. Lichtenstein and Moorthy.

230 Having considered the nature of the product and the relevant geographic market, I turn to consider whether Sears' regular prices for the Tires were offered in good faith as required by the time test.

X. GOOD FAITH AS REQUIRED BY THE TIME TEST

231 The Commissioner observes that the Act does not define "good faith", there are no other provisions in the Act that use the phrase, and there is no Canadian jurisprudence that has considered the concept of "good faith" in the context of OSP representations. There is, however, Canadian jurisprudence, which the Commissioner relies upon, which has considered the meaning of "good faith" in other legislative contexts.

(i) The subjective nature of "good faith"

232 In *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271, the British Columbia Court of Appeal considered whether a Crown employee was exempt from civil liability by virtue of legislation which exempted liability "for anything done or omitted to be done by a person acting reasonably and in good faith" while discharging certain responsibilities. The British Columbia Court of Appeal noted that the leading Supreme Court of Canada authority was *Chaput v. Romain*, [1955] S.C.R. 834 where the Supreme Court considered a provision that immunized police officers from liability where the officer exceeds his powers or jurisdiction but acts "in good faith in

the execution of his duty". Mr. Justice Taschereau defined "good faith" to be "a state of mind consisting of the false belief that one's actions are in accordance with the law". Six judges of the Court adopted this definition. Mr. Justice Kellock, with Mr. Justice Rand concurring, wrote at page 856 that:

What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did.

233 Having reviewed this jurisprudence, the British Columbia Court of Appeal concluded, at paragraph 69, that:

69 Kellock J.'s formulation clearly tends towards a subjective understanding of honest belief, but Taschereau J.'s formulation removes all doubt. There is good faith when there is "a state of mind" that the acts are authorized. Kellock J.'s reasons give content to what this "state of mind" is: a "belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did." As was noted in Hermann, the reasonableness of the belief is a factor to consider in determining whether the belief was honestly held, but reasonableness is not the issue.

234 To similar effect is the recent decision of the Saskatchewan Court of Queen's Bench in *Nelson v. Saskatchewan* (2003), 235 Sask. R. 250 at paragraphs 102-109.

235 The principle that good faith is inherently subjective is consistent with its dictionary definition. *Black's Law Dictionary*, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as follows:

good faith, n. A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. - Also termed bona fides. - good-faith, adj. Cf. BAD FAITH.

236 A subjective view of good faith is also consistent with American jurisprudence that has considered legislative provisions similar to subsection 74.01(3) of the Act. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 76 F. Supp. 2d 868 (N.D. Ill. 1999) the U.S. District Court had before it a regulatory provision that provided:

It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, [...] unless one of the following criteria is met:

- (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
- (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s). [underlining added]

237 The Court found that the defendant Finlay did not, in good faith, intend to sell the relevant products at the regular price because:

Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in fact, intentionally chose not to monitor information of the number of gold jewelry items sold on a given day and at what price. Finlay calculates the regular and sale prices of its gold jewelry simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.

238 Implicit in that finding is that the existence of a good faith intent to sell product is determined subjectively.

239 I conclude therefore that good faith is to be determined on a subjective basis. In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and bona fide prices, set with the expectation that the market would validate those regular prices. As noted by the Court in *Dorman*, supra, the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether Sears truly believed its regular prices were genuine and bona fide.

240 I believe this conclusion to be consistent with the description found in the Commissioner's Guidelines concerning the assessment of good faith in the context of the time test.

241 I also understand Sears generally to accept that good faith is subjective. In oral argument, counsel for Sears observed that:

The bottom line is that the Competition Bureau's Guidelines, the Commissioner's Guidelines, tell us that the analysis of good faith is going to be broadly based and will have regard for market conditions, not only those things perhaps, but those things will certainly be part of the mix. And the reason for that, in my submission, is - - the reason for that approach, I think, is obvious. If

there is no direct evidence of a subjective belief or ambivalent evidence of a subjective belief, or unclear evidence of a subjective belief, the Court will obviously refer to objective factors, or extrinsic factors which constitute evidence or can constitute evidence of the reasonableness of a subjective belief. [volume 30, page 4811 line 23 to page 4812 line 10, underlining added]

242 Counsel for Sears framed the question to be determined as follows:

The only issue, in our submission, for Your Honour to decide is whether Sears reasonably expected to sell single tires at its regular single tire price and whether [it set] those prices in an intelligent manner, having regard to the regular prices of similar tires in the marketplace.

243 However, the latter part of counsel's formulation is more objective. Shortly thereafter, counsel for Sears argued:

In our submission, at the end of the day a good faith regular price is one which is reasonably credible and by that I mean looked at through the eyes of a reasonable person, is credible given market conditions and is recognized as such by the market. And we submit that the Sears regular price clearly meets this definition.

244 Sears cited no jurisprudence relevant to determining the nature of good faith.

245 I remain satisfied, however, in spite of Sears' submissions about the reasonable person, that good faith is to be assessed on a subjective basis. I now move to consider the relevant evidence.

(ii) Sears' internal documents

246 The Commissioner placed into evidence a number of documents provided by Sears to the Commissioner in response to a section 11 order. Documents that are particularly relevant to the assessment of good faith are:

- a) Sears' competitive profiles for each of the Tires in issue; and
- b) Sears' Automotive Reviews for the Spring and Fall of 1999.

247 Section 69 of the Act provides that:

69(1) In this section, "agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

69(1) "participant" means any person against whom proceedings have been

instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

69(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

- (a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
- (b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and
- (c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
 - (i) that the participant had knowledge of the record and its contents,
 - (ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
 - (iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant. [underlining added]

* * *

69(1) Les définitions qui suivent s'appliquent au présent article. "agent d'un participant" Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant.

69(1) "participant" Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction.

69(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :

- a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;
- b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;
- c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :
 - (i) que le participant connaissait le document et son contenu,
 - (ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,
 - (iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant. [Le souligné est de moi.]

248 Sears concedes that all of the elements of subsection 69(2) of the Act are met but argues, correctly, that section 69 creates a limited, and rebuttable presumption to be applied to its documents and, in the case of paragraph 69(2)(c), the reference to prima facie proof speaks to proof absent credible evidence to the contrary.

249 I accept that, as submitted by Sears, it is for the Tribunal to interpret Sears' documents and to

determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.

250 This means, I believe, that Sears' documents tendered in evidence are properly before the Tribunal and are prima facie proof that Sears said, did and agreed to the matters set out in the documents. For example, to the extent the automotive review sets out marketing strategies prepared by Mr. Cathcart and Sears' tire buyer, Mr. Keith, to be presented to Sears' chief executive officer for approval or ratification, the document is prima facie proof that such strategies were agreed upon to be presented to Sears' chief executive officer and that the Spring and Fall 1999 automotive reviews set out Sears' assessment of its significant competition and its responsive marketing strategy.

251 To further illustrate, the Commissioner relies upon the buying plans prepared by the late Stan Keith, Sears' tire buyer, for the relevant period. The Commissioner argues that the year 2000 buying plans, created on June 19, 2000, and based on 1999 data for the Tires, did not forecast any sales at Sears' regular prices.

252 It is true that the documents appear to be premised on the assumption that (based upon 1999 sales data) 10% of the Tires in each tire line would be sold at the 2For price and 90% would be sold on promotion. However, the Tribunal received credible evidence from Mr. McKenna that touched upon the interpretation to be given to the buying plans.

253 Mr. McKenna identified "R & P Reports" which reported upon the regular and promotional sales of each line of a tire by month for 1999. The documents were tendered and received as exhibit CR-133 without objection. Mr. McKenna advised that he would receive this type of report on a monthly basis, as would Mr. Keith. Reviewing exhibit CR-133, Mr. McKenna testified that the breakdown between regular sales and 2For sales on the one hand, and promotional sales on the other, was as follows:

| Tire Line | Regular and 2For Sales | Promotional Sales |
|----------------------|------------------------|-------------------|
| BF Goodrich Plus | 20-25% | 75-80% |
| Michelin RoadHandler | | |
| T Plus | 25% | 75% |

The R & P Reports (to the extent they are wholly legible) reflect the following percentages for the remaining three tire lines:

| Tire Line | Regular and 2For Sales | Promotional Sales |
|----------------------|------------------------|-------------------|
| Michelin Weatherwise | 13% | 87% |
| Response RST Touring | 20% | 80% |
| Silverguard Ultra IV | 23% | 77% |

254 Turning then to the buying plans relied upon by the Commissioner, Mr. McKenna testified that he considered the buying plans with Mr. Keith in 2000 and that they were prepared in June 2000 as Mr. Keith prepared for the Fall presentation to Sears' chief executive officer. The buying plans, according to Mr. McKenna, were used to generate a conservative estimate of margin because "Stanley certainly was not one to want to position himself on being unable to deliver so he wouldn't [...] pigeon-hole himself on promising or committing to a margin that he wouldn't be able to deliver".

255 Considering Mr. McKenna's explanation of the purpose of the buying plans, supported by the "R & P Reports" that showed the buying plans not to be based upon actual prior sales data, I am satisfied that Sears has provided credible evidence to displace any prima facie proof based upon the buying plans that Sears was not forecasting sales at its regular, single unit, prices.

(iii) The competitive profiles

256 Mr. Keith was acknowledged within Sears as "the expert" with respect to the tire market in Canada and tire pricing. Mr. Cathcart acknowledged that Mr. Keith "most certainly" knew the tire market better than he did and that, arguably, Mr. Keith knew the tire market better than the manufacturer's representatives from whom he bought tires. As the tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

257 One document prepared for each tire line was a "competitive profile" which compared, for each tire, Sears' pricing at the 2For, normal promotional and great item prices, with a competitive tire offering identified by Mr. Keith. No comparison was made in these competitive profiles to Sears regular prices. To illustrate, the competitive profile for the Silverguard Ultra IV compared it with Canadian Tire's Motomaster Touring LXR tire. For tire size P185/75R14, Canadian Tire's every day low price was \$67.99. Sears' prices and the percentage comparisons with the competitive offering were as follows for this tire size:

| Price | Percentage price comparison to competitive tire |
|------------------|---|
| Regular \$109.99 | no comparison |

| | | |
|-------------|----------|---------|
| 2For | \$ 72.99 | 107.35% |
| Promotional | \$ 65.99 | 97.06% |
| Great Item | \$ 59.99 | 88.23% |

258 The Commissioner argues that Mr. Keith created these competitive profiles as he built Sears' tire line structure and that they evinced Sears' competitive response to what it identified as its major competitor. Because Sears' regular, single unit, price formed no part of the competitive response, the Commissioner submits that Sears could not have in good faith believed that the market would validate its regular, single unit, prices.

259 In response, Sears argues that the competitive profiles are contained in a document entitled "1999 Automotive Training Program" and that the program and the competitive profiles contained therein were prepared by Mr. Keith to explain to Sears' field associates Sears' tire lines and its pricing strategies. The competitive profiles were not intended to show how the regular price stood up against the broad range of retailers, but rather to show how Sears would respond to competition from both EDLP and hi-low retailers.

260 I do not accept Sears' submission that the competitive profiles were simply training tools on the basis of this excerpt from the cross-examination of Mr. Cathcart wherein he was speaking about the competitive profiles:

We have some comparisons where he has shown the AW+ to a Sears brand, and he would compare. The comparison was built to inform the associates how to respond to the Canadian Tire pricing.

So he would pick a Canadian Tire tire -- he could use one of their tires -- as a compare to say we are at this price in our tire, with a far better warranty package. And this is what Canadian Tire will be offering for the tire that closely resembles our tire.

These documents were his documents that he used as a response to our field people to inform them on how to respond to the competition, be it Canadian Tire, be it dealers, whomever.

He would never reference regular price in them, because they already knew the regular prices. They would have that information.

2:30 p.m.

MR. SYME: So is it your evidence, sir, that these were prepared solely to take on training missions, these cross-Canada training missions?

MR. CATHCART: Well, they are his documents, Mr. Syme. I recall them being in this cross-country package, but Stan - - Stan would create these documents as part of his own comparer during his line structure building and he would use these documents as part of the training package.

He would take those - - he would build these documents as he would build his lines because we would have to have - - he would have to have some sort of strategy in response to what the competition is doing. Canadian Tire, by sheer volumes, was our largest competitor - -

MR. SYME: Right.

MR. CATHCART: - - so he would build them for that. He would take them on the training mission, but I can't for sure say - - no, I would say he didn't build them specifically just for that reason.

MR. SYME: He built them as a competitive analysis to position Sears pricing and Sears product opposite the comparable Canadian Tire product. I think you have just said it.

MR. CATHCART: Right. He would build it to compare our product to Canadian Tire's product, but we know the pricing - - and the pricing would reflect that.

MR. SYME: Right. And he would come to you with a proposal with respect to a tire and he would show you these profiles, wouldn't he?

MR. CATHCART: Not usually. He would just provide me with the buying plan.

[underlining added]

261 From this, I conclude that the competitive profiles were used by Mr. Keith when building Sears' tire line structure. At the least, the competitive profiles indicate Sears' knowledge that:

- i) With respect to the BF Goodrich Plus, Silverguard Ultra IV, and RST Touring 2000 (which were compared with competitive Canadian Tire offerings), the regular price was not competitive with the prices of Sears' largest competitor; and
- ii) With respect to the Weatherwise and RoadHandler T Plus, the regular price was not competitive with the comparable competitive offerings selected by Mr. Keith.

262 I also note, in passing, that the competitive profiles for the two tires manufactured by Michelin were in its possession and were produced in response to a section 11 order. The competitive profiles were produced as being documentation exchanged with Sears in relation to the development and establishment of retail prices. This, in my view, lends credence to the conclusion that the competitive profiles were strategic, competitive documents.

263 Sears' beliefs about the nature of its competition and its competitive response are more clearly found in the Spring and Fall Automotive Reviews for 1999.

(iv) Automotive reviews

264 The 1999 automotive reviews were prepared by Mr. Keith and Mr. Vince Power, the national business manager, for the purpose of presenting, twice yearly, Sears' strategies and product line to Sears' chief executive officer. In Mr. Cathcart's words:

"Basically this whole communication to the CEO was to detail [...] what we were going to introduce as new commodities possibly and how we were going to address the competition".

265 Contained in the Spring 1999 review were separate strategies for private label tires and national brand tires. Identical wording is found in the Fall 1999 review with respect to the strategies. Oral evidence confirmed that the reviews were presented to Sears' executives. There was no evidence that the strategies contained in the reviews were rejected.

266 Sears argues that the Commissioner's reliance upon the 1999 automotive reviews is misplaced and points to Mr. Cathcart's evidence that he found more than one portion of the reviews to be confusing, and that, in places, he could not understand why Mr. Keith wrote what he did.

267 I found such testimony to be incredible and unpersuasive when it was given, and remain unpersuaded by Mr. Cathcart's testimony as it touched on the automotive reviews for 1999. I so conclude because it is to be remembered that the automotive reviews formed part of a large and important presentation to Sears' chief executive officer (and others) about how Sears was to address

the competition. In the past, some who had made presentations to the chief executive officer were summarily reassigned or let go if their presentations were found wanting. Mr. Keith was acknowledged to have a compendious knowledge of the tire market. Language contained in the Spring 1999 automotive review was repeated in the Fall 1999 automotive review. Weighing those facts against Mr. Cathcart's testimony that certain aspects of the automotive reviews were confusing or incomprehensible, I reject Mr. Cathcart's testimony. I accept, as discussed below, that the 1999 automotive reviews set out Sears' assessment of its significant competition in the tire market and Sears' responsive marketing strategies for private label tires and national brand tires.

268 I will deal first with Sears' strategy with respect to private label tires.

(a) Private label strategy

269 Sears' strategy was expressed to be:

"To increase our market share in Private Brand tires which represents almost 50% of the replacement tires sales in Canada. To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

270 Among the tactics listed to implement this strategy was the following:

"Index our every day pricing to [CONFIDENTIAL] ([CONFIDENTIAL] Private Brand retailer) to be equal to or within [CONFIDENTIAL] % of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at [CONFIDENTIAL]."

271 [CONFIDENTIAL], the competitive profiles built by Mr. Keith for the Silverguard Ultra IV and Response RST Touring compared each with Canadian Tire's comparable competitive offering. So too did the competitive profile for the BF Goodrich Plus. This was an entry-level tire, exclusive to Sears, that Mr. Keith compared to the Motomaster AW+. I accept, therefore, that while the BF Goodrich Plus was a flag brand tire, Sears chose internally to market it as if it were a private label tire.

272 Mr. Cathcart admitted that Sears' "every day" strategy ([CONFIDENTIAL]) involved its 2For price, and not its regular price, because Sears' regular price was not competitive with Canadian Tire. Sears' 2For price was generally within 10% of Canadian Tire's pricing. Mr. Cathcart also confirmed that the "plan to sell price" referred to in the automotive review (for example at pages 1485-1488 and at page 1493) was the 2For price.

(b) National brand strategy

273 The national brand strategy was expressed as follows:

"To increase our market share in National Brands which represents over 50% of

the Canadian replacement tire sales.

To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

274 The tactics to implement this strategy included:

"Continue to index our every day pricing to be 90 to 95% of the equivalent National Brand normal discounted price. When on sale indexed to be [CONFIDENTIAL] to [CONFIDENTIAL] % of the National Brand price. In the case of [CONFIDENTIAL] [[CONFIDENTIAL]] equivalent items we will match price".

275 Mr. Cathcart admitted that:

- Sears' dual branded tires (including the Weatherwise and RoadHandler T Plus) were marketed under the national brand strategy;
 - the competitive profiles for each of these tires reflect the national brand strategy in terms of pricing;
 - Sears' regular prices were close to or lower than the relevant manufacturer's suggested list price ("MSLP");
 - with respect to the competitive profile for the Weatherwise that referenced the competitive offering to be the Michelin RainForce MXA and that showed a comparison price described as "35% off list 9/1/97": Sears' regular prices for tire size P155/80R13 would be in the order of 147.92% of the comparison price; and
 - the 2For price was 95.53% of the comparison price. Thus the 2For price was how Sears responded to a dealer who was selling at 35% off the MSLP.
- (c) Sears' view of the pricing structure of its competitors

276 Mr. Keith, in the automotive review, described the pricing structure of Canadian Tire and the independent tire stores as follows:

Canadian Tire: Value priced every day with occasional off price promos"

Tire Stores: "Value priced off list with off price promo and gimmick promos"

277 Sears' pricing strategy was described in the same document to be "[CONFIDENTIAL]".

- (d) The MSLP

278 Sears relies heavily upon the existence of MSLPs as constituting an objective, independent mechanism to verify the bona fides of its regular prices for the Michelin Weatherwise, Michelin RoadHandler T Plus, and the BF Goodrich Plus tire. However, on the basis of the following evidence, I find as a fact that, in 1999, MSLPs were not widely or commonly used by tire dealers as their regular selling price.

279 First, Mr. Gauthier testified that:

- tire retailers set their own prices in the marketplace and, based on his experience, they tended to establish this price as a percentage of the MSLP;
- dealer prices so set represented a typical everyday selling price;
- tire retail selling prices in 1999 were not at the list price level;
- MSLPs were used to establish the tire dealer's acquisition price from the manufacturer and then by the dealer to set the dealer's retail price;
- in his experience, transactions did not occur at or close to MSLP.

280 Second, Mr. King testified that:

- the MSLP would serve as the starting point, or the starting price, that independent tire retailers would use in selling tires to individual consumers;
- in 1999, dealers typically sold for 35% off list;
- that 35% discount was arrived at either because it was the dealer's offering price or because it was the finally negotiated price;
- to his knowledge, tires were not sold to consumers at MSLP.

281 Third, Mr. Merkle testified that:

- various dealers would use the MSLP in different ways;
- in 1999 the norm, within Michelin's dealer channel, was to sell tires 30% to 35% off Michelin's list price.

282 Fourth, as noted above, in the Spring Automotive Review Mr. Keith described the pricing strategy of "Tire Stores" to be "Value priced off list with off price promo and gimmick promotions". The competitive profile for the Weatherwise tire compared that tire with the Michelin RainForce at a price described to be "35% off list 9/1/97" and the competitive profile for the RoadHandler T Plus compared that tire with the Michelin X One at a price described to be "New List less disc 40%". Mr. Cathcart confirmed these references to "list" in the competitive profiles to be to Michelin's MSLP. I take the Spring Automotive Review to evidence Mr. Keith's knowledge or belief that tire stores generally sold tires at a percentage off the MSLP. For the two Michelin tires it would appear that Sears' pricing, to be competitive, must compete with pricing 35% and 40% off Michelin's MSLP.

283 Professor Trebilcock's expert report sheds some light on the use of the MSLP by tire dealers as well. At paragraph 37, he notes that:

The Toronto Star article also suggests that discounting off the manufacturers' suggested retail prices was common practice in tire retailing. The retailers referred to in the Toronto Star article discounted off manufacturers' suggested retail prices by about 30-35%.

284 Professor Trebilcock also appends to his expert report an article dated January 17, 2000 written by Chris Collins and published in "Tire Business". The article quoted the following statement by John Goodwin, the Executive Director of the Ontario Tire Dealers Association ("OTDA"):

Mr. Goodwin said the OTDA has a committee investigating the ads auto makers and mass merchandisers are running. Some ads claim to sell tires at 50 percent off list price, but he asks rhetorically, "Who sells at list?"

285 In my view, the weight of the evidence leads to the conclusion that MSLPs were not commonly used by tire dealers as a selling price, and that in 1999, tire dealers typically sold national brand tires at a price in the order of 35% off the MSLP.

286 Sears argues that Mr. King's evidence should be discounted because neither he nor his employer sold tires at the retail level so that his evidence is "anecdotal at best". Mr. Gauthier's evidence is also discounted by Sears as being "anecdotal, overly broad, unsubstantiated and [...] not credible". Sears also argues that Mr. Gauthier is not truly an independent expert and, in oral argument, took great exception to his evidence, on cross-examination, that he disagreed with Mr. Winter when Mr. Winter concluded that Canadian Tire did not dominate the marketplace. In Mr. Gauthier's view, Canadian Tire is the dominant influence in the tire market in Canada.

287 I have previously described, generally, the background of these gentlemen in the tire industry. Mr. Gauthier has extensive experience dating since 1984 with respect to the promotion and wholesale sale of tires to tire retailers and I reject the suggestion that his testimony was partial or biased. Mr. King has two years of experience as Bridgestone's sales manager for associate brands and, since 1999, he has worked as its sales manager for Corporate Accounts and Original Equipment. He was responsible for the sale of tires to merchandisers such as Sears, Canadian Tire and Costco. In my view, their knowledge of the use dealers make of an MSLP can not be dismissed as anecdotal. Their evidence is confirmed to a significant extent by Mr. Merkle, and by Mr. Keith's description of the manner in which tire dealers priced tires and by the use he made of the MSLP in the two competitive profiles referred to above.

288 To the extent it was argued that Mr. Gauthier's view that Canadian Tire was the dominant influence in the tire market was not credible, I note that, at paragraph 83 of Sears' responding statement of grounds and material facts, Sears asserted that "Canadian Tire was a dominant tire

retailer in Canada (enjoying approximately a twenty-two per cent share of tire sales in Canada during the Relevant Period)".

(v) Conclusion: Good faith - private label tires

289 Did Sears truly believe that its regular price for the Silverguard Ultra IV, Response RST Touring and BF Goodrich tires were genuine and bona fide prices set with the expectation that the market would validate them? The following evidence touches on Sears' belief:

- i) Mr. Cathcart admitted that, going into 1999, Sears would have expected that it would only sell between 5 and 10% of the Tires at their regular price. This was because between 90 to 95% of the Tires would be sold as multiples. This made the regular price irrelevant to 90 to 95% of the Tires Sears expected to sell because, when a tire was not on promotion, a purchaser would be offered, without requesting it, the 2For price.
- ii) Sears viewed Canadian Tire as its main competitor in the private label segment. The competitive profiles prepared for these three tires only compared Sears' 2For, normal promotional and great item pricing to the Canadian Tire pricing. Sears' regular price was known not to be competitive with Canadian Tire and fell well outside the range of price which Sears believed to be competitive with its main competitor in the private label market.
- iii) Sears' 2For prices were described as its "every day pricing" in Sears' private label strategy. The Sears regular price was not.
- iv) Sears did not and could not track the number of tires it sold at the regular price.
- v) With respect to the 5 to 10% of tires that Sears expected to sell singly, if the distribution of single unit tire sales was constant over time, Sears could expect to sell a percentage of single tires on promotion equal to the percentage of time the Tires were offered on promotion. For example, if a tire was on sale 25% of the time, Sears could expect 25% of the single tires to be sold at a promotional price.

For the six month period preceding the representations at issue, the following tires were offered for sale at regular single unit prices for the indicated percentage of time:

| | |
|----------------------|-----|
| Response RST Touring | 46% |
| Silverguard Ultra IV | 60% |
| BF Goodrich Plus | 45% |

Thus, Sears could only have expected to sell the following:

Response RST Touring Silver- between 2.3 and 4.6% at its regular price between 3 and 6% at its
guard Ultra IV BF Goodrich regular price 2.25 and 4.5% at its regular price.
Plus

290 On the basis of that evidence, I find that Sears could not have truly believed that its regular prices for the Response RST Touring, Silverguard Ultra IV, and BF Goodrich Plus tires were genuine and bona fide prices that the market would validate.

291 Turning to the objective factor of actual sales at their regular prices, for each of these three tires respectively, for the 12 month period preceding the representations at issue, only 0.51%, 1.21% and 2.29% of the Tires sold were sold at their regular prices.

292 On the whole of the evidence, I find that Sears' private label tires were not offered for sale at Sears' regular prices in good faith.

(vi) Conclusion: Good faith - national brands

293 Did Sears truly believe that the regular prices for the Michelin Weatherwise and RoadHandler T Plus were genuine bona fide prices set with the expectation that the market would validate them? The following is relevant evidence:

- i) Again, 90 to 95% of these tires were expected to be sold as multiples and so the regular price would be expected to be irrelevant to 90 to 95% of these tires sold by Sears.
- ii) I have found that, in 1999, flag brand tires were typically being sold by tire dealers at 35% off the MSLP and were not generally being sold at list price. Sears knew this, as evidenced by Mr. Keith's description of tire store pricing. Sears' competitive pricing was its 2For price which was referred to as its "every day pricing" in its national brand strategy. Sears' regular prices were greatly in excess of what it knew to be the competitive price range.
- iii) Sears did not and could not track the number of tires it sold at the regular price.
- iv) In the six month period preceding the representations at issue, the Weatherwise and RoadHandler T Plus tires were offered for sale at their regular prices respectively at 19% and 38% of the time. It follows that, knowing that only 5 to 10% of the Tires would be sold singly, Sears could only have expected to sell (if single tire sales were constant over time)

- between 0.95 and 1.9% of the Weatherwise tire at its regular price

- between 1.9% and 3.8% of the RoadHandler T Plus at its regular price.

294 On the basis of that evidence, I similarly find that Sears could not have truly believed that its regular prices for the Weatherwise and RoadHandler T Plus were genuine and bona fide prices that the market would validate.

295 Turning again to actual sales, in the 12 month period preceding the representations, only 1.3% and 0.82% respectively of sales by Sears of the RoadHandler T Plus and the Weatherwise tire were made at their regular price.

296 On the whole of the evidence I find that Sears' national brand tires were not offered for sale at Sears' regular prices in good faith.

(vii) The opposing view

297 In concluding that neither Sears' private label nor national brand tires were offered for sale at Sears' regular prices in good faith, I have had regard to the expert evidence of Professor Trebilcock, noting that he was not qualified as an expert in marketing. It was his opinion that:

The information available on regular prices in 1999 indicates that Sears' regular prices were similar to or less than the regular prices of some [not all] of its competitors for comparable tires. At least some of Sears' regular prices were also similar to or less than manufacturers' suggested retail prices for comparable tires. Such observations are not consistent with a claim that Sears' regular prices did not make economic sense.

298 In Professor Trebilcock's view, comparison between Sears' regular prices and those of its competitors should include Sears' regular 2For prices. This is because the 2For price was always available on all multiple sales of regular priced tires; it was not a sale price.

299 For the following reasons, I have not found Professor Trebilcock's opinion to be of assistance.

300 To the extent Professor Trebilcock opined that Sears' regular prices were similar to or less than the regular prices of some, not all, of its competitors, he acknowledged that limited data was available. No data was available to him for either the Response RST Touring or the Michelin RoadHandler Plus tires. For the other three tire lines at issue, for only one tire (the BF Goodrich Plus) was Sears' regular single unit price lower than that of its competitors. For both the Michelin Weatherwise and Silverguard Ultra IV, Sears' regular single unit prices were significantly higher than its competitors' prices for comparable tires (eg. for the Weatherwise, Sears' regular price of \$181.99 compared to competitive offerings of \$110, \$98 and \$99; for the Silverguard Ultra IV, Sears' regular price of \$133.99 compared with a competitive offering of \$105). The reference prices

quoted by Professor Trebilcock were all prices that were discounted off the MSLP by 30% or more.

301 Professor Trebilcock acknowledged that Canadian Tire's regular prices were consistently lower than Sears' regular prices, but referred to add-ons that Sears' included in its prices. However, he did not have any information that would allow him to quantify how much consumers might be prepared to pay for those add-ons.

302 Professor Trebilcock concluded that Sears' regular prices were genuine in that approximately 21% of all of its tire sales took place at regular prices; such calculation included sales at both Sears' regular and 2For prices. However, subsection 74.01(3) of the Act is concerned only with the reference price. In this case, the reference price was Sears' regular single unit price.

303 With respect to the absence of consumer harm referred to by Professor Trebilcock, as noted below, consumer harm is not relevant to the consideration of the materiality of any misrepresentations and hence is not relevant to the existence of reviewable conduct.

XI. DID SEARS MEET THE FREQUENCY REQUIREMENTS OF THE TIME TEST?

304 There are two elements contained in the time test: the goods must be offered at the alleged OSP (or a higher price) in "good faith" for "a substantial period of time recently before" the making of the representation as to price. Both elements of the test must be met.

305 My finding that the Tires were not offered at Sears' regular single unit price in good faith is, therefore, dispositive of the time test. However, for completeness, and in the event that I am in error in my conclusion as to good faith, I will deal briefly with the frequency requirements of the time test.

306 The parties agree, I believe, that the first step in the application of the time test is to select the time frame within which to examine Sears' conduct. Sears says that the appropriate time frame is 12 months. The Commissioner argues that the appropriate period is six months. Once the appropriate time frame is selected, the next step is to determine within that time frame whether Sears offered the Tires at their regular prices for a substantial period of time.

(i) The reference period

307 For the following reasons, I accept the submission of the Commissioner that the appropriate reference period is six months.

308 First, paragraph 74.01(3)(b) of the Act requires the good faith offering to have occurred "recently" before the representation at issue. This means that there must be, as the Commissioner argues, reasonable temporal proximity between the impugned representations and the offering of the Tires at regular prices.

309 The word "recent" is commonly understood to mean "that has lately happened or taken place" (The Shorter Oxford English Dictionary, 3rd ed. vol. II) or "not long passed" (The Concise Oxford Dictionary, 7th ed.). A 12 month time frame would not, in my view, be in accordance with the requirement that the reference period be in reasonable temporal proximity to the making of the representation.

310 Second, after subsection 74.01(3) of the Act came into effect, Sears' legal department circulated a memorandum dated May 11, 1999 to all Sears vice presidents which described amendments to the Act. The memorandum advised that, with respect to the time test, in general "the time period to be considered will be the six months prior to [...] the making of the representation (this time period can be shorter if the product is seasonal in nature)". Thus, Sears did not posit internally the need for a 12 month reference period. Further, Mr. McMahon confirmed that, when he applied the policy set out in the May 11, 1999 memorandum, he looked to see whether the Tires were on sale at or above the comparison price more than 50% of the time in the six month period that pre-dated the representations at issue. While Sears now argues that a 12 month reference period is more appropriate in order to capture the seasonal nature of tire sales, in my view, its own internal practice of monitoring sale frequency over a six month period belies this argument.

311 Finally, I accept the opinion of Dr. Lichtenstein that six months is an appropriate reference period as it provides an accurate picture of Sears' OSP behaviour. In his view, the substantial period of time provision relates to the amount of time a product should be offered at an OSP such that it has the opportunity to be verified by the market as the "regular price". A six month period would provide such opportunity, in Dr. Lichtenstein's view, because:

- i) there is not much seasonal variation with respect to all-season tires;
- ii) to the extent there are sales increases in the Spring and the Fall, any contiguous six month period would capture some of the higher and lower periods; and
- iii) there is little reason to expect month-to-month variation in the percentage of tires sold at the OSP.

312 I do not find Dr. Lichtenstein's opinion on this point to have been impaired in cross-examination.

- (ii) The frequency with which the Tires were not on promotion.

313 Having concluded that a six month reference period is appropriate, Table 2, which follows paragraph 22 above, depicts that, for the six month period preceding the relevant representations, the Tires were offered for sale at their regular single unit price as follows:

Tire

Percentage of time offered at Regular Prices

| | |
|----------------------|--------------|
| BF Goodrich Plus | 45% |
| RoadHandler T Plus | 38% |
| Weatherwise RH Sport | 19% |
| Response RST Touring | 46 or 49.65% |
| Silverguard Ultra IV | 60% |

314 With respect to the Response RST Touring tire and the dispute with respect to the percentage of time that the tire was not on promotion, Sears' planning documents (that is the checkerboard and monthly pocket planners) show that the Response RST Touring tire was offered at regular prices 49.65% of the time. However, Sears' actual sales reports show that the Response RST Touring tire was sold at sale prices for one additional week. This would reduce the time the tire was offered at its regular price to 46% of the time. Mr. McKenna was unable to explain the discrepancy in these Sears' documents. Given his testimony that if Sears sold the product at promotional prices the product was on promotion, I find the information contained in the sales reports to provide the most accurate evidence as to when the Tires were actually on sale. It follows that the Response RST Touring tire was offered at regular prices 46% of the time.

(iii) "Substantial Period of Time"

315 In order to determine what is meant by the phrase "substantial period of time", regard must be had to the statutory context. The time test functions to assess whether a specified price actually constitutes a price at which a product was "ordinarily supplied" by the person making the representation for a "substantial period of time".

316 In this context, it seems to me that if a product is on sale half, or more than half, of the time, it can not be said that the product has been offered at its regular price for a substantial period of time. This conclusion is consistent with the decision of the Ontario County Court in *Regina v. T. Eaton Co. Ltd.* (1973), 11 C.C.C. (2d) 74. In the context of a prosecution under paragraph 33(C)(1) of the Combines Investigation Act, the Court there observed that, if a product was on sale 50% of the time, or thereabouts, the product could not be said to be ordinarily sold for a regular, or any other price.

317 In the present case, the following four lines of tires were on sale more than 50% of the time in the 6 month period pre-dating the relevant representations:

| Tire | Percentage of time on sale |
|----------------------|----------------------------|
| Weatherwise RH Sport | 81% |

| | |
|----------------------|-----|
| RoadHandler T Plus | 62% |
| BF Goodrich Plus | 55% |
| Response RST Touring | 54% |

318 I find, therefore, that Sears failed to offer those tires to the public at the regular price for a substantial period of time recently before making the representations.

319 Having found that Sears did not meet the good faith requirement for all of the Tires, and did not meet the frequency requirements of the time test for four of the five tire lines, it is necessary to consider whether Sears has established that the representations were not false or misleading in a material respect.

XII. WERE THE REPRESENTATIONS FALSE OR MISLEADING IN A MATERIAL RESPECT?

320 As an alternative to its position that it complied with the time test, Sears relies upon subsection 74.01(5) of the Act which relieves a person from liability under subsection 74.01(3) where the person establishes, in the circumstances, that a representation as to price is not false or misleading in a material respect. Subsection 74.01(5) must be read in conjunction with subsection 74.01(6) which requires that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect".

(i) What were the representations?

321 Sears argues that subsection 74.01(3) deals only with a representation as to price so that the general impression conveyed by a representation must be confined to a representation as to price. I agree. This means that any aspect of the advertisements at issue not related to price, for example warranty information, is not relevant.

322 Sears argues as well that the savings messages, or save stories, are also irrelevant because they are not representations as to price. I disagree. In my view, representations such as "save 40%" and "1/2 price" are properly characterized as representations as to price.

(ii) Were the representations false or misleading?

323 Sears asserts that the representations as to price were neither false nor misleading. Therefore, it is necessary to first determine what impression the representations at issue created. This is consistent with the approach taken by the Court in *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ontario County Court). In *Kenitex*, the accused was charged under paragraph 36(1)(a) of the Combines Investigation Act which made it an offence to make any representation to the public that was false or misleading in a material respect. Subsection 36(4) of the Combines Investigation Act provided that:

36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

* * *

36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

324 Thus, the legislation considered by the Court in Kenitex is substantially the same as that now before the Tribunal.

325 At page 107 of Kenitex, the Court considered the elements of the offence and wrote:

In my view [...] the representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

326 As to the concept of "ordinary citizen", the Court wrote:

The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

327 Turning to the representations in this case, I find that the general impression conveyed by them to an ordinary citizen is that consumers who purchased the Tires at Sears' promotional prices would realize substantial savings over what they would have paid for the Tires had they not been on promotion. This impression is consistent with the literal meaning conveyed by the representations. For example, turning to the advertisement set out at paragraph 17 above, the advertisement stated that one could "save 40%" on Michelin RoadHandler T Plus tires. For the smallest size shown, Sears' regular price of \$153.99 was compared with the promotional price of \$91.99. For the largest size, the regular price of \$219.99 was compared with the promotional price of \$131.99.

328 As to whether that impression was false or misleading, it is necessary to remember that:

- when the Tires were not on promotion, Sears' 2For price was always available if more than one tire was purchased;
- Sears' 2For price was always substantially lower than the regular (single unit) price;
- 90% to 95% of tires were sold in multiples; and
- Sears' regular (single unit) price would never have applied to sales of multiple tires.

329 It follows, as conceded by Mr. Cathcart in cross-examination, that for tires purchased in multiples at Sears' promotional events, the savings realized by customers would not have been the difference between Sears' regular price and the promotional price. Rather, the savings would be the difference between the 2For price and the promotional price.

330 Sears bears the onus under subsection 74.01(5) of the Act. It says that its representations as to price were not false or misleading because:

1. The representations accurately set out Sears' prices for a single unit of the Tires, and those were prices at which genuine sales took place.
2. The representations as to price were available to, and benefited, customers who purchased a single tire.
3. Averaged over the five Tires, 11% of purchasers would buy only one tire.
4. Any tire consumer to whom the representations were directed might choose to buy a single tire, so that the representations were true for 100% of the intended readers of the representations.
5. The representations as to price reflected prices that Sears used as a basis for calculating warranty adjustments and refunds.

331 All of these points are literally correct. However, the general impression conveyed by the representations is that consumers (not just 11% of consumers) who purchased the Tires at Sears at promotional prices would realize substantial savings. For 89% of consumers and 90 to 95% of the Tires sold, this was not correct. I find, therefore, that representations as to price contained in both the regular/promotional price comparison and in the save stories were false or misleading.

332 Before leaving this point, I note that a similar conclusion was reached in somewhat similar circumstances in *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ontario District Court). There, Simpsons caused a number of "mini casino" cards to be printed and distributed. The cards advertised "you could save 10% to 25%" on practically everything in the store, and that the possible discounts were 10%, 15%, 20% or 25%. The mini casino cards each contained four tabs, under each tab was printed a symbol. When a tab was lifted, the symbol was revealed. There were four symbols, corresponding to each of the four percentage discounts available. Each card instructed a customer to lift one tab only in order to reveal the discount level available to them. Of the cards printed, 90% had the 10% discount symbol printed under all four tabs. The remaining 10% of the

cards each contained all four symbols. On those facts, the Court found that the representation "you could save 10% to 25% on practically everything in the store" was manifestly false and misleading. The Court wrote at pages 37-38:

The cards had been printed in such a way as to ensure that 9 out of 10 of the recipients of the cards had no chance to obtain other than the minimum discount of 10%. Each card displayed all four discount symbols, and it is obvious from the get-up of the card that it was designed to leave the impression that a different symbol lay concealed under each of the four tabs. As a consequence of the design of the promotion, the representation that "you could save 10% to 25%" was false as to nine tenths of the cards. The recipients of those cards were misled and intentionally so.

To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90% of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addressees of the mailing.

The fact that the representation was true as to one-tenth of the recipients of the randomly distributed cards does nothing more than reduce the magnitude of the deception.

(iii) Were the representations as to price false or misleading in a material respect?

333 Prior jurisprudence in the context of criminal prosecutions under the Act or its predecessor has interpreted what is meant by "misleading in a material respect". As noted above, in *Kenitex*, the Court found that a materially false or misleading impression would be conveyed if the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."

334 In *R. v. Tege Investments Ltd.* (1978), 51 C.P.R. (2d) 216 (Alberta Provincial Court), the Court applied the dictionary meaning of "material" which was "much consequence or important or pertinent or germane or essential to the matter". The Court noted that it was not necessary to establish that any person was actually misled by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

335 Finally, in *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (Vancouver Magistrate's

Court, B.C.), the Court concluded that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase. Whether or not a consumer in fact obtained a bargain and may have paid less than he would ordinarily have paid was not the relevant criteria.

336 The question to be determined, therefore, is whether the impression created by the price comparisons and/or the save stories would constitute a material influence in the mind of a consumer. Put another way, I accept the submission of Sears that the relevant inquiry is not whether the type of representation is a material one, but whether the element of misrepresentation is material.

337 I believe that the following are relevant considerations.

338 First, the magnitude of the exaggerated savings. Returning to the Michelin RoadHandler T Plus advertisement set out at paragraph 17 above, for the smallest tire size advertised, an ordinary citizen considering the purchase of four tires would reasonably believe, in my view, their savings to be \$248.00 or $(\$153.99 - \$91.99) \times 4$. In fact, the 2For price for each tire was \$94.99. Accordingly, the actual savings would be \$12.00 or $(\$94.99 - \$91.99) \times 4$. In this example, the savings were substantially exaggerated. Because Sears' 2For price was always substantially lower than its regular price, it follows that the savings were similarly substantially overstated in every OSP representation made concerning the Tires.

339 In my view, that magnitude of advertised savings would be a material influence or consideration upon a consumer.

340 Second, I look to Sears' experience when it eliminated its 2For pricing on January 1, 2001 and lowered its regular prices for tires. Sears' Great Item and normal promotional prices remained unchanged. Following the reduction of its regular prices, Sears' sales volumes at promotional prices decreased. Mr. McMahon acknowledged in cross-examination that it was probably true that promotional sales decreased because Sears could not use as favourable save stories. As Sears argued, if savings are represented at all, consumers expect them to be of a certain magnitude and if the represented savings are incongruous with consumers' expectations concerning the deals typically offered, or typically offered by the particular retailer, the promotion will be less effective. In the circumstances where Sears was recognized to be a high-low retailer, where tires were sold in a competitive market, and where national brand tires were typically sold by tire dealers at a price 35% off the MSLP, I find that Sears' misrepresentation of the extent of the savings to be realized by purchasing the Tires on promotion was, more probably than not, likely to influence a consumer. This means that Sears' misrepresentation of the extent of the savings to be realized was misleading in a material respect.

341 Finally, I have found that consumers have a limited ability to evaluate the intrinsic attributes of tires, and it is admitted that the five lines of Tires were exclusive to Sears. In those circumstances, the following evidence from Dr. Lichtenstein's expert report is germane:

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.
46. However, where intrinsic product attributes are difficult for consumers to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes and competing retailers carry brands unique to them, neither of these strategies is open to consumers.
47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts", i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

342 Having regard to those circumstances, as required by subsection 74.01(5) of the Act, I accept that Sears' OSP representations are more likely to be relied upon to reflect quality or value so misrepresentation of the OSP is more likely to impact upon or influence a consumer.

343 Similarly, I have found that a very significant percentage of consumers do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores. Dr. Deal's study suggested that approximately 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears. This evidence also supports the conclusion that Sears' OSP representations and save stories were more likely to influence consumers.

344 Thus, on the whole of the evidence, Sears has failed to establish that its OSP representations were not false or misleading in a material respect.

(iv) Sears' arguments about materiality

345 In so concluding, I have had regard to Sears' submissions that the representations as to price were not false or misleading in a material respect because:

- a) consumers are recognized to consistently discount OSP representations by about 25%;
- b) Sears is a promotional retailer, and because its reference price is identified as "Sears reg.", consumers would interpret the reference price differently than OSP representations made by an EDLP marketer or suppliers generally;
- c) Sears' ads that did not feature Sears' regular price representations produced more of an uplift in sales levels from non-promotional periods;
- d) Mr. Winter testified that, in 1999, tires were sold in a highly competitive and highly promotional context which included a variety of pricing frameworks in which no single pricing framework or competitor dominated the market. Further, Dr. Deal found approximately 63% of consumers comparison shop even where they see ads that indicate reduced tire prices;
- e) factors such as warranties, roadside assistance and the provision of a "satisfaction guaranteed or your money refunded" guarantee could enhance a consumer's perception of value and positively impact the decision to purchase a tire; and
- f) Dr. Deal found that 78% of survey respondents were satisfied with the value they received and 93% were satisfied with their tire purchase.

346 I will deal with each item in turn.

- (a) Consumers consistently discount OSP representation by about 25%

347 It is correct that it was Dr. Lichtenstein's opinion that consumers mentally discount advertised reference prices and that one study found that consumers consistently discount OSP offerings by about 25%. However, it remained Dr. Lichtenstein's opinion that:

- 33. However, even though knowledgeable/skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany

and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price ... even though, on the whole, they were skeptical of its validity... Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference price." Also, Urbany et al. (1988) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.

34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much... and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions. [underlining added]

348 Moreover, on cross-examination it was Dr. Lichtenstein's evidence that there would be less discounting of a reference price where the OSP representation is made by a credible retailer such as Sears.

349 Thus, I do not find Dr. Lichtenstein's evidence with respect to discounting of OSP representations establishes that Sears' OSP representations were not material.

- (b) Sears' regular price representations must be seen in the context of consumers' knowledge that Sears is a promotional retailer

350 Sears says that because it is known to be a promotional retailer, its customers would interpret its OSP representations in a different fashion from their interpretation of OSP representations made by ordinary suppliers or EDLP retailers. No evidence was cited to support this submission.

351 It would seem to be equally likely that if influenced by Sears' reputation as a promotional retailer, a consumer would be influenced by its OSP representations and find them to be very material as signalling an appropriate time to purchase in order to obtain substantial savings from the price consumers would ordinarily pay at Sears if the Tires were not on promotion.

(c) Sears' ads that did not feature OSP representations

352 Sears argues that:

172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did not feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.
173. Mr. McKenna's reasonable conclusion was:

That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.

174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

353 Mr. McKenna testified that, with respect to the Michelin Weatherwise and the Silverguard ST (not one of the tires at issue), he compared sales for those tires when they were not on promotion to their sales during a period when they were on promotion. The Silverguard ST had no regular price, it was simply priced based on rim size, starting at \$44.99. Thus, the Silverguard ST was advertised with no regular comparison price or save story. The Michelin Weatherwise was advertised with its regular price shown together with a 40% save story.

354 When the Michelin Weatherwise was advertised, its unit sales increased by approximately [CONFIDENTIAL] times over sales when it was not advertised. Sales volumes of the Silverguard ST, when advertised, increased by [CONFIDENTIAL] times over sales when not advertised. In this context, Mr. McKenna concluded that customers recognized value.

355 This evidence is anecdotal, relating to a tire that had no regular price, and is in conflict with Mr. McMahon's evidence and Mr. Cathcart's evidence about Sears' experience with the BF Goodrich Plus tire set out at paragraphs 214 and 215 above.

356 For this reason, I do not find the evidence relating to the Silverguard ST establishes that Sears' OSP representations were not material.

357 To the extent that Sears relies on Mr. Merkley's acknowledgement in cross-examination that a "Tireland" advertisement relied upon a consumer's ability to discern value without reference to a save story, Mr. Merkley simply responded "I guess, yes" to the suggestion that the retailer in question assumed that his potential customers would recognize value. Further, the particular price advertised by Tireland was sufficiently low that it caused Sears to write to Michelin expressing its concern and caused Michelin to respond to Sears that it shared Sears' concern at the pricing. However, Michelin said that it found this to be an isolated case where the dealer intended to have a weekend sale for the fifth consecutive year.

358 This evidence does not establish that Sears' OSP representations were immaterial.

(d) Mr. Winter's and Dr. Deal's evidence

359 Sears relies upon Mr. Winter's evidence that, in 1999, tires were sold in a highly competitive and promotional context and Dr. Deal's evidence that his survey found that 63% of consumers comparison shop even when they see ads that show reduced tire prices.

360 However, comparison shopping would seem to be directed to final transaction prices, and not necessarily the materiality of OSP representations. For those consumers who say they comparison shop, the OSP representations could nonetheless have: drawn the consumer into the market; attracted the consumer to Sears; and caused the consumer to purchase from Sears if no lower final transaction price was located in the consumer's search.

(e) The consumers' perception of value based upon factors such as warranties and the guarantee of satisfaction

361 Sears relies upon Dr. Lichtenstein's acknowledgement that factors such as warranties, roadside assistance programs, and Sears' guarantee could enhance consumers' perception of value and positively impact upon the decision to purchase a tire. This is said to reduce the effect of Sears' OSP representations because response to price is context dependent.

362 Given Professor Trebilcock's acknowledgement that he did not have information that would allow him to quantify how much consumers might be willing to pay for add-ons provided by Sears relative to add-ons provided by Canadian Tire, and the rather amorphous nature of Dr. Lichtenstein's acknowledgement, I am not persuaded that the value consumers attach to add-ons is sufficient to make Sears' OSP representations immaterial. Even with add-ons, the extent of the

savings misrepresentation could still be influential to the consumer's decision to purchase.

(f) Sears' consumer satisfaction

363 Sears says that even if consumers purchased their tires from Sears solely upon the strength of the representations at issue, 78% of respondents to Dr. Deal's survey indicated that they had received good value for their money.

364 There are, I believe, two responses to this.

365 First, harm is not a necessary element of reviewable conduct. As the Court noted in *Kellys on Seymour*, supra, at page 26, the "criteria is, did in fact the person think that what he was buying was, to the ordinary purchaser, in the ordinary market, worth the price it is purported to be worth, and from which it is reduced". Whether or not a consumer in fact got a bargain or paid less than what the consumer would ordinarily have paid is not the criteria. See also: *R. v. J. Pascal Hardware Co. Ltd.* (1972), 8 C.P.R. (2d) 155 at page 159 (Ont. Co. Ct).

366 Second, I accept Dr. Lichtenstein's evidence, which I find was not substantially challenged on the point, that:

39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.
40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995). [underlining added]

367 Thus, for all these reasons, Sears failed to establish that its OSP representations were not false or misleading to a material extent.

(v) Conclusion

368 Sears admitted that it did not meet the requirements of the volume test and I have found that the Tires were not offered at Sears' regular price in good faith and that Sears failed to meet requirements of the time test for four of the five tire lines. I have also found that Sears failed to establish that the representations at issue were not false or misleading in a material respect. It follows that the allegations of reviewable conduct have been made out and the Tribunal finds Sears to have engaged in reviewable conduct. It is therefore necessary to consider what administrative remedies should be ordered.

XIII. WHAT ADMINISTRATIVE REMEDIES SHOULD BE ORDERED?

369 Section 74.1 of the Act sets out the range of remedies available and the circumstances in which the remedies may be ordered. Section 74.1 of the Act is as follows:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

- (a) not to engage in the conduct or substantially similar reviewable conduct;
- (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
 - (i) a description of the reviewable conduct,
 - (ii) the time period and geographical area to which the conduct relates, and
 - (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
- (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

- (i) in the case of an individual, \$50,000 and, for each subsequent order, \$100,000, or
- (ii) in the case of a corporation, \$100,000 and, for each subsequent order, \$200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- (a) the reach of the conduct within the relevant geographic market;
- (b) the frequency and duration of the conduct;
- (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d) the materiality of any representation;
- (e) the likelihood of self-correction in the relevant geographic market;
- (f) injury to competition in the relevant geographic market;
- (g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and
- (h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

- (a) an order was previously made against the person under this section in

- respect of conduct reviewable under the same provision;
- (b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;
 - (c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part;

or

- (d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part. [underlining added]

* * *

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :

- a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
- b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
 - (i) l'énoncé des éléments du comportement susceptible d'examen,
 - (ii) la période et le secteur géographique auxquels le comportement est afférent,
 - (iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias -- notamment de la publication -- utilisés;
- c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :

- (i) dans le cas d'une personne physique, de 50 000 \$ pour la première ordonnance et de 100 000 \$ pour toute ordonnance subséquente,
- (ii) dans le cas d'une personne morale, de 100 000 \$ pour la première ordonnance et de 200 000 \$ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

- a) la portée du comportement sur le marché géographique pertinent;
- b) la fréquence et la durée du comportement;
- c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
- d) l'importance des indications;
- e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
- f) le tort causé à la concurrence sur le marché géographique pertinent;
- g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
- h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas

suivants :

- a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
- b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
- c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;
- d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie. [Le souligné est de moi.]

370 Each of the three available remedies shall be considered in turn.

- (i) An order not to engage in the conduct or substantially similar reviewable conduct

371 The Commissioner seeks an order prohibiting Sears and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns, or any other person or corporation acting on its behalf, from engaging in conduct contrary to subsection 74.01(3) of the Act for a period of 10 years.

372 In support of this submission, the Commissioner relies upon:

- Sears' admission that it is primarily a hi-low retailer which relies extensively on OSP representations in its advertising;
- Sears used hi-low marketing for 27 of the 28 lines of tires it sold in 1999 and continues to use hi-low marketing techniques to sell automotive products;
- Sears continues to use hi-low marketing techniques generally throughout its business;
- Sears has engaged in deceptive marketing behaviour in the past as reflected in the following decisions:

R. v. Simpsons-Sears Ltd. (1969), 58 C.P.R. 56 (Ont. Prov. Ct. (Crim.

Div.));

R. v. Simpsons-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. County Ct. (Crim. Div.)); and

R. v. Simpsons-Sears Limited and H. Forth and Co. Limited (1983), unreported (Ont. County Ct.).

373 Sears argues that no administrative remedy is warranted. It points to the following:

- The representations at issue were made in November and December of 1999. Section 74.01 of the Act came into force in March of that year. The Guidelines were not published until late September, 1999, and there was no interpretive jurisprudence relating to the time and volume tests.
- OSP advertising is a legitimate practice and Sears should not be punished for depending upon promotional events to market its products.
- Sears turned its mind to complying with subsection 74.01(3) of the Act. It created and distributed a written policy and Mr. Cathcart maintained a checkerboard for planning and promoting the sale of the Tires.
- The convictions the Commissioner relies upon are old, going back 21, 28 and 35 years. The last two mentioned convictions relate to a catalogue advertisement for multi-vitamins and to the advertisement of a particular refrigerator in Ottawa.
- It is reasonable to assume that there have been significant changes in Sears' ownership, management and control since the early 1980's when the most recent conviction was entered.

374 In the alternative, Sears says that any cease and desist order should relate only to tires. Sears points to the Tribunal's decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129; *aff'd* (2004), 31 C.P.R. (4th) 331 (F.C.A.) wherein the order prohibited the making of misrepresentations related to "PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device".

375 In light of the false or misleading impression given by Sears in its advertisements with respect to the OSP representations at issue concerning the Tires, I have concluded that it is appropriate to issue an order pursuant to paragraph 74.1(1)(a) of the Act. Such an order will address the harm subsection 74.01(3) was created to address. As the order will be directed only to OSP representations which do not conform with the Act, and will not be directed to all OSP representations, it cannot be said that such an order "punishes" Sears for depending upon promotional events.

376 I am satisfied by virtue of Sears' internal memorandum of May 11, 1999 to its vice-presidents concerning the amendments to the Act that the timing of the enactment of the relevant statutory provision and the issuance of the Guidelines gave sufficient notice to Sears' employees of the requirements of the Act. Therefore, it is not inappropriate to make an order under paragraph 74.1(1)(a).

377 As to the duration of the order, I see no reason to depart from the general provision found in subsection 74.1(2) of the Act that an order under paragraph 74.1(1)(a) applies for a period of 10 years unless otherwise specified. That 10 year period will commence when an order is issued. In this regard see paragraph 389 of these reasons.

378 As to the scope of the order, I believe that it construes the intent of the Act too narrowly to limit any order so as to apply only to Sears' promotion of tires. The scope of the order issued by the Tribunal in P.V.I., supra, is distinguishable, in my view, because there misrepresentations as to the performance of a product relating to fuel savings, emission reduction and government approval were at issue. There was no basis on which the order should have applied to any other product other than an allegedly similar gas-saving, emission-reducing and/or performance-enhancing device (as the orders provided).

379 Equally, however, I have not been persuaded that it is necessary that the order to apply to all goods marketed by Sears through its various business channels. In this regard, I note the relatively long period of time that has elapsed since Sears was last convicted of deceptive marketing behaviour.

380 Here Sears has stated in its responding statement of grounds and material facts, at paragraph 39, that Sears automotive is the business division of Sears responsible for the supply of the Tires and other automotive-related products and services and for the operation of Sears' retail automotive centres. From this I conclude that it is appropriate for the order to be directed to the business division which was responsible for the misrepresentations at issue. Therefore, the order will apply only to tires and other automotive-related products and services.

(ii) A corrective notice

381 The Commissioner requests an order requiring Sears to publish or otherwise disseminate a corrective notice or notices that shall:

- a. bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to the Application, including:
 - i. a description of the reviewable conduct,

- ii. the time period and geographical area to which it relates, and
- iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

b. be published in the following media:

i. in flyers ("pre-prints") by the Respondent as follows:

- (1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.
- (2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:
 - (a) 84% to be distributed through newspapers; (b) 15% to be distributed door-to-door; and (c) 1% to be distributed in-store.
- (3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

ii. in newspapers by the Respondent as follows:

- (1) in the language appropriate to the newspaper;
- (2) within the first nine pages of the Wednesday edition of each of the newspapers listed in paras. 26 and 27 of Exhibit CA-9, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said newspaper;
- (3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

382 Sears submits that temporal concerns alone mitigate against the publication of a written notice. Sears also points to the evidence of Dr. Trebilcock that consumers who purchased the Tires

at Sears during the sales events at issue received very good deals. Finally, Sears submits that it exercised due diligence in order to prevent the reviewable conduct from occurring.

383 In PVI, supra, the Federal Court of Appeal, at paragraph 26, considered that the time elapsed from the making of false or misleading representations was a relevant factor to consider when assessing the appropriateness of a corrective notice.

384 In the present case, five years have elapsed since the representations at issue were made. In my view, that length of time alone militates against the issuance of a corrective notice.

385 The report of the Consultative Panel contemplated that the purpose of a corrective notice was to inform marketplace participants about deceptive practices where those practices may have left residual mistaken impressions in the marketplace. I do not accept that, after 5 years, any residual mistaken impression exists which arises from the representations at issue. To require a corrective notice in that circumstance would, in my view, be punitive and not remedial.

386 In view of this conclusion, it is not necessary for me to consider, and I do not consider, whether Sears has established that it exercised due diligence in order to prevent the reviewable conduct from occurring.

(iii) An administrative monetary penalty

387 By its reasons for order and order dated August 5, 2004, the Tribunal ordered that, if it determined that Sears had engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears was given leave to present evidence and make submissions at a future hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act. Accordingly, the issues of whether an administrative monetary penalty should be imposed, and if so, its amount are reserved. See in this regard, paragraph 390 of these reasons.

XIV. COSTS

388 The issue of costs is also reserved.

XV. ORDER

389 Once the issues of administrative monetary penalty and costs are finally decided by the Tribunal, an order will issue reflecting these reasons together with the Tribunal's rulings with respect to an administrative monetary penalty and costs.

XVI. DIRECTIONS TO THE PARTIES

390 In light of these confidential reasons for order, the parties are directed as follows:

- 1) To enable the Tribunal to issue a public version of these reasons, the

- parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Wednesday, January 19, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)
- 2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 21, 2005.
 - 3) Following the issuance of these reasons the Registry will contact counsel to set a date for a case management conference to address the following:
 - i) The time required for the further hearing concerning the factors relevant to subsection 74.1(5) of the Act.
 - ii) The number of any proposed witnesses to be called.
 - iii) The provision of any required will-stay statements and or expert reports.
 - iv) The extent of the Commissioner's participation in this further hearing.
 - v) Potential dates for such hearing.
 - vi) The manner, nature and timing of the submissions as to costs.

DATED at Edmonton, this 11th day of January 2005.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Eleanor Dawson

XVII. APPENDIX

391 Sections 74.01, 74.09 and 74.1 are as follows:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

- (a) makes a representation to the public that is false or misleading in a material respect;
- (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
- (c) makes a representation to the public in a form that purports to be
 - (i) a warranty or guarantee of a product, or
 - (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

74.01(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

- (a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
- (b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be

ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

- (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
- (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

74.01(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to

- (a) the price at which products have been or are supplied; or
- (b) the price at which products will be supplied.

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[...]

74.09 In sections 74.1 to 74.14 and 74.18, "court" means the Tribunal, the Federal Court or the superior court of a province.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

- (a) not to engage in the conduct or substantially similar reviewable conduct;
- (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
 - (i) a description of the reviewable conduct,
 - (ii) the time period and geographical area to which the conduct relates, and
 - (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
- (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
 - (i) in the case of an individual, \$50,000 and, for each subsequent order, \$100,000, or
 - (ii) in the case of a corporation, \$100,000 and, for each subsequent order, \$200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- (a) the reach of the conduct within the relevant geographic market;
- (b) the frequency and duration of the conduct;
- (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d) the materiality of any representation;
- (e) the likelihood of self-correction in the relevant geographic market;
- (f) injury to competition in the relevant geographic market;
- (g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and
- (h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

- (a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;
- (b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;
- (c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part;

or

- (d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

* * *

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

- a) ou bien des indications fausses ou trompeuses sur un point important;
- b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;
- c) ou bien des indications sous une forme qui fait croire qu'il s'agit :
 - (i) soit d'une garantie de produit,
 - (ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,

si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

74.01(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :

- a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
- b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits

similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

- a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
- b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

74.01(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[...]

74.09 Dans les articles 74.1 à 74.14 et 74.18, "tribunal" s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

74.1(1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :

- a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
- b) de diffuser, notamment par publication, un avis, selon les modalités de

forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

- (i) l'énoncé des éléments du comportement susceptible d'examen,
 - (ii) la période et le secteur géographique auxquels le comportement est afférent,
 - (iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias -- notamment de la publication -- utilisés;
- c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :
- (i) dans le cas d'une personne physique, de 50 000 \$ pour la première ordonnance et de 100 000 \$ pour toute ordonnance subséquente,
 - (ii) dans le cas d'une personne morale, de 100 000 \$ pour la première ordonnance et de 200 000 \$ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

- a) la portée du comportement sur le marché géographique pertinent;

- b) la fréquence et la durée du comportement;
- c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
- d) l'importance des indications;
- e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
- f) le tort causé à la concurrence sur le marché géographique pertinent;
- g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
- h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

- a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
- b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
- c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;
- d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

TAB 3

Indexed as:

Canada (Competition Act, Director of Investigation and Research) v. Washington

**Reasons and Orders Regarding Discovery Issues
Rendered at the Pre-Hearing Conference on October 7-8, 1996**

**IN THE MATTER of an application by the Director of
Investigation and Research for orders pursuant to section 92
of the Competition Act, R.S.C. 1985, c. C-34;**

**AND IN THE MATTER of the merger whereby Dennis Washington
and K & K Enterprises acquired a significant interest
in, and propose to acquire control of, Seaspan
International Ltd.;**

**AND IN THE MATTER of the merger whereby Dennis Washington
acquired Norsk Pacific Steamship Company, Limited;**

Between:

**The Director of Investigation and Research, Applicant and
Dennis Washington, K & K Enterprises, Seaspan International
Ltd., Genstar Capital Corporation, TD Capital Group Ltd., Coal
Island Ltd., 314873 B.C. Ltd., C.H. Cates and Sons Ltd.,
Management Shareholders, Preference Shareholders, Norsk
Pacific Steamship Company, Limited, Fletcher Challenge
Limited, Respondents**

[1996] C.C.T.D. No. 23

Trib. Dec. No. CT9601/139

Also reported at: 70 C.P.R. (3d) 317

Canada Competition Tribunal
Ottawa, Ontario

Before: Rothstein J., Presiding Judicial Member

Heard: October 7-8, 1996

Decision: October 8, 1996

(13 pp.)

Counsel for the Applicant:

Director of Investigation and Research

William J. Miller

Ann Wallwork

Counsel for the Respondents:

Dennis Washington

K & K Enterprises

C.H. Cates and Sons Ltd.

Norsk Pacific Steamship Company, Limited

Seaspan International Ltd.

Douglas G. Morrison

Genstar Capital Corporation

Robyn M. Bell

TD Capital Group Ltd.

Kent Thomson

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Reasons and Orders Regarding Discovery Issues
Rendered at the Pre-Hearing Conference on October 7-8, 1996

1 At the pre-hearing conference in this matter, held on October 7 and 8, 1996, the Tribunal dealt with two motions by the Director. The first motion arose from the oral discoveries of the respondents C.H. Cates and Sons Ltd. ("Cates") and Seaspan International Ltd. ("Seaspan"). The second motion arose from the oral discovery of the respondent Genstar Capital Corporation ("Genstar"). The Tribunal's orders were given from the bench at the pre-hearing conference, with brief reasons. The following is the text of those orders and the edited reasons.

I. MOTION REGARDING ORAL DISCOVERY OF CATES AND OF SEASPAN

2 The Director's notice of motion asks that the representative of the respondent Cates be required to re-attend to answer questions relating to the issue of "natural monopoly" as set out in the response at paragraphs I-24 to I-32, and question relating to the facts obtained from third party sources by the respondent or on its behalf by its counsel. He also asks that the respondent Cates advise what information it has from third party sources that is relevant to the issues and produce summaries of the statements of those third parties.

3 The Director also asks that he be allowed to put certain confidential documents of Cates to the Seaspan representative during his oral examination for discovery and vice versa.

A. Further and Better Answers

4 With respect to the request for further and better answers to questions asked of the deponent on discovery for Cates, I will first make some general observations and then deal with specific questions.

5 It seems that a problem may have arisen because of a misunderstanding between the parties as to the propriety of certain questions exploring the "natural monopoly" issue. Counsel for Cates may have thought that the questions were seeking economic or legal opinions whereas counsel for the Director was trying to get an understanding of the respondent's pleading relating to the natural monopoly issue and to obtain factual information regarding that issue. As a general rule, the party examining is entitled to ask questions that are grounded in the pleadings. In doing so, the party examining is entitled to specific, material, relevant facts but not economic or legal opinions.

6 There also seems to have been a misunderstanding as to whether the deponent on discovery had to inform himself about factual information obtained by counsel speaking to third party sources outside the respondent. The law is clear that factual information must be provided and is not protected by privilege even if facts were obtained through an investigation conducted by counsel.¹

7 The way the questioning developed here, it seems to have led to the asking of broad, general questions about all facts obtained from third-party sources. It may be appropriate, if factual answers are given in response to a particular question, to ask the source of those facts. And it may be necessary that the sources be provided, but that is different from asking a broad, general question as to who all the sources were and what all the information obtained from those sources was. Generally, I think that type of broad inquiry is not appropriate. In this particular case, for practical purposes it may be necessary to place a greater onus on the party being examined than would normally be appropriate, just because the discoveries have gone some distance. This point is dealt with further below.

8 With respect to witness statements or statements from third-party sources, or summaries or "gists" of those statements, rule 458(1)(b) of the Federal Court Rules, which guides us in these

proceedings, requires that the person being discovered:

answer, to the best of the person's knowledge, information and belief, any question that . . . concerns the names or addresses of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to any matter in question in the action.

There is no reference in the rule to providing statements or summaries of statements obtained from those third-party sources. Counsel for the Director provided some authority to the Tribunal that in Ontario there has been a practice of providing, for discovery purposes, summaries of evidence that witnesses may be expected to give. However, the authority in Ontario seems to be mixed on the point.

9 Rule 458(1)(b) was brought in force on December 6, 1990. While I do not want to place too fine a point on it, I am inclined to think that there was sufficient knowledge amongst lawyers and courts at that time that, had it been the intention to require "gists" or summaries of statements for discovery purposes in the Federal Court, there would have been some reference in rule 458. I do not see such reference. I am not suggesting that there may not be circumstances when "gists" or summaries might not be appropriate, and it may be within the Tribunal's discretion, when applying rule 458, to require such production. But, generally, I do not think that production of such "gists" or statements are contemplated by the rule and I would not require it in this case.

10 That is not to say, however, that "will-say" statements should not be provided for hearing purposes in this matter. I need not say more about that because it has been the Tribunal's practice to require the exchange of "will-say" statements prior to the hearing and there is merit to it in terms of the efficient conduct of the hearing. But here we are talking about providing such statements for discovery purposes, and I do not think that generally rule 458 contemplates such production.

11 Counsel for Cates has brought to the Tribunal's attention *Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd.*,² a decision of the Alberta Court of Appeal. In that case the Court indicates that a question framed as, "On what facts do you rely?" is objectionable. Counsel for Cates does not object to counsel for the Director rephrasing questions that ask for factual information in another form.

12 To the extent, then, that the respondent Cates was asked for factual information relating to the issues arising from the pleadings or for the names and addresses of persons who have provided specific, material, factual information to Cates with respect to issues in the case, whether that information be positive or negative, such questions should be answered. The names of expert witnesses need not be provided.

13 Dealing specifically with the questions which the Director has sought to have answered in this motion, paragraph 1(a) of the notice of motion refers to questions relating to "natural monopoly". The Director is entitled to ask factual questions arising from the pleadings. In the course of

argument, counsel for Cates agreed that such factual questions were not objectionable. Questions going to opinions need not be answered.

14 During argument on this motion, counsel for Cates gave some further explanation of the way in which the term "natural monopoly" was being used by Cates in its pleadings. The Director is entitled to rely upon that explanation for purposes of developing questions and seeking factual information with regard to the natural monopoly issue.

15 Paragraph 1(b) of the notice of motion asks for "facts, if any, additional to those provided at the examination which are within the knowledge of the said Respondent, including its counsel, based upon third party sources." As I previously indicated, generally that type of blanket question is not appropriate. However, in the circumstances of this case, because discoveries have proceeded some distance, practicality dictates, and the parties have agreed, that the deponent for Cates should review the information obtained from third-party sources, whether that information was obtained directly by Cates or by its counsel, for factual information. To the extent that there is factual information of which the deponent was not aware previously, he should indicate anything additional to or that changes the answers that he has already given. Again, additional information or changed information should be restricted to material facts and not opinions. For this purpose, the deponent should re-attend, although if the parties agree, the answers can be given in writing.

16 Paragraph 1(c) of the notice of motion asks that the deponent advise himself with respect to the matters set out in paragraphs 1(a) and 1(b). I have already dealt with that in the disposition of paragraphs 1(a) and 1(b). Paragraph 1(d) asks that Cates:

advise if it has information from third-party sources which are facts relevant to the issues in this proceeding, and what those facts are, if not otherwise disclosed in the response of the witness Towill.

Also in paragraph 1(d), the Director asks for the production of summaries of statements, including the identity of the makers thereof, with respect to information obtained from third parties. Both these points also have been dealt with.

B. Confidential Documents

17 The Director seeks to place four confidential documents before the deponents on discovery of Cates and Seaspan and to ask them questions about the information in those documents. The documents are confidential to the respondent other than the one whose deponent will be questioned about them. The respondents Cates and Seaspan object on the ground that the documents contain sensitive marketing information of the other party that is not already known to the party for whom the deponent is appearing. Because I do not want these reasons, which will be public, to subvert the fact that I am not ordering any further disclosure of the documents, I will indicate only in broad terms why the four documents should not be disclosed to the deponent being examined.

18 I am satisfied from what counsel for Cates and Seaspan has told me that there is no objection to questions dealing with the substance of the information in the documents that is within the knowledge of the deponent properly informed. Such questions may be asked and answers must be given. I am further satisfied that there is some material in the documents that should not be disclosed. The information, as far as I can appreciate it, is sensitive marketing information. I do not think it would be in the interest of any party that this type of information be disclosed when it does not appear absolutely necessary to do so.

19 The Director argues that the force of the examination might be somewhat stronger if a document could be placed in front of the witness. However, these are not documents which the respective deponents have even seen and, therefore, I find that argument somewhat marginal in these circumstances. The Director's counsel can ask the kind of questions that he wishes to ask, obtain the information that the deponent has and obtain whatever admissions he can obtain, to all intents and purposes, without the actual disclosure of the documents to the deponents.

II. MOTION REGARDING ORAL DISCOVERY OF GENSTAR

20 The Director's notice of motion asks that the representative of the respondent Genstar be required to re-attend to answer questions relating to the competition issues which influenced the negotiations between Genstar and the Washington group leading to the sale of Seaspan (in particular questions 711 and 712) and relating to third party sources.

21 With respect to the first point, counsel for the Director did not convince me with respect to questions 711 and 712. As I understand it, the questions relate to prior proposed transactions that did not go forward as originally intended. It is not clear to me why these questions are relevant to the issues in this proceeding. However, without having to address that question, it does seem to me that the questions, in substance, seek the legal advice that was given to Genstar with regard to those prior proposed transactions. In that sense, I think the questions are objectionable as encroaching upon solicitor-client privilege and need not be answered.

22 Counsel for the Director did refer to an objection by counsel for Genstar during the discovery, which counsel for the Director took to purport to restrict the Director from asking questions about any "competition issues". I do not read the objection that way. However, in an abundance of caution, I will say that, to the extent that the deponent has factual information about a marketplace and about the kind of considerations that apply in determining whether a merger or a proposed merger may substantially lessen competition, questions pertaining to those factual matters are appropriate.

23 Regarding the second point, counsel for the Director concedes that he has received from Genstar's counsel a list of names of third parties who have information about the issues. However, he argues that so many names have been given that it is difficult to use the list and to determine who gave important information as opposed to information of marginal importance. Counsel for Genstar says that, with respect to people under the control of Genstar, it has given all relevant names and

has indicated who are the persons who have the most knowledge. With regard to the other names, she says that Genstar is not in a position to know, at least not in every case, the extent of the involvement of individuals and is unable to say who has important information and who does not.

24 In reply, counsel for the Director submits that it would have been open to him, in asking specific questions, to enquire as to the source of the deponent's knowledge and thus find out the names of the third parties from whom the deponent obtained specific information, where the deponent's information came from third parties. He says that he should not be precluded from asking, at the end of the discovery, a compendious question summarizing what he could have obtained asking individual questions.

25 There is no allegation here of bad faith or disingenuousness against Genstar and no suggestion has been made that Genstar was trying to impede counsel for the Director by giving so many names that he would practically be unable to deal with them. It would appear that Genstar has complied with the letter of rule 458(1)(b). The Tribunal accepts that it may be difficult for Genstar to know the extent of knowledge of persons not under the control of Genstar. In the circumstances, if Genstar is in a position to advise the Director of any names of persons on the list already provided whose knowledge is not material or who have had a peripheral involvement only, Genstar should do so. Otherwise, counsel for the Director has the names and it is up to him to take whatever steps he deems appropriate in communicating with such persons in an effort to advance the Director's case.

DATED at Ottawa, this 8th day of October.

SIGNED on behalf of the Tribunal by the presiding judge.

(s) Marshall Rothstein Marshall Rothstein

qp/d/lis

1 See *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] C.T.C. 353 (Ex. Ct).

2 [1989] 1 W.W.R. 750.

TAB 4



CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to October 24, 2018
Last amended on May 1, 2018

À jour au 24 octobre 2018
Dernière modification le 1 mai 2018



R.S.C., 1985, c. C-34

L.R.C., 1985, ch. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Short Title

Titre abrégé

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2^e suppl.), art. 19.

PART I

PARTIE I

Purpose and Interpretation

Objet et définitions

Purpose

Objet

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

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

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

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

Interpretation

Définitions

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

PART II

Administration

Commissioner of Competition

7 (1) The Governor in Council may appoint an officer to be known as the Commissioner of Competition, who shall be responsible for

- (a) the administration and enforcement of this Act;
- (b) the administration of the *Consumer Packaging and Labelling Act*;
- (c) the enforcement of the *Consumer Packaging and Labelling Act* except as it relates to food, as that term is defined in section 2 of the *Food and Drugs Act*; and
- (d) the administration and enforcement of the *Precious Metals Marking Act* and the *Textile Labelling Act*.

Oath of office

(2) The Commissioner shall, before taking up the duties of the Commissioner, take and subscribe, before the Clerk of the Privy Council, an oath or solemn affirmation, which shall be filed in the office of the Clerk, in the following form:

I do solemnly swear (or affirm) that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Commissioner of Competition. (*In the case where an oath is taken add "So help me God".*)

Salary

(3) The Commissioner shall be paid such salary as may be from time to time fixed and allowed by the Governor in Council.

R.S., 1985, c. C-34, s. 7; 1999, c. 2, ss. 4, 37.

Deputy Commissioners

8 (1) One or more persons may be appointed Deputy Commissioners of Competition in the manner authorized by law.

Powers of Deputy

(2) The Governor in Council may authorize a Deputy Commissioner to exercise the powers and perform the duties of the Commissioner whenever the Commissioner is absent or unable to act or whenever there is a vacancy in the office of Commissioner.

PARTIE II

Application

Commissaire de la concurrence

7 (1) Le commissaire de la concurrence est nommé par le gouverneur en conseil; il est chargé :

- a) d'assurer et de contrôler l'application de la présente loi;
- b) d'assurer l'application de la *Loi sur l'emballage et l'étiquetage des produits de consommation*;
- c) de contrôler l'application de la *Loi sur l'emballage et l'étiquetage des produits de consommation*, sauf en ce qui a trait aux aliments, au sens de l'article 2 de la *Loi sur les aliments et drogues*;
- d) d'assurer et de contrôler l'application de la *Loi sur le poinçonnage des métaux précieux* et de la *Loi sur l'étiquetage des textiles*.

Serment professionnel

(2) Préalablement à son entrée en fonctions, le commissaire prête et souscrit ou fait, selon le cas, le serment ou l'affirmation solennelle, tels qu'ils sont formulés ci-après, devant le greffier du Conseil privé, au bureau duquel il est déposé :

Je jure d'exercer (ou affirme solennellement que j'exercerai) avec fidélité, sincérité et impartialité, et au mieux de mon jugement, de mon habileté et de ma capacité, les fonctions et attributions qui me sont dévolues en ma qualité de commissaire de la concurrence. (*Ajouter, en cas de prestation de serment : « Ainsi Dieu me soit en aide ».*)

Traitement

(3) Le commissaire reçoit le traitement fixé par le gouverneur en conseil.

L.R. (1985), ch. C-34, art. 7; 1999, ch. 2, art. 4 et 37.

Sous-commissaires

8 (1) Le ou les sous-commissaires de la concurrence sont nommés de la manière autorisée par la loi.

Pouvoirs du sous-commissaire

(2) Le gouverneur en conseil peut autoriser un sous-commissaire à exercer les pouvoirs et fonctions du commissaire en cas d'absence ou d'empêchement de celui-ci ou de vacance de son poste.

TAB 5

CT - 90 / 1

IN THE MATTER of an application by the Director of Investigation
and Research for orders pursuant to section 92 of the
Competition Act, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER of the direct and indirect acquisitions
by Southam Inc. of equity interests in the businesses of publishing
The Vancouver Courier, the North Shore News and the Real Estate Weekly

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

**Southam Inc.
Lower Mainland Publishing Ltd.
Rim Publishing Inc.
Yellow Cedar Properties Ltd.
North Shore Free Press Ltd.
Specialty Publishers Inc.
Elty Publications Ltd.**

Respondents

ORDER REGARDING SCOPE OF DISCOVERY
TO BE PROVIDED BY THE APPLICANT

Date of Hearing:

June 14, 1991

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

Stanley Wong
Keith C.W. Mitchell

Counsel for the Respondents:

Southam Inc.
Lower Mainland Publishing Ltd.
Rim Publishing Inc.
Yellow Cedar Properties Ltd.
North Shore Free Press Ltd.
Specialty Publishers Inc.
Ely Publications Ltd.

Neil R. Finkelstein
Mark C. Katz

COMPETITION TRIBUNAL
ORDER REGARDING SCOPE OF DISCOVERY
TO BE PROVIDED BY THE APPLICANT

The Director of Investigation and Research

v.

Southam Inc. et al

This motion raises some fundamental issues about the scope of discovery which a respondent should be entitled to obtain from the Director of Investigation and Research ("Director"). The respondents take the position that the Director should be subject to discovery in a manner analogous to any party in civil proceedings. The Director takes the position that his role before the Tribunal is not analogous to a private party, that as an applicant he is acting in a representative capacity and therefore discovery as against him is not a meaningful procedure or at least should be significantly curtailed. The answers to many of the questions which the respondents pose are refused on the ground of either litigation privilege or public interest privilege. Many of the questions are also argued to be irrelevant and some to elicit opinions or conclusions of law.

The Director's counsel took the position that the Director has no direct knowledge of the facts relevant to the application and thus his

representative on discovery was in no position to make any admissions of fact. Counsel stated that the Director's representative was being put forward only to answer questions concerning the facts that are in the knowledge of the Director but not to make admissions with respect thereto. This is a semantic argument. To the extent that any party on discovery does not have first hand knowledge of the facts to which the questions relate, that party is only stating what is known by him, her or it at the time. In addition, insofar as "admissions" on discovery are said to be "binding" on the party making them, it is of course always open to contradict or modify such "admissions" at trial.¹ Admissions are obtained to narrow the issues. While they are said to "bind" the parties, this is not an irrevocable position.

Discovery has two purposes: (1) the obtaining of admissions so that the issues between the parties can be narrowed; (2) the obtaining by one party of the information in the knowledge of the other.² Despite the Director's contention that his representative cannot make admissions because of a lack of direct information, it is to be hoped that certain issues of fact can be agreed upon and admitted. Indeed, the Director's commitment to

¹ See, for example, *Holmsted and Gale on the Ontario Judicature Act and Rules of Practice*, vol. 2 (Toronto: Carswell, 1983) at 1745, para. 2.12.

² C.E. Choate, *Discovery in Canada* (Toronto: Carswell, 1977) at 8, para. 29; *Graydon v. Graydon* (1921), 51 O.L.R. 301 (C.A.): the primary purpose of discovery is to enable the party opposite to know what is the case he has to meet and its *secondary* and subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing. See also Choate, *ibid.* at 5, para. 15 and at 8, para. 26.

present an agreed statement of facts prior to the hearing belies the contention that it is not possible for him to make admissions at the discovery stage.

Counsel for the Director argues that the present proceedings are different from a normal discovery where parties are actually participants and have knowledge of the transactions. This is not a convincing reason to deny the respondents a right to discover a representative of the applicant. Discovery procedures work in other contexts where government investigating officers are in charge of preparing one side of the case (e.g. tax litigation). Discovery procedures have worked in other cases before the Tribunal.³ On some occasions it may be that the complainant is the proper person to be put forward for discovery instead of an official from the Director's office. In the *Chrysler* case, the complainant was examined for discovery and this was most appropriate since the issue (refusal to deal) was one which exclusively involved the respondent and the complainant.

The Director's position is that discovery as against his office should not occur, that it is not a meaningful procedure because all of his investigations (information collecting activities) are privileged (public interest or litigation privilege). Counsel argues that the position of the respondents and the Director is asymmetrical, with the Director having a

³ *Director of Investigation and Research v. Air Canada et al*, CT-88/1, Reasons and Order, February 14, 1989; *Director of Investigation and Research v. Chrysler Canada Ltd.*, CT-88/4, Reasons and Order, October 13, 1989.

number of highly intrusive powers. Thus a procedure is suggested whereby the Director will provide the respondents with a summary of the evidence he plans to produce as well as "will say" statements from his witnesses at some time prior to trial. While the Director has agreed in this case, and in previous proceedings before the Tribunal, to be examined on discovery, on reflection the appropriateness of that procedure is now being questioned. At the outset of the discovery, counsel for the Director stated:

I would like to put something on the record. The Director is of the view that the respondents should have fair disclosure of the evidence that the Director will present in the hearing of the application. I have been instructed by the Director to say the following: Counsel for the Director undertakes to provide to counsel for the respondents, prior to the commencement of the hearing, a summary of the evidence that he intends to present to the Competition Tribunal. We will advise you before the end of June the date by which this disclosure will be made. In addition, counsel for the Director intends to seek the agreement of counsel for the respondents, that as a general practice each counsel should give reasonable notice of calling a witness with a "will say" statement of that witness to opposing counsel prior to the calling of the witness.⁴

This commitment was relied upon by the Director's representative when refusing to answer a number of questions.

The *Competition Tribunal Rules* do not expressly require oral discovery; they do require documentary discovery. Also, in previous applications before the Tribunal, discovery (both oral and documentary) has

⁴ Transcript of Examination for Discovery of Andre Brantz, An Authorized Representative of the Director of Investigation and Research, vol. I at 1.

proceeded in a reasonably normal way as between the parties. There is no reason in principle why it should not do so in this case. The procedure which the Director proposes may be of additional benefit to the respondents and to the proceedings before the Tribunal. It is not, however, a substitute for discovery particularly in the context of the present case where discovery was agreed to by the parties. Indeed, the Director's conduct on the examination for discovery was much more forthcoming than the position set out above would seem to indicate.

What is at the heart of the present dispute is the fact that on March 6, 1989, the Director sent the respondent Southam Inc. ("Southam") a "no-action" letter with respect to its January 27, 1989 acquisition of the *North Shore News*. The Director, however, now challenges that acquisition in the application filed November 29, 1990. The application challenges not only the January 1989 acquisition of the *North Shore News* but also the May 8, 1990 acquisition of some other community newspapers (the *Real Estate Weekly* and *The Vancouver Courier*).

Many of the questions which counsel for the respondents seeks to have answered relate to the nature of the investigation which was carried out prior to the issue of the no-action letter. In this context, the respondents seek information concerning discussions which occurred in the Director's office between officials prior to the no-action letter being sent, information on whether acquisitions of other newspaper mergers (Brabant) had been taken

into account, information concerning the process of investigation which occurred after the letter was sent and information as to what caused the Director to change his mind. Counsel for the Director argues that answers to these types of question are covered by litigation privilege and, what is more, that they are irrelevant on the basis of the pleadings as they stand: the conduct of the Director is not in issue.

The Tribunal agrees that many of the questions which the Director's representative has been asked are not relevant to the present litigation: how many merger investigations have you been involved in (Q. 59); in investigating this one did you consider other newspaper mergers (Q. 61); when you did an interview and got an answer ... did you cut your interview short (Q. 91, 92, 93); who in the Bureau had conversations with respect to Exhibit 5.⁵ (Q. 183); was there disagreement between the investigating officers (Q. 186); produce any documents or correspondence relating to those disagreements or arguments (Q. 187); did any of the investigators disagree re the facts in Exhibit 5 (Q. 189); when Mr. McAllistair received Exhibit 6,⁶ did he show it to anybody (Q. 193); was any agreement or disagreement expressed orally or in writing by those reviewing the transaction (Q. 203); what was Mr. Wetston thinking when he wrote the no-action letter (Q. 230); what did the Director and his staff rely on in writing

⁵ Southam's letter of December 15, 1988 advising the Director of the proposed acquisition of the *North Shore News* and providing information in relation thereto.

⁶ Letter from Southam to the Director dated January 31, 1991.

the no-action letter (Q. 245); was any inquiry done by the Director and his staff between receipt of Exhibit 5 and receipt of Exhibit 6 (Q. 247).

The issue before the Tribunal is not the conduct of the Director's investigation. The issue is whether the challenged acquisitions are likely to result in a substantial lessening of competition and particularly the market definition which is relevant for that determination. The no-action letter is relevant only in an indirect way to these proceedings. It is *not relevant* to the *fundamental* issues before the Tribunal. It does provide evidence of the context within which the present application arises and to that extent has peripheral relevance. As has been noted, whether the Director issued his no-action letter on the basis of extensive investigation or after minimal review is not relevant. In addition, the letter itself commits the Director only to taking no action at the time when the letter was written and it is based on the knowledge then in the hands of the Director. It may occur that there are changed circumstances between the date of a no-action letter and a subsequent challenge by the Director and that as a result the time when certain information was obtained by the Director becomes relevant. There is, however, no allegation that would make that date (or dates) a relevant factor for the purpose of this case.

The following questions, as well as those set out above, need not be answered because they relate primarily to the conduct of the investigation, discussions within the Director's office or to other

investigations which the Director might have carried on: 24, 54, 58, 60, 62, 63, 83, 105, 110, 114, 136, 137, 138, 140, 181, 184, 188, 195, 196, 210, 216, 226, 227, 229, 232, 241, 242, 243, 244, 246, 247, 248, 251, 252, 254, 255, 256, 257, 258, 259, 260, 264, 265, 270, 273, 276, 320, 321, 322, 325, 326, 333, 334, 348, 372, 373, 374, 672. Of a similar nature are questions which are directed at determining the date when the Director obtained certain information: 269, 323, 324, 331, 369. Questions 137 and 672 seek non-public documentation which is in the Director's hands and which supports the commencement of the section 10 inquiry. These questions by their breadth encompass internal memoranda prepared for the Director. These are not relevant to the present proceedings.

Another category of questions which can easily be disposed of is that concerning the relevance or preparation of pleadings. Some questions are irrelevant to the issues at hand, others call for conclusions of law. Two examples of such questions are: why is no reference made to the no-action letter in the Director's notice of application (Q. 144); why are paragraphs 11, 12, 13 and 14 in the notice of application (Q. 145). These need not be answered. Other questions of a similar nature which need not be answered are 163 and 423.

A number of questions ask for opinions from the witness and therefore need not be answered: which newspaper has a *comparable circulation* to the Courier's Wednesday edition (Q. 161); has the circulation of the Southam dailies *remained stable* (Q. 356). Question 513 is of a similar

nature: "... even if there was an actual decline in retail advertising revenues by the dailies ... there's no way of calculating how much of this decline is attributable to the north shore news and the courier as opposed to other community newspapers ...?" With respect to the questions concerning comparable or stable circulation, the circulation figures for the newspapers in question are in the hands of both parties. The conclusions to be drawn therefrom are not something that a party must answer on discovery. At the same time, why answers to questions 161 and 356 were not provided, merely to expedite the discovery process, is not clear. If a co-operative attitude had prevailed at discovery it seems likely that the witness would have answered these questions as a matter of course. Also, the fact that question 513 was not answered (the answer surely being obvious) seems the result of an unduly technical approach.

A number of questions which peripherally relate to the internal procedures of the Director's office (filing procedures) have a direct relevance to the admissibility of evidence before the Tribunal. Questions 282, 283, 291, 292, 300 and 314 seek information concerning the files from which documents number 1 to 35 in the Director's affidavit of documents were obtained. Counsel for the respondents are of the view that these documents were obtained pursuant to a warrant and are being used for purposes outside that warrant. The questions should be answered. The public interest, if any, which exists in the Director being entitled to keep his filing procedures confidential is clearly outweighed by the respondents'

interest in having answers given.

With respect to question 66, counsel for the Director took it "under advisement". It is not clear why counsel for the respondents considered his response to be a refusal; the question should be answered. The question seeks information concerning the Director's merger policy in light of the *Merger Enforcement Guidelines* which were released on April 17, 1991 and the previous Information Bulletin, no. 1, June 1988.

Some questions were not answered because they were considered by counsel for the Director to be unreasonable. In general, individuals when being discovered need not answer questions seeking information which is in the questioner's knowledge or questions that would put a burden on the party being questioned which is out of all proportion to the benefit to be gained from the answer by the examining party. Among the questions which need not be answered for these reasons are those which relate to the allegation that *The Vancouver Courier* and the *North Shore News* have the highest circulations of the community newspapers in the Lower Mainland (Q. 148, 152, 161 and 162).⁷ Question 161 might also be classified as an opinion question (*supra*). The circulation figures for the newspapers are in the hands of both parties. Indeed, the Director obtained much of his information in this regard from the respondents.

⁷ Although, again, why one finds it necessary to adopt so technical an approach in refusing to answer questions is difficult to understand.

Another series of questions which need not be addressed for the above noted reasons are those seeking reference *to every* document which is relied upon by the Director for the allegation that community newspapers compete with the daily newspapers in the Lower Mainland (Q. 472, 475 and 477)⁸ and those seeking identification by the Director of *every* document (or part thereof) on which he relies for support of the allegation that the Southam dailies were in direct competition with the *North Shore News* (Q. 564). The Director's representative answered the first series of questions by identifying some documents in schedule 2 of the Southam affidavit of documents which the Director specifically had in mind in making these allegations: document 20 and Pacific Press document 111, a confidential report entitled "Future Value of the Vancouver B.C. Marketplace". Question 564 was answered in a similar fashion by reference to illustrative documents.

It is unreasonable to expect a party to identify *every* document or part thereof which might be relied upon to support an allegation such as those under consideration here. The allegations by their nature are of a type that a great many documents might relate thereto, some of minimum probative value. The conclusion respecting whether competition has been substantially lessened is a complex one and, while factually based, is likely to

⁸ Decisions which have considered unreasonable questions are: *Andres Wines Ltd. v. T.G. Bright & Co. Ltd.* (1978), 41 C.P.R. (2d) 113 (F.C.T.D.) and *Cominco Ltd. v. Westinghouse Canada Limited* (1979), 11 B.C.L.R. 142 (C.A.).

be formed with the assistance of expert evidence. Every copy of every newspaper concerned might relate to these issues. It is sufficient if a party on discovery indicates the significant sources on which it relies for its allegation when the conclusions which these facts go to support are constructs of the type in question. It is always open to a party, if truly surprised by the sources chosen from the materials produced on discovery, upon which an opposing party relies, to object to the introduction of such evidence by reason of prejudice or to seek additional time to respond. While counsel for the respondents referred to the great quantity of documents which had been produced on discovery and to which reference might be made as support for this allegation, the Tribunal was not persuaded that there was a serious difficulty in this regard.

Other questions which need not be answered are those seeking identification of all the facts and documents upon which the Director relies for the allegation that there has been over the years a loss of advertising revenue from the Southam dailies to the *North Shore News* and *The Vancouver Courier*. Again a vast quantity of documents might serve in a general way as evidence for such a conclusion. It is sufficient if the Director indicates the main sources upon which he proposes to rely. This is true with respect to the request for further information both in a general sense, and secondly as found in the documents provided to the Director by Southam (Q. 489, 497, 499, 500, 501, 503). The purpose of discovery is to reveal facts on which the other party relies (an outline of the case); it is not intended to require

disclosure of minute details of the evidence by which those facts will be proved.

The most difficult issue to resolve with respect to discovery which has been raised by the present motion is the status of those questions which seek access to information collected by the Director in reviewing the transactions in question. These questions are clearly relevant to the issues before the Tribunal. The questions which fall into this category are: Q. 87, 88, 111, 112, 115, 129, 131, 134, 135, 197, 198, 228, 246, 324, 408, 455, 483, 502, 588, 658, 665, 666, 682, 683, 706, 736. These are of the following nature: what interviews were held with industry participants, who was interviewed, what industries were looked at, what economic experts were spoken to, what information was collected, who did the interviews, produce the interview notes. The Director argues that these questions are covered by either litigation privilege or public interest privilege.

While the Director is opposed to providing the actual interview notes and similar detailed information, particularly the identity of the interviewees, he is not opposed to providing a summary of the information which has been obtained at least insofar as he intends to rely on it in presenting his case to the Tribunal. The nature of the dispute between the parties in this regard can be illustrated by portions of the transcript:⁹

⁹ *Supra*, note 4, vol. II at 208-215, 230-232; vol. III at 241-243.

At pp. 208-215:

MR. WONG: Sorry, to be clear, *we're not going to tell you who said what, but we're prepared to tell you what the facts that we have derived from the investigation are in support of the case. ...*

MR. FINKELSTEIN:

I said upon what facts does the Director rely for the allegation that there is significant direct competition between the Vancouver courier and the Southam dailies.

A Well, the creation of Flier Force for one thing.

575 Q Okay. Now, please explain that.

A Pacific Press, or the parent corporation of Flier Force, Southam perhaps, felt necessary to be able to offer increased penetration in the market served by both the courier and also the north shore news. Presumably this was a function of the less than satisfactory or adequate penetration offered by the dailies in those markets and Flier Force would have delivered fliers as a supplement to any insert availability by the dailies in the market served by the Vancouver courier.

...

579 A I believe a study was prepared -- Excuse me. An article appeared in 1984 by Ms. Urban and it was, has been received as, it was an Exhibit during the Discovery of Mr. Ballard and it stood for the proposition that inserts had a better -- We have the document here, why should I paraphrase it? Okay.

MR. WONG: I think it was marked as a separate Exhibit, called the Advantage Flier wasn't it?

A "Get the Inserted Advantage".

MR. WONG: I don't think we have the actual Exhibit number, but we do have the actual document, but it's produced under tab 2 of Schedule 1 of the Rim productions.

...

MR. FINKELSTEIN:

583 Q Mr. Brantz, you were going through the facts upon which you rely for the proposition that flier inserts are more effective than free-standing fliers.

A Correct.

584 Q Continue. Or have I heard it all?

A Oh, no.

585 Q Well, let's have the rest.

MR. WONG: This is a document marked as Exhibit "24" in the Discovery of Mr. Peter Ballard. It's the other part of the Urban article which was marked as Exhibit "27" to this Examination.

MR. FINKELSTEIN:

Okay. Can we mark that as the next Exhibit? (EXHIBIT "28" - URBAN ARTICLE)

MR. FINKELSTEIN:

586 Q Anything else?

A Yes. The fact that fliers are dropped off in lobbies and remain there whereas community papers with inserts in them tend to be picked up at a greater rate and, therefore, penetrate in apartment buildings the higher rate than would a stand-alone flier.

587 Q Now, is that your theory or do you have some evidence in support of that?

A *That view has been expressed to us by a number of executives in the community newspaper field here in British Columbia.*

588 Q *Which I take it you're not going to tell me about?*

A Correct.
MR. WONG: That's a refusal.

A That's correct.

MR. FINKELSTEIN:

589 Q Are there any other facts upon which you rely for your proposition that flier inserts are more effective than free-standing fliers?

A Certainly. Climatic factors in British Columbia make that inserts are dryer than fliers left on the doorstep.

MR. KWINTER:
What do you mean by "climatic effects"?

A They don't get wet from the rain.

MR. FINKELSTEIN:

590 Q Is that your theory or do you have some evidence in support of that?

A That is a view put to me by advertisers here in the Vancouver market.

591 Q And you're not going to tell me about that I take it?

A *I will not identify the person who made that comment.*

592 Q I see. You've heard it from one person. Is that it?

A Actually, no, I've heard it from several.

593 Q How many?

A I cannot be more specific. Two or three perhaps.

594 Q Have you got any way of finding out?

A I don't believe so.

595 Q What other facts do you rely upon in support of this proposition that flier inserts are more effective than free-standing fliers?

A Certainly the -- I believe MetroVan, which was an association, is an association, was an association of community newspapers offered the possibility of offering total market coverage. I'm sorry, excuse me, you're making the proposition whether inserts are -- No.

596 Q No further facts?

A None that come to mind at this time.

597 Q Well, if there are any others you'll let me know?

A Certainly.

(Emphasis added)

At pp. 230-232:

655 Q But Mr. Ballard's evidence was that the courier's most direct competitors were other community newspapers operating in the courier's market. I take it that you accept that evidence generally?

A No.

656 Q Okay. Can you tell me why not?

A Many of the community newspapers in the market served by the courier have relatively insignificant circulations, 2,200 I believe in one case, 9,500 copies in another, and as such could not be put forward as more direct competitors for advertising business than would be the case for the dailies.

657 Q Do you rely upon any other facts for your disagreement with Mr. Ballard that his most direct competitors are other community newspapers operating in his market?

A Yes. Having regard to advertisers; other community paper publishers, present or former; former employees, dailies, and I guess that's, that's about it.

658 Q *And you're not going to tell me about those conversations or anything arising out of them; is that right?*

A *I will not identify who I spoke to.*

659 Q *And I take it you also won't tell me what was said?*

MR. WONG: *We'll tell you in a general summary way what was said.*

MR. FINKELSTEIN:

660 Q I'm listening.

A It has been advanced that the courier was possibly a threat to the dailies inasmuch as it might be transformed at some future time into a daily itself. That proposition has not been advanced in respect of any other community paper in the courier market.

661 Q Is that it?

A The size of the courier in terms of the number of pages, the size of its circulation make it a more direct competitor for advertising revenues with the dailies than with other community papers.

662 Q Is that a complete summary now of what you've been told by all these people that you spoke to?

A To the extent that a premium or a, may have been paid for the courier in respect of its influence in the market-place. That might be an indice of its present or potential competition to the daily newspapers.

663 Q Is that it for the summary of the conversations?

A I believe that's the case.

664 Q *Now I'm asking you for details of all of those conversations.*

...

MR. WONG: *No.*

...

MR. WONG: *Mr. Brantz has given you a summary of the facts known to the Director concerning the questions you've asked*

MR. FINKELSTEIN:

And I take it that's all he's going to give me?

MR. WONG: That's right.

(Emphasis added)

At pp. 241-243:

MR. FINKELSTEIN:

Now, Mr. Wong, you've directed the witness not to answer generally about his interview with Mr. Robson, not to say when he was interviewed, where he was interviewed, whether a transcript was kept. I take it that that instruction to the witness not to answer also includes an instruction not to inform me what it was that Mr. Robson said.

MR. WONG: That is correct.

MR. FINKELSTEIN:

If I understand you correctly the witness is relying upon information from Mr. Robson to the effect that the courier had the potential to go daily, but you're not going to tell me what it is that Mr. Robson said

that the witness is relying upon for that allegation. Do I have that correct?

MR. WONG: *I will direct the witness to provide you with a summary of the information we have obtained from Mr. Robson. Go ahead, Mr. Brantz.*

MR. FINKELSTEIN:
I take that as a refusal.

MR. WONG: All right.

MR. FINKELSTEIN:
So we're clear, I want the details of who did the interview, when, where, what was said, any notes and records and so on.

MR. WONG: That's a refusal.

MR. FINKELSTEIN:

684 Q Without prejudice to that, being a refusal, let's have the summary.

A I believe Mr. Robson stated that Southam was concerned about the possibility of community papers in the Vancouver area possibly becoming dailies and threatening the cash flow generated by the Pacific Press dailies in the Vancouver area. I believe the expression was used that Southam wished to "close the back door."

685 Q On what?

A So that a weekly would not get strong enough to become a daily and decrease the -- in Mr. Robson's response, "... million dollar per year profit."

686 Q You have just read that from somewhere. Could you tell me what you read it from?

A Exhibit 36 answer 2(d).

687 Q What was the source of Mr. Robson's information?

A Mr. Robson I believe had at least one -- two, possibly three meetings with Mr. David Perks at which time the discussion involved the subject of the setting up of a chain of community newspapers in the lower mainland market.

688 Q And did Mr. Robson tell you that he was told by Mr. Perks that Mr. Perks was concerned that the courier would become - - had the potential to become a daily newspaper?

A I cannot say whether he specifically identified the courier. I can't recall that specifically, but definitely that there was concern that community papers in the Vancouver area could possibly become dailies, yes.

689 Q Would you make inquiries of Mr. Robson to find out whether Mr. Perks specifically told him that he was concerned that the courier had the potential to become a daily newspaper?

MR. WONG: Are you asking the witness to make inquiries?

MR. FINKELSTEIN: Yes.

MR. WONG: We're not going to do that. You can speak to Mr. Robson.

MR. FINKELSTEIN:

690 Q Would you make inquiries of whoever it was who did the interview, you're not telling me who that is, to see whether they recall whether Mr. Robson said he was told specifically that the courier, or anyone at Southam was concerned that the courier had the potential to become a daily newspaper?

MR. WONG: We'll do that.

(Emphasis added)

The Director refuses to provide the respondents with more details concerning both the interviews which were conducted and the information collected on the ground that these are protected from disclosure by either litigation privilege or public interest privilege. The Director argues that all documents from the beginning of his review of the acquisition of the *North Shore News*, which commenced in the late fall of 1988, are covered by litigation privilege. It is argued that all of the Director's activities are in contemplation of litigation.

The respondents argue that documents are not covered by litigation privilege if they were prepared for the purposes of reviewing the transaction and not with a view to an actual or contemplated application to the Tribunal. It is argued that an analogy can be drawn to the preparation of appraisal and other reports prepared with a possibility of litigation in mind.¹⁰ Counsel's argument relies heavily on the fact that most of the transactions which the Director reviews do not lead to an application being made to the Tribunal and the Director's preferred course of action is to negotiate changes with the parties involved rather than proceeding to the Tribunal. In addition, it is argued that only documents passing to or from counsel and his client are covered by the privilege.

Documents which were prepared before the no-action letter was sent in March 1989 cannot in any circumstances, it is argued, be covered by litigation privilege. That letter expressly states not only that litigation is not being commenced but that no inquiry for the purpose of investigating the transaction further is being undertaken. Counsel for the respondents concedes that in the present case litigation was contemplated from at least October 3, 1990. On that date a letter was sent to counsel for Southam stating that a section 10 inquiry would be commenced and an application would be

¹⁰ *Blais v. Honourable Robert Andras* [1972] F.C. 958 (C.A.); *Canadian National Railway v. McPhail's Equipment Company Ltd.* (1977), 16 N.R. 195 (F.C.A.); *Canadian National Railway v. Milne* [1980] 2 F.C. 285 (T.D.); *Houle v. The Queen in Right of Canada* (1985), 2 W.D.C.P. 439 (F.C.T.D.).

filed with the Competition Tribunal.

A number of issues are raised by the assertion of litigation privilege. Certainly a broad definition of the privilege could undercut any meaningful discovery by a respondent of the applicant's case. It may very well be that for Tribunal purposes a distinction between a solicitor's work product and communications with the client (a distinction which pertains in some United States jurisdictions) is the appropriate dividing line to apply in order to decide when documents are protected by litigation privilege. In any event, at the very least in the present case it is difficult to consider that the review process which took place prior to September 1990 would be protected by litigation privilege. Litigation privilege protects from disclosure documents which were brought into existence for the dominant purpose of litigation (actual or contemplated).¹¹ The purpose for the privilege is to ensure effective legal representation by counsel for his or her client. While litigation may have been a theoretical possibility prior to September 1990, there is no reason to think that the possibility of commencing litigation was being considered in such a manner that it could be said to be in contemplation. A reasonable distinction can be drawn between the Director's initial review procedures and the more intense and focused investigating procedures provided for by section 10 which in this case at

¹¹ *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.* (1988), 61 Alta. L.R. (2d) 319 (C.A.); *Santa Ursula Navigation S.A. v. St. Lawrence Seaway Authority* (1981), 25 C.P.C. 78 (F.C.T.D.); *Hodgkinson v. Simms et al* (1988), 55 D.L.R. (4th) 577 (B.C.C.A.).

least were clearly exercised in contemplation of litigation. When a litigation privilege is asserted the party making the assertion has the burden of proof.

Whether or not litigation privilege applies, however, is somewhat academic since in the Tribunal's view public interest privilege covers much of what the Director seeks to keep from the respondents. The Director refuses to provide the specific interview notes, to identify the individuals interviewed, when they were interviewed and who they were interviewed by. At the same time, he has agreed to give the respondents a summary of what was said. In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-à-vis the respondents. It is in the public interest, then, to allow the Director to keep their identities confidential, to keep the details of the interviews confidential, to protect the effectiveness of his investigations. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them.

It is conceivable that in some cases a respondent's ability to

answer a case might be impaired if information concerning the identity of those interviewed or detailed information concerning the interview is not given (although it is difficult to conceive of a situation where this would be so). In any event, there is no indication that this is the case in the present litigation. The public interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them. This is particularly so given the fact that the Director has agreed to provide summaries of the relevant information.

The Director's position that a summary of the information obtained from the interviews will be provided is a reasonable one. It raises, however, three issues: (1) at what time should the information be provided; (2) whether the summary should encompass only information on which the Director intends to rely in presenting his case; (3) how is the obligation to provide accurate but general summaries to be enforced.

With respect to the first consideration, in the present proceedings there is an obligation to provide the information in the context of the discovery proceedings. An undertaking to provide a summary at some later time of information *which is known now* is not appropriate. In many instances the Director may in fact have already provided the information as is obvious, for example, from the answers to questions 684 to 690 set out above. If he has not done so, then he should do so now rather than promising to do it in the future.

With respect to the extent of the information which should be provided, the Tribunal is of the view that the Director has an obligation to provide in a general way (aggregated form) not merely information which supports his case but also information which favours the respondent. For example, some of the general descriptions and observations found in document number 59 (provided to the Tribunal in response to a request for sample documents) would satisfy this requirement. The respondents are particularly entitled to a summary of the information which was collected by the Director prior to his decision to commence an application before the Tribunal.

This leaves for consideration the question of how compliance with these requirements can be assured in the absence of some review of the actual documents (for example, interview notes). Ensuring compliance with a discovery obligation of this nature is no different from ensuring compliance with ordinary documentary discovery. In both cases confidence is placed in the parties to accurately produce information within their control. If a serious question were to arise in this regard it is always open to the parties to seek an order for further discovery or a review by the Tribunal.

One aspect of the present dispute between the parties which was not explored is the extent to which the respondents are conceding by their present request that the names, times and details of interviews and discussions they have had with various industry participants are required to

be disclosed to the applicant. If the applicant is required to provide such information, would the respondents not similarly be required to do so?

The respondents raise in questions 74 and 79 the adequacy of the Director's claim for privilege. The Director's affidavit of documents contains a blanket clause in this respect. That clause describes the documents for which privilege is claimed as follows:

Confidential communications and documents which, since the commencement of this proceeding or in view of this proceeding, whilst it was contemplated or anticipated, have passed between any of the Applicant, his servants or agents, his solicitors or Counsel, or have been created by them, for the purpose of obtaining or furnishing information or materials to be used as evidence on his behalf in this proceeding or to enable such evidence to be obtained and to enable solicitors and Counsel for the said Applicant to conduct this proceeding on his behalf and to advise with reference thereto.¹²

In the *Chrysler* decision¹³ it was held that a general description of the above type was sufficient (at the time the documents had been filed with the Tribunal). The respondents' affidavits of documents contain a similar blanket claim. There is also authority that a more detailed listing is necessary.¹⁴ There is no doubt that a general practice has developed in the

¹² Schedule 1, Part 2.

¹³ *Director of Investigation and Research v. Chrysler Canada Ltd.*, CT-88/4, Reasons and Order, July 5, 1989.

¹⁴ *Barrett v. Vardy* [1989] O.J. No. 959 (Hawkins D.C.J.); *Grossman v. Toronto General*

profession of using blanket descriptions as was done in the present case. The better view is that a detailed listing should be provided but not one which by its terms breaches the confidence which it is sought to protect (e.g. by giving the name of an interviewee). At the same time, a need for practicality may require that documents be described in some group manner. In the present case there are apparently over 500 documents (not all of them relevant) which were not provided to the respondents. Within the constraint of practicality, documents for which privilege is claimed should be identified in some more specific form than by a general blanket clause.

Subsection 14(1) of the *Competition Tribunal Rules* require the filing and serving of an affidavit of documents which contains "a brief description of each of the documents". Subsection 14(2) provides within that context that a claim "that a document is privileged ... shall be made in the affidavit of documents". Thus, it is contemplated that claims for privilege will be made within the context of an affidavit of documents in which each document has been described.

That having been said, however, in the present circumstances there is no need to provide such further description because the Tribunal has already actually reviewed some of the documents and stands ready, as noted below, to review the rest. At the hearing of the present motion, the Tribunal

Hospital (1983), 35 C.P.C. 11 (Ont. S.C.); *Champion Truck Bodies Ltd. v. The Queen* [1987] 1 F.C. 327 (T.D.).

asked counsel for the applicant to provide it with a representative sample of the 500 documents (a sample of both those which were claimed to be irrelevant and those which were relevant but claimed to be privileged). Sixty such documents were provided. These were reviewed for the purpose of assessing the public interest and litigation privileges which were asserted and for assessing the claim of irrelevancy. Only one of them in the Tribunal's view seems relevant and not privileged (document 48). If counsel for the Director wishes to make further argument in this regard it might be addressed at the next session of the pre-hearing conference.

Counsel for the respondents objected to counsel for the applicant being allowed to choose a sample for review. While the Tribunal has no doubt that the sample was fairly chosen, if counsel for the respondents are still of the view that all documents which *are relevant* and for which public interest or litigation privilege is claimed should be reviewed by the Tribunal, then this will be done. If such a review is requested, counsel for the respondents should inform counsel for the applicant and the Tribunal quickly so that a review can be completed before the next session of the pre-hearing conference.

Five questions remain to be considered: 689, 715, 725, 732 and 736. Question 689 is quoted above and asks the Director to seek information from Mr. Robson as to what he was told by Mr. Perks. Mr. Perks is the publisher of *The Gazette* in Montreal, a Southam paper, and he was involved

in the Southam acquisition which the Director challenges. The question need not be answered. As indicated, it is within the respondents' ability to ask Mr. Robson this question directly. The remaining four questions relate to market definition and ask whether the Director accepts as accurate certain information set out in Exhibit 20, a report prepared for Southam in 1987 by Urban and Associates. Counsel for the Director objected to these questions on two grounds: questions of market definition are legal questions; it is unreasonable to ask the Director to go through the respondents' report page by page and say whether he thinks it is accurate.

With respect to the proposition that market definition is a legal question, it is not. It is a mixed question of fact and law. The Director's representative can be asked questions relating to that issue although the pleadings do define the issues between the parties on this point in a fairly clear way (whether the market should be defined as the supply of newspaper retail advertising services, print real estate advertising services or more broadly as including other forms of media such as radio and T.V.). The questions which seek to have the Director's representative state on a page by page basis whether the information contained in the Urban report is accurate are unreasonable and need not be answered.

In so far as discovery is resisted by the Director on the ground that discovery does not lie against the Crown, it is too late to raise that argument. If any such immunity exist, it has been waived.

THE TRIBUNAL THEREFORE ORDERS THAT:

1. Questions 66, 282, 283, 291, 292, 300 and 314 shall be answered. These can be answered in writing and there is no need for Mr. Brantz to reattend to answer them.

2. The Director shall provide summaries of the information he has collected, as set out in the reasons for this order, in those cases where he has not already done so. Mr. Brantz shall reattend in Vancouver for this purpose unless counsel agree that this might be done in writing.

3. Mr. Brantz shall reattend in Vancouver to answer questions about the facts and documents upon which the Director relies for his position on market definition, if counsel for the respondents so requests.

DATED at Ottawa, this 27th day of June, 1991.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) B. Reed
B. Reed

TAB 6

Indexed as:
Hodgkinson v. Simms

Between
Robert L. Hodgkinson, Plaintiff (Appellant), and
David L. Simms and Jerry S. Waldman carrying on business as
Simms & Waldman, and the said Simms & Waldman, a partnership,
Defendants (Respondents)

[1988] B.C.J. No. 2535

55 D.L.R. (4th) 577

[1989] 3 W.W.R. 132

33 B.C.L.R. (2d) 129

36 C.P.C. (2d) 24

1988 CarswellBC 437

13 A.C.W.S. (3d) 60

1988 CanLII 181

Vancouver Registry: CA010003

British Columbia Court of Appeal

McEachern C.J.B.C., Taggart and Craig JJ.A.

Heard: November 18, 1988

Judgment: December 13, 1988

Discovery -- Documentary discovery -- Documents not produced in contemplation of litigation -- Copies of documents later obtained by party in contemplation of litigation -- Documents privileged dominant purpose of making copies being in contemplation of litigation.

This was an appeal by the plaintiff from a decision ordering it to produce copies of documents

obtained by it from third parties in support of its action against the defendant accountants alleging negligence. The plaintiff alleged that he had invested substantial funds in several MURB projects on the advice of the defendant. The investments went bad and the plaintiff alleged breach of duty and negligence by the defendant. The defendants had moved their offices four times since the investments were made and had merged with other firms as well. During these moves, portions of the plaintiff's files went missing. The plaintiff's solicitor managed to obtain copies of much of the missing documentation for which privilege was claimed. The defendants successfully applied to have the documents produced on the grounds that they were not originally produced in contemplation of litigation and were therefore not privileged. The plaintiff appealed.

HELD: The appeal was allowed. The reason for full disclosure was that both sides should be fully informed of the other's case to prevent ambush if a trial took place and to facilitate settlement before proceeding to trial on known facts. The jurisprudence did not, however, suggest that the need for full disclosure displaced privilege. It was highly desirable to maintain the privilege historically afforded to a solicitor's brief. The purpose of privilege was to ensure that a solicitor could, for the purpose of preparing for litigation, proceed with complete confidence that the protected information which he gathered, and the advice he gave, would not be disclosed to anyone except with the consent of his client. While the documents in question in this case were not originally produced for the purpose of conducting litigation, they were photocopied for that purpose. The law had always been that where a lawyer exercising legal knowledge and skill had assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he was entitled to claim privilege for such collection and resist production.

Counsel for the Appellant: Gregory Walsh. Counsel for the Respondents: Glenn Urquhart and Shannon M. Larter.

The judgment of the Court was delivered by McEachern C.J.B.C., allowing the appeal; concurred in by Taggart J.A. Dissenting reasons for judgment delivered by Craig J.A.

MCEACHERN C.J.B.C.:-- This appeal is concerned with an important practice question relating to the privilege of a solicitor's brief, particularly whether photocopies of documents collected by the Plaintiff's solicitor from third parties and now included in his brief are privileged even though the original documents were not created for the purpose of litigation.

The Plaintiff alleges that he invested substantial funds in MURB projects on the advice of the Defendant accountants. The investments not having turned out as expected, the Plaintiff alleges various breaches of duty including the acceptance by the Defendants of secret commissions from the MURB developers, and negligence in the advice upon which the Plaintiff says he relied. These

investments were made in 1980 and 1981.

The Defendants have moved their offices four times since these investments were made and there have been mergers with other firms and departures of accountants within this firm, as a consequence of which the Defendants say they do not have complete files on some or all of these transactions.

The Plaintiff's solicitor, however, has conducted investigations in the course of which he has obtained photocopies of numerous documents said to be relevant to the issues in the action for which he claims privilege. The Plaintiff says the Defendants could find these documents for themselves but the Defendants, without making very serious investigations, say they are entitled to see the documents the Plaintiff's solicitor has "ingathered" into his brief as they are not privileged.

These documents have been mentioned in the Plaintiff's Supplementary List of Documents in the following terms:

" Documents obtained by the Solicitor for the Plaintiff after this litigation arose for the dominant purpose of preparing for this litigation and forming a part of the Plaintiff Solicitor's brief ..."

Following the above are 31 separate items which may be illustrated by quoting just a few:

- | | | |
|-----|-------------------------|--|
| "1. | 80 06 12 to 84 01 15 | 64 photocopied documents |
| 2. | Undated | 2 photocopied documents |
| 3. | Undated | 4 handwritten documents (photocopies) |
| ... | | |
| 13. | 80 09 02 to 85 12 03 | 15 photocopied documents |
| ... | | |
| 26. | Various | 7 photocopied documents" |

It is apparent that a serious question of practice arises. The Defendants say there is no privilege for copies of unprivileged documents and for that reason, and for the further reason that there is said to be a general trend toward full disclosure and the avoidance of ambush, the Plaintiff must disclose

these documents.

The Plaintiff says such copies are privileged and that great mischief will result if, in an adversarial system, counsel of one party is entitled to "dip" into the solicitor's brief of opposing counsel.

The learned Chambers judge, in a careful judgment, applied the dominant purpose theory. He concluded (at Appeal Book pp. 57-9):

" For a 'communication' from a third party to attract the privilege, he who has caused it to come into being (its genesis) must have done so with the dominant purpose of its being used by the solicitor in the matter of his forming an opinion with respect to an issue or issues arising in litigation already underway or of litigation of which there is a reasonable prospect of becoming underway. *Shaughnessy Golf & Country Club v. Uniguard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309 (C.A.) and *Lust v. Lewis*, [1987] B.C.J. No. 2480 (Vancouver Registry CA008155, November 27, 1987). ...

It is manifest that whoever was the author of the original documents whose existence Mr. Walsh has uncovered, and of which he holds copies, that author did not create them with the dominant purpose of their being used in this litigation. Mr. Walsh ingathered them with that dominant purpose, but he was not their creator. Accordingly, they do not satisfy the dominant purpose test and were it not for certain authorities to which I am about to refer, I would not hesitate to hold that these copies held by Mr. Walsh are not entitled to the protection of the privilege."

The Chambers judge went on to discuss a number of authorities, particularly *Lyell v. Kennedy* (1884), 27 Ch.D. 1 (C.A.); *Re Hoyle Industries Ltd. et al.*, [1980] C.T.C. 501, 80 D.T.C. 6363, (F.C.T.D.); *Crown Zellerbach v. Deputy Attorney General of Canada*, [1982] C.T.C. 121, 82 D.T.C. 6116 (B.C.S.C.), which appear to support the claim to privilege but nevertheless concluded there is a material distinction between collections of documents which were in issue in those cases and the copies of documents in dispute in this case. At p. 61 he said:

" It seems to me that there is a material distinction between the 'documents' collected in these tax cases and the copies of the 'documents' (other than the 'Communications' referring to these 'documents') in gathered by Mr. Walsh. The former were 'Communications', properly speaking, as described by *Esson, J.* in *Crown Zellerbach*, supra, at p. 123, whereas the latter never were."

I do not find it helpful to approach this question of privilege just from the perspective of "communications." Privilege attaches in proper cases to conventional communications where

information is transferred from a client to his solicitor and vice versa by letter or conversation, but other documents such as cheques, invoices, legal bills and many other commercial or non-commercial documents may also be privileged even though they convey information or ideas indirectly. For example, a cheque may be evidence of a secret commission, or it may be completely innocent, but it is not a conventional communication. For that reason, I would not support the distinction which apparently found favour with the Chambers judge.

Similarly, I do not find it helpful to attempt a distinction between solicitor privilege and the "lawyer's work product" that was recognized by the United States Supreme Court in the leading case of *Hickman v. Taylor* (1946), 329 U.S. 495, and which distinction some commentators attempt to extract from some of the cases: "Civil Litigation Trial Preparation in Canada," Neil J. Williams, 1980, 58 C.B.R. 1 at p.50. "Lawyer's work product" is a convenient term to describe the kinds of material that, subject to controlling authorities such as *Voth*, *infra*, are protected by privilege, but I see no need to recognize a separate category of immunity against production.

The learned Chambers judge also perceived a policy, said to be approved by this Court, of moving "... from privilege to complete disclosure." This is said to arise from two unreported decisions of this Court which are mentioned in *Wipfli et al. v. Britten et al.*, which is also unreported, C781186, Vancouver Registry, May 15, 1979 (B.C.S.C.).

The first of these decisions, *Gergely et al v. Ellington*, CA1978/747, September 11, 1978, was a case where the defendant driver, who had vision difficulties, was ordered to submit to a medical examination and to submit his eyeglasses for inspection and analysis.

The second case was *Blackstock v. Patterson et al.*, CA780814, November 3, 1978, where there was a question about who was driving a vehicle, and certain portions of a damaged motor vehicle, which carried signs of human blood and hair, were ordered produced for inspection and analysis.

The *Wipfli* case related to an application to have the plaintiff, a birth-damaged child, examined by a physician appointed by the defendants.

In each of these three decisions there are pronouncements about the advantages of full disclosure. In *Gergely* the Court stated that the modern philosophy is that trials by ambush should be avoided and there should be full disclosure. It is said that both sides should be fully informed of the other's case for two purposes: (1) to prevent ambush if a trial does take place; and (2) to facilitate settlement before proceeding to trial on known facts.

I pause to say that I have difficulty with the word "ambush" in connection with this case. Documents to be relevant would have to relate to the transactions in question and the Defendants are just as able as the Plaintiff to make the enquiries necessary to discover these documents. One who seeks to ambush another does not disclose that fact in advance.

While I have no hesitation associating myself with the fullest possible disclosure, it seems to me

with respect that the cases cited are not authority for the proposition that privilege must give way to disclosure. In fact, the cases cited do not deal with solicitor's privilege at all. There are strong and valid reasons for privilege which should not lightly be diluted, and conflicting policies, even where they collide head-on, often co-exist, with one subject to the other. While I favour full disclosure in proper circumstances it will be rare, if ever, that the need for disclosure will displace privilege.

In my view it is highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate. The cases are replete with explanations for such a privilege. In *Susan Hosiery v. M.N.R.*, [1969] 2 Ex. C.R. 27 (F.C.T.D.) at pp. 33-34, Jackett, P., in a much quoted passage, said:

" Turning to the 'lawyer's brief' rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system."

With respect, I do not think the learned President has fully explained the reason for a solicitor's privilege and I would place possible misunderstandings of context at the lower end of the scale of importance. More to the point, in my view, is the statement of Cotton, L.J. in *Lyell v. Kennedy* (1881), 27 Ch.D. 1 at pp. 18-19 where he said:

"Now the only privilege which can be claimed, and such as here the Defendant desires to claim, is what is called 'professional privilege,' that is to say, that if a man does not employ a solicitor he cannot protect that which, if he had employed a solicitor, would be protected; the reason for this privilege being, as has frequently been stated, that the English law being technical, the greatest facilities ought to be afforded to every one who is involved in litigation to consult a solicitor and to receive from his solicitor communications which shall be privileged, and to enable the legal adviser of the party employing him to make a sufficient investigation, and so obtain the fullest means of ascertaining what advice he shall give as to the course to be adopted, without affording the opportunity to an opponent of prying into those communications, those searches, those responses, which are according to English law all of a confidential character"

To the same effect are the judgments in *Anderson v. Bank of B.C.* (1875) 2 Ch.D. 644 (C.A.) as follows:

" Again, the solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged." (per Jessel, M.R. at p.p. 649-650)

"Looking at the dicta and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." (per James, L.J. at p. 656)

In my view the purpose of the privilege is to ensure that a solicitor may, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information or material he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his client.

Thus it appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely: (a) confidential communications with a client; and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such enquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

It is obvious, however, that everything a client says to a solicitor and everything a solicitor does or collects cannot be privileged and it is important to define, with as much precision as possible, what falls within and what falls outside the privilege.

There are really two overlapping questions here. The first problem relates to the dominant purpose rule and the second is whether solicitor's privilege extends to the kind of documents in question on this application.

1. THE DOMINANT PURPOSE RULE

In *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District* (1981) 29 B.C.L.R. 114 and *Shaughnessy Golf & Country Club v. Uniguard Services Ltd. et al.* (1986), 1 B.C.L.R. (2d) 309, this Court adopted the dominant purpose rule described in *Waugh v. British Railways Board*, [1980] A.C. 521 (H.L.) . That rule is stated in the following terms:

"...a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

It is conceded by Plaintiff's counsel that the original documents he discovered in his investigation, being documents which were created before litigation was anticipated, and not for the purpose of litigation, are not privileged and he asserts no claim in that behalf.

It is also apparent in my view that the photocopies of these unprivileged documents, resting in Mr. Walsh's brief, were produced or brought into existence with the dominant purpose of being used in the conduct of litigation.

Mr. Urquhart argues that a copy of a pre-existing unprivileged document cannot become privileged by being added to counsel's brief. Mr. Walsh disagrees. It is necessary to turn to the second question.

2. DOES SOLICITOR'S PRIVILEGE EXTEND TO THESE COPY DOCUMENTS?

The starting point in any discussion of solicitor's privilege is *Lyell v. Kennedy* (No. 1] *supra*, the facts of which are significantly close to the facts of this case. It was a pedigree action where the solicitor for a party procured copies and extracts from certain entries in public registers and also photographs of certain tombstones and houses, for all of which privilege was claimed.

This claim to privilege was challenged but the Court of Appeal upheld the privilege. Cotton, L.J. at pp. 25-26 said:

" What ought we to do here? Here is a litigation about pedigree and the heirship to a lady who died many years ago; and it is sworn by the Defendant that for the purpose of defending himself against various claimants he has made inquiries, and that he has obtained every one of those documents for the purpose of protecting himself, and that he has got them, not himself personally, but that his solicitors have got them, for the purpose of his defence, for the purpose of instructing his counsel, and for the purpose of conducting this litigation on his behalf. Now no case has been quoted where documents obtained under such circumstances have been ordered to be produced. In my opinion it is contrary to

the principle on which the Court acts with regard to protection on the ground of professional privilege that we should make an order for their production; they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps juris in themselves, to be produced because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might shew what his view was as to the case of his client as regards the claim made against him."

Mr. Walsh argues that there is no proper distinction between a photograph of an unprivileged tombstone and a photocopy of an unprivileged document, provided of course that they are both obtained for the purposes of litigation.

In the same case, Bowen, L.J. at p. 31 said:

" Then comes the point as to documents, and as to the documents, I agree with everything that has been said by the Lord Justice. We are not dealing now with documents which the party has procured himself; we are dealing with documents which have been procured at the instigation of a solicitor; and, bearing in mind, the rule of privilege which the law gives in respect of information obtained by a solicitor, it seems to me we cannot make the order asked for by Mr. MacClymont without doing very serious injustice in this case. A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them. I entirely agree, therefore, with what has been said, and without saying what ought to be done in another case, I am satisfied that in this case we could not make the order asked for without infringing the principle on which the Court acts, nor is it necessary to say what would be done as to any particular document if a right to inspection were made out."

In *Watson v. Cammell Laird & Go* [1959] 1 W.L.R. 702 (C.A.) the solicitors for the plaintiff in a personal injury case made a copy of case notes prepared by a hospital regarding the plaintiff's treatment. After that the hospital refused the defendant similar access to its records. In an

application to require the plaintiff to disclose its notes, there being no equivalent to our Rule 26 (11), it was held that the notes were privileged. At pp. 703-705 Lord Evershed, M.R. said:

"... the facts are clear: this document, this copy of the case notes, was undoubtedly, and admittedly, prepared by the solicitors for the plaintiff after the litigation had either commenced or was-- clearly--contemplated; and also it is not in doubt that the document was prepared by the solicitors for the purpose of assisting and advising their client, the plaintiff, in connection with his claim.

...

It has, however, been contended with vigour by Mr. Clothier that that general rule ought not to apply where the document is a mere verbatim copy of a document not itself the subject of privilege, because, he says, the making of such a copy involves in itself no exercise of skill, properly so called. He says that if the solicitor had exercised some kind of eclectic judgment in making the copy, leaving out bits that were irrelevant or unhelpful, then it would be another matter: but since (says he) the actual case notes would be liable to be produced at the trial, on service on the appropriate hospital officer of a subpoena duces tecum, and since therefore the original would never be privileged, in any proper sense, so a mere verbatim copy can be in no better position.

I am unable to accept that view. The question of privilege does not really have any significance in regard to the original: that is a document which is not, and never has been, in the possession or power of the plaintiff. It is a document which is in the possession of a third party; and undoubtedly by the appropriate means it can be produced at the trial. But that fact seems to me to have very little to do with the question whether this document -- this copy document -- did or did not come into existence in the way I have indicated, namely, by being obtained by the solicitor for the purpose of advising his client in regard to the litigation.

...

It seems to me that in this case (as in *The Palermo*) the document with which we are concerned is a copy which was made by the plaintiff's advisers for the purposes of the litigation in which the solicitors were acting for the party. That being so, it seems, I think, clear that the judge was right to say that he could not make the order."

The same conclusion had been reached in *Chambers* and on appeal in *The Palermo* (1883), 9 P.D. 6 which was cited in *Watson v. Cammell Laird*, *supra*.

There are two cases on point in Canada. First, in *Re Hoyle Industries Ltd. and Hoyle Twines Ltd.*, [1980] C.T.C. 501 (F.C.T.D.) privilege was claimed for files seized from a solicitor in the course of an investigation into a tax fraud. The solicitor who was retained after the investigation commenced requested the client to obtain copies of certain telex messages from third parties. With respect to these copies, Collier, J. at p. 503 said:

"This was, it appears to me, necessary for the solicitor to advise the clients as to their position. It was contended by the Crown that no privilege attached to the originals in the first instance; therefore no privilege could attach to the copies obtained at a later date. I agree, speaking generally, that copies of non-privileged documents are themselves not privileged.

But there are situations where the copies may, and in particular circumstances, acquire the category of privilege. See *Lyell v. Kennedy*, [1984] 27 Ch.D. 1. I quote from the head note:

'Held (affirming Bacon, VC), that although mere copies of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional knowledge, skill, and research of his solicitors, must be privileged--any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case.'

That principle, in my view, applies in this case. The whole file, including the copies of the telexes, is privileged, and will be returned to the solicitors."

The same conclusion was reached by Esson, J. (as he then was) in *Crown Zellerbach Canada Ltd. v. Deputy Attorney General for Canada*, [1982 C.T.C. 121 (B.C.S.C.) where he said at p. 124:

" In respect of a number of the files, I have applied the rule that where the documents or copies of documents which are not otherwise privileged form part of the collection assembled by or at the request of the lawyer, the whole of the collection is privileged: *Lyell v. Kennedy* (1884) 27 Ch.D. 1. That rule was applied by Collier, J. In *re Hoyle Industries Ltd. and Hoyle Twines Ltd*"

In the schedule to his judgment Esson, J. said, with respect to a particular file:

"23. Bleach Kraft Pulp Contract--CZ Corp and Elk Falls Co. Ltd.--A1-51

This is a large file including a number of memoranda which appear elsewhere in the files. It apparently was assembled in relation to the present issues as to tax liability and while litigation was in contemplation. Mr. Thorsteinsson was involved in some parts of it. The whole of the file is privileged." (at p. 129)

Lastly, in connection with this historical review of cases, is *Regina v. Board of Inland Revenue, Ex parte Goldberg* W.L.R. August 12, 1988 522 (C.A.) which was apparently not before the learned Chambers judge in this case. The Board of Inland Revenue was investigating certain transactions relating to commissions allegedly paid to a Mr. Al-Atia on oil shipments from Abu Dhabi to an American company. Mr. Rickless, an American attorney based in London, took copies of documents in the possession of Mr. Al-Atia and delivered them to Mr. Goldberg, a barrister in London, for the purpose of obtaining legal advice for clients including Mr. Al-Atia, whose whereabouts, along with the documents, had become unknown. The Board sought access to these copy documents and other documents in the possession of Mr. Goldberg. At p. 532 the Court said:

" But in this case we are concerned with copy documents which, on the evidence, came into existence for the purpose and only for the purpose of obtaining legal advice from Mr. Goldberg. As the law stands we have no hesitation in saying that because the documents came into existence for that purpose they do attract privilege so that Mr. Goldberg cannot without the consent of his client comply with the requirements of the notice which has been served upon him. It may be that the documents are also privileged because as Mr. Rickless asserts in his affidavit he personally 'reviewed and photocopied the relevant files.' If the review involved a process of selection as to what should be photocopied and submitted to counsel then it would seem to follow that the product of that review is also privileged for the reasons set out in *Lyell v. Kennedy*, 27 Ch.D. 1, but we do not find it necessary finally to decide whether or not that was the case."

As I have said, these passages seem to furnish strong support for the claim to privilege which has been made in this case.

But Mr. Urquhart refers to a number of passages in these and other judgments as authority for the proposition that a copy of a pre-existing unprivileged document does not become privileged just because it is given to a legal adviser. He cites the dictum of Lord Blackburn in *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81 (H.L.) . at p. 87:

"I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, 'I have a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action,' or 'in the course of litigation.' That would be no privilege at all."

I confess I do not understand what is meant by this passage. I think it means that if a party is entitled to see an unprivileged deed, it does not become privileged because it is obtained by a lawyer. I do not think Lord Blackburn was directing his mind to a situation under consideration in this case but I agree that a document or a copy of a document in the possession of a party before litigation, or "ingathered" by a party before that time in the ordinary course of events and not for the dominant purpose of litigation, does not become privileged just because it or a copy of it is later given to a solicitor.

Next Mr. Urquhart refers to the passage from *Re Hoyle*, supra, quoted above, where Collier, J. said that, generally speaking, copies of non-privileged documents are themselves not privileged. But, as also quoted above, that learned judge went on to say that there are situations where such copies are privileged, particularly where a collection of such documents is the product of professional knowledge, skill and research.

Mr. Urquhart also referred to *Buttes Gas & Oil Co. v. Hammer* (No. 3), [1981] Q.B. 223 where Lord Denning, M.R. at p. 244B said in obiter:

"if the original is not privileged, a copy of it also is not privileged--even though it was made by a solicitor for the purpose of the litigation: see *Chadwick v. Bowman* (1886) 16 Q.B.D. 561.

Lord Denning, M.R. also went on to say that there are cases which "... appear to give privilege to copies on their own account, even when the originals are not privileged ..." and he cited *The Palermo and Watson v. Cammell Laird & Co.*, both supra. He also referred to the Sixteenth Report of the Law Reform Committee on Privilege in Civil Proceedings (1967), which doubted the authority of some of the older cases and went on to recommend the abolition of privilege for copy documents.

Buttes Gas and Oil Co. v. Hammer, supra, was considered in *Goldberg* supra, at p. 530 where the comments of Lord Denning, M.R. were said to be obiter and were expressly not followed.

Mr. Urquhart also argues that these authorities, except *Goldberg*, were decided before *Waugh and Voth* but they do not conflict with those authorities unless it may be said that no distinction can be made between originals and copies. Considering the purpose for privilege, see no reason why a collection of copy documents which satisfy all the requirements of *Voth*, including literal creation, should not be privileged even though the uncollected originals are not privileged because they do not satisfy the same test.

It is my conclusion that the law has always been, and in my view should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

I reach this conclusion because of the authorities cited which state the law accurately and authoritatively and because this does no violence to the dominant purpose rule established by Waugh and Voth, both supra. This conclusion merely extends the application of that rule to copies made for the dominant purpose of litigation. It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test (Voth) as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not.

I would not wish it thought that the foregoing applies only to collections of copies. It could apply also to a single copy-document, or to a number of unrelated copies if they meet the test of Voth as I have described it.

Mr. Walsh adds a further argument with which I respectfully agree. He says that what the Defendants seek is not just to look at these copy-documents but also to look into counsel's mind to learn what he knows, and what he does not know, and the direction in which he is proceeding in the preparation of his client's case. That, in my view, would be a mischief that should be avoided.

I turn to another question which was argued before us. There is no doubt the onus of establishing privilege rests with the party claiming or alleging that a document is privileged: *Steeves v. Rapanos* [1982] 6 W.W.R. 244 (B.C.C.A.).

In this case the claim to privilege was made in the language quoted supra which was taken from Lord Atkin's *Court Forms and Precedents in Civil Proceedings*, 1941, vol. 8, p. 49.

In my view the claim is adequately made in the Plaintiff's Supplementary List. But the authorities are clear that the documents for which privilege is claimed must be sufficiently identified so that the Court may make an effective order for production in a proper case. I do not think the Plaintiff has sufficiently described the documents in its Supplementary List. The Plaintiff has a difficult problem in this connection because it does not wish to even hint at the nature or source of the documents. Presumably there is some order in the organization of the documents on the Supplementary List and I think it would be sufficient if the Plaintiff followed the practice with respect to each item in its list suggested in Lord Atkin's 1983 edition, Vol. 15, p. 115 as follows:

"Letters ... and copies ... tied up in a bundle marked 'A.B. 1', numbered consecutively Nos. 1 - 26, the same being initialled by me."

I do not suggest the documents must be described such as "letters"; "documents" would be sufficient. If this is done the parties will know that documents being produced by an order for production or at trial, if any, have been disclosed on the list.

But in the particular circumstances of this case I would not deprive the Plaintiff of its right of privilege because of an insufficient identification of the documents. The Plaintiff must, however, forthwith deliver an amended Supplementary List.

I would allow the appeal and dismiss the Defendants' application for production with costs to the Plaintiff throughout.

MCEACHERN C.J.B.C.

TAGGART J.A.:-- I agree.

CRAIG J.A. (dissenting):-- The plaintiff appeals from the judgment of a judge in chambers ruling that copies of certain documents in his possession were not privileged.

The Chief Justice has set out the facts and circumstances in his reasons for judgment, and I will not repeat them except to the extent that I feel it necessary to illustrate why I have reached a different conclusion from my colleagues. I would dismiss this appeal. I would rigidly circumscribe the ambit of the lawyer brief privilege.

Rule 26(1) requires a party to an action to deliver, on demand, a list of documents which are or have been in his possession or control relating to any matter in question in the action and produce these documents. The courts have universally adopted the judgment of Lord Esher in *Compagnie Financiere v. Peruvian Guano C2.*, (1882), 11 Q.B.D. 55 at 63 as determining when a document relates to a matter in question. Rule 26(2) provides that where a claim is made that a document is "privileged from production", counsel must claim privilege for a specified document and ... a statement of the grounds of the privilege".

Counsel for the plaintiff relies on the case of *Susan Hosiery Limited v. The Minister of National Revenue*, [1969] 2 Ex. C.R. 27. At p. 33, Jackett P. stated that there were two principles involved in legal professional privilege. I will refer to them, briefly, as (1) solicitor-client privilege and (2) lawyer brief privilege (sometimes referred to as litigation privilege). According to Jackett P. the privilege under (2) relates to "all papers and materials created or obtained specially for the lawyer's 'brief' for the litigation, whether existing or contemplated"

Although counsel for the plaintiff concedes that the original of the documents obtained from third parties are not privileged, he submits that the photocopies are privileged because they were obtained in the course of preparing the lawyer's brief. I think that it is appropriate to recall what Wigmore said about solicitor and client privilege (adopted by the Supreme Court in *Baker et al.*, [1976] 1 S.C.R. 254). In Vol. VII, (McNaughton Revision) s. 2285 p. 527, Wigmore states:

Looking ... upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception ..., four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized.

(author's emphasis)

As the lawyer brief privilege is simply an aspect of solicitor-client privilege, I would circumscribe the ambit of the lawyer brief privilege by a reference to these four rules.

McCormick on Evidence (3rd ed) observes at p. 171 that the vast majority of the rules of evidence "... have as their common purpose the elucidation of the truth," He continues at p. 171:

By contrast the rules of privilege, ... are not designed or intended to facilitate the fact finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.

In *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169, Lord Edmund-Davies observed at p. 1182:

Justice is better served by candour than by suppression. For, as it was put in the *Grant v. Downs* majority judgment, "privilege ... detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise"

(my emphasis)

Rule 1(5) states that "the object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits". In my view, we may attain this object only if we promote full disclosure and rigidly circumscribe the concept of privilege, including the lawyer brief privilege. I think that this has been the trend of the decisions of this court in recent years; *Gergely et al v. Ellingson* (September 11, 1978, No. CA780747); *Dufault v. Stevens et al.* (1978), 86 D.L.R. (3d) 671; *Bates v. Stubbs* (1979), 101 D.L.R. (3d) 623; *Blackstock v. Patterson et al.* (1978), 95 D.L.R. (3d) 362; *Voth Bros. Construction (1974) Ltd. v. North Vancouver S. Dist. No. 44 Board of School Trustees et al.* (1981), 29 B.C.L.R. 114; *Shaughnessy Golf & Country Club v. Uniguard Services Ltd. et al.* (1986), 1 B.C.L.R. (2d) 309.

In *Gergely*, Chief Justice Farris gave the judgment of the majority. He said at p. 4 of his judgment:

I take the position that this Rule is remedial [Rule 30(1)(4)] and it is intended to give litigants the right to know each other's case in advance. It is part of the modern philosophy that there should not be trials by ambush but that there should be full disclosure between the two parties in order (a) that the matter may be settled, without going to court, or (b) that, if it goes to court, there will be a trial with both sides being fully informed as to the other side's case. Therefore, I think this Rule should not receive a restricted interpretation.

Members of this Court have referred to this passage with approval from time to time in the course of dealing with the object of the rules: see *Bates v. Stubbs* at pp. 629-30.

In the *Voth Bros. Construction* case, this Court adopted the approach of the House of Lords in the *Waugh* case, namely, that the test for privilege should be the dominant purpose test. In adopting the dominant purpose test for privilege, the House of Lords preferred the view of Barwick, C.J., who dissented, in the Australian case of *Grant v. Downs* (1976), 135 C.L.R. 674. The majority of the court in *Grant v. Downs* decided that privilege should only be granted to documents which were brought into being for the sole purpose of litigation. The House of Lords decided that the dominant purpose test enunciated by Barwick, C.J. was the more appropriate. The headnote in the report of *Waugh* to which I have referred above, accurately sets out what I think is the ratio of the case:

The court was faced with two competing principles, namely that all relevant evidence should be made available for the court and that communications between lawyer and client should be allowed to remain confidential and privileged. In reconciling those two principles the public interest was, on balance, best served by rigidly confining within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation. Accordingly, a document was only to be accorded privilege from production on the ground of

legal professional privilege if the dominant purpose for which it was prepared was that of submitting it to a legal advisor advice and use in litigation. Since the purpose of preparing the internal enquiry report for advice and use in anticipated litigation was merely one of the purposes and not the dominant purpose for which it was prepared, the board's claim of privilege failed and the report would have to be disclosed.

(my emphasis)

At p. 1172, Lord Wilberforce made certain observations which I consider to be apt in this case:

. . . before I consider the authorities, I think it desirable to attempt to discern the reason why what is (inaccurately) called legal professional privilege exists. It is sometimes ascribed to the exigencies of the adversary system of litigation under which a litigant is entitled within limits to refuse to disclose the nature of his case until the trial. Thus one side may not ask to see the proofs of the other side's witnesses or the opponent's brief or even know what witnesses will be called: he must wait until the card is played and cannot try to see it in the hand.

The fact that a party may be required to disclose the memorandum or statement of a prospective witness does not necessarily mean that person will be called as a witness. It does provide, however, an opportunity for counsel for the opposite party to investigate circumstances and to be prepared for the eventuality in case that person does testify.

Counsel for the defendant concedes that in this case he is not entitled to see the brief of counsel for the plaintiff but he submits that if the documents are not privileged, initially, they should be produced for discovery if they relate to a matter in question, otherwise the defendant will be taken by surprise at the trial. I agree with this submission. I reiterate that the object of the rules is set out in Rule 1(5) and that we can attain this object only by rigidly circumscribing the concept of lawyer brief privilege. I think that this principle is the essence of the decisions in the cases of *Waugh*, *Voth Bros. Construction*, and *Shaughnessy Golf & Country Club*.

There is no case which requires this Court to adopt the lawyer brief rule, to the extent proposed by counsel for the plaintiff, including the cases of *Anderson v. Bank of British Columbia* (1876), 2 Ch.D. 644 and *Lyell v. Kennedy* (1884), 27 Ch.D.1. The courts decided these cases over one hundred years ago, and they certainly do not manifest the so-called "modern" approach. I appreciate that in *Watson v. Cammell Laird & Co.*, [1959] 1 W.L.R. 702 the Court of Appeal followed *Lyell v. Kennedy*, but I think that these decisions are not in accord with the avowed purpose of our rules as set out in Rule 1(5) and, certainly, are contrary to the decisions in *Voth Bros. Construction* and *Shaughnessy Golf & Country Club*.

I fail to comprehend how original documents which are not privileged (because they are not prepared with the dominant purpose of actual or anticipated litigation) can become privileged simply because counsel makes photostatic copies of the documents and puts them in his "brief". This is contrary to the intent of the rules and to the modern approach to this problem. If a document relates to a matter in question, it should be produced for inspection.

I think that the chambers judge was right in considering that since the documents were not brought into being for the dominant purpose of getting advice from a lawyer, or for use in litigation (actual or anticipated) they were not privileged and that the copies should not be privileged even though they were used in the lawyer's brief. Unless the party advancing a claim for privilege is able to depose that the documents owe their origin to the dominant purpose of obtaining legal advice or to conduct or aid in the conduct of litigation which at the time of its origin was in reasonable prospect, the court should refuse a claim for privilege: *Shaughnessy Golf & Country ChLb* I am not prepared to accept the proposition that documents which originally were not privileged should become privileged simply because they have become part of the lawyer's brief in his preparation for trial.

The defendants submit, also, that the plaintiff has not sufficiently identified the documents for which he claims privilege in the list of documents. I agree with this submission.

Accordingly, I would dismiss the appeal.

CRAIG J.A.

TAB 7

Case Name:

Ontario v. McLellan

Between

**Her Majesty the Queen in Right of Ontario,
(Prosecutor and Respondent) (The
Ontario Ministry of the Attorney General), and
Melissa McLellan, (Defendant and Applicant)**

[2015] O.J. No. 1562

2015 ONCJ 165

332 C.R.R. (2d) 1

North Bay Court File No.: 11-0528

Ontario Court of Justice

L.M. Scully J.P.

Heard: April 23, July 15 and 16, 2014.

Judgment: January 28, 2015.

(55 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- On being charged with an offence -- To be tried within a reasonable time -- Remedies for denial of rights -- Procedural remedies -- Stay of proceedings -- Application by defendant, charged with nine counts of wilfully collecting and using personal health information without authority, for stay based on delay allowed -- Inherent time requirements amounted to eight months and 26 days, given complexity of case, voluminous disclosure, and number of witnesses -- Crown's delay in providing extensive, important disclosure amounted to 16 months and 10 days -- Delay had caused actual and inferred prejudice to defendant -- Reasons for delay, length of delay and prejudice experienced resulted in violation of s. 11(b) of Charter -- Canadian Charter of Rights and Freedoms, s. 11(b).

Government law -- Access to information and privacy -- Protection of privacy -- Governmental or public information -- Health and medical records -- Offences and penalties -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Application by defendant, charged with nine counts

of wilfully collecting and using personal health information without authority, for stay based on delay allowed -- Inherent time requirements amounted to eight months and 26 days, given complexity of case, voluminous disclosure, and number of witnesses -- Crown's delay in providing extensive, important disclosure amounted to 16 months and 10 days -- Delay had caused actual and inferred prejudice to defendant -- Reasons for delay, length of delay and prejudice experienced resulted in violation of s. 11(b) of Charter -- Canadian Charter of Rights and Freedoms, s. 11(b).

Application by the defendant, charged with nine counts of wilfully collecting and using personal health information without authority, for a stay based on delay and abuse of process. The defendant, a nurse, allegedly looked at the medical records of 45 patients over a nine-day period. The Information was sworn in September 2011. The only waiver by the defence was a four week period. The Crown had delayed in providing extensive technical disclosure, leading to the loss of the first scheduled trial date. There had been three pre-trials. The trial was set for five days and 14 witnesses were expected to testify. The defendant had lost her job as a result of the charges and had experienced ongoing stress.

HELD: Application allowed. The inherent time requirements amounted to eight months and 26 days, given the complexity of the case, voluminous disclosure, and number of witnesses. The Crown's delay in providing extensive, important disclosure amounted to 16 months and 10 days. The delay had caused actual and inferred prejudice to the defendant. The reasons for the delay, the length of delay and the prejudice experienced by the defendant resulted in a violation of s. 11(b) of the Charter. Section 7 of the Charter was not engaged. There had been no abuse of process as result of the late disclosure.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 11(b), s. 24(1)

Highway Traffic Act, R.S.O. 1990, c. H.8,

Occupational Health and Safety Act, R.S.O. 1990, c. O.1,

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Schedule A, s. 72(1)(a), s. 72(2)

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

Cases cited:

Statutes, regulations and rules cited:

Canadian Charter of Rights and Freedoms, s. 7, s. 11(b), s. 24(1).

Personal Health Information Protection Act, 2004, s. 72(1)(a), s. 72(2).

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

Section 11(b).

R. v. Morin [1992] S.C.J. No. 25 (S.C.C.).

R. v. Tran, [2012] O.J. No. 83 (Ont. C.A.).

R. v. Schertzer, [2009] O.J. No. 4425 (Ont. C.A.).

R. v. Carmichael-Graham, [2013] O.J. No. 2918.

R. v. N.N.M., [2006] O.J. No. 1802.

R. v. Kovacs-Tator, [2004] O.J. No. 4756 (Ont. C.A.).

R. v. Godin [2009] 2 S.C.R. 3 (S.C.C.).

R. v. Omarzadah [2004] O.J. No. 2212 (Ont. C.A.).

R. v. Williamson 2014 ONCA 598.

R. v. MacMillan (1991) 3 O.R. (3d) 588 (Ont. C.A.).

R. v. Rahey [1987] 1 S.C.R. 588.

R. v. Thomson, 2009 ONCA 771 (Ont. C.A.).

Section 7.

R. v. 1260448 Ontario Inc. (c.o.b. William Cameron Trucking), [2003] O.J. No. 4306 (C.A.).

R. v. Polewsky, [2005] O.J. No. 4500 (Ont. C.A.).

R. v. Miles of Music Ltd., [1989] O.J. No. 391(Ont. C.A.).

New Brunswick (Minister of Health and Community Services) v. G.(J.) [1999] S.C.J. No. 47.

R. v. Jewitt, [1985] 2 S.C.R. 128.

R. v. Power, [1994] 1. S.C.R. 601.

R. v. Keyowski [1988] 1 S.C.R. 657.

R. v. National Wrecking Co. 2005 ONCJ 371.

R. v. Johnston [1996] O.J. No. 2882.

Counsel:

Ms. Hazel Jones, Crown counsel for the prosecution.

Mr. Robert K. Stephenson, defence counsel for the defendant Melissa McLellan.

**Decision regarding s. 11(b) and
s. 7 Charter applications
Reasons for Judgment**

1 L.M. SCULLY J.P.:-- The defendant, Melissa McLellan, has been charged with nine counts of wilfully collecting and using personal health information without authority in contravention of the *Personal Health Information Protection Act*, 2004 (hereinafter referred to as PHIPPA), section 72(1)(a). The defendant brought *Canadian Charter of Rights and Freedoms* (hereinafter referred to as *the Charter*) applications pursuant to section 11(b) for unreasonable delay and pursuant to section 7 for abuse of process and selective prosecution.

2 I will first give my decision in relation to the section 11(b) application. I must analyze the application in accordance with the factors and analysis as set out in the Supreme Court of Canada decision of *R. v. Morin* [1992] S.C.J. No. 25 (S.C.C.) and the many subsequent cases which have used that same analysis.

LENGTH OF DELAY

3 First of all, I must look at the overall length of delay. In this case the Information was sworn on September 20, 2011 and I'm giving my decision on these Charter applications on today's date of January 28, 2015. That is an overall time period of three years, four months and eight days. As this time period is well over the 8 to 10 month acceptable delay guidelines as set out in *Morin* it does warrant a further inquiry.

WAIVER OF TIME PERIODS

4 Next I must look at waiver of any time periods by the defence. Waiver must be clear and unequivocal. The only waiver of time by the defence in this case was from January 20, 2014 to February 19, 2014... a period of four weeks. The defence and Crown agreed that this time was neutral as the parties were attempting to resolve the matter and the Charter applications were

therefore adjourned. There were no other waivers of time periods in this case.

REASONS FOR THE DELAY

INHERENT TIME REQUIREMENTS/INTAKE PERIOD

5 I must now analyze the reasons for the delay under five subheadings, the first being inherent time requirements of the case. Inherent time requirements of the case are considered neutral in the section 11(b) analysis. Inherent time requirements of the case have been categorized as items that are common to almost all cases or would be a necessary part of preparing a case for trial and consist of activities such as the retention of counsel, bail hearings, police and administration paperwork, disclosure, pre-trials, etc. Justice Sopinka in the *Morin* case at paragraph 42 says: "*As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay.*"

6 The defence categorizes a time period of 4.6 months as a normal intake period or inherent time requirements of the case. The defence characterizes the rest of the delay in this case as being delay caused by what they categorized as an ongoing pattern of late or incomplete disclosure and the change in tactics from using the Mogg report to getting a new report created by Detective Sgt. O'Connor.

7 The Crown position is that 70.5 weeks (which is one year and just over 5 1/2 months) is the appropriate time to categorize as inherent time requirements for this case.

8 Based upon my analysis I have come to the conclusion that the appropriate time to categorize as inherent time requirements or intake period of this case is from the date the information was sworn which is September 20, 2011 to June 15, 2012 which is the date on which the 5 day trial for December 2012 was set. Therefore the time that I have characterized as inherent time requirements of this case is 8 months and 26 days. I base this decision on the fact that this was a fairly complex case in certain respects. There was voluminous disclosure, numerous witnesses were likely to be called at trial (approximately 14), three pre-trials (one of which was severely shortened as the Justice of the Peace was not originally available at the specified time) and five days of trial time was initially set for this case and there were numerous ongoing resolution discussions. This is therefore not your run-of-the-mill Provincial Offences Act matter which can be completed with a trial time of one or two hours and minimal intake requirements and no necessity for pre-trials.

9 The decision of *R. v. Tran*, [2012] O.J. No. 83 (Ont. C.A.) at paragraph 34 makes it clear that pre-trials are an important and necessary part of preparation for trial and that the time required for pre-trials, and a reasonable period of time to schedule the pre-trials, should be treated as part of the inherent time requirements of a case.

ACTIONS OF THE CROWN

10 Next I must analyze actions of the Crown. Delay which falls under this heading is not neutral but falls at the feet of the Crown.

11 In the *Morin* decision at paragraph 46 Justice Sopinka says: "*As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc.*"

12 I consider that the time period from June 15, 2012 (which is the date the December 2012 trial dates were set) to October 25, 2013 (which is the date the defence sought an adjournment to file their motion materials in relation to their Charter applications) as falling under actions of the Crown. This time period is 16 months and 10 days. I characterize this entire time as being delay attributable to the Crown as a result of the fact that the extensive, late disclosure provided to the defence in November 2013 relating to Mr. Mogg's computer methodology set in motion a chain of events which led to delay during this time. On Nov. 9, 2012 extensive additional disclosure was provided to the defense by the Crown. Some of this disclosure was very important in that it related to more specific details about the methodology used by Mr. Mogg in preparing his audit report, information about the databases and programs used and an indication that Mr. Mogg had kept these databases. (Mr. Mogg was at the time, a hospital employee in the computer department who took various databases and put them into a computer program to analyze them in order to determine if Ms. McLellan, a nurse at the hospital, had breached privacy legislation. Mr. Mogg's analysis and report was the heart of the Crown's case and lead to charges being laid against Ms. McLellan).

13 When the defence brought the motion to adjourn the December trial dates as a result of this extensive, important, late disclosure I agreed and granted the adjournment. In my decision at that time I indicated that while some of the disclosure was not that important or was simply another version of the same thing there **was** extensive, important disclosure that related to the computer methodology used by Mr. Mogg which was provided. This disclosure was very technical in nature and I could see why it would require a computer expert to sort through it.

14 I am using the start date of June 15, 2012 (when the trial dates for December 2012 were set) as the starting of this time frame. This is because that time between June 15, 2012 and the trial dates in December which was December 3 to the 12th ...essentially became lost time as a result of the late disclosure provided in November 2012. This disclosure being provided so late resulted in the defence requiring time to hire a computer expert to analyze the computer information provided and it resulted in the defence having to bring an application for third-party records from the hospital to obtain further disclosure that their computer expert felt was necessary to properly analyze Mr. Mogg's methodology.

15 The Crown initially indicated that the material sought by the defence on the third-party records application was not relevant and also was not in their possession. However the investigating officer, Detective Sgt. O'Connor, subsequently sought and obtained a search warrant (on the day

before the application for third-party records was to be argued in court) in order to obtain some of the information the defence was seeking in their application for third-party records. The reason the Crown gave for this somewhat bizarre turn of events is that they were trying to protect the privacy of the patients whose information would have been disclosed to the defence if the application for third-party records had proceeded and been granted. Given the extensive disclosure already provided of thousands of patient records; some of which had the names redacted but some of which did not; that reasoning seems to ring somewhat hollow. The defence was not seeking patient names so the information could have been provided in a redacted format and ultimately was provided in that fashion after my decision. Also the fact that a search warrant was sought and obtained would seem to be contrary to the Crown's position that this material was not relevant. If this material was not relevant then the police should not have been able to obtain it via a search warrant. The police officer must have satisfied the issuing Justice of the Peace of the relevance of this material in order to get a search warrant. The investigating officer did obtain some of the material the defence was seeking via the search warrant however they asked for it in paper format only not in electronic format as the defence was requesting. The Crown's position that the material was not in their possession was also an interesting one. Although perhaps technically correct in that these were documents in the possession of the North Bay Regional Health Centre, in light of the previous extensive disclosure which was obtained from the hospital by the investigating officer both with and **without** search warrants it does seem to be a curious position for the Crown to take.

16 During the application for third-party records, which was argued on June 11, 2013, the Crown indicated that they were no longer relying upon the Mogg report nor calling Mr. Mogg as a witness during the trial. The Crown said the investigating officer, Detective Sgt. O'Connor, would conduct her own independent search of the hospital documents or databases and prepare her own report which would be provided to the defence. The Crown said that the investigating officer would not be relying on any of Mr. Mogg's materials in order to prepare her report. I heard arguments and then adjourned the matter to July 5, 2013 to allow for further submissions if required as a result of the obtaining of Detective Sgt. O'Connor's report which had not yet been prepared. The application was also adjourned so I could make my decision on the issue of whether notice had to be provided to thousands of individuals whose privacy interests in the records requested in the application would have to be given and for my decision that day if possible on whether to order the hospital to produce certain records to the Court.

17 While the Crown certainly has the prerogative to change their tactics for trial and to change which witnesses they will be calling this did create a situation where there was some further delay (at least part of the reason for some further delay) of the third-party records application and it created further ongoing disclosure.

18 The Crown also attempted to argue that the materials sought by the defence on the third-party records application should not be provided because Mr. Mogg was no longer being called as a witness by the Crown. It is very clear from the case law that the question of whether Mr. Mogg would or wouldn't be called as a witness was not a relevant consideration for such a decision

respecting third-party records. I ultimately ordered the hospital to disclose the computer databases prepared by Mr. Mogg that the defence was requesting however not for the extensive time period they requested but only for the time periods relating to the offences themselves, which was a 9 day period. It also turned out that the investigating officer **did** have to rely on one of the databases created by Mr. Mogg in order to prepare her report.

19 After reviewing the material I then ordered the hospital to release those records to the defendant by October 9, 2013 but I requested that patient names and other identifying information with the exception of "J number" (which is the hospital patient identifying number) be redacted.

20 The Crown conceded during their submissions on this section 11(b) application that there were many hiccups along the way regarding the investigation and the disclosure provided in this case. The Crown said the situation was not ideal and this was the first prosecution of its' kind resulting in a steep learning curve by everyone involved. It also appears to me and was conceded by the Crown that because the initial investigation was done by what I would characterize as "lay" witnesses (that is hospital employees that do not normally investigate offences nor appear in court as witnesses) those employees did not realize the importance of certain information or the importance of providing all information that led to their conclusions to the police. Nor does it appear that the officer was aware of some of this information and was not knowledgeable on the computer methodology used and therefore did not think to ask for certain disclosure from Mr. Mogg. The Crown argues that the defence could have asked for this computer information however if the Crown and the investigating officer don't even know this information exists or the importance of it...how is the defence supposed to know? The Crown says that there was no malicious, abusive or improper motives on behalf of the police or the Crown in the decisions that it made in this case. However in my analysis of section 11(b); as indicated in the *Morin* decision and many other cases; I am not seeking to assign blame towards the Crown in a moral or judgmental sense and it is not necessary to impute improper motives to the Crown in order to find delay caused by the Crown. The Crown must take the case that they have...good, bad, difficult or otherwise, and if that case or situation or decisions made by the Crown, police or Crown witnesses leads to delay then that delay certainly should not be attributable to the defence nor should all of it in certain circumstances; such as I've outlined in this case; be attributed to inherent time requirements of the case.

21 The Crown argues that this time period which I have attributed as being Crown delay is a combination of inherent time requirements of the case and defence delay. They rely in part on the decision of *R. v. Schertzer*, [2009] O.J. No. 4425 (Ont. C.A.) to support their position. I find that the *Schertzer* case is distinguishable on the facts. First of all the trial Judge's decision to stay the charges for delay was overturned in part because the trial Judge did not allocate certain large periods of time to any specific category of delay. Second the Ontario Court of Appeal attributed a much larger time period to inherent time requirements of the case than the trial Judge did due to numerous complex issues which are not present in this case such as conflicts issues, issues relating to vetting of disclosure due to confidential informants, undertakings related to disclosure, the requirement to obtain an "electronic courtroom", the withdrawal of one counsel, the number of

defendants, difficulty in co-ordinating schedules of numerous counsel, certiorari applications to quash committal for trial decision, etc. I have already allocated quite a lengthy period of time to inherent time requirements of this case for the reasons indicated above.

22 In the *Schertzer* decision the court also found that the trial Judge had made the mistake of equating the amount of disclosure with the importance of it. With all due respect I do not believe I have made such a mistake in this case. I have indicated why the late disclosure relating to Mr. Mogg's methodology was so important and the subsequent impact the late disclosure of it had on these proceedings. I certainly do not find that the *Schertzer* decision stands for the proposition that delay caused by late disclosure can never be attributed to the Crown. The impact, causes and importance of late disclosure will have to be analyzed on a case by case basis and the categorization of it will be largely fact driven.

23 A decision which is factually relevant to this analysis is that of *R. v. Carmichael-Graham*, [2013] O.J. No. 2918. In this decision, Justice Buttazzoni says at paragraph 40: "*There was clearly nothing inappropriate about the Crown interviewing their witnesses and disclosing the new information to the defence. Regrettably the timing of the interview and the subsequent late disclosure resulted in a delay of the trial. This delay is to be attributed to the Crown.*" Also at paragraph 42 he says: "*I am not blaming the Crown for having conducted an interview of its witnesses late in the day. The fact remains that when the Crown chooses to do so it takes the risk of delaying the trial if new information is disclosed by the witness. I appreciate that the Crown has no control over changes that a witness might make to their previous statement. It does, however, have some control over the timing of the witness interview process. Optimally, these interviews should be conducted well enough in advance of the trial to allow the defence time to respond to any new disclosure.*" In this case the delay was caused by the timing of the Crown and police interviewing the witnesses to prepare for trial, the fact that the police and Crown were not fully understanding the methodology that Mr. Mogg used and the fact that Mr. Mogg did not disclose certain information to them until later interviews (most likely inadvertently due to not understanding the importance of that information or the legal requirement to disclose it). In this particular case I find that all of these factors contributed to Crown delay which at a certain point went over and above the inherent time requirements of this case.

ACTIONS OF THE DEFENCE

24 Actions of the defence which are voluntarily undertaken such as attacks on wiretaps, Charter applications, etc. cause delay which is attributable to the defendant. This category also does not seek to assign blame nor suggest that the defence should not undertake these applications, but seeks to put the delay in the correct category and at the feet of the correct party. Such actions of the defence do not contribute to delay which triggers s. 11(b). It is only institutional delay and Crown delay which triggers s. 11(b).

25 The time taken for these *Charter* applications, which is attributable to the defence, is from

October 25, 2013 (the date the defence sought an adjournment to file these Charter applications) to the date when I was originally supposed to render my decision on these *Charter* applications which was September 26, 2014. This is a total time period of 11 months less one day. I find that there are no other actions of the defence which should be attributed to this category.

26 Normally an application for third-party records would be delay which would be attributable to the inherent time requirements of the case as per the decision of *R. v. N.N.M.*, [2006] O.J. No. 1802 (or possibly in some cases attributable to the defence if it was unreasonably brought) however in this case I find that the whole time frame from when the 5 day trial was adjourned to when the defence sought an adjournment to file these *Charter* applications as delay attributable to the Crown for the reasons indicated above under the category "actions of the Crown."

27 The cases of *R. v. N.N.M.* and *R. v. Kovacs-Tator*, [2004] O.J. No. 4756 (Ont. C.A.) make it clear that the defence cannot delay the setting of trial dates and any and all other steps in a proceeding in order to have every last piece of disclosure prior to the setting of such dates. However these cases also make clear that the nature of the outstanding disclosure and other factual issues will become important in the analysis. I have done that analysis in the category of "actions of the Crown."

28 While I would agree with the Crown that the defence certainly did not attempt to speed this case along I cannot find that the actions of the defence would allow me to reduce the time allocated to actions of the Crown in light of what was happening at that relevant time.

LIMITS ON INSTITUTIONAL RESOURCES

29 The next category that I must look at is limits on institutional resources. I find that there is no time in this case that I would allocate to this category of delay. I find that there was nothing excessive that occurred here with respect to reasonably accommodating the schedules of Crown counsel, defence counsel, the Court and myself. In the case of *R. v. Godin* [2009] 2 S.C.R. 3 (S.C.C.), Justice Cromwell at paragraph 23 states; "*Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability.*"

OTHER REASONS FOR DELAY

30 The only other reason I find for delay in this case is that I was unable to give my decision on the section 11(b) and section 7 Charter applications on September 26, 2014 as a result of my sudden illness and unexpected surgery. This resulted in the delay from September 26, 2014 to today's date when I am rendering this decision which is January 28, 2015. This entire time period however is not attributable solely to my availability as I had dates available as early as the end of November 2014 to give this decision. It is also due to reasonably accommodating the schedules of both defence counsel and Crown counsel (who I would note are both from out of town) and trying to align those schedules with my schedule and the court schedule. Again I find nothing unreasonable in this time

frame and therefore I classify it as neutral and in any event I have no specific information as to what dates everyone was or was not available.

31 Rather than subtracting all of the neutral time periods or defence attributable time periods from the overall delay I will take the easier mathematical approach in this case of looking at Crown delay and institutional delay only. The only delay in this case that falls under one of those categories is actions of the Crown and this is a period of 16 months and 10 days. Therefore I must analyze this time period with reference to the case law, prejudice and balancing of interests.

32 The guidelines for constitutionally tolerable delay (Crown and/or institutional delay) in Provincial Offences matters is 8 to 10 months as indicated in the Ontario Court of Appeal decision in *R. v. Omarzadah* [2004] O.J. No. 2212 (Ont. C.A.), a decision of Justice Doherty. Justice Doherty determined that the *Morin* guidelines of 8 to 10 months do apply to Provincial Offense cases, although not strictly, it is still a guideline. The delay that I have attributed to the Crown of 16 months and 10 days is beyond the constitutionally tolerable guidelines of 8 to 10 months. That however does not end my inquiry as 10 months is a guideline only.

PREDJUDICE

33 I must now look at the issue of prejudice. I must consider prejudice to the defendant as a result of the delay. Prejudice cannot be considered separately from the length of delay. First I have to look at whether there is actual prejudice which can arise in three different ways. The first type of actual prejudice is prejudice to the liberty interests of the defendant that arise from pre-trial incarceration or restrictive bail conditions. This is a type of prejudice which rarely arises in Provincial Offences matters but does arise in many criminal cases. In this particular case the defendant is not and has never been incarcerated in relation to these offences nor is she on any form of bail so this type of prejudice would not apply to this case.

34 The second type of actual prejudice that may result is prejudice to the accused's security interests as a result of ongoing stress or damage to reputation as a result of overlong exposure to criminal prosecution or in this case to a Provincial Offences prosecution. I have reviewed the affidavit of the defendant Melissa McLellan which was filed in relation to these Charter applications. While much of the prejudice that Ms. McLellan refers to would have resulted and did result simply from the fact of being charged and accused (i.e. loss of her job at the hospital; reporting of this matter to the College of Nurses and a subsequent hearing in front of that College; the publicity initially surrounding this case in the City of North Bay, etc.)... I do find however that the delay in this case has caused some actual prejudice to the defendant. Ms. McLellan has indicated ongoing stress which appears to me to go over and above the consequences of being charged and the possible consequences of a conviction but relates also to the delays in this case. Ms. McLellan has been hopeful to get this matter resolved and put behind her one way or another and try to put her career back in order however the delays have resulted in psychological stress from constantly thinking the matter will come to an end and then it does not. If Ms. McLellan were

eventually convicted of any of these charges that could certainly have detrimental effects on her future nursing career and any decision made by the College of Nurses so delay if there were to be a conviction could in some senses operate in her favor however if there is an acquittal then the delay has not been operating in her favor. There is still the psychological stress of expecting something to be completed and having it hanging over your head and it not being completed.

35 The third category of actual prejudice that I must consider is prejudice to the accused's ability to make full answer and defense; for example for the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defense. I have no evidence before me that there is such prejudice to the defendant's ability to make full answer and defence.

36 Next I must consider inferred prejudice. Even in the absence of specific evidence of prejudice, prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. In the case of *R. v. Williamson* 2014 ONCA 598, the court found that there was inferred prejudice where the combined Crown and institutional delay exceeded the *Morin* guidelines by 8 months. In this particular case I find that the length of the delay which is 16 months and 10 days and which is six months and 10 days over the top end of the *Morin* guidelines of 8 to 10 months is a lengthy enough delay to allow for inferred prejudice even in a Provincial Offences Act case. Therefore I find that actual prejudice and inferred prejudice are factors in this case and this does **not** assist in finding that the 16 months and 10 days of Crown delay are constitutionally tolerable.

BALANCING OF INTERESTS

37 Next I must balance the competing interests. This is the final stage of the analysis where I must balance the individual and state interests that section 11(b) of the Charter is designed to protect, against the factual background of these previously stated factors such as reasons for the delay, prejudice, etc.

38 Justice Sopinka at paragraph 31 of the *Morin* decision states: *"The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause the delay."*

39 The defendant has an interest in a timely trial and s. 11(b) gives the defendant a constitutional right to such and the community has an interest in seeing charges proceeding to trial and prosecuted on their merits. However their interests are not always so divergent as may initially appear. In the *Morin* decision Justice McLachlin (as she then was) noted in her concurring decision at paragraph 86: *"When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice."*

40 The charges in this case are serious in that they involve alleged breaches of private medical records. Such records are among the most private and personal of information about a person. The public would be understandably concerned if a trusted medical professional looked at such medical records when not authorized to do so. However I cannot say that these charges would be any more serious than many criminal charges and it is certainly arguable that they are less serious than criminal offences involving violence or even provincial offences involving death or serious injury such as some Highway Traffic Act charges or some Occupational Health and Safety Act charges. Such more serious charges have been stayed for less delay than I have found in this case. For example in the case of *R. v. MacMillan* (1991) 3 O.R. (3d) 588 (Ont. C.A.) a criminal charge of Dangerous Driving Causing Death was stayed by the court for institutional delay of 8 and a half months. However the case law also makes clear that the determination of whether s. 11(b) has been violated is very fact specific. I am aware of cases that range from a low end of 6 months delay where a stay was granted (in a provincial offence case) to 56 months delay where a stay was not granted (in a criminal case).

41 The Crown argues that these charges are very serious as allegedly the defendant has illegally viewed the sensitive medical records of thousands of hospital patients. I do not agree that I must consider allegations relating to "thousands" of patients as increasing the seriousness of this case. The charges before me relate only to a 9 day time period and involve approximately 45 different patients. Those are the only matters that I can consider in my decision. I cannot consider allegations which are not before this court.

42 In this case I conclude that the reasons for the delay (as outlined in the category of "actions of the Crown" above); the amount of Crown delay (16 months and 10 days); the amount of delay over and above the *Morin* guidelines (6 months and 10 days over the top end of the guideline), and the actual and inferred prejudice result in a violation of s. 11(b). I conclude that the charges against the defendant are not so serious as to warrant extending the *Morin* guidelines to such an extent. Once I make a finding that section 11(b) has been violated the only remedy is a stay as per the decisions of *R. v. Rahey* [1987] 1 S.C.R. 588 and *R. v. Thomson*, 2009 ONCA 771 (Ont. C.A.). Therefore a stay is entered with respect to the charges before this court pursuant to section 11(b) and section 24(1) of the *Charter*.

SECTION 7 (ABUSE OF PROCESS)

43 The defendant alleges a violation of section 7 of the *Charter* for abuse of process based on three grounds: 1. A pattern of late disclosure; 2. The Crown abandoned evidence that it initially relied upon to charge the defendant (the Mogg report) and 3. selective prosecution.

44 Section 7 of the *Charter* provides as follows: "*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*" Imprisonment is not available as a penalty for a violation of the sections of PHIPPA that the defendant was charged under pursuant to section 72(2) of PHIPPA and

therefore section 7 is not engaged as per the decision of *R. v. 1260448 Ontario Inc. (c.o.b. William Cameron Trucking)*, [2003] O.J. No. 4306 (C.A.) at paragraph 16.

45 In the decision of *R. v. Polewsky*, [2005] O.J. No. 4500 (Ont. C.A.) at paragraph 4 the court made it clear that the remote possibility of imprisonment for non-payment of a fine pursuant to the *Provincial Offences Act, R.S.O. 1990, c. P-33* did not engage the liberty interest in section 7.

46 Moreover the Ontario Court of Appeal in *R. v. Miles of Music Ltd.*, [1989] O.J. No. 391 (Ont. C.A.) at paragraph 21 stated that the right to earn a livelihood is not included in the concept of "security of the person" in section 7. Therefore the defendant losing her job as a result of being charged or possibly convicted does not engage s. 7.

47 The defence refers me to the case of *New Brunswick (Minister of Health and Community Services) v. G.(J.)* [1999] S.C.J. No. 47 as a precedent for finding that s. 7 does apply in this case. This case did find that s. 7 was applicable however they were dealing with the state removal of a child from parental custody and the serious interference with the psychological integrity of the parent which that causes and I find that decision to be factually distinguishable from Ms. McLellan's case.

48 Even though s. 7 of the *Charter* does not apply in this case I must still consider the concept of "abuse of process" from a common law perspective. In the case of *R. v. Jewitt*, [1985] 2 S.C.R. 128 at paragraph 25 the Supreme Court of Canada adopted the conclusion of the Ontario Court of Appeal in *R. v. Young*, [1984] O.J. No. 3229, and stated: "*there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process though oppressive or vexatious proceedings.*"

49 The courts have further articulated the high standard for such a finding of abuse of process when they talk about the fact that it must amount to conduct which "*shocks the conscience of the community*" and a stay will be granted "*only in the clearest of cases.*" (*R. v. Power*, [1994] 1 S.C.R. 601 at paragraphs 10 and 11).

50 In this case while I found that certain decisions or actions of the Crown were unusual or perhaps mistakes and caused delay and that there were difficulties with the prosecution of this case for reasons I've outlined above in my decision regarding section 11(b), I find that there is no evidence that such actions of the Crown were undertaken with any bad faith, improper motive or with mal intent.

51 Courts are not allowed to second guess the decisions of prosecutors without conspicuous evidence of bad faith, improper motives or decisions so obviously wrong that shock the conscience of the community. In this case there is speculation but no evidence. It is arguable that the Crown did not have to provide reasons for some of the controversial decisions it made in this case as they were decisions relating to core prosecutorial decisions which are within the discretion of the prosecutor

however it did provide reasons and explanations. While I may have found those reasons or tactics curious ones and that they caused delay that does not equate with abuse of process and I find no reason not to accept the Crown at their word with respect to the reasoning behind the decisions they made.

52 The defence provided me with the case of *R. v. Keyowski* [1988] 1 S.C.R. 657 which states that a proceeding can be oppressive without requiring an improper motive or misconduct. The court in that case made it clear that they were dealing with the narrow legal issue of whether requiring the accused to stand trial for a third time after the first two trials resulted in the juries being unable to reach verdicts was an abuse of process. This case is also very distinguishable on its facts from the case at bar and I do not find that the legal principles enunciated have broader application than the narrow issue that the court was expressly dealing with.

53 I therefore find that there has been no abuse of process in this case as a result of a pattern of late disclosure nor as a result of the Crown changing their trial tactics and witnesses which is an exercise of prosecutorial discretion.

54 With respect to the argument that s. 7 was violated due to the selective prosecution of Ms. McLellan I also find that this argument must fail. I agree with the Crown that a mere allegation that other persons could or should be charged is insufficient to establish prosecutorial conduct amounting to an abuse of process. In the case of *R. v. National Wrecking Co.* 2005 ONCJ 371, Justice Keast said at paragraph 201: "*In theory, selective prosecution might constitute a basis for an abuse of process and a stay of proceeding. However, the failure to charge others would have to be outrageous and shock the conscience of the community. Such prosecutorial conduct would have to amount to "the clearest of cases."*" There is no evidence of such outrageous conduct in this case.

55 In the case of *R. v. Johnston* [1996] O.J. No. 2882, Justice Then says the following while addressing the allegation of selective prosecution: "*...there is no evidence that the prosecutor's conduct or the conduct of the police, vis-à-vis the applicant, was prompted by bad faith or an improper motive as opposed to the cogency of the evidence with respect to the applicant.*" In this case there is also no evidence of bad faith or improper motive and it would appear from the information I do have before me that an investigation and charges were pursued against Ms. McLellan due to the volume of alleged breaches referred to during her interview at the hospital and allegedly found during the subsequent audit. There would seem therefore to have been a good faith basis to pursue the investigation in relation to Ms. McLellan. Therefore I find that there has been no breach of section 7 of the *Charter* nor has there been a common law abuse of process.

L.M. SCULLY J.P.

TAB 8

Case Name:

R. ex rel. York (Regional Municipality) v. Jukes

**IN THE MATTER OF an appeal under section
116 of the Provincial Offences Act,
R.S.O. 1990, c. P.33, as amended;
Between
Her Majesty the Queen, Ex.Rel. the
Regional Municipality of York,
Respondent, and
Richard Jukes, Appellant**

[2014] O.J. No. 4182

2014 ONCJ 438

2014 CarswellOnt 12208

115 W.C.B. (2d) 422

Regional Municipality of York Court File No. 4960-11-4025

Ontario Court of Justice

J.F. Kenkel J.

Heard: August 22, 2014.

Judgment: August 22, 2014.

(24 paras.)

Appeal From:

On appeal from a conviction by Justice of the Peace K. Walker on April 22, 2013.

Counsel:

Ms. Volga Pankou, agent for the Respondent Municipality.

Richard Jukes, appeared on his own behalf.

1 J.F. KENKEL J.:-- The appellant was convicted at trial of Failing to Comply with a Property Standards Order issued pursuant to s.15.2(2) of the *Building Code Act*. The court suspended the passing of sentence and placed the appellant on probation for a period of one year.

2 Mr. Jukes now appeals as against conviction only. The Notice of Appeal sets out only one ground of appeal - trial within a reasonable time -- but on the hearing of the appeal four grounds were advanced:

- i. Trial within a reasonable time -- Charter s.11(b)
- ii. Disclosure and Trial Fairness -- Charter s.7
- iii. Cruel and Unusual Punishment -- Charter s.12
- iv. Equality under the Law -- Charter s.15

3 For the reasons below I find that the appeal must be dismissed.

Charter Issues Not Raised at Trial

4 In criminal matters appellate courts do not permit new arguments to be raised upon appeal. The other party did not have an opportunity to respond with evidence at trial and the record will often not be sufficient to make findings of fact necessary to decide the issue. *R. v. Mahmood* [2011] O.J. No. 4943 (CA) at pra.62

5 An appellant is not permitted to raise new Charter arguments for the first time on appeal unless there has been a dramatic shift in the law such that the argument not available at trial was now available by the time of the appeal. See: *R. v. Sweeney* [2000] O.J. No. 3534 (CA) at para.31

6 In my view, the public interest in finality of litigation in criminal matters applies with stronger reason to provincial offence matters given the higher number of cases, the simplified nature of the proceedings and the reduced range of penalty as compared to criminal matters. However, given that the accused is unrepresented and has gone to great expense and effort in pursuit of this matter I will exercise my discretion and consider the Charter arguments advanced. The main Charter argument being raised for the first time concerns s.11(b) and the transcripts provide an evidentiary basis for consideration of that issue. Although there was no formal Charter application at trial, the issues of disclosure and the equality in prosecution were advanced and considered by the court.

Trial Within a Reasonable Time

7 The history of the proceedings is as follows:

Sep 8 -- Oct 13/11

Intake

Oct 13/11

First Appearance

The Crown offered to set a trial date. The accused asked for an adjournment of 3 months. The court found that was too long and adjourned the matter to December 15, 2011

Dec 15/11

Second Appearance

The Crown offered to set a trial date. The accused needed time to speak to counsel and a February 16th trial date was set.

Feb 16/12

1st Trial Date

The accused pleaded not guilty then asked for an adjournment to pursue further disclosure regarding the general enforcement of bylaws in the municipality. The prosecution submitted the further disclosure was not relevant. The court struck the plea and further dates in March, April and May were offered. The accused chose the furthest date May 17, 2012. "Yeah that's better, May. The other dates I'm booked". The matter was set for trial May 17th 2012.

May 17/12

2nd Trial Date

The accused requested disclosure related to a past proceeding his now deceased father had with Georgina Township that took place in 2005, some 7 years earlier. The prosecution submitted that the requested disclosure was irrelevant. The court adjourned the trial and ordered that the prosecution obtain and disclose the order referred to by the defendant. The prosecution confirmed with the municipality that the requested order could be made available quickly. The prosecution wanted to set a trial date but the defendant had again mentioned speaking with a lawyer so the matter was adjourned to provide the further disclosure requested and allow the defendant to obtain counsel's dates for trial.

June 14/12

5th Appearance - Set Date

The defendant requested further disclosure in relation to his father's matter in 2005 and caselaw. The prosecution submitted that they had provided the requested disclosure relating to his father's matter even though it wasn't relevant. The prosecutor declined to provide legal research or caselaw and noted that she wasn't aware of any cases dealing with this bylaw. Both parties agreed to a trial date of September 13, 2012. Mr Jukes said, "that will be fine" when he agreed to that date.

Sept 13/12

3rd Trial Date

Accused pleaded not guilty. Evidence was heard. The trial was interrupted when the accused told the court he didn't receive the bylaw officer's notes. The prosecution told the court they had provided everything in duplicate and triplicate including the notes at issue and including documents relating to an unrelated 2005 matter involving the defendant's father. The court struck the proceedings, as although the officer's notes had been disclosed the accused didn't have them in his possession at the time of trial. The court adjourned the trial to November 15, 2012 peremptory on the defendant to proceed.

Nov 15/12

4th Trial Date

The defendant told the court he still didn't have all the information he wanted but he was "ready to proceed anyway". The further information he wanted was research of caselaw to see if there were any cases that supported his position. The trial commenced and evidence was heard. The accused told the court he did not remember receiving a document where evidence showed it was served upon him by mail. The prosecution also had a complete photocopy of all items provided to Mr. Jukes by way of disclosure and this document had already been disclosed. Time ran out and a further date was selected. The defendant was asked by the court to organize his documents so that time wouldn't be wasted with objections relating to documents in his possession that he was having a hard time finding. The prosecution agreed to give Mr. Jukes further copies of documents he lost. The next available trial date for the expanded time required for this particular trial was March 11th, 2013.

Mar 11/13

8th Appearance -- Continued Trial

The evidence was completed and submissions heard and the matter was put to April 22, 2013 for

judgment.

Apr 22/13

Judgment

8 I agree with the appellant that the overall time to completion of trial was extraordinary for such a simple bylaw case and requires review.

9 However, contrary to the appellant's submission that he was trying to set a trial date from the first appearance onward but was continually frustrated by the Crown's request for adjournments, the transcript of the first appearance shows that the opposite was true. He requested an adjournment and a lengthy one which was refused. It's not improper to request an adjournment early in the proceedings to prepare, but the submission that the appellant tried to set a trial date from the first appearance onward simply isn't true. Nor is it true that he opposed delay throughout.

10 All of the remaining trial adjournments and other delays were at the request of the defendant. Much of the delay centred around his requests for plainly irrelevant material relating to other proceedings involving other parties in 2005. Institutional delay in this case is two months to the first trial date. The accused requested an adjournment and then requested the furthest date be set for the second trial. The transcripts show that the various Justices of the Peace showed extraordinary patience with the unrepresented defendant and generously allowed multiple adjournments and 4 trial dates to be set in response to the many disclosure requests by the accused of little or no apparent relevance to the case and other accommodations. The trial proceedings show that the prosecution had disclosed the information essential to the trial at first instance and the further delays at the request of the accused cannot fairly be attributed to Crown or institutional delay.

11 The simple charge was not completed on the first trial date. The transcript of proceedings shows numerous reasons why the initial trial time proved inadequate and further time was scheduled.

12 Contrary to the submission on appeal, the accused did not allege a breach of his s.11(b) rights at trial either in formal or informal terms. There was no allegation that the trial would be unfair given the delay.

13 I can find no evidence of a s.11(b) breach.

Disclosure -- Charter s.7

14 As noted above, the Justices of the Peace throughout were very generous in ordering disclosure even where it appeared plainly irrelevant, in ordering further copies where original disclosure had been lost, and in granting trial and other adjournments to permit the accused to have further time to prepare.

15 Even on appeal, one of the central documents he was able to cite as having been tendered on surprise at trial was actually part of initial disclosure and disclosed again on his objection. The property roll in question was not particularly relevant in any event as the defendant was charged as being an occupant (which he admitted) and not as an owner.

16 I can find no evidence that relevant information was not disclosed or that the accused was not given time to prepare for documents he received. The Justices of the Peace throughout dealt with the many disclosure requests and adjournment requests in a generous and appropriate manner. This ground of appeal must fail.

Cruel and Unusual Punishment -- Charter s.12

17 This is a conviction appeal and so s.12 does not apply. I would note though that a suspended sentence in relation to a provincial offence effectively applies no actual punishment, much less anything cruel or unusual.

Equality Under the Law -- Charter s.15

18 The appellant argued at trial that other neighbours in his area were also violating bylaws and therefore that the fact that he was charged and they weren't violates his s.15 Charter right to equality.

19 That's not the law. It's not the case that an individual cannot be charged with an offence unless all others committing similar acts are similarly charged. As the Court of Appeal noted in *R. v. Miles of Music Ltd.* [1989] O.J. No. 391 (CA) at para.23, it is not a defence to a speeding charge to point out that others were also speeding on that same highway.

20 Even where a municipality may be aware of other bylaw violations and exercises some discretion in prosecution that mere fact does not engage s.15. See: *Scott v. North Perth* [2009] O.J. No. 50 (SCJ) at para.13.

21 In this case the appellant submits that there's evidence of harassment towards him by the bylaw officer over an offer to buy a vehicle that was not accepted. He attributes the actions of others and many other things happening on his property to this one brief conversation and submits that the bylaw charge against him was false.

22 The learned Justice of the Peace heard the evidence of both parties at trial and patiently tried to determine the various defences being put forth by the appellant. She considered the equality submission and she noted that the photographic evidence and the testimony at trial provided evidence of a bylaw breach that was not corrected as required. The court did not find that the charge was laid for an improper purpose. The defendant's central defence -- that he exercised reasonable diligence in attempting to comply with the order was rejected. Given the photographs, documents and testimony at trial that finding was open to the court and supported by the evidence.

Conclusion

23 The appellant has failed to show that the finding of guilt was unreasonable or was not supported by the evidence. The appellant has not shown any error of law. There was no merit to the Charter arguments including those raised for the first time on appeal.

24 The appeal is dismissed.

J.F. KENKEL J.

TAB 9

Case Name:
R. v. Khan

Between
Her Majesty the Queen, and
Mohammad Khan and Yannick Muellenbach

[2014] O.J. No. 6488

2014 ONSC 5664

Court File No.: CR-13-10000003-0000

Ontario Superior Court of Justice

M.A. Code J.

Heard: September 8-12 and 15-19, 2014.

Judgment: September 29, 2014.

(185 paras.)

Counsel:

Christopher Webb and John Pearson, for the Crown.

Jessyca Greenwood, for Mohammad Khan.

Paul Slansky, for Yannick Muellenbach.

REASONS FOR JUDGMENT

M.A. CODE J.:--

A. OVERVIEW

1 The accused Mohammad Khan and Yannick Muellenbach (hereinafter, Khan and Muellenbach) are charged in an Indictment with various forgery-related offences, (contrary to ss. 367, 368 and 369(b) of the *Criminal Code*), money laundering (contrary to s. 462.31), and income tax fraud (contrary to s. 380). Their trial is scheduled to commence on January 5, 2015. It is presently estimated to last eight weeks, that is, until the end of February 2015.

2 The facts of the case, in brief summary, are that Khan and Muellenbach were allegedly the directing minds behind a business known as Flash Jack, located in a building at 361 Yonge Street in downtown Toronto. The building was owned by their family. There is no serious dispute that false identification was being produced and sold through Flash Jack. The first live issue in the case is whether that false identification is a "false document", within the meaning of s. 366 and, if so, whether those responsible for making and selling it had the requisite intent that it be "used or acted on as genuine". The defence, in this regard, is that the false identification was a mere "novelty" item. See: *R. v. Sommani* (2007), 218 C.C.C. (3d) 168 (B.C.C.A.). The second live issue in the case is whether Khan and Muellenbach were mere owners and landlords of the building and had no involvement in any illegal activities carried on by their tenants. The police investigation of the forgery-related offences developed into a tax fraud and money-laundering investigation, as the police tried to discover the identity of the directing minds behind the businesses operating out of 361 Yonge Street.

3 The parties have brought a large number of pre-trial Motions which I heard over a two week period in early September, 2014. I may or may not be the trial judge in this case, depending on my schedule in January and February of 2015. However, the parties have agreed to be bound by my rulings on the pre-trial Motions, absent some material change in circumstances sufficient to justify re-argument of any Motion.

4 I reserved judgment at the end of oral argument on each of the Motions, in order to keep the hearing moving expeditiously. These are my Reasons for Judgment on the pre-trial Motions.

B. ADDING NEW COUNTS TO THE INDICTMENT PURSUANT TO S. 574

5 At the end of a lengthy eighteen day preliminary inquiry involving Khan, Muellenbach and two other co-accused (Osman and Saleh), Khawly J. committed Khan and Muellenbach for trial on the s. 367 and s. 368 forgery offences that were charged in the Information, and on added s. 369(b) offences, all of which are presently charged in the Indictment.

6 However, Khawly J. declined to exercise his powers under s. 548(1)(a), to commit the accused for trial on additional charges of money laundering and income tax fraud that were not charged in the Information. The Crown had given notice at the beginning of the preliminary inquiry that he would seek committal for these further offences and would submit that they were part of the "same transaction" as the forgery-related offences, as required by s. 548(1)(a).

7 After failing to persuade Khawly J. to commit for these further offences, the Crown included

them in the Indictment, exercising powers under s. 574(1)(b) to add further offences "disclosed by the evidence taken on the preliminary inquiry". The Applicants Khan and Muellenbach submitted before me that it is an abuse of process, and a violation of s. 7 of the *Charter of Rights*, to circumvent a judicial decision under s. 548(1)(a) by resort to the powers found in s. 574(1)(b). It was further submitted that the powers granted the Crown in s. 574(1)(b), to add further charges "disclosed by the evidence", was no longer available once the Crown had engaged judicial powers under s. 548(1)(a) at the preliminary inquiry. In Mr. Slansky's submission, the Crown can refrain from engaging s. 548(1)(a) at the preliminary inquiry, and can then resort to its s. 574(1)(b) powers to add further charges after a committal. However, he submitted that the Crown cannot elect to utilize s. 548(1)(a), and fail, and then resort to s. 574(1)(b) powers. He submitted that this is an affront to the Court.

8 In my view, there is no merit to this submission. The judicial powers set out in s. 548(1)(a) are quite distinct from the Crown's powers set out in s. 574(1)(b). The "same transaction" requirement is unique to s. 548(1)(a) and is not found in s. 574(1)(b). Furthermore, the "same transaction" requirement has been given a narrow technical construction that significantly limits the judicial power to commit for additional offences. In other words, it will often be appropriate for a judge to decline committal under s. 548(1)(a) and for the Crown to, nevertheless, indict under s. 574(1)(b) because the latter power is broader than the former power. See: *R. v. Goldstein and Caicedo* (1988), 42 C.C.C. (3d) 548 (Ont. C.A.); *R. v. Stewart* (1988), 44 C.C.C. (3d) 109 (Ont. C.A.); and *R. v. Panzavecchia* (1997), 115 C.C.C. (3d) 476 (Ont. C.A.), which illustrate the technical difficulties raised by the "same transaction" requirement in s. 548(1)(a).

9 Historically, the power of a judge to commit for trial at the end of a preliminary inquiry was limited to only those offences charged in the Information, or some lesser included offence. By way of contrast, the Crown's power to indict after a committal was always much broader and expressly included any other "offences disclosed by the evidence taken on the preliminary inquiry". See: *R. v. Chabot* (1980), 55 C.C.C. (2d) 385 (S.C.C.).

10 In 1985 Parliament statutorily reversed the decision in *Chabot* by amending s. 535 and s. 548 of the *Criminal Code* and expressly enacting a new power to inquire into and commit for "any other indictable offence in respect of the same transaction". It was thought by some, at the time of the 1985 amendments, that this expansion of judicial charge screening powers at the preliminary inquiry would have the indirect effect of limiting the Crown's unilateral power to indict for further offences, after a committal.

11 The Court of Appeal addressed this issue in an important decision which was never reported, to my knowledge, perhaps because it was an oral endorsement. In *R. v. Dean Hoffman*, [1992] O.J. No. 4014 September 15, 1992 (Ont. C.A.), Hoffman submitted on appeal that the Indictment at his trial was a nullity. He had been committed for trial and then convicted on two counts of sexual assault and common assault. However, the Crown had added a third count to the Indictment, alleging assault with a weapon, on which Hoffman had never been charged in the original

Information and on which there had been no committal. He was also convicted at trial on this third count. The argument on appeal was that the 1985 amendments to the *Criminal Code* had broadened the judicial power to commit after a preliminary inquiry by adding the new s. 548(1)(a) power in relation to offences "in respect of the same transaction". Given the availability of this expanded judicial charge screening power, it was submitted that the Crown could only indict the accused "for an offence or offences upon which he was committed for trial". The Court of Appeal (Dubin C.J.O., Catzman and Abella J.J.A.) rejected the argument, holding that the longstanding s. 574 (1)(b) power to indict for additional offences "founded on the facts disclosed by the evidence" was still available. That section had remained essentially unchanged by the 1985 amendments. The Court noted the distinctly different statutory language in the two sections and stated:

The language of s. 574(1) can be conveniently contrasted with s. 548(1) of the *Criminal Code* which limits the power of a judge presiding over a preliminary inquiry to commit an accused for trial only for the offence charged or any other indictable offence with respect to the same transaction. [Emphasis added.]

Hoffman's further application for leave to appeal to the Supreme Court of Canada, [1993] S.C.C.A. No. 98 was dismissed by Lamer C.J.C., McLachlin and Major J.J. on May 19, 1993.

12 Subsequent and earlier authorities have arrived at the same conclusion. In *R. v. Hyde* (1990), 55 C.C.C. (3d) 251 (Man. C.A.), the judge at a 1988 preliminary inquiry had declined to commit the accused for trial on an additional charge of attempt murder, pursuant to the new s. 548 (1)(a) powers. The Crown, nevertheless, relied on its historic s. 574 powers to add this further charge to the Indictment. Hyde argued at trial and on appeal that this further count was never properly before the Court. The Court of Appeal rejected the argument and stated:

A justice on a preliminary inquiry has the option of committing the accused to stand trial or of discharging the accused. If he is of the opinion that there is sufficient evidence to put the accused to trial he must do the former. He will ordinarily commit him to stand trial for the offence charged, but may do so for any indictable offence, in respect of the same transaction, which is in his opinion disclosed by the evidence. The actual charge for which the accused is committed to stand trial is not, however, the only charge for which he can be indicted. Under s. 574 the prosecutor can add any charge which is founded on facts disclosed by the evidence taken on the preliminary inquiry.

It is inconsequential, in our opinion, that the Crown asked the Provincial Court judge to commit the accused on the charge of attempted murder and that the Provincial Court judge declined to do so. He did not discharge the accused, but committed him to stand trial. The prosecutor then exercised his prerogative to add the charge of attempted murder, correctly so, it being a charge founded on

the evidence. We are therefore of the view that the accused's appeal on the first ground fails. [Emphasis added.]

Also see: *R. v. Leatherdale* (1999), 123 O.A.C. 315 (C.A.); *R. v. Murray* (2000), 46 W.C.B. (2d) 128 (Ont. S.C.J.); *R. v. Lacelle*, 2010 ONSC 5374.

13 The above authorities hold that a refusal to commit for trial in relation to additional offences not charged in the Information, pursuant to s. 548(1)(a), is not a "discharge" within the meaning of s. 548(1)(b). Accordingly, the Attorney-General's extraordinary power to prefer a direct Indictment pursuant to s. 577 is not engaged in such a case and the line prosecutor's power to indict under s. 574 is engaged. The term "discharged" in s. 577 means "not committed on the charge laid". Accordingly, there never was a "discharge" in relation to the counts of tax fraud and money laundering in the present case since those charges were never laid. See: *R. v. Tapaquon* (1993), 87 C.C.C. (3d) 1 (S.C.C.).

14 I have considerable doubt as to whether the added offences of tax fraud and money laundering in the present case could be considered part of the "same transaction" as the forgery-related offences. It was always an ambitious argument for the Crown to attempt to bring these added offences within Khawly J.'s limited powers under s. 548(1)(a). The safer course was simply to indict under the Crown's broader powers under s. 574(1)(b). However, I would not be critical of the Crown's failed attempt to utilize s. 548(1)(a). It was fair to the accused, to give them notice at the start of the preliminary inquiry that the Crown intended to seek committal for these additional offences. This allowed counsel for the accused to explore any evidence relating to the additional offences, at the preliminary inquiry, and to then make full *inter partes* submissions at the committal stage as to the merits of those additional offences. Mr. Slansky's argument would penalize the Crown for taking this very fair approach. He submitted that the Crown's unsuccessful attempt to utilize s. 548(1)(a) is a form of election which prevented the Crown from subsequently resorting to s. 574(1)(b). There is nothing in the statutory scheme that suggests the Crown must make an election, as between these two provisions. Furthermore, it would introduce an element of gambling into the preliminary inquiry, and would discourage use of s. 548(1)(a), rather than encouraging greater fairness to the accused.

15 For all these reasons, I am satisfied that the Crown's use of s. 574 powers in this case, to indict Khan and Muellenbach for the additional offences of money laundering and tax fraud, was fair and lawful and was not an abuse of process or a breach of s. 7 of the *Charter*. This Motion is, therefore, dismissed. I will address Mr. Slansky's further argument, concerning the "sufficiency" of the evidence relied on by the Crown in support of these added charges, in a later section of these Reasons.

C. WARRANTLESS SEIZURE OF TELEPHONE SUBSCRIBER INFORMATION

16 There is considerable evidence in the case at bar about two telephone numbers that consistently appeared on various banking and business records. The identity of the person

associated with those phone numbers is, therefore, relevant as it will provide some evidence as to who was associated with certain business transactions where those particular phone numbers appeared.

17 The police obtained information concerning the person who was associated with the two phone numbers by contacting the carrier, Rogers Communications, who voluntarily identified their subscriber. As Cpl. McMath explained in one of the many Affidavits he prepared, in support of search warrants and production orders:

On March 26th 2010 I conducted research on ph# 416-893-7181, the telephone number indicated on the cheques issued by Anke Mullenbach to Marla Schwartz David. The phone number was registered to the carrier Rogers Communications Inc. I sent an e-mail to the Law Enforcement Support department of Rogers Communications Inc. requesting subscriber information. On March 30th 2010 I received an e-mail from the Law Enforcement Support department of Rogers Communications Inc. I was advised that ph# 416-893-7181 was registered to Mohammad Khan of 77 Granby Street, Toronto, Ontario, M5B 1H8.

18 When the police executed a search warrant at 361 Yonge Street on June 10, 2009, Cpl. McMath observed a "night directory information listing ... in case of emergency" which stated, "Mohammad Khan is building owner, 77 Granby Street, Toronto, 416-880-3320". This is how the police first learned about a further phone number associated with Khan.

19 At the preliminary inquiry, the Crown followed up and obtained a business records Affidavit from Rogers Communications, confirming that Mohammad Khan was the subscriber for both the telephone number listed on the Anke Muellenbach cheque and the telephone number observed on the directory listing at 361 Yonge Street.

20 The Applicants Khan and Muellenbach have now brought a *Charter* Motion alleging that the warrantless seizures of the telephone subscriber information, as described above, violated s. 8. They seek exclusion of this evidence pursuant to s. 24(2). They also seek the remedy of excision of this unconstitutionally obtained information from various Production Orders, pursuant to the doctrine enunciated in the 1993 trilogy of Supreme Court decisions, *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.); *R. v. Wiley* (1993), 84 C.C.C. (3d) 161 (S.C.C.); and *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.).

21 In my view, there is no merit to this argument. I am not satisfied that there was any breach of s. 8 as there is a long line of authority holding that a warrant is not required to identify the subscriber associated with a telephone number. The law in this area is evolving, as a result of the recent decision of the Supreme Court in *R. v. Spencer* (2014) 11 C.R. (7th) 52 (S.C.C.). If the law has recently changed, and a warrant is now required as a result of *Spencer*, I would not exclude the evidence pursuant to s. 24(2) as the police were operating in good faith under the pre-*Spencer* state of the law.

22 As noted above, it was in March 2010 that the police first obtained subscriber information, on a voluntary basis and without obtaining a warrant, from Rogers Communications. At that time, the authorities in Ontario and in British Columbia had approved of this practice on the basis that there was little or no reasonable expectation of privacy in the association between a name and a telephone number. Many telephone numbers are openly listed in directories and people frequently give them out to friends and associates and to businesses they are dealing with. Furthermore, as can be seen from the facts of the present case, telephone numbers are openly displayed on cheques and on posted notices so that the responsible person can be reached. There will be evidence in the present case that Khan's phone numbers were known to certain of his suppliers of commercial products, they were not unlisted phone numbers, and they were placed openly on certain business documents, sometimes in association with his own name and sometimes in association with other names. Perhaps most importantly, one of his phone numbers had at one time been placed on business cards for "Hi Tech Novelty ID Cards". These business cards were seized from 361 Yonge Street when the search warrant was executed. The phone number had been crossed out on the business cards.

23 Mr. Slansky conceded that Anke Muellenbach had no reasonable expectation of privacy in the phone number openly displayed on her cheques, assuming that it was Anke Muellenbach who actually placed the phone number on the cheques. Mr. Slansky submitted that it is only Khan who has a reasonable expectation of privacy in the fact that the phone number actually belonged to Khan. This argument, of course, begs the question of whether it was Khan who was controlling these cheques and who placed his own phone number on the cheques, as the Crown hopes to prove at trial.

24 The leading authorities concerning warrantless seizures of the name associated with a telephone number, as well as warrantless seizures of telephone call records, were succinctly summarized by Pardu J., as she then was, in *R. v. Schertzer et al*, [2011] O.J. No. 6528 at paras. 24-6 (S.C.J.):

The Defence also argued that when police obtained subscriber information from service providers, that this was a search within the meaning of s. 8 of the *Charter*, which was warrantless and presumptively unreasonable.

Many courts have held that there is no reasonable expectation of privacy in this information and I see no reason to disagree with them [citations omitted]. I agree that police do not need a warrant to obtain this information.

On the other hand, the Crown went so far as to argue that the content of the cell phone bills showing numbers called and the origin of numbers received as well as the duration of the calls may not be private information. I agree with the defence position that this information is of a nature which may reveal "intimate

details of the lifestyle and personal choices of the individual" and that individuals in a free and democratic society would wish to "maintain and control from dissemination to the state" [citations omitted]. I find that there is a reasonable expectation of privacy in the telephone bills listing the information I have described.

Also see: *R. v. Edwards*, [1999] O.J. No. 3819 (S.C.J.); *R. v. Brown et al*, [2000] O.J. No. 1177 (S.C.J.); *R. v. Hutchings* (1996), 111 C.C.C. (3d) 215 (B.C.C.A.); *R. v. Plant, supra*.

25 The extent to which the issue of warrantless seizure of a name associated with a phone number was regarded as uncontroversial in Ontario is illustrated by the fact that the five experienced defence counsel in *R. v. Brown et al, supra* at paras. 30 and 33, all conceded that no warrant was required to obtain this minimal subscriber information. LaForme J. (as he then was) explained what appeared to be the normal practice amongst the telephone companies:

It appears to be a common practice that where the police have either a cell phone number or electronic serial numbers, the providers of the cell phone (i.e. Cantel or Bell Mobility) will give certain information to the police. The information that will be provided to the police is limited to the subscriber's name and address. Thereafter, the provider claims that it requires a search warrant to provide further information such as a contact number (e.g. land line phone number), where the cell phone in question currently is, or any information on the call records.

...

All counsel agree that none of the Applicants' s. 8 Charter rights have been breached by the information the police obtained from Cantel on July 22, 1997. Specifically the Applicants accept that the information was in respect of Mr. Blackwood and Mr. Agbete (i.e. subscriber names, status of the cell phone, and addresses). It is agreed that for our purposes, this is not information that attracts any s. 8 Charter protection for these Applicants. [Emphasis added.]

26 Pardu J. noted in *Schertzer*, in the passage quoted above, that a person's "phone bills showing numbers called and the origin of numbers received", attracts a higher level of s. 8 protection because of the higher expectation of privacy in this kind of information. Indeed, the *Criminal Code* provides for a form of warrant on "reasonable grounds to suspect", pursuant to s. 492.2(2), before the police can seize this kind of "call record" information. There is no suggestion the police obtained information covered by s. 492.2(2) in the present case, that is, "records of telephone calls". See: *R. v. M.(B.)* (1998), 42 O.R. (3d) 1 (C.A.); *R. v. Mahmood* (2011), 282 C.C.C. (3d) 314 (Ont. C.A.).

27 In light of the above authorities, I am satisfied that there was no violation of s. 8 when the police obtained Khan's name from Rogers Communications, as the subscriber associated with the two telephone numbers. It may be that the law in this area will evolve as a result of the Supreme Court's recent decision in *R. v. Spencer, supra*. That case held that the police must have a warrant before they can obtain the name associated with an internet protocol address. In my view, *Spencer* can be easily distinguished from the case at bar. Internet activity is often anonymous and the name associated with an internet protocol address is not openly disclosed and disseminated, like a telephone number. The Court made it clear in *R. v. Spencer, supra* at paras. 63 and 71, that the police can still ask service providers for voluntary disclosure of information "relating to matters that are not subject to a reasonable expectation of privacy". As noted above, a consistent line of authority has held that there is no reasonable expectation of privacy in the name associated with a phone number. *Spencer* did not reverse these authorities. Also see: *R. v. Ward* (2012), 112 O.R. (3d) 321 at para. 46 (C.A.).

28 In the event that I am wrong concerning this s. 8 issue, I will briefly address the s. 24(2) remedy sought by Khan and Muellenbach. In my view, all three of the lines of inquiry set out in *R. v. Grant* (2009), 245 C.C.C. (3d) 1 (S.C.C.) favour admission of the evidence.

29 In terms of the gravity of the s. 8 breach, any violation of rights, in seizing the telephone subscriber name without a warrant, would be the result of a recent and subsequent change in the law brought about by the June 2014 decision in *Spencer*. This is the least serious kind of *Charter* violation. As the Court noted in *Spencer* itself, "the police were acting by what they reasonably thought were lawful means" and so "the police conduct in this case would not tend to bring the administration of justice into disrepute". See: *R. v. Spencer, supra* at para. 77; *R. v. Blake* (2010), 251 C.C.C. (3d) 4 at paras. 25-7 (Ont. C.A.); *R. v. Duarte* (1990), 53 C.C.C. (3d) 1 (S.C.C.); *R. v. Wijesinha* (1995), 100 C.C.C. (3d) 410 at para. 56(S.C.C.).

30 Mr. Slansky conceded that the second set of *Grant* factors favours admission of the evidence as the authorities have consistently held that there is a reduced expectation of privacy, if any privacy at all, in telephone subscriber information. Accordingly, the impact of any breach on Khan's s. 8 interests was minimal.

31 Finally the seized information is an undoubtedly reliable business record. Although it is not essential to the Crown's case, it is an important piece of circumstantial evidence. The third set of *Grant* factors, therefore, favours admission.

32 For all these reasons, I would not have excluded the evidence pursuant to s. 24(2) even if I had found a violation of s. 8 of the *Charter*. This Motion is dismissed.

D. THE GROUNDS FOR THE PRODUCTION ORDERS AND LEAVE TO CROSS-EXAMINE THE AFFIANT

33 Aside from the above argument concerning the warrantless seizure of telephone subscriber

information, Khan and Muellenbach brought a further s. 8 *Charter* Motion alleging that there were substantial defects in the Production Orders obtained by the police in relation to certain banking records. In support of this Motion, they sought leave to cross-examine the Affiant, Cpl. McMath.

34 As already noted above, the s. 8 Motion concerning Khan's telephone subscriber information was linked, in part, to this further s. 8 Motion concerning the banking Production Orders, given that the *Grant*, *Wiley*, and *Plant* remedy of excision was sought in relation to the telephone subscriber information, whenever it was included in one of the Affidavits sworn in support of the Production Orders. However, Mr. Slansky correctly conceded that excision of this one small part of the Affidavits, even if I granted that remedy, would not render the Affidavits insufficient to support the Production Orders. His submission is that excision of this one part of the Affidavits, combined with other more substantial defects in the Affidavits, would meet the *Garofoli* standard of review on a s. 8 Motion.

35 The statutory requirements that a Production Order must meet, pursuant to s. 487.012(3), are "reasonable grounds to believe that an offence ... has been or is suspected to have been committed", that the documents sought "will afford evidence" respecting the offence, and that the target of the Production Order "has possession or control of the documents". The standard of review in relation to such a Court Order, on a s. 8 Motion at trial, is the deferential one set out in *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 at 187-8 (S.C.C.), namely:

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

36 In other words, the issue is whether there remains "any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed", as Charron J. put it in *R. v. Pires and Lising* (2005), 201 C.C.C. (3d) 449 at para. 30 (S.C.C.), speaking for the unanimous Court. Charron J went on to link the test for leave to cross-examine the Affiant to this narrow scope of review, stating (*R. v. Pires and Lising, supra* at para. 40):

As discussed earlier, the *Garofoli* leave requirement is simply a means of weeding out unnecessary proceedings on the basis that they are unlikely to assist in the determination of the relevant issues. The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous -- it is because there is just a narrow basis upon which an authorization can be set aside. Hence, in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focused on the question to be determined on a *Garofoli* review -- whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it

should not be permitted.

37 Mr. Slansky submitted that there were three main defects in Cpl. McMath's Affidavit. He relied on them, both as a basis for seeking leave to cross-examine the Affiant and as a basis for attacking the sufficiency of the Affiant's grounds. In my view, these alleged defects are all misconceived.

38 The first defect is that the Affiant allegedly referred to the production and sale of forged "driver's licenses" at Flash Jack, rather than the production and sale of forged "identification cards". It was submitted by Mr. Slansky that this reference to "driver's licenses" was false and misleading and that it made the offences appear more serious.

39 I cannot accept this submission for three main reasons. First, the Affiant repeatedly described the investigation as involving "forged identification documents", "forged Canadian provincial identification cards", "U.S. and other country state identification cards", "university student identification cards", "identification documents", and "identification cards". There is no suggestion that these terms were false or misleading and they are the predominant ones used throughout the Affidavit.

40 Second, there are occasional references to "forged driver's licenses" in the Affidavit but, in my view, they are immaterial. For example, it was asserted that another store on Yonge Street known as JSP Photo Studios allegedly "produces U.S. forged driver's licenses", that an undercover officer (Cst. Ishmail) observed a binder in Flash Jack that included "Canadian/American drivers licenses" amongst other identification cards, and that another undercover officer (Cpl. Parr) "purchased a fraudulent Alberta driver's license and a fraudulent Canadian university ID" from Flash Jack. The first two of these three references to "driver's licenses" had no impact on the sufficiency of the grounds. The third reference, involving Cpl. Parr's undercover purchase, was more significant. Cpl. Parr testified at the preliminary inquiry that he attended at Flash Jack and asked for an "Alberta driver's license for a friend". He provided a photograph of the friend to the store clerk and they discussed how to make the photo resemble those used on Alberta driver's licenses. The store clerk then produced "a reasonable copy of what a driver's license in Alberta is", according to Cpl. Parr, although it was labelled "Alberta Identification Card". The store clerk also produced a university identification card for Cpl. Parr's friend. In my view, a more fullsome recitation of the facts relating to Cpl. Parr's undercover purchase of two false identification cards from Flash Jack would not have changed the essential point, namely, that the store was attempting to produce a card that resembled an Alberta driver's license, together with other false identification.

41 Finally, even if the occasional reference to "driver's licenses" was completely removed from the Affidavit, it would not make any difference. Flash Jack was undoubtedly producing and selling a variety of false identification cards. The forgery-related offences remained the same, whether they included driver's licenses or only other forms of identification. Mr. Slansky conceded, in this regard, that this first alleged defect concerning "driver's licenses", standing alone, would not satisfy the

Garofoli standard of review.

42 The second alleged defect is that the Affiant linked the Flash Jack business, operating out of 361 Yonge Street, with a second false identification business known as JSP Photo Studios, operating out of 330 Yonge Street. Mr. Slansky submitted that there was no evidence linking the two businesses and that the false and misleading connection to JSP Photo Studios improperly bolstered or conflated the evidence relating solely to Flash Jack.

43 I cannot accept this submission for two main reasons. First, it is factually inaccurate. In my view, the investigation had established some connection between the two businesses. They were located close together, they appeared to be owned or controlled by two brothers, and they were both in the business of producing false identification cards. More importantly, it appears that undercover police officers had twice entered JSP Photo Studios, had asked about purchasing false identification, and had been referred to Flash Jack where "the guy makes good ones, he is not here now". Finally, a number of Toronto police reports tended to infer that there was association between persons connected to the two stores. In particular, Hamade appeared to be a person who provided some connection between the two businesses. In other words, the police had not yet established that the two businesses were linked but there was certainly some basis for believing they may be linked. In my view, Mr. Slansky's submission that there was no evidence linking the two businesses is not correct.

44 The further reason for rejecting this submission about alleged improper conflating or bolstering of the evidence concerning Flash Jack, with evidence about JSP Photo Studios, is that it makes no difference. The evidence concerning JSP Photo Studios, and its possible connection to Flash Jack, played almost no role in the banking Production Orders. There was abundant evidence in the Affidavit about forgery-related offences being committed at Flash Jack, that is, at 361 Yonge Street. The brief references to forgery-related offences at JSP Photo Studios, located at 330 Yonge Street, could be completely deleted and there would still be more than sufficient evidence to justify the Production Orders. See: *R. v. Bisson* (1994), 94 C.C.C. (3d) 94 (S.C.C.).

45 The third defect in the Affidavit is that it allegedly conflated the forged identification card business at Flash Jack with ownership of the 361 Yonge Street building. Mr. Slansky submitted that the Flash Jack business was simply one tenant, operating out of the basement of the building, and that the Affiant improperly equated this one tenant's business with the owners of the entire building. Mr. Slansky conceded that the Affidavit does not say this but he submitted that it is the overall effect or inference that the Affiant insinuated or suggested.

46 Once again, there are a number of reasons for rejecting this submission. First, the Affidavit accurately stated that Flash Jack was only "one of the signs" on the 361 Yonge Street building. The Affiant went on to refer to three other businesses operating at various times out of the same 361 Yonge Street building. These other business were known as Las Vegas Strip, Famous Amusement Depot, and Famous Mashour Retail Depot. It was, therefore, apparent that more than one business

operated out of the building. Second, the Affidavit disclosed that title to the building was held, at different times, by Khan's wife and then by Khan's mother, but that the mortgage on the building was being paid through bank accounts held by third parties. Third, the police had evidence from two persons who operated businesses in the building (Hilmy and Saleh) to the effect that the businesses belonged to Khan but that "Khan did not want to put anything in his name" and so he operated the businesses through others. In particular, Saleh told the police that it was Khan and his son Muellenbach who used "the computer equipment in the store [at 361 Yonge Street] to complete the identification cards".

47 Based on all this evidence, there were available inferences that Khan may be the controlling mind behind the various businesses at 361 Yonge Street, that he may be hiding his connection to the businesses through nominees, that he was closely connected to the ownership of the building, and that the owners with legal title to the building were not paying its expenses. In other words, the Affiant did not improperly conflate the business of the tenant Flash Jack with the ownership of the building. Rather, there were reasonable inferences linking the two. The common link between ownership of the building and the Flash Jack business was Khan. By seeking Production Orders to discover who was paying the building's expenses, and where the funds came from to pay these expenses, the police could well discover reliable documentary evidence as to who was actually in control of Flash Jack.

48 For all these reasons, I am satisfied that there were no material falsehoods or misleading information in Cpl. McMath's sworn Affidavits in support of the Production Orders. Furthermore, the three defects alleged, both in support of the application for leave to cross-examine Cpl. McMath and in support of s. 8 review of the Production Orders, are all misconceived. There is no basis on which to grant leave to cross-examine and no basis for finding any properly reviewable breach of s. 8. See: *R. v. Pires and Lising, supra*.

49 I should add that Mr. Slansky also sought leave to cross-examine Cpl. McMath on the basis that his subsequent testimony at the preliminary inquiry included evidence which Mr. Slansky characterized as "perjury". This attack on the Affiant's extrinsic credibility, even if it could be established, is no substitute on a s. 8 Motion for the failure to show "any untruthfulness in the substance of the information in the affidavit itself," [emphasis added] as LeBel J. put it, speaking for the Court in *R v. Araujo et al* (2000), 149 C.C.C. (3d) 449 at para. 60 (S.C.C.).

50 For all these reasons, the s. 8 Motion attacking the Production Orders is dismissed.

E. ADMISSIBILITY OF EVIDENCE RELATING TO KHAN'S CHARACTER

51 Mr. Webb and Ms. Greenwood sensibly resolved this issue and I agree with their proposed resolution, as set out in a three-page written Agreement that was submitted to me.

52 In brief summary, the Crown will call evidence through the witness Hilmy about the history of the Flash Jack and Las Vegas Strip businesses located at 361 Yonge Street, about Khan's role in the

businesses, and about Khan's practice of not putting the businesses in his own name, as summarized in the Crown's Factum. However, the Crown will not lead evidence concerning the civil litigation that arose in relation to Las Vegas Strip, about Khan's conduct in that litigation, and about the adverse findings made by Lane J. and Sharpe J. (as he then was) concerning Khan, unless the defence opens up these issues.

53 Similarly, the Crown will call evidence through the witness Otkem relating to the history of the false identification business that operated out of 361 Yonge Street, about Khan's role in that business, and about how Otkem's involvement in that business came to an end, as summarized in the Crown's Factum. However, the Crown will not call evidence concerning an allegedly false complaint that Khan made to the police about Otkem or an alleged threat and assault made by Khan against Otkem.

54 Similarly, the Crown will call evidence through the witness Hamade about the history of the false identification business at 361 Yonge Street, about Khan's role in the business, and about how Hamade's involvement in that business came to an end, as summarized in the Crown's Factum. However, the Crown will not elicit evidence about allegedly false statements made by Khan to the police about Hamade, about Khan's alleged involvement in an immigration fraud, or any other evidence concerning Khan's allegedly bad character.

55 Finally, the Crown will call evidence through the witness Ansar about the history of the Flash Jack business, about Khan's role in that business, and about Khan's practice of putting his businesses in other people's names, as summarized in the Crown's Factum. However, the Crown will not adduce any evidence regarding Ansar's views of Khan's general character.

F. TRIAL WITHIN A REASONABLE TIME

56 Khan and Muellenbach have brought a Motion alleging that their s. 11(b) *Charter* right to trial within a reasonable time has been violated. They seek a stay of proceedings pursuant to s. 24(1).

57 This is not a difficult s. 11(b) Motion. The parties agreed that the overall period of delay, from June 9, 2011 when the charges were laid until late February 2015 when the trial will likely end (almost three years and nine months, or a total of forty-five months), is sufficient to trigger further inquiry. The parties also agreed that there were no periods where s. 11(b) rights were waived. Accordingly, the reasons for the various periods of delay and any prejudice to s. 11(b) interests are the only factors requiring analysis. See: *R. v. Smith* (1989), 52 C.C.C. (3d) 97 (S.C.C.); *R. v. Askov et al* (1990), 59 C.C.C. (3d) 449 (S.C.C.); *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.).

58 What particularly facilitates analysis in this case is that the parties agreed on the underlying causes of most periods of delay. There are only two or three periods of delay that were subject to dispute. In my view, the reasons for the various periods of delay can be summarized as follows:

* The approximately six months of initial delay, from June 9 to December

16, 2011, was the so-called "intake period". It was a relatively complex case, there were four co-accused, the initial Crown disclosure was timely and "substantial", Mr. Pinkofsky (who acted for both Khan and Muellenbach at the time) made a lengthy and detailed follow-up request for some eighty-nine items of further disclosure, there were separate Crown pre-trials with three separate counsel, and there was a judicial pre-trial. These activities are all part of the inherent time requirements of the case and they carry neutral weight in the s. 11(b) calculus. The parties agreed with the above characterization of this initial period. See: *R. v. Lahiry et al* (2011), 283 C.C.C. (3d) 525 at para. 19 (Ont. C.S.J.);

- * The second period of delay is the approximately eight months from December 16, 2011 to August 10, 2012. This is one of the periods where the parties disagreed about the underlying causes. It is the time from when the parties were ready to set a date for the preliminary inquiry until the first day on which the eighteen day preliminary inquiry proceeded. The defence submitted that the entire period is systemic delay. The Crown submitted that the period should be apportioned between delay needed to prepare the case and to clear counsel's calendars (inherent or neutral delay) and delay caused by systemic congestion in the courts. I agree with the Crown's analysis. An eighteen day long preliminary inquiry is a substantial block of time and finding this many available dates in the calendars of three defence counsel and one Crown, as well as in the Court's calendar, is no easy task. Furthermore, Mr. Pinkofsky never stated on the record, on behalf of Khan and Muellenbach, that he had earlier available dates in his calendar. Only Mr. Royle, who was briefly acting for the co-accused Saleh at the time, made it clear that he had earlier dates. Mr. Pinkofsky was focused primarily on his request for further disclosure, he referred to the date for the preliminary inquiry as a mere "target" that he could not yet "confirm", and he kept bringing the case back for further remands and judicial pre-trials, in order to monitor the progress of his request for further disclosure. I am not critical of Mr. Pinkofsky's approach, insisting on a great deal of detailed further disclosure (including lifting numerous redactions) before he would "confirm" the preliminary inquiry date. It simply means that the principle enunciated in *R. v. Schertzer et al* (2009), 248 C.C.C. (3d) 270 at para. 131 (Ont. C.A.) becomes engaged. The Court stated:

... it must be borne in mind that the defence approach to disclosure will impact on the pace of the proceedings. Some counsel may choose to pursue

every possible relevant piece of information in the Crown's possession, while other counsel may choose a more focused attack on specific crucial Crown witnesses. Neither approach is necessarily unreasonable, but the former approach can result in significantly longer inherent time requirements. [Emphasis added.]

Mr. Pinkofsky's approach to disclosure meant that the case required more inherent time, for the Crown to respond, for Mr. Pinkofsky to review the response, and for ongoing judicial pre-trials. More importantly, I have no doubt that the busy senior counsel on this case were not immediately available to commence an eighteen day preliminary inquiry, when the date was set. Similarly, I have no doubt that the Crown and defence both required time to prepare for a relatively complex hearing involving "substantial" disclosure. However, there is also no doubt that systemic congestion in the Court played a role as August 10, 2012 was the first available block of time for a case of this length. In all these circumstances, I would apportion this eight month period of delay equally between the inherent needs of the case and institutional causes of delay. Accordingly, four months carries neutral weight and four months weighs against the Crown in the s. 11 (b) calculus. See: *R. v. Tran et al* (2012), 288 C.C.C. (3d) 177 at paras. 30-40 (Ont. C.A.);

- * The third period of delay is the approximately three and a half months that it took to complete the preliminary inquiry, from August 10 to November 30, 2012. Mr. Webb and Ms. Greenwood both characterized the entire period as neutral delay, due to the inherent time requirements of a relatively complex hearing with a number of busy counsel. Mr. Slansky submitted that some of this period should be characterized as delay caused by the Crown, due to late disclosure. The preliminary inquiry had originally been scheduled as a block of ten consecutive days, beginning August 10, 2012. In fact, the hearing did proceed over those ten days because Khawly J. was diligent in forcing it on in a timely way so that good use was made of all the time that had been set aside. When more time was required to complete the preliminary inquiry, defence counsel's calendars understandably became a significant problem. At one point, they suggested dates for completion in the next year, that is, in 2013. Once again, Khawly J. was forceful in refusing to tolerate these kinds of delays. He set continuation dates into his ordinary trial list, on days in October and November 2012 when all counsel were available. As a result, any delays in the continuation of the preliminary inquiry were minimal and they appear to have been scheduled on counsel's earliest available dates. There is no

doubt that ongoing Crown disclosure played some role in the need for further continuation dates. The Crown had responded to Mr. Pinkofsky's eighty-nine point disclosure request on June 14, 2012, that is, approximately two months prior to the commencement of the preliminary inquiry. Further disclosure was also provided on July 24 and 27, 2012, two weeks prior to the preliminary inquiry. This latter disclosure involved post-offence conduct, including an ongoing undercover police investigation that resulted in the execution of a second search warrant at 361 Yonge Street on July 23, 2012. It also included the fruits of an "ongoing investigation into the financial arrangements respecting 361 Yonge Street", which resulted in the issuance of a Restraint Order for the building on July 19, 2012, by Nordheimer J., on the basis that there were reasonable grounds to believe that 361 Yonge Street was "offence related property" within the meaning of s. 2 and s. 490.8. It is apparent that the case became much more complex, and its inherent time requirements expanded, on the eve of the preliminary inquiry. For example, the ongoing financial investigation concerning the 361 Yonge Street building caused Mr. Pinkofsky to want to retain a defence forensic accountant to assist him. The important point, in my view, is that it was appropriate for the Crown to delay disclosure relating to an ongoing police investigation. See: *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 11 and 13-24 (S.C.C.). Furthermore, it is settled law that inherent time requirements normally will "include adjournments necessitated by the need to find additional court time when initial time estimates prove inaccurate". See: *R. v. Allen* (1996), 110 C.C.C. (3d) 331 at para. 27 (Ont. C.A.). Finally, it is also settled law that the time taken to complete a hearing is normally treated as inherent or neutral delay, absent exceptional circumstances such as frivolous, bad faith, or arbitrary conduct by a party that prolongs the hearing. See: *R. v. Schertzer et al, supra* at paras. 95 and 113-118. Once it became clear that eight more days were needed to complete the hearing, it is significant that Khawly J. gave the case priority in his calendar and found early continuation dates. This is what the case law requires, when initially scheduled dates turn out to be insufficient and when the inherent needs of the case expand. As a result, a relatively complex eighteen day hearing involving four counsel, numerous witnesses, and a lot of documentary evidence, was completed in a three-and-a-half-month period. That is not unreasonable, in my view, given that it was originally scheduled as a ten-day hearing. I would characterize this entire period as inherent or neutral delay. See: *R. v. Tran et al, supra* at paras. 43-57; *R.v. Lahiry et al, supra* at paras. 62-70;

- * The fourth period of delay is the approximately six months between the November 30, 2012 committal for trial and the May 22, 2013 judicial pre-trial in this Court. The parties agreed that this entire period should be characterized as neutral "intake" in the Superior Court of Justice. I agree with the parties' position. Although six months is a relatively long "intake" period in this Court, after committal, Mr. Pinkofsky was engaged in another long trial and was not available for an early judicial pre-trial. In addition, Saleh's counsel had died and he needed time to retain new counsel. Finally, Mr. Slansky appeared for the first time on April 22, 2013 and advised that Muellenbach was in the process of retaining him. All of these developments inevitably extended the inherent time requirements of the case during the neutral "intake" period;

- * The fifth period of delay is the longest, extending over some fifteen and a half months, from May 22, 2013 to September 8, 2014. This is the time from the judicial pre-trial, when the parties were ready to set a date for trial, until the trial date. There was some controversy about this period, during oral argument, as the record was not as clear as it should have been. However, I ordered an expedited transcript that had been missing, relating to one remand appearance (and received the transcript within two hours) and counsel supplemented the record by advising me about the state of their calendars. As a result, I am satisfied that reliable findings can be made about what happened during this period. Setting a trial date fifteen and a half months away is relatively unusual, in this Court, as it is double the six to eight month *Askov* guideline for systemic delay. See: *R. v. Schertzer et al, supra* at paras. 110-112. In spite of this, nothing was said on the record when the trial date was set by Nordhiemer J., after the judicial pre-trial. I take this, in and of itself, to be an indication that systemic delay was not one of the contributing causes. Otherwise, something would have been said. Over the course of a number of subsequent appearances, the cause of this fifteen and a half month period of delay emerged. These statements on the record were supplemented by what counsel advised me, as officers of the court, on the hearing of the s. 11(b) Motion. I am satisfied that what happened, when setting the trial date was as follows: Mr. Webb, for the Crown, and Mr. Royle, who was once again acting for Saleh, both requested a date in January 2014 for the eight week trial; the Court had this date available; Mr. Slansky, however, was unavailable as he was committed to what was described as a lengthy "terrorism trial" in Brampton that was scheduled to commence in early January 2014; the Court then offered a date in April 2014 but Mr. Slansky thought he would be unavailable on this date, due to the same Brampton

trial (as it turned out, Mr. Slansky was correct and the "terrorism trial" proceeded before Baltman J., from early January until late May 2014); there is no evidence as to when Mr. Pinkofsky was available, as he said nothing on the record when setting the date, he never appeared subsequently, and there is no affidavit evidence concerning his availability; it, therefore, appears that Nordheimer J. set the earliest date for trial when all counsel would be available, namely, September 8, 2014. As Mr. Slansky put it, on one of the subsequent appearances before Nordheimer J., "we set the target date in September because I had a commitment doing a terrorism trial in Brampton which would be continuing to the end of May". In these circumstances, none of this fifteen and a half month period of delay can be characterized as systemic. Mr. Slansky effectively conceded this during oral argument. I should add that Mr. Slansky advised Nordheimer J. that he contemplated a significant number of lengthy pre-trial Motions and he anticipated arguing these Motions well in advance of the September 8, 2014 trial date. He was clearly available to argue the Motions, in advance of the September 8, 2014 trial date, and Nordheimer J. intended to schedule them in advance of the trial date. I will analyze the delays in scheduling the Motions in the next section below. I should also add that there were a number of collateral or concurrent developments during the fifteen-and-a-half month period of delay leading up to the trial date. Mr. Pinkofsky, who was still acting for Khan, was hospitalized in June 2013 and he made a slow recovery. As it turned out, he was not available to attend court and represent Khan until sometime in 2014, at the earliest. Similarly, Mr. Slansky was still not retained and on the record, on behalf of Muellenbach, as late as January 9, 2014. It is clear that his client needed time, between Mr. Slansky's first appearance on April 22, 2013 until sometime after January 9, 2014, in order to raise the money to retain counsel. Finally, there were delays in ordering and obtaining the lengthy preliminary inquiry transcripts which were needed for Ms. Slansky's pre-trial Motions, and in order to prepare for trial. None of these collateral or concurrent developments played any role in causing the fifteen-and-a-half month delay, when setting the September 8, 2014 trial date on May 22, 2013. They may have some relevance in relation to delays in scheduling the Motions and in the assessment of prejudice, which I will address below, but "there was no causal connection between [these] problems ... and the timing of the [trial] proceedings". See: *R. v. Schertzer et al, supra* at paras. 2, 87 and 110. For all these reasons, the fifth period of delay was due to Mr. Slansky's unavailability. It carries neutral weight in the s. 11(b) calculus as it was delay that was needed by the defence for entirely legitimate reasons;

- * The sixth period of delay is the four months from September 8, 2014 to January 5, 2015, which is the present trial date. Although it was never stated on the record, Mr. Slansky advised me that he was intending to schedule the pre-trial Motions in November or December of 2013, before he started his Brampton "terrorism trial". I agree that this would be logical, since he was seeking remedies that would put an end to the trial, such as a stay of proceedings for abuse of process and/or quashing the committal on *certiorari*. Nordheimer J. clearly intended to set the three to four weeks that Mr. Slansky was seeking for the Motions, well in advance of the trial, so as to free up the trial time if the Motions were successful. Mr. Pinkofsky was joining Mr. Slansky on the pre-trial Motions. All of the Motion materials were filed jointly, on behalf of both lawyers and both clients, and Mr. Slansky spoke for himself and Mr. Pinkofsky in relation to scheduling the Motions. However, Mr. Slansky and Mr. Pinkofsky would not agree to set a date for the pre-trial Motions until they had the preliminary inquiry transcripts in hand. These transcripts were delayed for a variety of reasons: first, neither Mr. Slansky nor Mr. Pinkofsky ever ordered the transcripts during the six months following the November 30, 2012 committal (it appears that Khan made inquiries with the Court Reporter "sometime in January 2013" about the cost of the transcripts and about the time it would take to prepare them, but neither he nor his counsel ever ordered the transcripts); second, it was Mr. Royle who ordered the transcripts, sometime in May 2013, once Saleh's Legal Aid certificate was transferred to Mr. Royle after the death of Saleh's former counsel (Mr. Royle first appeared on the record on May 9, 2013 and the fact that the transcripts had now been ordered was stated on the record on May 30, 2013); third, Nordheimer J. raised the question of whether his assistance was required in expediting the preparation of the transcripts, on July 25, 2013, and counsel did not take him up on this offer (I note that, by this point, Mr. Pinkofsky was in hospital as a result of surgery and was not available and Mr. Slansky was still not retained and on the record, which may help to explain why counsel did not seek the assistance of the Court in expediting the transcripts); fourth, Mr. Royle advised the Court on September 17, 2013 that a "good chunk of the transcripts have been prepared" and that the Court Reporter advised him that "the balance will be prepared any day" and, as a result, Mr. Royle was of the view that "it's looking good" and he raised the issue of "scheduling a motion that has to be scheduled", however, Mr. Slansky advised the Court that he wished to await some remaining transcripts "that are relevant to the 11(b)"; fifth, on October 30, 2013, the Crown argued forcefully that a target date should be set for the

pre-trial Motions, while awaiting delivery of the remaining transcripts from the Court Reporters, but Mr. Slansky continued to insist that no date should be set for the Motions until he was in possession of all the necessary transcripts; sixth, on January 3, 2014, Mr. Slansky advised Nordheimer J. that he had now received all the transcripts that he needed for the pre-trial Motions and that he was now ready "to set a date for these Motions", however, he was about to begin the five month long "terrorism trial" in Brampton and so he advised, "I won't be available to do these Motions until sometime in June"; seventh, and last, on January 9, 2014 Nordheimer J. advised that he could schedule one week for the pre-trial Motions in June 2014 but that he did not have the three to four week block of time that Mr. Slansky was seeking until the September 8, 2014 trial date, and so it was agreed that the trial date would be converted into a four week block of time for the pre-trial Motions and that the trial proper would be re-scheduled for January 5, 2015 (on this final scheduling appearance, Mr. Slansky advised that he was still not "on record" for Muellenbach, although "I do anticipate being retained", and that Mr. Pinkofsky was "still not one hundred percent, can't be here today, but tells me he will be up and running to do these Motions"). It is no easy task to allocate what caused this four month period of delay, given that the above record indicates a number of contributing causes. I am satisfied that one or more Court Reporters were less than expeditious in preparing the transcripts. See: *R. v. Stensrud and Smith* (1988), 42 C.C.C. (3d) 569 (Sask. C.A.), aff'd (1989) 52 C.C.C. (3d) 96 (S.C.C.). On the other hand, I am also satisfied that Mr. Slansky and Mr. Pinkofsky were not anxious to schedule the Motions, perhaps understandably, as one of them was in poor health and the other was still not retained. It would have been an easy matter to schedule a target date to hear the Motions, for example, in November or December 2013, and to obtain an order from Nordheimer J. expediting the transcripts. Mr. Slansky repeatedly resisted these simple remedies that are frequently resorted to and that are effective. In my view, this is analogous to the situation, where counsel delay setting a target date for trial or preliminary hearing until they have every last piece of disclosure. See: *R. v. Lahiry et al, supra* at paras. 109-115. In all these circumstances, the delay should be apportioned equally. Two months of delay was due to Crown or institutional causes (the Court Reporters) and two months was due to counsel's decision not to schedule a target date for the Motions and not to expedite the transcripts (defence delay). The former weighs against the Crown and the latter weights against the defence;

* The seventh and last period of delay is the two months from January 5 to

February 27, 2015. This is the time required for the trial. It is settled law that this is part of the inherent time requirements of the case and it carries neutral weight in the s. 11(b) calculus. See: *R. v. Schertzer et al, supra* at paras. 114-115.

59 In the result, the reasons for delay should be allocated as follows:

- * Six months neutral "intake" in the Ontario Court of Justice;
- * Four months inherent delay, to allow counsel time to clear their calendars, address further disclosure, and prepare for the two week long preliminary inquiry;
- * Four months institutional delay, due to congestion in the Ontario Court of Justice;
- * Three and a half months inherent delay, in order to schedule eight additional days and to complete what was now an eighteen day preliminary inquiry;
- * Six months neutral "intake" in the Superior Court of Justice;
- * Fifteen and a half months inherent delay, when setting the first trial date, due to counsel's unavailability;
- * Two months delay caused by the Court Reporters (Crown delay) when scheduling the pre-trial Motions;
- * Two months delay caused by counsel's decision not to schedule a target date for the pre-trial Motions and not to expedite the transcripts (defence delay);
- * Two months inherent delay, in order to conduct the trial

60 It can be seen that only six months of the forty-five month period of overall delay weighs against the Crown (four months of systemic delay and two months of delay caused by the Court

Reporters). Similarly, only two months delay was due to the conduct of the defence. As in *Schertzer*, almost all the delay was due to the inherent time requirements of the case. A total of thirty-seven months delay carries neutral weight in the s. 11(b) calculus because it was delay that was needed, given the exigencies of this particular case.

61 It would require strong evidence of prejudice to s. 11(b) interests to justify a stay of proceedings on this record. In my view, there is little evidence of prejudice in this case. Both Khan and Muellenbach were released on an undertaking, without any conditions. There is no suggestion of prejudice to "liberty" interests. Neither Khan nor Muellenbach filed affidavit evidence suggesting any special prejudice to their "security of the person" interests. Any inferred prejudice is diminished by the fact that they needed time to raise a retainer for Mr. Slansky, to allow Mr. Pinkofsky to recover from his hospitalization, and to allow Mr. Slansky to complete his trial in Brampton. In this regard, it should also be noted that a failure to take steps that would have expedited the proceedings (such as setting a target date for the Motions and seeking an order expediting the transcripts) can negative prejudice that might otherwise be inferred. See: *R. v. Morin*, *supra* at paras. 40, 62 and 64; *R. v. Lahiry et al*, *supra* at para. 77.

62 Ms. Greenwood and Mr. Slansky relied primarily on prejudice to "fair trial" interests, due to the loss of evidence from three potential witnesses who have died. The most important of these three witnesses is Mumtaz Khan, the mother of the accused Khan and the grandmother of Muellenbach. She owned 361 Yonge Street at the relevant time, in the sense that she held legal title to the building, after Khan had initially bought it for his son Muellenbach. She held title in trust for Muellenbach and the building passed to him upon her death. Mumtaz Khan died on February 14, 2010, that is, some sixteen months before the charges were laid in this case. Accordingly, any post-charge delay had no impact on the loss of her evidence. Furthermore, both Ms. Greenwood and Mr. Slansky agreed that other witnesses are available to testify to at least some of the matters that Mumtaz Khan could have testified about.

63 The other two witnesses who have died are both Toronto police officers who Khan spoke to and who allegedly reassured Khan that the business of selling "novelty" identification cards was not unlawful. These two officers died on January 13 and April 28, 2012, that is, within about seven months and ten months of the date when charges were laid in this case. Accordingly, any post-charge delay had little or no impact on the loss of their evidence. Their evidence would have been lost, in any event, even with the most expeditious proceedings. Furthermore, their proposed evidence is not clearly admissible as it may relate to a defence of mistake of law. At best, it would have to await testimony from Khan in order to potentially link it to his state of mind and his intent. Even then, the Crown may be able to attenuate its loss by making some limited admissions, as the Crown did on the s. 11(b) Motion.

64 In all these circumstances, the impact of the loss of Mumtaz Khan's evidence is better evaluated at the end of the trial, which is the normal approach to any prejudice caused by pre-charge delay. See: *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.); *R. v. L. (W.K.)* (1991), 64 C.C.C. (3d)

321 (S.C.C.); *R. v. R. (G.W.)* (1996), 112 C.C.C. (3d) 179 (Ont. C.A.). In terms of the loss of the two police officers' evidence, I am not persuaded that it "would have existed had the case come to trial within a shorter time", nor am I yet persuaded that it is admissible and capable of assisting. See: *R. v. Schertzer et al, supra* at para. 135.

65 In conclusion, the only periods of unreasonable and unjustified delay in this case total six months. This is not a lengthy delay. Furthermore, there is little prejudice to s. 11(b) interests. In these circumstances, there is no proper basis to find any violation of s. 11(b) of the *Charter*. This Motion is dismissed. I should add that the Crown withdrew the charges against Saleh. As a result, I did not have to evaluate his somewhat different position in relation to s. 11(b) rights.

G. PRE-CHARGE DELAY

66 Khan and Muellenbach also alleged a violation of their s. 7 *Charter* rights, due to unreasonable pre-charge delay. They sought the remedy of a stay of proceedings on this further basis, pursuant to s. 24(1).

67 The parties agreed that the R.C.M.P. investigation in this case began on January 14, 2008. The charges were laid on June 9, 2011. The pre-charge investigative period therefore extended over some three years and five months. The s. 7 prejudice to fair trial interests alleged by Khan and Muellenbach, as a result of this pre-charge delay, is the same as on the s. 11(b) Motion, namely, the loss of three witnesses. I have already discussed this evidence above.

68 There is no evidence that any delays in the investigation were due to "bad faith or ulterior motive". Furthermore, the considerable difficulties involved in discovering the directing mind or minds behind Flash Jack would inevitably have required a lengthy investigation. Finally, any prejudice caused by the loss of the three witnesses can best be assessed at the end of the trial, when the availability of other sources of this evidence and the admissibility of the lost evidence can be properly determined. See: *R. v. L. (W.K.)*, *supra*; *R. v. R. (G.W.)*, *supra*; *R. v. National Steel Car Ltd.* (2003), 174 C.C.C. (3d) 91 at para. 12 (Ont. C.A.).

69 For all these reasons, the s. 7 Motion to stay proceedings due to pre-charge delay is dismissed, at this pre-trial stage. The Motion can be renewed at the end of the case and on the trial record, if counsel are so advised.

H. POST-OFFENCE CONDUCT

70 The evidence of post-offence conduct in this case is not particularly controversial. The Indictment alleges a time period for the offences that ends on June 10, 2009, the day on which the first search warrant was executed at 361 Yonge Street. Evidence of certain kinds of post-offence conduct, such as flight or the making of false statements, can be susceptible to faulty inferences as the proponent of this kind of circumstantial evidence seeks to infer a state of mind about the earlier offences from sometime ambiguous subsequent conduct. See: *R. v. White and Coté* (1998), 125

C.C.C. (3d) 385 at paras. 19-23 (S.C.C.); *R. v. White* (2011), 267 C.C.C. (3d) 453 at paras. 17-24 and 132-3 (S.C.C.).

71 In the present case, Mr. Webb and Ms. Greenwood agreed that the evidence of post-offence conduct which the Crown seeks to call at trial is admissible. Unlike evidence of flight or the making of false statements, the evidence to be tendered in this case is essentially to the effect that Khan and Muellenbach carried on as before, operating a false identification card business out of the Flash Jack premises at 361 Yonge Street and using nominee businesses and bank accounts, until the police executed the second search warrant on June 23, 2012.

72 In particular, it is anticipated that evidence will be called through the witnesses Pardal and Saleh, to the effect that Khan used them as nominees, putting the business and/or bank accounts in their names, depositing proceeds in the nominee's bank account, and paying the building's expenses out of that bank account. In addition, evidence will be led concerning the police seizure of computer equipment at Flash Jack on June 23, 2012, capable of producing false identification cards. Finally, evidence will be led about Khan's efforts to arrange lawyers for Pardal and to persuade Saleh to take ownership of the Flash Jack business and of the things seized by the police from Flash Jack. However, the Crown will not seek to adduce any evidence relating to Khan's general character from either Pardal or Saleh.

73 The resolution of this issue, as between Ms. Greenwood and Mr. Webb, is set out in a written Agreement tendered in Court. I agree with it and adopt it as my ruling in relation to this body of evidence. It is based on the assumption that Pardal will testify in accordance with his sworn and recorded *KGB* statement and that Salah will testify in accordance with his recorded statement to the police.

74 Mr. Slansky is also in substantial agreement with the above resolution. However, he advanced one narrow argument concerning the admissibility of Pardal's evidence as it relates to Muellenbach. He submitted that certain portions of Pardal's *KGB* statement were the product of police pressure and suggestion which eventually succeeded in getting Pardal to change an initially neutral or exculpatory account and to incriminate Muellenbach. Mr. Slansky submitted that the overall effect of the evidence was less probative and more prejudicial because of the above improper police process that brought it about.

75 Mr. Slansky made the above submissions without taking me to the transcript of Pardal's *KGB* statement. In response, Mr. Webb took me to the transcript and I have now reviewed it carefully. I am satisfied that Mr. Slansky has mischaracterized the facts. Pardal did not initially exculpate Muellenbach and the incriminating evidence was not the product of police pressure and suggestion that brought about a change in the evidence. At worst, some of Pardal's responses, when read in isolation, may be unclear. I am satisfied that Pardal's account throughout was that Muellenbach was an "owner" who "helps out" at the store, including by being one of "the guy who make the ID ... in the backroom". None of this evidence emerged as a result of coercion or leading questions. As to

payment of the store's or the building's bills, and ownership of the proceeds of the store sales, Pardal stated that Khan opened the bills ("not my bills. Why I open?"), that the sales proceeds belonged to Khan ("not my money, I am working there and working for pennies"), and that Khan told him to write the cheques, including at least one approximately \$7,000 "rent" cheque ("Khan told me to endorse it and deposit it into the account ... he told me write down one cheque to this, this, this. I write ... First I pay rent ... how I pay seven thousand, this, this, this rent?").

76 I am satisfied that Pardal's evidence is admissible, as against both Khan and Muellenbach, and that it is more probative than prejudicial. This Motion is dismissed.

I. THE CO-CONSPIRATOR'S EXCEPTION TO THE HEARSAY RULE

77 The Crown will call evidence at trial from three witnesses who attended at Flash Jack at various times as customers. That evidence will include acts and declarations made at those times by Flash Jack sales staff. This evidence potentially engages the co-conspirator's exception to the hearsay rule.

78 The first witness is Kristen Jellow. When she was seventeen years old, in the summer of 2007, she purchased false government and student identification cards that represented her to be nineteen years old. The store clerk, who she could neither name nor identify, made utterances and performed acts at the time which are all admissible as they accompany and characterize the nature of the transaction. See: Sopinka et al, *The Law of Evidence in Canada*. 3rd Ed. (Lexis Nexis 2009), at 339-342; *R. v. Ly* (1997), 119 C.C.C. (3d) 479 (S.C.C.), affirming (1996) 193 A.R. 149 (C.A.); *R. v. Sheri* (2004), 185 C.C.C. (3d) 155 at paras. 106-9 (Ont. C.A.).

79 The second witness is Cst. Ismail. He attended at the store in January 2008, in an undercover capacity, and spoke to a clerk named "Kassa". There was a binder on the store counter with sample identification cards. Cst. Ismail asked about purchasing an identification card. "Kassa" made various utterances, explaining how the transaction could be completed. Once again, this evidence is all admissible as it accompanies and characterizes the nature of the transaction that was under discussion. I should add that no one has been able to identify the store clerk who went by the name "Kassa".

80 The third witness is Cpl. Parr. I have already summarized his evidence above, in relation to one of the s. 8 Motions. He entered the store on two separate occasions. He purchased two pieces of false identification, in an undercover capacity, on the second occasion which was in June 2009. On both occasions, various acts were performed and utterances were made by store personnel who Cpl. Parr did not name or identify. This evidence is also admissible on the same basis as the evidence of Ms. Jellow and Cst. Ismail.

81 The parties agree that the Crown can lead all this evidence during its case in-chief and, at the end of the trial, the trial judge would normally instruct the jury in accordance with the three steps in *R. v. Carter* (1982), 67 C.C.C. (2d) 568 (S.C.C.). If the jury are satisfied beyond reasonable doubt

that there was a conspiracy or common unlawful design to commit forgery, and if the jury are satisfied that Khan and/or Muellenbach were probably members of that conspiracy or common unlawful design on the basis of their own acts and declarations, then the acts and declarations in furtherance of other members such as the store sales staff referred to above, would become admissible for their truth as against Khan and/or Muellenbach. Of course, if there is no evidence connecting Khan and/or Muellenbach to the alleged conspiracy or common unlawful design, based on their own acts and declarations, then the trial judge can take the co-conspirator's exception to the hearsay rule away from the jury. See: *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525 (Ont. C.A.); *R. v. Hobart, Fogel and Doolin* (1982), 65 C.C.C. (2d) 518 (Ont. C.A.).

82 These well-known principles concerning the operation of the co-conspirator's exception to the hearsay rule are generally not controversial. The parties agree that the above approach applies to the evidence of Ms. Jellow, the evidence of Cst. Ismail, and the evidence of Cpl. Parr concerning his first attendance at Flash Jack in June 2008. On all three of these occasions, there is no evidence as to the identity of the sale staff who made the utterances and performed the acts in question and so there is no available declarant, in any event, who the Crown could call.

83 In relation to Cpl. Parr's second attendance at Flash Jack, in June 2009, however, Khan and Muellenbach take the position that the declarant can be identified and that he is available to testify. Accordingly, they submit that the Crown must call the declarant and cannot rely on the co-conspirator's exception to the hearsay rule and on the three-step procedure set out in *Carter*. In this regard, they rely on *R. v. Simpson* (2007), 230 C.C.C. (3d) 542 (Ont. C.A.). In that case, the Court held that the hearsay declarant had to be called and that the Crown could not rely on the traditional co-conspirators exception to the hearsay rule.

84 I am not satisfied that there is any material distinction between Cpl. Parr's second attendance at Flash Jack in June 2009 and the other three occasions on which he, Cst. Ismail, and Ms. Jellow attended at the store. There is simply no identification of the store sales staff on any of these four occasions. The Crown no doubt hoped that Cst. Parr would be able to identify the former co-accused Osman, as the store clerk who assisted him in June 2009, when the Crown called Cpl. Parr to testify at the preliminary inquiry over three years later, on August 10, 2012. However, Cpl. Parr was unable to identify Osman, who was an accused before the Court at the time. Indeed, Cpl. Parr identified an "individual seated at the back", in the body of the court, as the sales clerk or, at least, as someone who "resembles [the] description" which he had provided. Cpl. Parr's description of the sales clerk was as follows: "approximately 5'6", 5'7"; "a black male with a shaved head"; "in his early twenties". The only other evidence implicating Osman as the store clerk and declarant was that he undoubtedly worked at Flash Jack during the same time period as Cpl. Parr's attendance at the store. However, a number of other individuals also worked at the store and there were legitimate products that were sold at the store, aside from the false identification which was made in the back room. Mr. Slansky conceded that Cpl. Parr's description of the sales clerk was very general and that it does not "get you very far", in terms of identifying the declarant. At the end of the preliminary inquiry, Khawly J. concluded that, "Mr. Osman is seen only once at Flash Jack, which is on the day

of the execution of the search warrant ... he is not much more than a found-in".

85 The case at bar is, therefore, easily distinguishable from *Simpson* where the declarant was a known person named Rhys Williams who had been positively identified by the undercover officer. Williams had been charged, as a co-accused with Simpson, and had resolved his charges prior to Simpson's trial. He was clearly a known and available witness. *Simpson* is also distinguishable from the case at bar on a number of further bases: first, Williams had resolved his charges and "might be a cooperative Crown witness" whereas Osman refused to resolve his charges and has not provided a statement (he was discharged by Khawly J. at the preliminary inquiry); second, the content or substance of Williams' utterances involved minimizing his own role in the drug transactions and implicating Simpson as the principal trafficker, whereas the utterances that the store clerk made to Cpl. Parr did not minimize his own role or implicate others; third, the undercover officer who recorded Williams' utterances did not make her notes until "hours after the transaction or the next day" and so there was a "possibility of inaccurate recording", whereas Cpl. Parr made his notes in a timely way; and fourth, the undercover officer's evidence in *Simpson* concerning Williams' utterances, was characterized by unreliable opinions "about the behaviour of drug trafficking" for which she lacked expertise, whereas Cpl. Parr's account was factual and involved no such opinions about the behaviour of forgerers.

86 In my view, there were a constellation of circumstances in *R. v. Simpson, supra*, relating to both necessity and reliability, which led LaForme J.A. to conclude, on behalf of the Court, that it was one of those "rare cases" referred to in *R. v. Mapara* (2005), 195 C.C.C. (3d) 225 (S.C.C.), where the modern principled approach to hearsay exceptions overrides the traditional co-conspirator's exception. None of those circumstances exist in the present case.

87 The burden is on Khan and Muellenbach to show that the traditional exception does not apply and they have not met their burden. This Motion is dismissed.

J. FORENSIC ACCOUNTING OPINION EVIDENCE

88 The RCMP retained a forensic accountant to assist in their investigation. Scott McBride, a Certified General Accountant, prepared a thirty-three page report that was filed at the preliminary inquiry on the basis that it was "credible or trustworthy" within the meaning of s. 540(7). In addition, a large Appendix to the report was filed containing various schedules and supporting documentation.

89 The Crown intends to call this evidence at trial, except that Mr. McBride will actually testify and his report will be updated on the basis of further documentation received as a result of the ongoing investigation.

90 Defence counsel conceded that this body of evidence is admissible at trial. However, they submitted that its admissibility is limited to the forgery-related offences. In relation to the tax fraud and money-laundering offences, they submitted that the accounting evidence is more prejudicial

than probative and that it ought to be excluded pursuant to the second stage "gatekeeper" function described in *R. v. Abbey*, (2009) 246 C.C.C. (3d) 301 (Ont. C.A.).

91 Opinion evidence from a qualified forensic accountant is commonplace in large complex fraud prosecutions. The form that the opinion takes is often a series of charts or summaries or spread-sheets that sum up the effect of a mass of underlying business records. It is simply impractical to expect the trier of fact to engage in a time consuming analysis of each underlying document and so the assistance of an expert is necessary. As with any expert opinion, its weight depends on proof of the underlying facts/documents on which the expert relies. Accordingly, the better practice is for the Crown to tender the underlying documents in evidence, together with the expert's opinion, so that they are available for cross-examination and so that the expert is not relying on hearsay. See: *R. v. Scheel* (1978), 42 C.C.C. (2d) 31 (Ont. C.A.); *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.); *R. v. Giesbrecht* (1994), 91 C.C.C. (3d) 230 (S.C.C.).

92 The foregoing accounting documentation and report, in brief summary, is to the following effect:

- * Khan bought 361 Yonge Street in 1989 for his son Muellenbach. He placed legal title to the property in his wife's name, as trustee for his son. In 2002, title was transferred to Khan's mother, Mumtaz Khan, and she held it in trust for Muellenbach. Finally, in 2010, title was transferred to Muellenbach for consideration of \$1.00, shortly after Mumtaz Khan's death;
- * The expenses for the 361 Yonge Street building, such as mortgage, tax, and insurance, were paid through five bank accounts held by third parties. Neither Khan's name nor the name of the building's legal title holder appeared on the documentation relating to these third party accounts. However, Khan's phone number was associated with some of these accounts;
- * The source of the credits in these five accounts included cash deposits, proceeds from an ATM bank machine that could be linked to 361 Yonge Street, and proceeds from a point of sale (POS) terminal that could also be linked to 361 Yonge Street. Khan's phone number was associated with both the ATM and the POS terminal;
- * The amount of gross revenues or credits flowing into these five accounts over the six years from 2005 to 2010 was substantial. For example, accounting summaries relating to three of the five accounts showed

deposits totalling \$660,580;

- * Khan failed to file any income tax returns for the ten years from 2000 to 2009. After execution of the first search warrant, he made a voluntary disclosure to the Canada Revenue Agency (C.R.A.). He declared some minimal business income for the ten years from an adult store located on the second floor of 361 Yonge Street, known as "Zack's Viewing Booths". The gross business income each year was less than \$30,000 and the net income was \$10,000 or less. No other income was declared. As a result, he declared that he owed little or no tax. He advised that he lived in a "tiny room in the basement of the retail store at 361 Yonge Street ... without windows" (Flash Jack was located in the basement of 361 Yonge Street and it could be inferred that the false identification cards were being made in the small room with no windows);
- * Muellenbach filed tax returns for the three years from 2007 to 2009, declaring no income, no expenses, and no tax owing. In 2010, after title to 361 Yonge Street was transferred to him and after execution of the first search warrant, he declared \$138,676 in gross rental income from 361 Yonge Street, \$104,006 in expenses (such as tax, insurance, and mortgage interest), resulting in net income of \$34,670 which was offset by Capital Cost Allowance;
- * Mumtaz Khan's tax returns were filed by her estate upon her death. During the four year period covered by the Indictment, from August 2005 to June 2009, gross rental income of \$18,900 (in 2005), \$24,300 (in 2006), \$32,400 (in 2007), and \$32,400 (in 2008) was reported by Mumtaz Khan. Either no or minimal net income was reported, and no tax was owing;
- * One of the five bank accounts that was paying the expenses related to 361 Yonge Street, and receiving credits or deposits that could be associated with 361 Yonge Street, was in the name of Muellenbach's business, "Pizzano's B.B.Q." During the two year period from August 2007 to May 2009, the credits or deposits received into this account totalled \$274,470 and the debits or withdrawals totalled \$182,807. As set out above, Muellenbach declared no income in this period, either from "Pizzano's B.B.Q." or from any other source. The accounting report noted:

... it would appear that Pizzano's B.B.Q. was generating revenue, yet no Statement of Business Income was filed with C.R.A.

The business address listed for "Pizzano's B.B.Q.", on its business license, was 645 Yonge Street, another building associated with Khan and Muellenbach. When the police attended at this building in February 2008, they found a wooden door with the numbers 645 and 647, and some flyers for a pizzeria, but there was no operating business ("it appeared to be an empty business").

93 As noted previously, defence counsel conceded the admissibility of the above body of accounting evidence in relation to the forgery-related offences. They do not accept that the trier of fact will ultimately draw the inferences that the Crown submits ought to be drawn from this body of evidence. Nevertheless, they acknowledge that the combination of the anticipated testimony from various Crown witnesses, together with the accounting evidence could arguably lead to inferences that Khan and Muellenbach were in control of the businesses at 361 Yonge Street, including Flash Jack, that they were receiving and controlling gross revenues from those businesses through bank accounts held in the name of other individuals or businesses, and they were using the revenues in these accounts for their own benefit, that is, to pay expenses for the 361 Yonge Street building. In other words, the accounting evidence has real probative value in relation to the forgery offences by tracing monies that can arguably be linked, at least in part, to those offences and by showing that Khan and Muellenbach received the benefit of those monies.

94 I agree with this concession. The *viva voce* evidence of the witnesses, if accepted, will establish that Khan and Muellenbach were in control of Flash Jack, and other businesses at 361 Yonge Street, but that they put the businesses in the names of third party nominees. The accounting documentation and report could confirm the alleged business association between Khan and Muellenbach, as well as their association with third party businesses and bank accounts, in the manner set out above. It also tends to confirm that the five third party accounts were nominee accounts. Accordingly, the accounting evidence is admissible. It takes the traditional form for such evidence, approved by the Court of Appeal over thirty-five years ago in *R. v. Scheel, supra*, namely, charts, summaries, spread-sheets and related opinions.

95 Mr. Slansky's argument, to the effect that the accounting evidence is not admissible on the tax fraud and money-laundering counts in the Indictment, turns on a narrow point. He submits that the accounting evidence does no more than show gross revenue or credits flowing into the five bank accounts, and that the revenue or credits in these accounts was arguably being used for Khan's and Muellenbach's benefit. He conceded that this evidence is relevant to the tax fraud counts, in the sense that gross revenue is the first step in analyzing whether net income is being earned and whether tax is being evaded. However, he submitted that the accountant's report makes no effort to calculate business expenses that could be deducted against these gross revenues, no effort to calculate net income, and no effort to calculate tax owing. In short, he submitted, the report

conflates gross revenue with tax owing. This approach to tax fraud, and the related laundering of proceeds of tax fraud, is both minimally probative and highly prejudicial in Mr. Slansky's submission.

96 In my view, the flaw in this argument is that it places the entire burden of the Crown's case, in relation to the tax fraud and money-laundering counts, on the accounting evidence. As with the forgery-related offences, the accounting evidence must be assessed together with all the other evidence.

97 As I understand the anticipated evidence of the various Crown witnesses, they will testify that the false identification card business was lucrative, due to low cost, a significant mark-up, and high demand. For example, the witness Hamade advised that the identification card business "was generating \$3,000 to \$5,000 in sales every day", at one time, which is why Khan was said to have taken over the business from a previous tenant. Hamade also advised that the profit margins were substantial: "cost you five cents and you make fifty bucks with it. It's a piece of plastic". The witness Ansar's statements generally corroborated this account. The witness Saleh's statement was to similar effect: "when [Khan] make the ID, he made the money, no ID no money". Saleh's estimate was that gross receipts from the sale of false identification cards was a minimum of \$1,000 a day, at the time when Saleh worked at Flash Jack. Khan's suppliers, "Custom Card Canada", will testify as to the cost of the plastic cards and printers that they sold to Khan. Various witnesses will testify as to the minimal wages they were paid by Khan to work in the shop. All of this *viva voce* testimony complements and assists the accounting evidence, in relation to the tax fraud and money-laundering offences.

98 Furthermore, as a matter of law, the accounting evidence cannot be expected to calculate the exact amount of business expenses that could properly be deducted, had the taxpayer filed a Statement of Business Income with C.R.A. There is a positive statutory duty on the taxpayer under s. 150 and s. 283 of the *Income Tax Act*, to file a return "in prescribed form and that contains prescribed information". See: *R. v. Hunter* (2008), 77 W.C.B. (2d) 705 (Ont. C.A.). The law of fraud does not require proof of the exact amount of loss caused by a fraud. All that has to be proved is dishonest means and deprivation. The element of deprivation includes risk of economic prejudice to the victim of the fraud which, in this case, is the Government of Canada. See: *R. v. Olan et al* (1978), 41 C.C.C. (2d) 145 (S.C.C.); *R. v. Zlatic* (1993), 79 C.C.C. (3d) 466 (S.C.C.); *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 (S.C.C.). The exact quantum of any loss can become important, at the time of sentencing, in order to calibrate the gravity of the offence and to calculate the quantum of any restitution. See: *R. v. Eizenga* (2011), 270 C.C.C. (3d) 168 at paras. 97-110 (Ont. C.A.); *R. v. Drabinsky and Gottlieb* (2011), 274 C.C.C. (3d) 289 at paras. 175-185 (Ont. C.A.). At this stage, however, mere admissibility of the accounting evidence at trial cannot turn on the accountant's ability to opine about the exact amount of net income received and the exact amount of tax evaded.

99 I am satisfied that the totality of the anticipated evidence, including the accounting evidence, could give rise to the following reasonable inferences: large amounts of money that appeared to

belong to Khan and Muellenbach were being processed through five nominee accounts; at least some parts of the businesses at 361 Yonge Street, including the false identification business, were lucrative and were generating profits; some of these businesses, including the false identification business, appeared to be under Khan and Muellenbach's control; no business income was being declared by Khan or Muellenbach (or, apparently, by Mumtaz Khan, prior to her death); no Statement of Business Income and Expenses was being filed with the C.R.A. by anyone in relation to the large amounts of money moving through the five accounts or in relation to the apparently lucrative proceeds of the false identification business; the elaborate scheme of using and changing five rotating nominee accounts, together with the failure to file any Statement of Business Income and Expenses, tends to infer that at least some net income was being hidden as there would be no reason to hide businesses and their bank accounts, if the businesses were running at a loss. It will be open to the trier of fact, on all this evidence, to infer that tax was being evaded. At a minimum, there is evidence of "deprivation", as that term is understood in the law of fraud. The accounting evidence is an essential part of this circumstantial web and there is no basis on which it can or should be excluded.

100 For all these reasons, this Motion is dismissed.

K. PARTICULARS

101 Khan and Muellenbach have brought a Motion seeking particulars, pursuant to s. 587, in relation to the tax fraud and money-laundering counts. They are content with the particularization of the forgery-related counts in the Indictment.

102 The argument concerning particulars is somewhat connected to the previous Motion, concerning the admissibility of the forensic accounting evidence in relation to the tax fraud and money-laundering counts. Defence counsel submitted that they require particularization in relation to two main aspects of these charges: first, the source of the income that is the subject of the tax fraud counts; and second, the apportionment of the income as between Khan and Muellenbach. They submitted that they require this kind of detail in the pleadings in order to know how to defend these counts. For example, if the income is from a particular business, then certain expenses will be deductible that would not be deductible in relation to a different business. Similarly, if a certain portion of the income is allegedly attributable to one accused, and not the other, then there will be no need for the other accused to defend in relation to that portion of the income.

103 As presently pleaded, the counts are framed as follows:

- * between August 23, 2005 and June 10, 2009, at Toronto and elsewhere in Ontario, "did by deceit, falsehood or other fraudulent means defraud the Government of Canada of money in excess of \$5,000, to wit: income tax payable to the Government of Canada", contrary to s. 380(1)(a);

- * between August 23, 2005 and June 10, 2009, at Toronto and elsewhere in Ontario, "did use, transfer the possession of, transport, transmit, dispose of or otherwise deal with property, to wit: monies, with intent to conceal or convert that property, knowing or believing that all or part of the property was obtained or derived directly or indirectly as a result of the commission in Canada of the designated offence of fraud on the Government of Canada", contrary to s. 462.31.

104 Defence counsel conceded that the above pleadings conform with the requirements of s. 581. They also conceded that the amount of the fraud or tax evaded need not be pleaded and that facts or evidence need not be pleaded. As s. 581 makes clear, the pleadings simply "identify the transaction referred to" together with "a statement that the accused ... committed an indictable offence therein specified". Finally, counsel conceded that particulars cannot be used to restrict the Crown to one theory, for example, principal liability versus party liability. See: *R. v. Coté and Vezina* (1986), 23 C.C.C. (3d) 481 (S.C.C.); *R. v. Groot* (1998), 129 C.C.C. (3d) 293 (Ont. C.A.); *R. v. Thatcher* (1987), 32 C.C.C. (3d) 481 (S.C.C.); *R. v. Khawaja* (2011), 273 C.C.C.(3d) 415 at paras. 139-150 (Ont. C.A.), aff'd (2012) 290 C.C.C. (3d) 361 (S.C.C.); *R. v. Hersi*, [2014] O.J. No. 3585 (S.C.J.).

105 The s. 587 discretion to order particulars, in spite of the pleadings being in compliance with s. 581, depends on whether "it is necessary for a fair trial". In this regard, defence counsel conceded that it is well established that the Court can consider disclosure provided by the Crown, evidence called at the preliminary inquiry, and statements made by Crown counsel, for example, in opening and closing addresses, in determining what trial fairness requires. See: *R. v. Robinson* (2001), 153 C.C.C. (3d) 398 (Ont. C.A.).

106 Based on the disclosure and on the Crown's conduct of the case up to the present time, my understanding is that the Crown will advance the theory at trial that all of the money processed through the five nominee accounts was income under the control of Khan and Muellenbach. It is also apparent that the Crown alleges that the money came from various sources, including the ATM bank machine associated with 361 Yonge Street, the POS terminal associated with 361 Yonge Street, cash sales from businesses at 361 Yonge Street (including the Flash Jack business), and any other sources of the cash deposits. It is also apparent that the Crown's theory is that none of that money was declared as business income, whether before or after any expenses could have been properly deducted, resulting in "deprivation" to the victim and the loss of some amount of tax. However, as the Court noted in *R. v. Khawaja, supra* at paras. 144 and 145, "the Crown has the right to modify its theory or strategy as the trial progresses" and it would be "unobjectionable for the Crown to adjust the theory of its case in response to the evidence at trial as it evolved". In this case, as in others, the Crown may decide to adjust its theory as to the sources of the income, in response to the way that the evidence unfolds at trial. See: *R. v. Rose* (1998), 129 C.C.C. (3d) 449 at para. 27 (S.C.C.), per. Binnie J., in dissent, but not on this point.

107 In my view, any attempt to have the Crown specify particular parts of the alleged income as

being derived from specific sources or lines of business, by way of particulars, and any attempt to have the Crown specify which parts of the alleged income belonged to Khan and which parts belonged to Muellenbach, also by way of particulars, would be contrary to a number of rules of pleading. First, it would effectively require the Crown to quantify and plead specific amounts of income that were not declared, thus quantifying the alleged frauds. Second, it would preclude the Crown from relying on both principal and party liability, in the alternative, as in *Thatcher* (it is apparent to me that the Crown's theory, at present, is that all the monies in the five accounts were under the joint control of Khan and Muellenbach, either as parties or as principals). Third, and most important, it would amount to an attempt to use particulars as a device to "fetter the prosecutor in the conduct of his case". Indeed, it would also fetter the trial judge who is not bound by the theory of the Crown or the theory of the defence and can put alternative bases of liability, not advanced by either party, provided they are supported by the evidence. See: *R. v. Ranger* (2003), 178 C.C.C. (3d) 375 at paras 134-139 (Ont. C.A.); *R. v. Pickton* (2010), 257 C.C.C. (3d) 296 at paras. 17-30 (S.C.C.); *R. v. Govedarov, Popovic and Askov* (1974), 16 C.C.C. (2d) 238 at 269-271 (Ont. C.A.).

108 I am satisfied that "the transaction" and "an offence" referred to in s. 581 have been properly pleaded, namely, the offences of income tax fraud and laundering proceeds of income tax fraud, at a certain time and place, and by certain means. I am also satisfied that the defence has very substantial disclosure, has had a lengthy preliminary inquiry, and knows the Crown's present theory, as it has been repeatedly articulated in numerous written and oral submissions. As a result, the particulars sought are not "necessary for a fair trial". Counsel and the accused know precisely how to prepare for trial and how to defend the case on these counts, namely, by pointing to any reasonable doubt as to whether the monies in the five accounts were under their effective control. At present, there are no other monies I am aware of that could qualify as income. Other evidence may emerge at trial, pointing to other monies, in which case the Crown's theory may evolve. That issue is not presently before me. Of course, there may also be other defences available that I am not privy to.

109 For all these reasons, the Motion is dismissed.

L. CERTIORARI TO QUASH THE COMMITTAL

110 Khan and Muellenbach have brought an Application seeking prerogative relief, in the nature of *certiorari*. They seek to quash their committals on the forgery-related charges on the basis of "insufficient evidence". They also seek to review the merits of the Crown's decision to add the tax fraud and money-laundering offences to the Indictment on the basis that these offences were not "disclosed by the evidence", as required by s. 574(1)(b). This latter review of the Crown's decision is said to be based on s. 7 of the *Charter*, as I understand it.

111 There are a number of preliminary obstacles to these Applications. The committal for trial, at the end of the preliminary inquiry before Khawly J., occurred on November 30, 2012. As far as I can see, the first time that Khan and Muellenbach ever filed a Notice of Application seeking

prerogative relief and the quashing of their committals was on April 1, 2014, that is, one year and four months after the committal. Furthermore, no mention was made of *certiorari* in the Notice of Application. The relief sought concerning "quashing the committal" appeared to be part of a larger "Omnibus Motion" seeking, *inter alia*, a stay of proceedings. Finally, the Notice of Application (assuming it sought *certiorari*) did not comply with Rule 43.03(2) of the *Criminal Proceedings Rules* as it omitted the special endorsement that is always required when seeking *certiorari*.

112 The most serious of these defects is the first one, namely, delay. Rule 43.04(1) requires that a Notice of Application seeking prerogative relief in the nature of *certiorari*, to quash a committal in a criminal matter, must be served within thirty days of the committal. It must be served both on the Crown and on the Court Services Manager in the committing Court, in accordance with Rule 43.03. Furthermore, the Notice of Application must be made returnable within thirty days. None of this was done and no application has been made to extend time, pursuant to Rule 43.04(3). Finally, no Factum was ever filed summarizing the evidence at the preliminary inquiry, as required by Rule 43.05(5).

113 There is good reason to require expedition when applying for prerogative relief. While *certiorari* is pending, the trial proceedings in this Court are effectively suspended and the case may ultimately be ordered back to the Ontario Court of Justice. Indeed, delay in seeking prerogative relief is a reason, in itself, for denying relief as a matter of discretion. The leading authority on this point remains *Re Harelkin and University of Regina* (1979), 96 D.L.R. (3d) 14 at 40 (S.C.C.) where Beetz J. gave the majority judgment and stated:

The principle that *certiorari* and *mandamus* are discretionary remedies by nature cannot be disputed. The principle was recently reaffirmed with respect to *certiorari* in a unanimous decision of this Court, *P.P.G. Industries Canada Ltd. et al v. A.-G. Can.* (1975), 65 D.L.R. (3d) 354 at pp. 361-2, (S.C.C.). And *mandamus* is certainly not less discretionary than *certiorari*:

The award of the writs usually lies within the discretion of the court.

The court is entitled to refuse *certiorari* and *mandamus* to applicants, if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty. On applications by subjects for *certiorari* to remove indictments the courts have always exercised a very wide discretion. [Emphasis added.]

Beetz J. went on (at p. 55 D.L.R.) to state that, "The Courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right".

114 More recently, in *R. v. Papadopoulos et al* (2005), 201 C.C.C. (3d) 363 at para. 20 (Ont. C.A.), the Court stated:

The decision whether to grant or not to grant a prerogative remedy is ultimately a matter of discretion, exercised by the superior court as part of its general and inherent jurisdiction: *R. v. Nat Bell Liquors Ltd.* (1922), 37 C.C.C. 129 (S.C.C.); *R. v. Workmen's Compensation Board Ex parte Kuzyk*, [1968] 2 O.R. 337 (C.A.); and *R. v. Krawkowski and the Queen* (1983), 4 C.C.C. (3d) 188 (S.C.C.). While this authority must be exercised in accordance with established principles, there are cases where the court has exercised its jurisdiction not to award the remedy whether or not there was jurisdictional error -- e.g., where there has been unnecessary delay in applying for the writ, or where the applicant has not acted in good faith in seeking the order: see for example, *Young v. Attorney-General of Manitoba, Boxall and Fryer* (1960), 129 C.C.C. 110 (Man. C.A.) and *Krawkowski, supra*. [Emphasis added].

Also see: *R. v. Faulkner*, 2013 ONSC 1824.

115 I am inclined to deny prerogative relief in this case due to "unnecessary delay". It is now almost two years since Khawly J. committed Khan and Muellenbach for trial. As explained above in relation to the s. 11(b) Motion, Mr. Slansky and Mr. Pinkofsky took no steps to schedule this *certiorari* Application in a timely way and took no steps to expedite the preparation of the necessary transcripts. The case is now, effectively, on the eve of trial. The overall delay in the case, as set out above, is forty-five months. There has been significant non-compliance with the Rules, as explained above. In these circumstances, there is strong reason to deny a discretionary remedy such as *certiorari*.

116 I am similarly of the view that there are preliminary obstacles to the closely related attempt to review the merits of the Crown's decision to add further offences of tax fraud and money-laundering to the Indictment, on the basis that they were not "disclosed by the evidence". That exercise of Crown discretion, pursuant to s. 574(1)(b), would have fallen within the old concept of a "core" exercise of discretion, namely, "decisions regarding the nature and extent of the prosecution", as explained in *Krieger v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 at paras. 43 and 47 (S.C.C.). The merits of these kinds of decisions could only be reviewed on a highly deferential abuse of process standard. More recently, the Court appears to have abandoned the "core/non-core" dichotomy and has expanded the kinds of Crown decision-making that can only be reviewed on a showing of abuse of process. Included within this more expansive approach to Crown discretion is the "decision to charge multiple offences". See: *R. v. Anderson* (2014), 11 C.R. (7th) 1 at paras. 41-5 (S.C.C.).

117 It seems plain to me, from the above authorities, that the Crown's decision to indict Khan and Muellenbach for tax fraud and money-laundering can only be reviewed by the Court if there is a

showing of abuse of process. I have yet to consider Mr. Slansky's allegations of abuse of process, which are found in a separate Motion. In the present Motion, however, he simply seeks to review the Crown's decision on the same basis that he seeks to review Khawly J.'s decision, namely, the *certiorari* standard concerning the "sufficiency" of the evidence. That standard bears no resemblance to the doctrine of abuse of process.

118 In my view, there are strong preliminary reasons to dismiss the present Application without addressing the "sufficiency" of the evidence, both in relation to the charges on which Khawly J. committed and in relation to the offences added to the Indictment by the Crown. However, out of an abundance of caution and in the hope of bringing some finality to the lengthy pre-trial phase of this case, I intend to address the merits of the present Application.

119 The scope of review on *certiorari*, in relation to committal for trial, is limited. As Estey J. put it, speaking for the majority in the root case, *Re Skogman and the Queen* (1984), 13 C.C.C. (3d) 161 at 170-1 (S.C.C.):

"No evidence" on an essential element of the charge against the accused cannot amount to "sufficient evidence" under s. 475 [now s. 548]. In my view, this is the state of the law in this country on this issue.

Estey J. went on to find (at p. 173 C.C.C.) "that there was a scintilla of evidence to support the committal of the appellant to trial", in relation to the one disputed element of the offence, and that the reviewing court erred in quashing the committal order. He stated (at p. 174 C.C.C.):

Whether there is, in the juridical sense, "no evidence" revealed in the record, is a question of law. In finding there was "no evidence" in the record at the preliminary hearing, the learned reviewing judge committed an error of law. Such a finding, unsupported by the record, is, in my view, a reversible error which, in the absence of other overriding considerations, would dispose of the appeal.

120 More recently, McLachlin C.J.C. gave the unanimous judgment of the Court in *R. v. Russell* (2001), 157 C.C.C. (3d) 1 at 10-11 (S.C.C.) and stated:

The scope of review on *certiorari* is very limited ... Critically, the preliminary inquiry is *not* meant to determine the accused's guilt or innocence. That determination is made at trial. The preliminary inquiry serves a screening purpose, and it is not meant to provide a forum for litigating the merits of the case against the accused. The limited scope of supervisory remedies reflects the limited purpose of the preliminary inquiry. [Emphasis of McLachlin C.J.C.]

121 Even more recently, in *R. v. Sazant* (2004) 208 C.C.C. (3d) 225 at para. 18 (S.C.C.), Major J. gave the majority judgment and stated:

... a preliminary inquiry judge is not permitted to assess credibility or reliability, and ... where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered. A preliminary inquiry judge who fails to respect these constraints acts in excess of his or her jurisdiction.

122 Perhaps the clearest statement of the standard of review on *certiorari*, in relation to the "sufficiency" of evidence at a preliminary inquiry, remains Estey J.'s judgment for a unanimous full Court in *R. v. Dubois* (1986), 25 C.C.C. (3d) 221 at 230 (S.C.C.):

Jurisdictional error is committed where "mandatory provisions" of the *Criminal Code* are not followed, and in the context of s. 475 [now s. 548], this means at least that there must be some basis in the evidence proffered for the justice's decision to commit. There is no jurisdiction to act "arbitrarily". However, where there is some evidence, it is clearly within the justice's jurisdiction to come to a decision as to whether that evidence is of sufficient weight to commit. This follows from the statement of Lord Sumner in *Nat Bell Liquors*, *supra* at p. 141 C.C.C.:

On *certiorari*, as far as the presence or absence of evidence becomes material, the question can, at most, be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court.

In other words, the reviewing court does not re-weigh "sufficiency" but does analyze whether there is "some basis in the evidence proffered for the justice's decision to commit". This is often referred to as the "some evidence" standard on *certiorari*.

123 Mr. Slansky conceded that there was "some evidence", in the *certiorari* sense, on which Khawly J. could find "sufficient evidence" that the forgery-related offences were being committed by someone at Flash Jack. I agree with this concession, in light of the decision of the British Columbia Court of Appeal in *R. v. Sommani*, *supra*, which involved somewhat similar facts to the case at bar. Accordingly, the only issue in relation to these offences is whether there was "some basis in the evidence proffered", as Estey J. put it in *Dubois*, to infer that Khan and Muellenbach were involved in the false identification business at Flash Jack.

124 I appreciate that the Crown tendered less evidence at the preliminary inquiry, connecting Khan and Muellenbach to the false identification business, than what is presently available and is likely to be called at trial. Nevertheless, Khawly J. found that there was "sufficient evidence" to commit them to trial on the forgery-related offences. He relied, in particular on the accounting evidence, which I have already summarized above. He reasoned as follows:

This [accounting] report connects the direct financial relationship between Mr. Khan and Mr. Muellenbach, and more particularly with the five accounts. In addition, the connection between those accounts and Flash Jack

...

Suffice it to say that if the jury accepts the validity of the documentation and the connection between the five bank accounts to Mr. Khan and Mr. Muellenbach, the relevance of the transaction and the accounts to 361 Yonge Street, the business relationship that is established between Mr. Khan and Mr. Muellenbach through instruments held by third parties in trust, then all that speaks to their involvement in the operation of Flash Jack. That being said, that ensnares them in the whole operation from the equipment to the manufacturing of the cards and to the sale of the cards, and to any conduct or actions of their agent. There is enough in that report that suggests that they are the controlling minds behind 361, and if they are, if the jury is satisfied that they are, then anybody who is working there who does anything there is doing it as their agent.

Even Mr. Pinkofsky at some point called Mr. Khan some kind of a -- what is the word, super landlord? A super superintendant. But no matter how you phrase it, even that showed the connection between Mr. Khan and the premise. He clearly is doing work around that particular store. In that context the Crown has more than satisfied the onus and there will be committal of Mr. Muellenbach and Mr. Khan on all three counts.

125 I am satisfied that there was "some evidence" on which Khawly J. could find "sufficient evidence" of Khan and Muellenbach's involvement in the forgery-related offences. In particular, I rely on the following:

- * The witnesses Ansar and Hilmy implicated Khan in the operation of the false identification card business and the receipt of its proceeds, either as a principal or as a party. They also implicated him in the use of third parties, by using their names for his businesses and by using their bank accounts to receive proceeds from the businesses;
- * The accounting evidence, already summarized above, confirmed that Khan and Muellenbach were using third party businesses and their bank accounts to both receive proceeds from businesses located at 361 Yonge Street and to pay expenses for the 361 Yonge Street building. In other words, the

monies in these accounts were being used for Khan and Muellenbach's benefit;

- * The POS terminal could arguably be linked to the false identification card business. It was undoubtedly connected to Khan and Muellenbach, it was connected to some business located at 361 Yonge Street, and it was connected to the nominee bank accounts. Muellenbach was receiving proceeds from the POS terminal directly into his own business' bank account. When the police executed the first search warrant at Flash Jack, in the basement of 361 Yonge Street, there was a POS terminal attached to the Flash Jack cash register;
- * Even Mr. Slansky conceded that the elaborate way in which Khan and Muellenbach were rotating the proceeds of various businesses at 361 Yonge Street through various nominee bank accounts, and using these proceeds and nominee accounts to pay the building's expenses, could infer that they were concealing their involvement in criminal activity;
- * At one point, Khan's phone number was on the business cards for the false identification business located in the basement of 361 Yonge Street. His phone number was also associated with the POS terminal at 361 Yonge Street, the ATM bank machine at 361 Yonge Street, and some of the nominee businesses and/or bank accounts;
- * Finally, the false identification card business was being carried on openly in the basement premises at 361 Yonge Street. Both Khan and Muellenbach were closely associated with the building, as beneficial owner and/or superintendent. Muellenbach owned the ATM bank machine located at 361 Yonge Street and received its proceeds into his business' bank account. Khan claimed to live in the basement room where the false identification cards were being produced. At a minimum, there was evidence that they knew and permitted the false identification business to operate in their premises. See: *Re Chambers and the Queen* (1985), 20 C.C.C. (3d) 440 at 446-9 (Ont. C.A.).

126 In relation to the tax fraud and money-laundering offences, I am also satisfied that there was "some evidence" on which the Crown could conclude that these offences were "disclosed by the evidence" at the preliminary inquiry. Many of Mr. Slansky's arguments, in relation to these counts

in the Indictment, repeat arguments that I have already addressed, in particular, his arguments relating to the admissibility of the accounting evidence.

127 I will not repeat my analysis and summary of the accounting evidence, set out above at para. 92. Nor will I repeat my understanding of the law of fraud, in the context of the tax evasion alleged in this case, set out above at para. 98.

128 In relation to Muellenbach, there was direct evidence that he was receiving significant business income into his "Pizzano's B.B.Q." account, that there was apparently no such operating business known as "Pizzano's B.B.Q.", that its business account was simply a nominee account used to receive proceeds from 361 Yonge Street businesses and to pay the building's expenses, and that Muellenbach had declared no business income to C.R.A. and had filed no Statement of Business Income and Expenses. In these circumstances, there was "some evidence" that he was concealing income, causing "deprivation" to the victim, and evading taxes, even though the exact amount could not be calculated.

129 In relation to Khan, there was direct evidence from Ansar and Hilmy that he was operating businesses at 361 Yonge Street through third party nominees, either as a party or a principal, and he was using their bank accounts to receive proceeds from the businesses. The accounting evidence tended to confirm this testimony of the witnesses as it associated Khan with large amounts of money passing through the five nominee accounts, received from 361 Yonge Street businesses and used for the benefit of the 361 Yonge Street building. Khan had failed to file any income tax returns for ten years and, when he did, he declared none of these monies as business income and submitted no Statement of Business Income and Expenses. The elaborate scheme that Khan used to disguise this business income, together with the other evidence, provided a proper basis to infer that he was concealing income, causing "deprivation" to the victim, and evading taxes, although the exact amount was unknown.

130 For all these reasons, the Application in the nature of *certiorari*, and the s. 7 Charter Motion, seeking to quash all counts in the Indictment on the basis of "insufficient evidence", are both dismissed.

131 I should note that Mr. Slansky also relied on alleged denials of natural justice at the preliminary inquiry as a separate jurisdictional basis for quashing the committals. However, the denials of natural justice overlapped completely with Mr. Slansky's allegations of Crown misconduct and abuse of process. I will address the merits of those allegations in the next section of these Reasons.

M. ABUSE OF PROCESS, CROWN AND POLICE MISCONDUCT, AND THE EVIDENTIARY HEARING SOUGHT BY THE APPLICANTS

132 The centerpiece of Khan and Muellenbach's pre-trial Motions is their allegation of abuse of process and prosecutorial misconduct. The Motion is based on both the common law and s.7 of the

Charter. It seeks the remedy of a stay of proceedings or, in the alternative, the removal of Crown counsel from the case.

133 Mr. Slansky, who prepared the Factum and argued this Motion, also sought a lengthy evidentiary hearing in support of the Motion. He initially anticipated calling eighteen to twenty-two witnesses but advised that he had now reduced the number to approximately twelve to fourteen witnesses, although it sounded to me like seventeen witnesses when he broke them down by category (eight police officers, eight civilians, and Crown counsel). He estimated needing about nine to ten days of court time in order to examine these witnesses.

134 The Crown responded to the Motion by seeking to have it summarily dismissed, without a full evidentiary hearing. The Crown relied on the power set out in Rule 6.11(2), to summarily dismiss Motions that "do not show a substantial ground for the order sought" and are "frivolous or vexatious". The Crown also relied on common law case management powers which include a similar authority to summarily dismiss certain Motions pursuant to the inherent or implied power of trial courts to control their own processes. I should note that Mr. Pearson represented the Crown on this Motion, given that Mr. Webb was the subject of many of the allegations.

135 I reserved judgment on the preliminary issue of whether the abuse of process/prosecutorial misconduct Motion should be summarily dismissed. I then heard all the other Motions that did not require the lengthy evidentiary hearing that Mr. Slansky was seeking. As can be seen from the above reasons, I have dismissed all the other Motions.

136 As I understand Mr. Slansky's abuse of process and Crown/police misconduct Motion, it involves ten discrete allegations which can be summarized as follows:

- * First, it is alleged that the investigation and prosecution of Khan and Muellenbach is a form of "pay-back" or "selective prosecution", due to police animosity against Khan that arose because of Khan's role in securing his brother's acquittal on a charge of importing heroin;
- * Second, it is alleged that Crown counsel "knowingly violated the order excluding witnesses" at the preliminary inquiry;
- * Third, it is alleged that Crown counsel "suborned perjury" by calling evidence that was "obviously false" at the preliminary inquiry;
- * Fourth, it is alleged that Cpl. McMath and Crown counsel deliberately "lost" important items of seized evidence at the preliminary inquiry;

- * Fifth, it is alleged that Crown counsel knowingly made a false statement at the preliminary inquiry about Khan's status as a suspect at a certain stage of the investigation;
- * Sixth, it is alleged that Crown counsel "had an *ex parte* communication with the judge by email" at the preliminary inquiry;
- * Seventh, it is alleged that Crown counsel improperly added tax fraud and money-laundering counts to the Indictment after Khawly J. declined to commit for these offences, and thereby "abused process";
- * Eighth, it is alleged that Crown counsel made "sarcastic and inappropriate comments" on two occasions at the preliminary inquiry;
- * Ninth, it is alleged that Crown counsel "approved misleading versions of the facts in respect of warrant applications and production orders";
- * Tenth, it is alleged that Crown counsel attempted to negotiate resolutions on two occasions with lawyers who were acting in a conflict of interest.

137 Mr. Slansky conceded that a number of his ten allegations, standing alone, could not rise to the level of an abuse of process. Indeed, he conceded that he would not even have raised them, but for his more serious allegations. Given the more serious allegations, he submitted that the minor allegations simply added cumulative weight.

138 I do not accept this approach to abuse of process, especially when the form of abuse alleged is prosecutorial misconduct. In the Court's recent unanimous decision in *R. v. Anderson, supra* at paras. 49-50, Moldaver J. described the meaning of "abuse of process" in this context:

The jurisprudence pertaining to review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term "flagrant impropriety" (para. 49). In *Nixon*, [2011] 2 S.C.R. 566 the Court held that the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process" or "results in trial unfairness" (para. 64). The Court also referred to "improper motive[s]" and "bad faith" in its discussion (para. 68).

Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard. [Emphasis added.]

Many of Mr. Slansky's allegations simply do not fall within the above meaning of "abuse of process".

139 In my view, the last five of Mr. Slansky's ten allegations can be easily and summarily dismissed. They do not require any significant analysis for a variety of reasons, as follows:

- * Mr. Slansky conceded, when put to an offer of proof at the hearing, that he could not substantiate the sixth allegation concerning an alleged *ex parte* email;
- * I have already dismissed the seventh allegation, at paras. 5-15 above. It is based on a misapprehension of the law relating to the Crown's power to indict under s. 574(1)(b) and the judge's power to commit under s. 548(1)(a);
- * The eighth allegation concerning two "sarcastic and inappropriate comments" has no place in an "abuse of process" Motion, in my view. It appears that Crown counsel made two very brief and isolated comments in the course of the eighteen day preliminary inquiry. The first comment, on August 17, 2012, was ambiguous at best and caused no offence. The second comment, on August 24, 2012, offended Khawly J. and he reprimanded Crown counsel. There was no repetition of this conduct during the remainder of the lengthy preliminary inquiry nor has there been any repetition during the ten days Crown counsel has appeared before me. All lawyers are susceptible to isolated mistakes or occasional errors in judgment. As long as the kind of comments attributed to Mr. Webb do not become what the Court referred to as "unrestrained repetition of ... sarcastic attacks", in *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at para. 78 (Ont. C.A.), they simply add nothing to an "abuse of process" Motion. Also see: *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 at para. 61;
- * The ninth allegation is completely baseless. I have already found on the s. 8 *Charter* Motion that there were no material misstatements in Cpl. McMath's Affidavit in support of the Production Orders, at paras. 33-50

above. Mr. Slansky repeated these allegations, on the abuse of process Motion, and added the assertion that Mr. Webb "approved" the materially misleading parts of Cpl. McMath's Affidavits. When put to an offer of proof at the hearing, all that Mr. Slansky could point to in support of this allegation of Crown "approval" was the fact that Mr. Webb was the Crown counsel who was giving legal advice to the police during the lengthy investigative stage of the case. He repeatedly submitted that Mr. Webb "should have known" that parts of the Affidavits were "misleading". Needless to say, "should have known" is different from "approved". In any event, I was not satisfied on the s. 8 Motion that the Affidavits were materially misleading. Furthermore, Mr. Slansky's "should have known" standard for Crown fault is simply not the stuff of abuse of process which requires "Crown conduct that is egregious". See: *R. v Anderson, supra*;

- * The tenth allegation is equally baseless. Mr. Slansky asserted that when Feig and Pardal were charged, after the execution of the second search warrant, Crown counsel negotiated with lawyers who acted for Feig and Pardal and failed to raise those lawyers' alleged conflicts of interest. When put to an offer of proof at the hearing, Mr. Slansky acknowledged that Feig was represented throughout by Mr. Skurka. There was no suggestion that Mr. Skurka was ever in a conflict of interest. The allegation was simply that Mr. Skurka may have conferred with, or been assisted by, another lawyer in another law firm in some fashion at some stage of Mr. Skurka's negotiations with the Crown. The other lawyer was alleged to be in a conflict of interest and it was alleged that Mr. Webb should have raised the alleged conflict. This entire allegation is remote, speculative and baseless as Feig's lawyer was Mr. Skurka who was admittedly not in a conflict. As for Pardal, Mr. Slansky submitted that his first lawyer was in a conflict of interest, as that first lawyer was acting for a co-accused in the present case. Pardal eventually changed counsel and his new lawyer negotiated a resolution of his charges with Mr. Webb. There is no suggestion that the new lawyer, who resolved the charges, was in a conflict of interest. Furthermore, I am not satisfied that Mr. Slansky's vague offer of proof showed that the first lawyer was in a conflict. Needless to say, this entire allegation concerns only the interests of Feig and Pardal. It has no impact at all on Khan or Muellenbach's interests.

140 Having dismissed the last five allegations, the abuse of process/prosecutorial misconduct Motion rests entirely on the first five allegations, which are more serious. They require closer analysis. Before turning to the offer of proof relating to the first five allegations, I will briefly set out the law relating to the power to summarily dismiss certain Motions, without an evidentiary

hearing.

141 The root case, which set out the beginnings of a common law case management power in relation to *Charter* Motions, was *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.). In that case, the trial judge had refused defence counsel's request for an evidentiary hearing in order to inquire into an alleged s. 9 *Charter* violation. The Court of Appeal agreed with this summary dismissal of the *Charter* argument. Finlayson J.A., speaking for the Court, stated (at 298 C.C.C.):

Returning to the case under appeal, I agree with Borins D.C.J. [the summary conviction appeal judge] that the trial judge was correct in concluding that nothing adduced in evidence before him suggested that the appellant was detained when he was first approached by the police. Furthermore, counsel did not indicate that he proposed to call evidence which would provide some basis for a finding that the appellant's *Charter* rights had been violated. Counsel simply asserted that he was entitled to a *voir dire* to explore the issue.

Absent any basis on which it could be argued that the appellant was detained, the trial judge was well within his authority in declining to exercise his discretion to reopen the question of the admissibility of the evidence tendered by the Crown.

142 Finlayson J.A. went on to suggest certain procedures for *Charter* Motions generally (at 300-301 C.C.C.), stating that "written notice particularizing the *Charter* breach" was "a desirable practice", together with an offer of proof, but declined to specify "the extent or the form of the offer of proof". He concluded by re-affirming the power to summarily dismiss certain kinds of *Charter* Motions:

If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a *Charter* infringement, or a finding that the evidence in question was obtained in a manner which infringed the *Charter*, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.

As Finlayson J.A. put it (at 302 C.C.C.), the purpose of this kind of case management is to "weed out the applications which have no basis in fact or law". Also see *R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.), which was released concurrently with *Kutynec*.

143 The decisions in *Kutynec* and *Loveman* were released on February 24, 1992. In the ensuing months, the Ontario Court of Justice (General Division) developed the first set of formal *Criminal Proceedings Rules*, governing *Charter* Motions. They were drafted by Watt J., as he then was, and

came into force pursuant to s. 482 on May 11, 1992. They have been revised over the ensuing twenty years but their essence remains the same as to the basic requirements of written notice and an offer of proof. For example, Rule 27.03 requires that the Notice specify "the documentary, affidavit and other evidence to be used at the hearing of the Application", Rule 6.05 requires that these materials must be included in the Application Record, and Rule 31.05 requires "statements of anticipated evidence in sufficient detail to show the essential features of the evidence" on Motions where the "testimony of witnesses" is proposed.

144 On May 15, 1992, four days after the *Criminal Proceedings Rules* came into force, the Court of Appeal released a further decision concerning common law case management powers, in the context of *Charter* Motions. The same panel that heard *Kutynech* and *Loveman* presided in *R. v. Durette et al* (1992), 72 C.C.C. (3d) 421 (Ont. C.A.). It is an important decision, for purposes of the present appeal, because it involved an allegation of Crown misconduct. The case was a large conspiracy with sixty-one accused initially charged in a single Information. The Crown divided the accused into two groups and preferred two direct Indictments, one in the Supreme Court and one in the District Court. The Supreme Court Indictment proceeded to trial first, in a reasonably expeditious manner, and the District Court Indictment was adjourned. When the District Court Indictment came on for trial, the defence brought a s. 11(b) *Charter* Motion and sought an evidentiary hearing in order to inquire into the reasons behind the Crown's decisions, to divide the accused into two groups and to give one group priority, resulting in the delaying of the District Court trial.

145 The trial judge denied the evidentiary hearing and dismissed the s. 11(b) Motion. In a unanimous decision, the Court of Appeal agreed with the trial judge on this point. Both Finlayson J.A. and Doherty J.A. wrote reasons discussing the s. 11(b) evidentiary hearing requested by the defence. Doherty J.A. emphasized (at 463-4 C.C.C.) that the defence was alleging that the Crown's decision was "arbitrary" and "an abuse of process" and that this was to be the focus of the proposed evidentiary hearing. He held that:

The evidence the appellants wanted to adduce would have made the propriety of the Crown's conduct an issue in the s. 11(b) application. The authorities are clear that it is not relevant to the s. 11(b) inquiry. The trial judge was right in refusing to admit the evidence.

In other words, the proposed evidentiary hearing was irrelevant to the s. 11(b) issues and the defence had simply misconceived the applicable law.

146 Finlayson J.A. (Brooke J.A. concurring) took a different approach to the issue, although they arrived at the same result as Doherty J.A. They reiterated the case management approach that the Court had taken in *Kutynech* but, in the context of an attack on the integrity of the Crown, Finlayson J.A. imposed a preliminary burden and a preliminary presumption. He reasoned as follows (at 436-440 C.C.C.):

In my opinion, because the burden of establishing a violation of the *Charter* falls on the accused, when an accused makes a *Charter* motion he or she can be asked to stipulate a sufficient foundation for the claim or its constituent issues. If such a foundation cannot be articulated, I think the trial judge may determine that it is not necessary to hear evidence on the issue and he is entitled to dismiss the motion.

...

I think the trial judge was correct in not permitting the calling of evidence. The court may inquire into the sufficiency of the Crown's explanation for the delay without hearing further evidence. An evidentiary hearing is not justified, in my opinion, by merely pointing out that the discretion of the Crown could have been exercised differently and that this could have entailed different consequences to one or more of the accused. On a s. 11(b) delay issue, in order for the trial judge to inquire further than the sufficiency of the Crown's explanation and to allow an evidentiary hearing for that purpose, there must be some basis for suspecting the Crown's choice of conduct. In order to ask the court to delve into the circumstances surrounding the exercise of the Crown's discretion, or to inquire into the motivation of the Crown officers responsible for advising the Attorney-General, the accused bears the burden of making a tenable allegation of mala fides on the part of the Crown. Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation, the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly and not for improper or arbitrary motives

...

It must follow from La Forest J.'s statement [in *Beare*] that the allegation of improper or arbitrary motives cannot be an irresponsible allegation made solely for the purpose of initiating a "fishing expedition" in the hope that something of value will accrue to the defence.

...

The mere fact that the Crown made a decision does not, without more, form a

basis for an allegation of bad faith. Nor does it require a trial judge to allow an evidentiary hearing to inquire into why the discretion was not exercised differently.

...

Being satisfied as to the Crown's explanation for the delay and in the absence of any basis for an inquiry into the Crown's choice of conduct, I think the trial judge was correct in refusing to allow defence counsel to call or cross-examine witnesses on this question. Nothing raised at trial or on appeal would cause me to consider interfering with the trial judge's undoubted discretion in dealing with this issue.

The Supreme Court of Canada and appellate courts across Canada have been attempting in recent years to restrict the issues that go to a jury to those which have, on the evidence, an air of reality to them. Just as we have tried to restrict the trial of an accused on the merits to factual issues that are directly raised in the particular case, so should we strive to restrict pre-trial Charter motions to matters of substance where defence counsel can establish some basis for a violation of a right. Unless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. As Jonathan Swift might have said, we are presently sacrificing justice on the shrine of process. [Emphasis added.]

Durette went on further appeal to the Supreme Court of Canada, on a wiretap issue, but the Court did not address the above case management issue. See: *R. v. Durette et al* (1994), 88 C.C.C. (3d) 1 (S.C.C.).

147 Finlayson J.A.'s approach in *Durette* has been followed and applied in a number of subsequent cases. In *Perks v. A.-G. Ontario*, [1998] O.J. No. 421 at para. 9 (S.C.J.), the Applicant sought an evidentiary hearing to inquire into allegations that the Attorney-General was in a conflict of interest, amounting to an abuse of process, when the Crown intervened and withdrew charges in a private prosecution. Dambrot J. cited the above passages from Finlayson J.A.'s judgment in *Durette* and declined to permit an evidentiary hearing. He reasoned as follows:

In this case, the Crown articulated a perfectly reasonable explanation for his decision to intervene, and to withdraw the information. Thus the record disclosed no basis to embark on an evidentiary hearing. Mr. Ruby's allegation that the Ministry of the Environment and big business are in "an unholy alliance ... whose

object is to rape the environment", however colourful, is nothing more than an allegation. It neither changes the state of the record nor amounts to an offer of proof. [Emphasis added].

On further appeal, the Court of Appeal expressly agreed with the above reasoning and dismissed the appeal. See: *Perks v. A.-G. Ontario*, [1998] O.J. No. 5266 (C.A.).

148 In *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.), Doherty J.A. gave the judgment of the Court and adopted and applied the reasoning of Finlayson J.A. in *Durette*. The accused in *Larosa* was charged with various drug offences in both Ontario and Texas. The Crown entered a stay of proceedings on the Ontario charges, allowing an extradition request to proceed. Larosa sought to appeal or review the Crown's decision to enter a stay on the Ontario charges at the same time as he appealed the extradition committal. Most importantly for the present case, he sought an evidentiary hearing and production of documents, on both appeals, in order to advance allegations of "alleged state misconduct resulting in a breach of ... s. 7 rights and/or an abuse of process". *Larosa* should be approached with caution, in the present case, because the Court decided the issue of the accused's entitlement to an evidentiary hearing in the context of the extradition appeal. Nevertheless, the decision is helpful as it involved an application of the principles set out in *Durette*, which was a domestic criminal trial.

149 The Court dismissed the allegations of "state misconduct", denied the evidentiary hearing, and dismissed both appeals. Doherty J.A.'s analysis of the preliminary threshold that should be met, before permitting an evidentiary hearing into the abuse of process allegations, was as follows (*R. v. Larosa, supra*, at paras 76-82 and 85):

In my view, before ordering the production of documents and compelling testimony in support of allegations of state misconduct, this court should be satisfied that the following three criteria have been met by the applicant:

- * The allegations must be capable of supporting the remedy sought;
- * There must be an air of reality to the allegations; and
- * It must be likely that the documents sought and the testimony sought would be relevant to the allegations.

The first criterion is self-evident. There is no point in engaging a lengthy evidentiary inquiry where it cannot in law yield the result sought by the appellant. For example, one of the allegations in the notice of motion claims that

the Crown misled the criminal court as to the status of Pagano. Even if this allegation were true, I fail to see how it could offer any support for a stay of the extradition proceedings.

...

The "air of reality" requirement comes from *R. v. Kwok*, [2001] 1 S.C.R. 532 *supra*, at 267-69. An "air of reality" means some realistic possibility that the allegations can be substantiated if the orders requested are made.

...

The "air of reality" standard I have attempted to describe is consistent with that prescribed by Finlayson J.A. (for the majority) in *R. v. Durette* [citations omitted]. In *Durette*, the appellants claimed that they were denied their right to trial within a reasonable time and in the evidentiary inquiry into that claim sought to compel the testimony of certain Crown officials and police officers. The appellants wanted to inquire into the reasons for certain decisions made by the Crown which had had the effect of delaying the trial of the appellants. Finlayson J.A. said at 437-38 C.C.C.:

In order to ask the court to delve into the circumstances surrounding the exercise of the Crown's discretion, or to inquire into the motivation of the Crown officers responsible for advising the Attorney-General, the accused bears the burden of making a tenable allegation of mala fides on the part of the Crown. Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly and not for improper or arbitrary motives.

The allegation of improper or arbitrary motives cannot be an irresponsible allegation made solely for the purpose of initiating a "fishing expedition" in the hope that something of value will accrue to the defence.

...

The appellant bears the burden of demonstrating the "air of reality" and may do so by reference to the appeal record or to evidence, normally by way of affidavit, tendered in support of the motion for production and the compelling of testimony.

...

The appellant suggests that the Crown's conduct somehow interfered with his "opportunity to plead guilty", which would have in turn prevented his extradition. There is nothing in the record to suggest that the appellant ever considered pleading guilty to the Canadian charges, or more to the point, that the Crown was aware of any possible guilty plea. A bald assertion in the notice of motion will not suffice to trigger the evidentiary inquiry sought by the appellant. [Italics of Doherty J.A. in the original, underlining added.]

150 In *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at para. 88 (Ont. C.A.), the Court took a similar approach to *Larosa* in the context of quasi-criminal proceedings where allegations of "abuse of process and prosecutorial misconduct" had been made. Rosenberg J.A. (Carthy and Doherty JJ.A. concurring) stated the following:

The defence has the right to make allegations of abuse of process and prosecutorial misconduct, but only where those allegations have some foundation in the record, only where there is some possibility that the allegations will lead to a remedy and only at the appropriate time in the proceedings. [Emphasis added.]

151 Finally, and perhaps most importantly, the Supreme Court of Canada has addressed the issue of common law case management powers, in the context of *Charter* Motions, in two recent unanimous decisions. In *R. v. Pires and Lising*, *supra* at paras. 24 and 34-5 Charron J. gave the unanimous judgment of the Court and adopted Finlayson J.A.'s above reasoning in *Durette*. She stated:

Third, the appellants submit that three important principles, repeatedly enforced by this Court in its *Charter* jurisprudence, favour the abolishment, or alternatively, the relaxation of the *Garofoli* leave requirement. These principles are: the recognized importance of a broad right to cross-examination; the lower standard generally applicable to the admissibility of defence evidence; and the need to ensure access to the remedial scheme in the *Charter*.

There is no debate that these important principles are relevant both in the formulation of an appropriate standard for allowing cross-examination and in its application. However, the accused's right to an evidentiary hearing must be considered in context. It must also be balanced against countervailing interests, including the need to ensure that the criminal trial process is not plagued by lengthy proceedings that do not assist in the determination of the relevant issues. As I will explain, the appellants' argument ignores important contextual factors.

...

Finlayson J.A. in *R. v. Durette* [citation omitted], forcefully and succinctly expressed the same concern in the following words (at p. 440 C.C.C.):

The Supreme Court of Canada and appellate courts across Canada have been attempting in recent years to restrict the issues that go to a jury to those which have, on the evidence, an air of reality to them. Just as we have tried to restrict the trial of an accused on the merits to factual issues that are directly raised in the particular case, so should we strive to restrict pre-trial *Charter* motions to matters of substance where defence counsel can establish some basis for a violation of a right. Unless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. As Jonathan Swift might have said, we are presently sacrificing justice on the shrine of process.

The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court. [Emphasis added.]

152 Most recently, in *R. v. Anderson, supra* at paras. 53 and 55, Moldaver J. held (like Finlayson J.A. in *Durette*) that there is a "presumption that prosecutorial discretion is exercised in good faith" and that presumption must be displaced before an evidentiary hearing into allegations of Crown misconduct can proceed. He stated:

In *Nixon*, this Court noted the following reasons as to why there must be a "proper evidentiary foundation" before the abuse of process claim should proceed:

... mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new. *R. v. Pires*, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* at (para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

Quite apart from any such pragmatic considerations, there is a good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process.

...

Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith. *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at para. 95. It also accords with this Court's statement in *Sriskandarajah*, at para. 27, that "prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives". [Emphasis of Moldaver J. in the original.]

153 It can be seen that there is now a considerable body of binding authority relating to the Crown's Motion to summarily dismiss Khan and Muellenbach's Motion, alleging prosecutorial misconduct and abuse of process, without an evidentiary hearing. In summary, the above authorities

stand for the following five propositions:

- * There is a presumption that Crown discretion is exercised on a *bona fide* basis (*Anderson and Durette*);
- * To displace that presumption, there must be a "tenable allegation of *mala fides*" (*Anderson and Durette*);
- * The meaning of a "tenable allegation" is one that has an "air or reality", in the sense that there is "some realistic possibility that the allegations can be substantiated" and "some possibility that the allegations will lead to a remedy" (*Larosa and Felderhof*);
- * The normal way of demonstrating this "air of reality" is "by way of affidavit" or by pointing to "some foundation in the record" or, exceptionally, "if the record is lacking or insufficient, by an offer of proof" (*Larosa, Felderhof, and Durette*);
- * What will not suffice, is "an irresponsible allegation made solely for the purpose of initiating a 'fishing expedition' in the hope that something of value will accrue to the defence" or a "bald assertion" by counsel or a "colourful ... allegation" by counsel (*Durette, Larosa, and Perks*).

154 Applying the above principles to Mr. Slansky's first five allegations, I am satisfied that they should all be summarily dismissed, without an evidentiary hearing.

155 The first allegation is that this was a "selective prosecution" as it was "initiated" out of police animosity towards Khan, as a form of "pay-back for the acquittal" of Kahn's brother on charges of importing heroin. When Mr. Slansky was put to an offer of proof, it became apparent that there was no basis for this allegation. In particular, I rely the following:

- * It is common ground between the parties that the present investigation was "initiated" on January 14, 2008. Khan's brother was not acquitted on the heroin importing charge until June 25, 2009. See: *R. v. Khan*, [2009] O.J. No. 2902 (S.C.J.). It is, therefore, factually impossible to allege that the forgery investigation was "initiated" as "pay-back for the acquittal";
- * There is no significant over-lap between the RCMP officers on the two

cases. In particular, the two lead officers on the forgery investigation (Cst. Ismail and Cpl. McMath) had no involvement in the heroin investigation. The only police over-lap that Mr. Slansky could point to was minor and insignificant;

- * It is conceded that other stores selling false identification were also under police investigation. Indeed, one of these other stores has been convicted;
- * Mr. Slansky conceded that even if Khan and Muellenbach were the first accused to be prosecuted in Toronto for selling false identification, held out to be a "novelty", this would not make out "selective prosecution" or abuse of process. This concession is well-founded, given the Court's decision in *R. v. Miles of Music Inc.* (1989), 48 C.C.C. (3d) 96 at para. 15 (Ont. C.A.). In that case, the accused was prosecuted for *Copyright Act* offences that had apparently been tolerated by the authorities for some time. Krever J.A., speaking for a unanimous Court on this point, stated:

Nor does the fact, despite the widespread practice of making compilation tapes, only the respondents were charged, assist them. There is no suggestion in the evidence that the police or the Crown had, on any other occasion, reasonable grounds for prosecuting, and it cannot be the law that a first prosecution for an offence under any given statute is, in itself, unfair and oppressive. [Emphasis added];

- * Finally, the prosecution in this case is brought by the Crown and not by the police, and there is no suggestion that the Crown is implicated in the alleged vendetta arising from the acquittal of Khan's brother. I also note that the acquittal was in a drug case prosecuted by the federal Crown and the forgery case is prosecuted by the provincial Crown.

156 For all these reasons, the first allegation is summarily dismissed.

157 The second allegation is that Mr. Webb "knowingly violated the order excluding witnesses" at the preliminary inquiry [emphasis added]. The incident underlying this allegation arose on August 10, 2012, after Cpl. Parr had identified somebody in the body of the court room, and not the accused Osman, as the sales clerk at Flash Jack who had sold him false identification in early June 2009. Cpl. Parr's evidence, in this regard, has already been summarized above at paras. 40 and 84. What happened after the conclusion of court proceedings that day emerged two months later, on October 12, 2012. Cpl. McMath, the officer-in-charge of the case, was now testifying. Counsel for

Osman asked him the following questions:

Q. ... within that role as lead investigator ... are you still having interactions with Mr. Webb with respect to how the preliminary inquiry is going, unfolding?

A. ... we discuss here and there a little bit. That's about it.

Q. Did you ever discuss Cst. Parr's testimony?

A. Did I ever discuss Cst. Parr's testimony? It may have been mentioned.

Q. It may have been mentioned. So do you think the fact that Cst. Parr wasn't able to identify the person who sold him fake ID, do you think that may have been mentioned?

A. I believe so.

158 At this point Khawly J. intervened, and stated: "it sounds like there's a violation of my order of exclusion of witnesses". He suggested that Mr. Webb get advice from a colleague, he asked all counsel to discuss appropriate remedies, and he went on to suggest some possible remedies. After a number of recesses, counsel returned to court. During the recesses, Mr. Webb acknowledged to defence counsel that he had breached the witness exclusion order. That order did not include an exception for the officer-in-charge, Cpl. McMath, until after he had finished testifying. Mr. Webb explained the breach to Khawly J.:

"And when I left the courtroom I made a joke about how, jeez, this guy can't even point in the right direction, kind of thing. And so all the officers heard that."

Khawly J. stated, "you're an officer of the court and I accept what you're telling me. I have no reason to doubt what you're telling me". He then asked all counsel to see if they could agree on appropriate remedies.

159 After a further recess, counsel returned to court and advised Khawly J. that they had reached a seven point resolution of the matter: first, Cpl. McMath's *viva voce* testimony at the preliminary inquiry would not be relied on by any party; second, Cpl. McMath would not be called as a Crown witness at trial; third, the exhibits introduced through Cpl. McMath would remain in evidence; fourth, Cpl. McMath could still testify on *voir dire*s, if he was needed; fifth, Cpl. McMath could now remain in the court room to assist, as the officer-in-charge; sixth, there would be no *Charter* or

common law Motion brought alleging abuse of process in relation to the matter; and seventh, Mr. Webb would not be called as a witness, either at the preliminary inquiry or at trial. Khawly J. made notes of the agreement, which was put on the record, and stated, "we're all *ad idem* ..."

160 On the next appearance, October 31, 2012, counsel raised an issue as to whether the above seven point resolution of the matter was vitiated by the fact that counsel now realized that another officer, and not just Cpl. McMath, may also have been present when Mr. Webb went out into the hallway and made his remark, after Cpl. Parr had testified. Khawly J. stated:

Well, in fairness I took that as a given that all the officers were out there when Mr. Webb told me he went outside and said "Hey, this guy can't even point to a witness". I thought that it involved everybody.

Counsel acknowledged that Mr. Webb "used the plural", when referring to the officers who were present in the hallway when he made his remark. Further argument ensued about the fact that other officers may have heard Mr. Webb's remark, in particular, Cst. Ismail, and whether this could vitiate the earlier seven point resolution of the matter. Khawly J. concluded that there was no prejudice, as Cst. Ismail's evidence did not over-lap with Cpl. Parr's evidence. Khawly J. stated:

No, sorry guys, this one doesn't go. Good trial balloon but there's just nothing there.

The preliminary inquiry then continued with the testimony of two further police officers, followed by closing submissions and committal.

161 I am satisfied that there is no basis in the offer of proof for Mr. Slansky's allegation that Mr. Webb "knowingly" violated the court order. In particular, I rely on the following:

- * Mr. Webb provided an innocent explanation to Khawly J. and to counsel for his breach of the court order. All the facts are consistent with it being, at worst, a careless but inadvertent mistake. It is likely that it was simply a minor slip;
- * Khawly J. accepted Mr. Webb's explanation, given to the presiding judge in open court and as an officer of the court;
- * All counsel conferred over a number of recesses and resolved the matter, in a careful seven point agreement that removed any possible prejudice. Included in that agreement was an undertaking not to raise the matter as an alleged abuse of process. Khawly J. approved of the resolution;

- * The only accused who could possibly have been prejudiced by the breach of the court order was Osman and he was discharged by Khawly J. at the conclusion of the preliminary inquiry. Mr. Slansky conceded that the breach did not result in any prejudice to Khan or Muellenbach's fair trial interests;
- * The Crown has repeated its undertaking before me, that Cpl. McMath will not be called as a witness at trial. The parties also agree that the credibility of police witnesses is not a significant issue in this case;
- * The fact that no other police witness' evidence over-lapped with Cpl. Parr's evidence, about the undercover purchase of false identification from the store clerk at Flash Jack in early June 2009 (as no other officer accompanied Cpl. Parr into the store), significantly attenuated the gravity of the breach of the witness exclusion order;
- * The fact that Cpl. McMath was the officer-in-charge, and that it was appropriate for the Crown to confer with him (as long as the Crown did not breach the witness exclusion order) also made the breach more understandable. Mr. Slansky conceded that there was no impropriety in Mr. Webb and Cpl. McMath conferring during the preliminary inquiry. This tends to confirm that the breach was an innocent and inadvertent slip or mistake;
- * Finally, the remedy that the Crown agreed to, and that Khawly J. affirmed, namely, complete exclusion of Cpl. McMath's evidence, was far more generous than what the authorities have historically imposed in these circumstances. See: *R. v. Dobberthien* (1974), 18 C.C.C. (2d) 449 (S.C.C.); *R. v. Maxwell* (1979), 47 C.C.C. (2d) 65 at 85 and 89-90 (S.C.C.).

162 In all these circumstances, the second allegation is summarily dismissed. I am satisfied that Mr. Slansky's added assertion, that the breach of the court order was "knowing" and deliberate, is a classic example of a bald conclusory assertion by counsel with no foundation.

163 The third allegation is that Mr. Webb "suborned perjury" by calling "obviously false" testimony from police witnesses at the preliminary inquiry. This third allegation is linked to the second allegation. Mr Slansky submitted that the failure of Cpl. Parr to identify Osman created a "problem" for the Crown, as there was now little or no evidence implicating Osman in the forgery-related offences, and that the Crown proceeded to solve its "problem" by calling three police officers who were "all lying". Mr. Slansky submitted that Mr. Webb was "suborning perjury" because he either "knew or should have known that this evidence he was leading was false".

164 In my view, this was an irresponsible allegation and it should never have been made. I am satisfied that there is no basis for it in the offer of proof. In particular, I rely on the following:

- * At its highest, Mr. Slansky's offer of proof was to the effect that Cpl. McMath's evidence was suspect and unreliable, concerning an utterance allegedly made by Osman on June 10, 2009, when Cpl. McMath executed the search warrant at Flash Jack. Unreliable or suspect evidence from a police witness occurs in many cases and it is not the same thing as "perjury";
- * In my view, there was nothing in the offer of proof to suggest that the evidence of the other two officers relating to Osman was even suspect or unreliable, let alone "perjury". Furthermore, they were always on the Crown's witness list sent to counsel at the start of the preliminary inquiry, as officers who would be called and who could potentially give some evidence relating to Osman;
- * Most importantly, there was simply no offer of proof that Mr. Webb "suborned perjury" by calling the three police witnesses. Mr. Slansky repeatedly submitted that Mr. Webb "should have known" that Cpl. McMath's evidence was false and that Mr. Webb "should have withdrawn" Cpl. McMath's evidence. This standard of alleged Crown fault cannot be equated with "suborning perjury" which means to deliberately induce or procure a witness to commit perjury;
- * All of the allegedly "perjured" evidence related to Osman who was discharged at the preliminary inquiry. Furthermore, Mr. Webb did not rely on Cpl. McMath's evidence in his closing submissions. Finally, he is not calling Cpl. McMath at trial. Once again, there is no suggestion that this allegation had any impact on Khan or Muellenbach's fair trial interests.

165 In all these circumstances, the third allegation is summarily dismissed. I am satisfied that counsel's statement, that Mr. Webb "suborned perjury", is nothing more than a bald conclusory assertion with no foundation.

166 The fourth allegation is that Mr. Webb and Cpl. McMath deliberately "lost" certain exhibits at the preliminary inquiry. This allegation is very similar to the previous allegation concerning "suborning perjury", and it is just as irresponsible. In effect, Mr. Slansky alleged that Mr. Webb and Cpl. McMath conspired to obstruct justice.

167 The underlying facts relating to this allegation are relatively straight forward. When the police executed the first search warrant at Flash Jack on June 10, 2009, they seized numerous exhibits. One of the seizures was sixty-three false identification cards and/or templates, which were

all placed in a single exhibit bag. Disclosure of these seizures was prepared by a civilian RCMP employee, Tony Veenendaal, who scanned the front and back of the cards/templates. Colour scanned images were then disclosed to the defence. Although sixty-three cards/templates were seized, only fifty-seven scanned images were disclosed to the defence. Tony Veenendaal's recollection is that some of the sixty-three cards/templates were "exact duplicates" and some were "completely blank cards" and so he would only scan "one of them". The inference from Veenendaal's recollection is that six of the sixty-three cards/templates were either duplicates or blanks and so he did not scan them and they were not disclosed.

168 At the preliminary inquiry, Cpl. McMath would bring the seized exhibit bags to court, as the officer-in-charge. Some of the seizures were entered in evidence as exhibits and the Court took custody of them. Other seizures were shown to various defence counsel and were not marked as court exhibits. At some point during the preliminary inquiry, Cpl. McMath lost the particular exhibit bag that contained sixty-three original cards/templates. It was never marked as a Court exhibit. The scanned copies of fifty-seven of these sixty-three cards/templates, of course, are still available.

169 It can be seen that two separate kinds of lost evidence have arisen: first, six original cards/templates that were not scanned, copied, and disclosed have been lost; second, fifty-seven original cards/templates that were scanned, copied, and disclosed have also been lost.

170 The defence brought a traditional s. 7 *Charter* "lost evidence" Motion, in relation to this matter, seeking a stay of proceedings. Counsel agreed that the law is to the effect that these Motions are generally brought at the end of the case when any prejudice to fair trial interests, and any alternate remedies such as jury instructions, can be properly evaluated. See: *R. v. Vu and La* (1997) 116 C.C.C. (3d) 97 at paras. 27-8 (S.C.C.); *R. v. Bero* (2000), 151 C.C.C (3d) 545 at paras. 16-18 (Ont. C.A.). In the latter case, Doherty J.A. gave the judgment of the Court and stated:

The trial judge should not have ruled on the motion at the outset of the trial. This Court has repeatedly indicated that except where the appropriateness of a stay is manifest at the outset of proceedings, a trial judge should reserve on motions such as the motion brought in this case until after the evidence has been heard. The trial judge can more effectively assess issues such as the degree of prejudice caused to an accused by the destruction of evidence at the end of the trial.

171 Cpl. McMath filed a detailed Affidavit, explaining how the exhibit bag came to be lost. The defence does not accept his explanation. It will be open to the defence to explore these issues at trial, if they are so advised. There are competing theories as to whether it was Cpl. McMath or defence counsel who was responsible for the loss of this particular exhibit bag. If it was Cpl. McMath, there are issues as to whether the loss was deliberate or negligent or entirely innocent. Finally, and perhaps most importantly, there are obvious issues as to whether the loss of the evidence caused any prejudice, given that fifty-seven of the sixty-three cards/templates were scanned, copied, and disclosed to the defence and are still available. See: *R. v. Vu and La, supra* at

para. 32. In my view, none of these traditional s. 7 "lost evidence" issues can or should be resolved now. Counsel can raise them at the end of the case and on the basis of the trial record, pursuant to the traditional practice set out in *Vu* and *Bero*, if they appear to have any merit at that time.

172 The only reason this "lost evidence" issue has been joined to the abuse of process/Crown misconduct Motion, seeking a stay prior to trial, is because of the added allegation that Mr. Webb was complicit in the loss of evidence and that he jointly conspired with Cpl. McMath or somehow approbated or facilitated the deliberate loss of this evidence.

173 In my view, there is no basis in the offer of proof to support these serious allegations of involvement by Mr. Webb in a deliberate obstruction of justice. The allegation is irresponsible and should never have been made. Mr. Slansky relied on a speculative theory that the six lost and unscanned originals were extremely important or, at least, were useful defence evidence and that the Crown and the police must have realized their importance to the defence. Accordingly, Mr. Slansky submitted, the Crown and the police had a motive to deliberately lose them. The theory that these six lost originals were important or useful defence evidence is speculative and could never be established, in my view. Furthermore, the motive would have to have arisen at the very early disclosure stages of the case, when Veenendaal failed to scan and copy six of the sixty-three cards/templates. Indeed, Veenendaal would have to be a party to the conspiracy as its most important step was the failure to scan the six cards/templates that were important to the defence. The subsequent loss of the other fifty-seven cards/templates, by Cpl. McMath at the preliminary inquiry, could not harm the defence when they already had scanned copies of these fifty-seven cards/templates. Finally, it should be stressed that this highly implausible motive, even if it could be established, is no evidence that Mr. Webb obstructed justice.

174 For all these reasons, the fourth allegation is summarily dismissed.

175 The fifth and last allegation is that Mr. Webb made a statement at the preliminary inquiry when he "knew it to be false". The statement was made on August 24, 2013 in the midst of a colloquy between Mr. Webb, Mr. Pinkofsky and Khawly J. The Crown was examining Cpl. McMath in-chief about an encounter that he had with Khan on August 20, 2009 at a court hearing about ongoing detention of the items recently seized from Flash Jack on June 10, 2009. Khan and Saleh both attended at court. Saleh filed an Affidavit claiming ownership and possession of the seized items. Cpl. McMath testified that he spoke briefly to Khan and that Khan made some response. According to both Crown and defence counsel, the response was not "particularly incriminating" and Khan essentially "declined" to give a statement. Nevertheless, Mr. Pinkofsky objected and took the position that voluntariness would have to be established before any utterance, allegedly made by Khan to Cpl. McMath, could be elicited. A discussion ensued as to whether Khan had been "cautioned" by Cpl. McMath, before speaking to him.

176 It was in this context that Mr. Webb took the position that there was no obligation in law to "caution" Khan, who was not yet charged. Mr. Webb referred to a Superior Court decision where a

suspect had not been cautioned and the Court held that "there was no obligation to caution him". Mr. Pinkofsky responded:

I still take the position there is an abundance of authority without going into case law that goes the other way. If somebody is a targeted suspect the police applies the caution before they make inquiries.

177 In response to Mr. Pinkofsky's position, concerning an alleged legal duty to "caution" a "targeted suspect", Mr. Webb made the statement that Mr. Slansky now asserts was knowingly false. The statement was as follows:

At the highest he [Khan] was a person of interest at the time largely because Mr. Saleh had been representing that he was the owner and operator of the business, notwithstanding police information that the Khan family had a significant association with the building so he was, you know, there was reason to believe that he might be involved but he wasn't the target at that time. It's inaccurate to describe it, at the time the police had reason to believe that Mashhour Saleh was trying to hoodwink them, but they were just exploring the circumstances.

178 There was no objection to Mr. Webb's statement at the time. Mr. Pinkofsky did not challenge it or respond to it or suggest that Mr. Webb's position concerning Khan's status was somehow untenable. Khawly J. stated:

Look guys look, we are wasting [a] time on this for no reason. Let's move on.

The Crown acceded to Khawly J.'s direction and moved on to another area of Cpl. McMath's evidence. Khan's alleged utterance to Cpl. McMath was never elicited in evidence. There was no voluntariness *voir dire*. The whole issue simply went away after the above brief exchange.

179 In my view, there is no basis in the offer of proof for Mr. Slansky's assertion that Mr. Webb "knew it to be false", when he made the above statement to Khawly J. at the preliminary inquiry. In particular, I rely on the following:

- * Mr. Webb's statement acknowledged that Khan "was a person of interest" in August 2009 and that "there was reason to believe that he might be involved". This appears to be a reasonably accurate assessment of Khan's status, at this stage of the investigation, as the police had not yet developed sufficient grounds to arrest and charge Khan. It was almost two years later, in June 2011, that the police believed they had the requisite reasonable and probable grounds and proceeded to charge Khan;
- * Mr. Webb's further statement, that Khan was not "the target", is the focus of Mr.

Slansky's attack. However, Mr. Slansky acknowledged during argument of the Motion that there were other targets in the investigation at this stage and that Khan was not the only target. Mr. Slansky's position is simply that Khan was "the primary target". Mr Webb, however, never addressed the issue of who were primary targets and who were secondary targets;

- * There is an artificiality to parsing the words of an advocate, in the midst of an extemporaneous argument. The issue of whether Khan was "a person of interest", "a target", "the target", or "the primary target", and whether he had to be "cautioned" (a term which no one ever defined), was the subject of an unforeseen argument that arose suddenly during the preliminary inquiry. The two sides presented their positions, without apparent preparation and while "on their feet". It is not reasonable to analyze small portions of these kinds of adversarial positions or arguments on a standard of knowing falsity, as Mr. Slansky does;
- * Finally, nobody thought anything of this issue at the time and it simply went away. It was an utterly inconsequential event in a lengthy preliminary inquiry. To suggest that this kind of minor incident could amount to egregious misconduct and an abuse of process, is entirely unrealistic. I note that a similar allegation in *R. v. Larosa, supra*, to the effect that "the Crown misled the criminal court as to the status of Pagano", was summarily dismissed by Doherty J.A.

180 For all these reasons, the fifth and last allegation is summarily dismissed.

181 One final point I should note is that Mr. Slansky repeatedly made it clear that the Motion was not being brought under the first or main branch of the abuse of process doctrine, as he was not alleging any prejudice to the fair trial interests of Khan and Muellenbach. Rather, Mr. Slansky tried to situate his arguments under the second or "residual category" of the doctrine, where the focus is on prejudice to the integrity of the justice system. The first stage of the test for "residual category" abuse of process is as follows: whether allowing the prosecution to proceed will "do further harm to the integrity of the justice system" because past instances of state misconduct are "likely to continue in the future" or because, in "very rare" or "exceptional cases", the past misconduct is "so egregious that the mere fact of going forward in the light of it will be offensive". See: *R. v. Babos and Piccirilli*, [2014] 1 S.C.R. 309 at paras. 30-41; *Re Minister of Citizenship and Immigration and Tobiass, Dueck and Oberlander* (1997), 118 C.C.C. (3d) 443 at paras. 90-92 (S.C.C.); *R. v. Regan* (2002), 161 C.C.C. (3d) 97 at paras. 54-55 (S.C.C.).

182 In light of the analysis set out above, concerning Mr. Slansky's ten allegations, there is simply no basis to suggest that the present case could fall within the "residual category" of abuse of process. There is no suggestion of ongoing misconduct and there is no basis to suggest "egregious"

or "exceptional" misconduct that would make it offensive to merely go forward.

183 I have summarily dismissed all ten of the allegations advanced by Khan and Muellenbach in support of the abuse of process/Crown misconduct Motion. Accordingly, that Motion is dismissed.

N. CONCLUSION

184 In the result, all of the pre-trial Motions are dismissed. Two of those Motions, relating to pre-charge delay and lost evidence, can be renewed at the end of the case and on the basis of the trial record, if counsel are so advised.

185 I believe that the case is now ready to be remanded to January 5, 2015, for jury selection. However, if any further issues arise, counsel can appear before me on short notice, prior to that date.

M.A. CODE J.

TAB 10

Regina v. Miles of Music Ltd. and Roch
Indexed as: R. v. Miles of Music Ltd.
(C.A.)

74 O.R. (2d) 518

[1989] O.J. No. 391

Action No. 767/86

ONTARIO
Court of Appeal

Blair, Tarnopolsky and Krever JJ.A.

March 16, 1989.

Courts -- Abuse of process -- Criminal proceedings -- Respondent using compilation tapes in disc jockey business -- Respondent attempting unsuccessfully to obtain licence to avoid possibility of copyright infringement -- Subsequent prosecution of respondent for copyright infringement not constituting abuse of process.

Constitutional law -- Charter of Rights -- Fundamental justice -- Respondent using compilation tapes in disc jockey business -- Respondent attempting unsuccessfully to obtain licence to avoid possibility of copyright infringement -- Subsequent prosecution of respondent for copyright infringement and seizure of equipment and books pursuant to search warrant not violating respondent's rights under s. 7 of Charter -- Canadian Charter of Rights and Freedoms, s. 7.

The respondent R. was a disc jockey and, through the corporate respondent M. Ltd., entered into franchise agreements with other persons to perform disc jockey services. The respondents prepared sets of compilation tapes by transferring to blank tapes selections from pre-recorded tapes or record albums. In 1985, R. became concerned about the possibility of copyright infringement. His solicitor approached the Canadian Recording Industry Association (CRIA) for a licence and was told that a licence was not available.

R. became involved in a dispute with a franchisee, H., which ended in the termination of the agreement. H. informed F., the director of investigation services of CRIA, that the respondents might be involved in copyright infringement. She received from CRIA, through F., an agreement

not to prosecute her for the use of copyright material on condition that she assist CRIA in an investigation of the respondents' possible breach of copyright. The Royal Canadian Mounted Police (RCMP) became involved in the investigation and search warrants were obtained for R.'s home and business premises. His sound equipment, records, tapes and business documents were seized, which had the effect of putting him out of business. He was charged with 42 counts of contravening the Copyright Act. The trial judge found that the conduct of the Crown constituted an abuse of process and that the respondents' rights under s. 7 of the Canadian Charter of Rights and Freedoms had been violated. The charges were ordered stayed. The stay was affirmed on appeal. The Crown appealed to the Court of Appeal.

Held, the appeal should be allowed.

Per Krever J.A.: Before there could be said to be an abuse of process, the respondents had to show on a balance of probabilities that the cause of the unfairness that underlies the concept was executive action or the conduct of the executive, i.e., the police or the Crown or both. The respondents failed to do so in this case. The search and seizure were duly authorized and no attempt was made to minimize the resulting hardship by applying under s. 446(8) of the Criminal Code for the return of the items seized. There was no evidence of police implication in the perceived unfairness, nor did the fact that only the respondents were charged despite the widespread practice of making compilation tapes assist the respondents. It is not the law that a first prosecution for an offence is in itself unfair and oppressive.

Although the doctrine of abuse of process and the requirement of fundamental justice under s. 7 of the Charter are closely related, they are independent of each other.

No violation of s. 7 of the Charter occurred in this case. The respondents' security of the person was not affected by the impugned prosecution. The hardship suffered was a consequence, not of the prosecution, but of the search and seizure, which had not been attacked. The economic right to carry on a business or earn a livelihood is not a right included in security of the person.

The stay was set aside and the case was remitted to Provincial Court for trial on the merits.

Per Tarnopolsky J.A. (concurring): While the doctrine of abuse of process is not directed solely at executive action, some knowing participation by the police or the Crown must be shown. Such knowing participation was not demonstrated in this case.

Per Blair J.A. (dissenting): Whether an abuse of process has occurred depends upon an objective judicial assessment of the total effect or result of the proceedings. It is not necessary to establish any impropriety or improper motive on the part of the police or the prosecutor. It is not necessary that the Crown, represented by the police or the prosecutor, be the "abuser". The categories of abuse of process are not closed.

A determination as to whether there was an abuse of process in this case had to include, not only an

assessment of the actions of the police from the date of the complaint by F., but also the motives and acts of F. leading up to the complaint.

The search and seizure conducted by the police was an integral part of the "process" and could not be disregarded and segregated from the prosecution.

F. devised and executed a plan to promote the concept of an audio licensing system through the prosecution of the respondents. The plan was accomplished by the deceit and duplicity of F. and CRIA. The police were deliberately misled by F., who did not advise them of R.'s attempt to get a licence. The proceedings were oppressive and vexatious and violated the community's sense of fair play and decency.

R. v. D. (T.C.) (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.); R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127; R. v. Keyowski, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97; R. v. Rourke, [1978] 1 S.C.R. 1021, 35 C.C.C. (2d) 129, 38 C.R.N.S. 268, 76 D.L.R. (3d) 193, [1977] 5 W.W.R. 487; R. v. Young (1984), 46 O.R. (2d) 520, 10 C.R.R. 307, 13 C.C.C. (3d) 1, 40 C.R. (3d) 289, 3 O.A.C. 254 (C.A.), *consd*

R. v. Janvier (1985), 41 Sask. R. 90, [1985] 5 W.W.R. 59 (Q.B.), *distd*

Other cases referred to

Aluminum Co. of Canada Ltd. v. Ontario (1986), 55 O.R. (2d) 522, 25 C.R.R. 50, 29 D.L.R. (4th) 583, 16 O.A.C. 14 (Div. Ct.); Amato v. R., [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31, 29 C.R. (3d) 1, 140 D.L.R. (3d) 405, 42 N.R. 487, [1983] 1 W.W.R. 1; Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, [1964] 2 All E.R. 401 (H.L.); Director of Public Prosecutions v. Humphrys, [1977] A.C. 1, [1976] 2 All E.R. 497, 63 Cr. App. Rep. 95 (H.L.); Home Orderly Services Ltd. v. Manitoba (1987), 43 D.L.R. (4th) 300, 49 Man. R. (2d) 246 (C.A.), *leave to appeal to S.C.C. refused* (1988), 54 Man. R. (2d) 160n, 87 N.R. 94n; Lewis v. Todd, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257, 34 N.R. 1; R. v. Belair (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179, 26 O.A.C. 340 (C.A.); R. v. Conway (1988), 26 O.A.C. 389 (C.A.), *affd* [1989] 1 S.C.R. 1659, 40 C.R.R. 1, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209, 96 N.R. 241, 34 O.A.C. 165; R. v. Inuvik Coastal Airways Ltd., [1984] N.W.T.R. 92 (S.C.); R. v. Leclair (1956), 115 C.C.C. 297, 23 C.R. 216, [1956] O.W.N. 336 (C.A.); R. v. Leroux (1928), 50 C.C.C. 52, [1928] 3 D.L.R. 688, 62 O.L.R. 336 (C.A.); R. v. Mack, [1988] 2 S.C.R. 903, 37 C.R.R. 277, 44 C.C.C. (3d) 513, 67 C.R. (3d) 1, 90 N.R. 173, [1989] 1 W.W.R. 577; R. v. Mills, [1986] 1 S.C.R. 863, 58 O.R. (2d) 543 (note), 21 C.R.R. 76, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 29 D.L.R. (4th) 161, 67 N.R. 241, 16 O.A.C. 81; R. v. Morgentaler, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 (note), 31 C.R.R. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 44 D.L.R. (4th) 385, 82 N.R. 1, 26 O.A.C. 1; R. v. Osborn, [1971] S.C.R. 184, 1 C.C.C. (2d) 482, 12 C.R.N.S. 1, 15 D.L.R. (3d) 85; R. v. Smythe, [1971] S.C.R. 680, 3 C.C.C. (2d) 366, 16 C.R.N.S. 147, 19 D.L.R. (3d) 480, 71 D.T.C. 5252; Schreiber Brothers Ltd. v. Currie Products Ltd.,

[1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335; *Smith, Kline and French Laboratories Ltd. v. Canada (Attorney General)*, [1986] 1 F.C. 274, 19 C.R.R. 233, 7 C.P.R. (3d) 145, 24 D.L.R. (4th) 321, 12 F.T.R. 81 (T.D.), additional reasons at (1986), 8 C.P.R. (3d) 422 (T.D.), affd [1987] 2 F.C. 359, 27 C.R.R. 286, 11 C.I.P.R. 181, 12 C.P.R. (3d) 385, 34 D.L.R. (4th) 584, 78 N.R. 30 (C.A.), leave to appeal to S.C.C. refused (1987), 27 C.R.R. 286n, 79 N.R. 320n

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 15, 24(1)

Copyright Act, R.S.C. 1970, c. C-30, s. 25(1) [rep. & sub. 1988, c. 15, s. 10]

Criminal Code, R.S.C. 1970, c. C-34, s. 446(2), (8) [both rep. & sub. 1985, c. 19, s. 74]

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APPEAL by the Crown from the judgment of the High Court of Justice (1987), 20 C.I.P.R. 157, 18 C.P.R. (3d) 77, dismissing its appeal from an order of the Provincial Court (Criminal Division) (1987), 14 C.P.R. (3d) 181, staying prosecution for violations of the Copyright Act.

Robert W. Hubbard and Robert J. Frater, for the Crown, appellant.

Gordon E. Kaiser and Malcolm N. Ruby, for respondents.

KREVER J.A.:-- This appeal by the Crown from a decision [of the High Court of Justice, reported (1987), 20 C.I.P.R. 157, 18 C.P.R. (3d) 77] dismissing its appeal from an order [reported (1987), 14 C.P.R. (3d) 181] of a Provincial Court judge staying a summary conviction prosecution for a number of offences under the Copyright Act, R.S.C. 1970, c. C-30, concerns the difficult and important subject of prosecutorial discretion and the extent to which it is subject to judicial interference. It is important because of the nature of the issue itself. It is difficult because the respondent Roch has every reason to regard himself as the victim of unfairness. At the heart of the factual issue is the question whether the manifest unfairness visited upon the respondents can reasonably be attributed to the Crown by which term, for the purposes of this appeal, I include the police.

The material facts are the following. The respondent Roch, until the date of the execution of the

search warrant, about which I shall say more later, was a disc jockey in London, Ontario. He had carried on that occupation for some 13 years and was the sole shareholder and president of the corporate respondent which employed and, at least in the case of Susan Hartung, entered into a franchise agreement with, other persons to perform disc jockey services, for the most part on social occasions. The respondents prepared sets of compilation cassette tapes by transferring to blank tapes selections from pre-recorded cassette tapes or record albums. In this way it became unnecessary to buy the pre-recorded cassette tapes and record albums in quantities that would serve the needs of some 40 disc jockeys associated with the respondents.

By virtue of the provisions of s. 25(1)(b) and (c) [s. 25(1) rep. & sub. 1988, c. 15, s. 10] of the Copyright Act a person who knowingly sells or offers for sale any infringing copy of a work in which copyright exists, or distributes such copies for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, commits an offence punishable on summary conviction by a fine, in the case of a first offence, not exceeding \$200.

According to the evidence, there are between 50 and 100 disc-jockey companies throughout Canada providing music services at more than 50,000 social events annually, and of the disc jockeys providing these services more than 50 per cent use compilation tapes. The record companies which own the copyright in the recorded or taped musical selections were found to have known about, and to have never objected to, this use of compilation tapes. The copyright interests of the major record companies are protected by their association, the Canadian Recording Industry Association, which I shall call CRIA. That association employed Patrick Fox, a former municipal police officer, as its director of investigation services with respect to copyright protection. I shall return to Mr. Fox later in these reasons.

In the autumn of 1985, Mr. Roch became concerned about the possible relationship between his practice of producing compilation tapes and copyright infringement. As late as mid-December 1985, he and his solicitor were making inquiries to determine whether licensing was necessary and, if so, whether this company could be licensed. By letter dated January 2, 1986, in reply to a written application by Mr. Roch's solicitor of December 17, 1985, for a licence, the president of CRIA stated that "we do not envisage a licence being available for disc jockey services in the immediate future". According to the evidence before the Provincial Court judge who heard evidence for the purpose of the motion before plea for an order quashing the informations or staying the prosecutions, this statement was not accurate. In October 1985, Mr. Fox had told a witness that the licensing of compilation tapes would take place and, in fact, in March 1986, Mr. Fox made a public announcement inviting disc jockeys to apply for licences to duplicate copyright musical material. By July, 1986, licences were being issued. Indeed, in December 1985, a sort of licence, more accurately an undertaking on the part of CRIA not to prosecute, was granted to the corporate respondent's franchisee, Susan Hartung, under the circumstances I shall now describe.

A dispute occurred in the latter part of 1985 between Mrs. Hartung and Mr. Roch over the franchise agreement between Mrs. Hartung and the corporate respondent under which Mrs. Hartung

carried on her disc jockey business. In the course of that business she used compilation tapes obtained from Mr. Roch. On October 25, 1985, Mrs. Hartung gave Mr. Fox a copy of the franchise agreement. One of its provisions was an indemnity by Mrs. Hartung to the corporate respondent against all claims and costs in respect of liability for royalties to artists whose works were included in the tapes. The dispute ended with the termination of the relationship between Mrs. Hartung and Mr. Roch on November 5, 1985, after which Mrs. Hartung continued to work as a disc jockey, retaining and using the tapes which she had received from Mr. Roch. In December 1985, she received from CRIA, through Mr. Fox, an interim licence of sorts, perhaps more accurately characterized as an agreement not to prosecute her for her use of copyright material. This tacit permission to use, but not reproduce, copyright works was initially for the period ending January 20, 1986, but was later extended indefinitely. It was a condition of their forbearance that Mrs. Hartung would continue to assist CRIA and the Royal Canadian Mounted Police (RCMP) in their investigation of the respondents' possible breach of copyright.

The RCMP had become involved after October 31, 1985, the date on which Mr. Fox, armed with the franchise agreement which Mrs. Hartung had given him, and which reflected a recognition that the use of the compilation tapes may have amounted to breaches of copyright, related the information he had obtained from Mrs. Hartung to two RCMP officers with whom he had been dealing in an unrelated matter. This led to the assignment of the investigation in the case to Constable C. Grant MacDougall of the RCMP, whom Mr. Fox did not know. I pause to make three important observations. The RCMP did not become involved, that is to say, there was no state or Crown involvement, in the issue of the perceived breach of copyright on the part of the respondents until after October 31, 1985. The second point is related to the first. The RCMP was not a party to, and there is no evidence that they were aware of, the licence given to Mrs. Hartung by CRIA on condition that she continue to assist CRIA and the RCMP in their investigations. Finally, Constable MacDougall undertook his investigation with no prior connection or association with either CRIA or Mr. Fox. It was Constable MacDougall who became the informant in these prosecutions.

The first overt act by state authorities was the execution by the RCMP of search warrants obtained on January 15, 1986, for Mr. Roch's residence and business premises. His sound equipment, records, tapes and business documents were seized. The seizure had the effect of putting the respondents out of business and, it appears, Mr. Roch has not since worked as a disc jockey. It is this effect that is the object of Mr. Roch's strongest complaint and criticism in these proceedings, a complaint and criticism, in the light of all the circumstances I have described, that one can easily understand and indeed sympathize with. Through his solicitor, he had sought to comply with the law by obtaining a licence to reproduce copyright material. However, it is fair to point out that it is the prosecution, and not the search and seizure, that the respondents' counsel had sought to stay. Moreover, the search and seizure took place pursuant to judicial authorization, which has not been challenged, and no steps were taken, as they could have been, under the provisions of the Criminal Code, R.S.C. 1970, c. C-34, to regain possession of the seized articles.

On April 14 and 25, 1986, two informations containing 42 counts of contravening s. 25(1)(b) and

(c) of the Copyright Act were laid against the respondents. On December 17, 1986, the respondents appeared before Judge J.L. Menzies of the Provincial Court (Criminal Division), in London, at which time counsel for the respondents, before plea, moved for an order quashing the informations or staying the prosecutions. The grounds relied on were (1) that the conduct of the Crown constituted an abuse of process against the respondents, (2) that the respondents' rights to security of the person guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms had been violated, and (3) that the respondents' right to the equal protection of the law under s. 15 of the Charter had been infringed by the prosecutions. Judge Menzies heard viva voce evidence on the motion. Counsel for the respondents had subpoenaed Constable MacDougall to testify at the hearing but, when it was pointed out that the Crown had commenced an application in the Supreme Court of Ontario for an order quashing the subpoena, Judge Menzies refused to require Constable MacDougall, who was present in the courtroom, to testify. He offered to adjourn the hearing until the disposition of the application in the Supreme Court. The respondents, however, chose to proceed with the hearing without Constable MacDougall's evidence. Judge Menzies delivered judgment on March 25, 1987, staying all the charges in the informations on the ground of abuse of process at common law and, in addition, under s. 24(1) of the Charter on the basis of a violation of the respondents' rights under s. 7 of the Charter. He found it unnecessary to deal with the equality argument under s. 15(1) of the Charter.

In the course of his reasons for judgment on the motion, Judge Menzies arrived at 12 enumerated conclusions [pp. 193-94 C.P.R.] which I reproduce:

1. The charges against Roch are the first instances of a prosecution of a disc jockey under the Act.
2. Prior to the fall of 1985 no concern was voiced by record companies to disc jockeys about their use of compilation tapes.
3. In the fall of 1985, when Roch learned of a potential problem in using compilation tapes he made reasonable efforts to seek such authority as might be required.
4. Roch was misled by CRIA ... into believing the licence he sought was not available while at the same time he was marked for prosecution.
5. Notwithstanding the newness of the issue Roch was given no warning about the prosecution and was given no opportunity to have his service conform to the wishes of the recording industry.
6. The actions of a disgruntled former employee (Hartung) set in motion a chain of events which resulted in a police search and seizure which had disastrous economic consequences on Roch.
7. The purpose of the police raid of January 15, 1986 was not to gather evidence but to put Roch out of business thereby making an example of him.
8. In the circumstances the R.C.M.P. are clothed with the knowledge and intent of the source of their prosecutorial information namely, Patrick Fox.
9. Fox saw an easy opportunity to make an example of one party in the industry for purposes of selling his regulation views to the industry at large.

10. In view of the serious economic consequences visited upon Roch prior to charge, trial and judgment, I find he was unfairly singled out for prosecution among many others whose conduct was the same.
11. A test case could have proceeded against Roch by simply swearing the required informations and thereafter issuing him appearance notices and/or summonses which procedure would have permitted him to continue to earn his livelihood until the new legal issue involved had been resolved.
12. Having in mind the summary nature of the offence charged the police search and seizure was an abusive measure in the pre-trial prosecutorial procedure of the Crown against Roch.

The Crown's appeal from the order of Judge Menzies to the Supreme Court of Ontario was dismissed on July 28, 1987 by Mr. Justice Hollingworth who also found it unnecessary to consider the s. 15 argument. It is from the order of Hollingworth J. that the Crown now seeks leave to appeal.

Before turning to a consideration of the legal issues, a comment on the conclusions of Judge Menzies is in order. I accept without qualification his findings of credibility and, in particular, his findings of credibility against Mr. Fox, in support of which there is ample evidence, and of the unfairness of the treatment of Mr. Roch, by Mr. Fox and CRIA. I consider myself to be in as good a position as Judge Menzies was in with respect to inferences that may be drawn from his findings of fact, and reserve the right to differ from him where differences are justified by my review of the evidence. As will appear later, I particularly disagree with the conclusions numbered 7, 8, 10 and 12. I should add that, given the absence of any testimony from an RCMP officer or any other evidence on the subject, and however open to criticism the conduct, purpose and motive of Mr. Fox and his employer are, I can find no justification for the conclusion about the search and seizure by the police on January 15, 1986, or for imputing the knowledge and intent of Mr. Fox to the RCMP. This comment of mine is perhaps all that need be said in the determination of this appeal but, in deference to the thoroughness of the submissions of counsel, I shall briefly consider the three issues of law argued by counsel.

As I have pointed out, one of the bases on which Judge Menzies ordered that the proceedings be stayed was that they amounted to an abuse of process on the part of the Crown. As I shall point out later, it is not yet entirely clear whether the law relating to abuse of process is now subsumed under, or comprehended by, s. 7 of the Charter. For reasons that will be apparent, that point need not be decided in this case. For present purposes, I shall assume that abuse of process remains a separate concept, a concept which, despite its recent history, is now firmly established in Canada. The earlier cases need not be canvassed. My starting point is *R. v. Young* (1984), 46 O.R. (2d) 520, 10 C.R.R. 307, 13 C.C.C. (3d) 1, 40 C.R. (3d) 289, 3 O.A.C. 254 (C.A.), at p. 551 O.R., p. 340 C.R.R., p. 31 C.C.C., where Mr. Justice Dubin came to the following conclusion:

I am satisfied on the basis of the authorities ... that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would

violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

This language was expressly adopted as an accurate statement of the law by Chief Justice Dickson, speaking for a unanimous Supreme Court of Canada, in *R. v. Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127, at pp. 136-37 S.C.R., p. 14 C.C.C., where he emphasized Dubin J.A.'s caveat that the power to stay can be exercised only in the "clearest of cases". In the more recent case of *R. v. Keyowski*, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97, at p. 659 S.C.R., pp. 271-72 C.R.R., pp. 482-83 C.C.C., the same court, through Wilson J., added a further dimension to the doctrine by saying that prosecutorial conduct and improper motivation were two of the factors to be taken into account in considering whether, in a particular case, the Crown's exercise of discretion amounted to an abuse of process. I add that this court, in *R. v. D. (T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168, at p. 447 C.C.C., has held that the onus of establishing that an abuse of process has occurred is on the respondent who must establish, on a balance of probabilities, that the Crown has acted in an oppressive or vexatious manner or that the prosecution is offensive to the principles of fundamental justice and fair play.

The authorities I have referred to make it clear that, before there can be said to be an abuse of process, the respondents must show on a balance of probabilities that the cause of the unfairness that underlies the concept is executive action or conduct of the executive. No case can fall within the category of the "clearest of cases" unless it can be fairly said that the cause of the apparent unfairness complained of can be laid at the doorstep of the executive, that is to say, can be attributed to either the police or the Crown or both. It must be remembered, as this court has recently had occasion to point out, that, in weighing the competing interests involved in the doctrine of abuse of process, the public has an interest in seeing that criminal charges are determined on their merits after a fair trial: *R. v. Belair* (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179, 26 O.A.C. 340 (C.A.) at p. 339 C.C.C. See also *R. v. Conway, Ont. C.A., Cory, Grange and McKinlay JJ.A.*, March 29, 1988 [now reported 26 O.A.C. 389 (C.A.)], *affd* [1989] 1 S.C.R. 1659, 40 C.R.R. 1, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209, 96 N.R. 241, 34 O.A.C. 165].

This is not one of the "clearest of cases" contemplated by the authorities. The respondents point to the motives of Mr. Fox and Mrs. Hartung and the hardship resulting from the search and seizure in January 1986, as being circumstances so oppressive or vexatious as to justify the objective conclusion that the respondents were the victims of a serious injustice. I use the adjective "objective" because I have no doubt that that conclusion is one that Mr. Roch has drawn. Although I can understand his view of the matter, I cannot accept the submission. The search and seizure were duly authorized and not impugned and no attempt was made to minimize the resulting hardship by invoking the remedy provided by s. 446(8) [rep. & sub. 1985, c. 19, s. 74] of the Criminal Code. The decision not to pursue the attempt to have Constable MacDougall testify led to the absence of

any evidence of police implication in the perceived unfairness. Nor does the fact that, despite the widespread practice of making compilation tapes, only the respondents were charged, assist them. There is no suggestion in the evidence that the police or the Crown had, on any other occasion, reasonable grounds for prosecuting, and it cannot be the law that a first prosecution for an offence under any given statute is, in itself, unfair and oppressive.

It is always with extreme caution and even reluctance that an appellate court interferes with a conclusion that is largely one of fact, arrived at by a judge of first instance who has had the inestimable advantage of observing the witnesses. However, there is a duty to do so when the former is in as good a position as the latter, the conclusion is the proper inference to be drawn from the facts as found and the facts as found do not support the inference drawn. It is in this frame of mind that I hold that it was wrong to conclude that the purpose of the search and seizure of January 15, 1986 was not to gather evidence but to put Mr. Roch out of business to make an example of him and that the police were clothed with the knowledge and intent of Mr. Fox, the source of their prosecutorial information.

It is unnecessary to analyze the reported cases to which we were referred on this branch of the argument because they were merely illustrations of either police or prosecution involvement in unfairness or non-involvement in unfairness. They reflect the truism that each case is to be decided according to its facts. Two observations should be made about the cases, however, because of Mr. Kaiser's alternative submissions. The first is to recognize the existence of authority for the submission that an accused person is not required to show police or Crown responsibility for the conduct said to be abusive if negligence on their part can be shown. If, it is argued, it can be demonstrated that they should have known of the impugned misconduct or motive, the police or Crown ought to be precluded from denying that they were affected by it. It is unnecessary to decide whether this sort of "negligence" has any role to play in criminal procedure. The short answer to the submissions is that there is simply no basis in the evidence for inferring that the prosecuting authorities ought to have known anything of the background I have described earlier.

The second point that should be made is with reference to the line of cases relied on by the respondents that hold that it is improper to use the criminal law to enforce a civil claim. An example of this line of cases is *R. v. Janvier* (1985), 41 Sask. R. 90, [1985] 5 W.W.R. 59, in which at p. 64 W.W.R., Gerein J. of the Court of Queen's Bench of Saskatchewan held that to use a criminal prosecution to enforce the payment of a debt amounted to an abuse of process. The analogy to these cases is faulty. The purpose of the prosecutions is not to require Mr. Roch to do anything. Indeed, he is quite prepared to pay whatever is necessary to obtain a licence to do what, in the absence of a licence, may be a breach of the law. The purpose of the prosecutions is to punish what is alleged to be a breach of copyright. Whether a breach did occur is to be determined according to the merits of the prosecutions.

I conclude that no stay of the prosecution should have been imposed on the basis of the doctrine of abuse of process and I now turn to a brief discussion of the submission that the stay was justified

because the respondents were deprived of the rights guaranteed by s. 7 of the Charter. Section 7 reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

As I have said, the relationship between abuse of process and the provisions of s. 7 of the Charter has not yet been determined by final authority. As Wilson J. pointed out in *R. v. Keyowski*, supra, at p. 660 S.C.R., p. 272 C.R.R., p. 483 C.C.C., the Saskatchewan Court of Appeal in that case accepted the parties' submission that "the common law doctrine of abuse of process was now subsumed in s. 7", although the Supreme Court of Canada thought that the issue could be left for another day. The view of this court, as expressed by Martin J.A. in *R. v. D. (T.C.)*, supra, at p. 450 C.C.C., is that the "doctrine of abuse of process and the constitutional requirement of 'fundamental justice' under s. 7 of the Charter are ... closely related". It is safe to say, at least for the time being, that although the two concepts are closely related, they are independent of each other. There are cases, of which this would be one if, for example, the police actions were tainted by the motives of CRIA, in which the doctrine of abuse of process might be invoked, despite the fact that s. 7 of the Charter had no application. This is particularly true of cases in which the maximum jeopardy the accused faced was a conviction for a summary conviction offence punishable at most by a modest fine. Under these circumstances, it would be difficult to say that the result could be a deprivation of the right to life, liberty or the security of the person. Nevertheless, it is conceivable that the proceedings could amount to an abuse of process.

In any event, for the reasons already advanced, I believe that no violation of the provisions of s. 7 of the Charter occurred in this case. The only right of the three independent rights protected by s. 7 that has any possible relevance to this discussion is that of security of the person. Even the broad interpretation to be given to "security of the person", as required by the decisions of the Supreme Court of Canada in *R. v. Mills*, [1986] 1 S.C.R. 863, 58 O.R. (2d) 543 (note), 21 C.R.R. 76, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 29 D.L.R. (4th) 161, 67 N.R. 241, 16 O.A.C. 81, at pp. 919-21 S.C.R., pp. 143-44 C.R.R., pp. 538-39 C.C.C., and *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 (note), 31 C.R.R. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 44 D.L.R. (4th) 385, 82 N.R. 1, 26 O.A.C. 1, at pp. 55-56 S.C.R., pp. 20-21 C.R.R., p. 465 C.C.C., would not encompass the circumstances of this case. No stigma can attach to a conviction for such a breach of copyright as that alleged against the respondents. Moreover, the hardship suffered, namely, the loss of livelihood, financial loss and psychological stress, was a consequence, not of the prosecution, but rather of the search and seizure which were not impugned. Moreover, if it can be said that the inability of the respondents to carry on their business because of their inability to obtain a licence to produce and use compilation tapes is a consequence of state action, that state action is simply law of general application arising from legislation that is not constitutionally impeached. Moreover, the economic right to carry on a business or earn a livelihood is not a right included in the right of security of the person. See *Home Orderly Services Ltd. v. Manitoba* (1987), 43 D.L.R. (4th) 300, 49 Man. R. (2d) 246 (C.A.), leave to appeal to S.C.C. refused (1988), 54 Man. R. (2d) 160n, 87 N.R.

94n; Aluminum Co. of Canada Ltd. v. Ontario (1986), 55 O.R. (2d) 522, 25 C.R.R. 50, 29 D.L.R. (4th) 583, 16 O.A.C. 14 (Div. Ct.); and Smith, Kline and French Laboratories Ltd. v. Canada (Attorney General), [1986] 1 F.C. 274, 19 C.R.R. 233, 7 C.P.R. (3d) 145, 24 D.L.R. (4th) 321, 12 F.T.R. 81 (T.D.), additional reasons at (1986), 8 C.P.R. (3d) 422 (T.D.), affd [1987] 2 F.C. 359, 27 C.R.R. 286, 11 C.I.P.R. 181, 12 C.P.R. (3d) 385, 34 D.L.R. (4th) 584, 78 N.R. 30 (C.A.), leave to appeal to S.C.C. refused (1987), 27 C.R.R. 286n, 79 N.R. 320n.

Section 7 of the Charter is of no help to the respondents.

Section 15 of the Charter, the "equality rights" provision, which neither judge found it necessary to deal with because of the grounds on which they thought the prosecution should be stayed, is equally unavailable to the respondents. Section 15 is an inappropriate bar to a first prosecution under a statute unless it can be shown that the accused has been singled out as a target despite the existence of reasonable grounds for prosecuting others as well. Even then the interference with the exercise of prosecutorial discretion must be exercised with caution. It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time. In any event, the absence of any evidence that, however prevalent the offensive practice may be, the police had reasonable grounds for prosecuting some other alleged offender, makes it impossible to say that the respondents were selected for prosecution on the basis of grounds relating to personal characteristics.

Leave to appeal is granted, the appeal is allowed, and the order of Hollingworth J. is set aside. In its place, an order is substituted allowing the appeal from Judge Menzies, setting aside the stay, and remitting the case to the Provincial Court (Criminal Division) for trial on the merits.

Although I have concluded that a stay of proceedings is not justified in the circumstances, I cannot leave this appeal without a comment which I admit is precatory in nature. Mr. Hubbard made it clear to us that the Crown's concern in this appeal was not the interpretation of the Copyright Act or the merits of the prosecutions under it but only the dampening effect on prosecutorial discretion, and the precedential value of the decision appealed from. I have described the circumstances in the background of the legal issue in this appeal that, understandably, will leave the respondents with a sense of unfairness. Now that the Crown's interest has been vindicated by this decision I ask whether it is necessary to the interests of justice to proceed with these prosecutions.

BLAIR J.A. (dissenting):-- This appeal is concerned with the interaction between two important legal discretions. One is prosecutorial discretion which accords to the police and law officers of the Crown freedom and independence in the launching and conduct of prosecutions. The other is the judicial discretion to stay proceedings which have resulted in an abuse of process.

I have had the advantage of reading the judgment of my brother Krever. I agree with him that there was no breach of the rights of the respondents under ss. 7 and 15 of the Canadian Charter of Rights and Freedoms; but, with respect, I disagree with his conclusion that no abuse of process

occurred. I am in substantial agreement with my brother's narration of the facts and will refer to them only to the extent necessary to an understanding of my conclusions. For convenience I will refer to the personal and corporate respondents individually and collectively as Roch.

The facts

The case involves a flourishing branch of the entertainment industry run by disc jockeys. They provide and play compilation tapes of recorded music suitable for various social events. The learned motions judge found [reported (1987), 14 C.P.R. (3d) 181 (Ont. Prov. Ct. (Crim. Div.))] that the practice was carried on openly by disc jockeys for many years, with the knowledge of the record companies and their trade associations, Canadian Recording Industry Association (CRIA) and the Canadian Music Video Licensing Agency (VLA). He said at p. 7 [of the reasons; p. 186-87 C.P.R.]:

The major record companies, over the years, and certainly by the fall of 1985, were well aware of the practice by disc jockeys of making and using compilation tapes.

In reaching this conclusion, Judge Menzies scathingly repudiated the evidence to the contrary given by Fox, CRIA's investigator [pp. 190-91 C.P.R.]:

I specifically reject Fox's evidence when he says that it was not until after January 15, 1986, the date of the R.C.M.P. search and seizure that he began to speak to a number of disc jockeys about the use of the compilation tapes. I am satisfied Fox well knew, even long before the meeting with Hartung of October 25, 1985, that there was widespread use in the industry of compilation tapes. As early as April 1984 Fox was, I find, aware that such practice existed in the industry. Specifically, where the evidence of Fox conflicts, on matters material to this application, with the testimony of Hampson, Robertson, MacMillan, Heindl, Chinneck and/or Roch I prefer the evidence of such witnesses to the testimony of Patrick Fox.

Chinneck was Roch's solicitor and the other witnesses were Canadian disc jockeys, some of whom were officers of the Canadian Disc Jockey Association.

It was not until the fall of 1985 that Canadian disc jockeys became aware that the making and use of compilation tapes might result in a copyright problem. This awareness arose from the efforts of CRIA and VLA to protect their members' copyrights in videotapes and the impression created by Fox, as one witness testified, that the associations also intended to license the use of audio recordings. Judge Menzies found that the meeting with Mrs. Hartung of October 25, 1985, to which my brother Krever referred, provided Fox with the opportunity to advance these licensing proposals. He stated [p. 191 C.P.R.]:

After the meeting of October 25, 1985 Fox saw a ready-made opportunity to press for a test prosecution of Roch under the Act, a prosecution which would require little or no investigative effort on his behalf. Fox held strong views on the criminal liability of disc

jockeys for using compilation tapes. Undoubtedly, a test prosecution would help sell his views to CRIA ... and would assist him greatly in convincing disc jockeys that audio licensing was required if they were to continue to use compilation tapes. Video licensing had been in effect for some years.

On October 31, 1985, Fox made a formal complaint to the Royal Canadian Mounted Police (RCMP) detachment at London. The police proceeded on the basis of the information supplied by Fox. The "summary of the facts" provided to Roch by RCMP Constable MacDougall confirmed this by stating that, on the basis of this information, the search and seizure had been ordered. The summary also stated that Fox supplied certificates of registration of copyright for the musical works mentioned in the information. There is no question that Fox was "the source of ... prosecutorial information of the police" as Judge Menzies found.

Reliance by the police on Fox enabled him to deceive them in two important respects. He said in evidence that he thought he had sent Constable MacDougall a copy of the memorandum given to Hartung permitting her to use compilation tapes "on the understanding that she continues to assist CRIA and the Royal Canadian Mounted Police investigations". Fox was disbelieved by the trial judge. I agree with my brother Krever that there was no evidence that the police were aware of the licence to use compilation tapes given by Fox to Hartung and the immunity promised to her for her co-operation in the prosecution of Roch.

The second and more serious deception occurred when Fox misled Constable MacDougall about Roch's application to CRIA for a licence to make compilation tapes. Following the seizure of Roch's files, Constable MacDougall discovered the letter, referred to by my brother Krever, from Roch's solicitor dated December 17, 1985 to the president of CRIA, in which he applied on Roch's behalf for a licence to make compilation tapes. The solicitor testified that the letter was written after several telephone conversations with the president, in which he had been led to believe that the CRIA was receiving applications for a licence. The Association's reply of January 2, 1986 was that "we do not envisage a licence being available for disc jockey services in the immediate future" although before that date a licence had been given to Hartung. Constable MacDougall asked Fox for an explanation of this correspondence and in his evidence Fox denied knowledge of the correspondence and described what took place as follows:

I was notified by the officer in charge of the investigation immediately following execution of search warrants on or about the 15th of January, the officer brought to my attention that they had come across a copy of this correspondence and that they were very puzzled by it and wanted to know why I had not brought the existence of this correspondence to their attention. In fact, I was not aware of the correspondence having come to our offices and it was only after searching through many files that we found the letter from Mr. Chinneck (the respondent's solicitor) and it was found in the pending applications file for foreground, background music licenses.

Judge Menzies entirely disbelieved this evidence and stated [p. 192 C.P.R.]:

I do not accept Fox's testimony that he was not aware of the letter of December 17, 1985 from Chinneck to CRIA until after the police raid of January 15, 1986. I have considerable doubt about his testimony that he was not aware of the substance of Chinneck's telephone conversation of December 17, 1985 with Robertson of CRIA.

The deception practised on the police was paralleled by that practised on Roch. There is ample evidence to support the trial judge's conclusion that [p. 193 C.P.R.]:

Roch was misled by CRIA ... into believing the licence he sought was not available while at the same time he was marked for prosecution.

The police were also unaware of the plan to license compilation tapes which Fox disclosed to the annual meeting of the Canadian Disc Jockeys Association when he invited applications for licences. By July of 1986, licences were being issued. It seems reasonable to question whether the police would have proceeded against Roch in such a heavy-handed manner if Fox had truthfully disclosed these facts to them.

The law

In these proceedings it can fairly be said that the prosecution used artillery to kill a fly. The Crown did not dispute the conclusion of the experienced motions court judge that [pp. 193-94 C.P.R.]:

A test case could have proceeded against Roch by simply swearing the required informations and thereafter issuing him appearance notices and/or summonses which procedure would have permitted him to continue to earn his livelihood until the new legal issue involved had been resolved.

The methods employed by the police were draconian. The police seized not only Roch's compilation tapes but also the original recordings from which the tapes were made, his equipment and his business records. This seizure put Roch out of business and ruined him financially. The result was, as my brother Krever has said, unfair to Roch. It now must be determined whether these proceedings, in addition to being unfair, constituted an abuse of process.

The Crown maintained that no abuse of process had occurred and that the decisions appealed from constituted an unwarranted interference with prosecutorial discretion. This discretion has been described as the greatest of all discretions by Professor Kenneth C. Davis in his book *Discretionary Justice: A Preliminary Inquiry* (Louisiana: 1969). He said at p. 188:

Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out

above all others is the power to prosecute or not to prosecute.

Traditionally, the courts have been loath to interfere with prosecutorial discretion: see, for example, *R. v. Smythe*, [1971] S.C.R. 680, 3 C.C.C. (2d) 366, 16 C.R.N.S. 147, 19 D.L.R. (3d) 480, 71 D.T.C. 5252. Prosecutorial discretion, however is not unlimited and is subject to control by the courts exercising their power to stay a proceeding which constitutes an abuse of process. The existence of this power was established beyond doubt in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254, [1964] 2 All E.R. 401 (H.L.), where the Solicitor General argued that the correction of abuse in a prosecution was "a matter for the Crown". Lord Devlin rejected this argument and asserted that the paramountcy of the courts in controlling abuse of process was of "great constitutional importance". He said at p. 1354 A.C.:

The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.

(Emphasis added)

See also: *Director of Public Prosecutions v. Humphrys*, [1977] A.C. 1, [1976] 2 All E.R. 497, 63 Cr. App. Rep. 95 (H.L.), per Lord Salmon at pp. 527-28 All E.R. and Lord Edmund-Davies at pp. 533-35 All E.R.

The Canadian abuse of process doctrine stemmed from *Connelly* and *Humphrys* but it was some time before it took root in Canada. The doctrine was rejected by the Supreme Court of Canada in *R. v. Osborn*, [1971] S.C.R. 184, 1 C.C.C. (2d) 482, 12 C.R.N.S. 1, 15 D.L.R. (3d) 85, *R. v. Rourke*, [1978] 1 S.C.R. 1021, 35 C.C.C. (2d) 129, 38 C.R.N.S. 268, 76 D.L.R. (3d) 193, [1977] 5 W.W.R. 487, and *Amato v. R.*, [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31, 29 C.R. (3d) 1, 140 D.L.R. (3d) 405, 42 N.R. 487, [1983] 1 W.W.R. 1, although strong dissents were written in the last two cases. The first Canadian case in which the doctrine was fully recognized was this court's decision in *R. v. Young* (1984), 46 O.R. (2d) 520, 10 C.R.R. 307, 13 C.C.C. (3d) 1, 40 C.R. (3d) 289, 3 O.A.C. 254 (C.A.), where Dubin J.A. stated at p. 551 O.R., p. 340 C.R.R., p. 31 C.C.C.:

I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a

court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

This decision was approved by the Supreme Court of Canada in *R. v. Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127, where Chief Justice Dickson specifically adopted the passages quoted above from Lord Devlin's judgment in *Connelly* and from Mr. Justice Dubin's judgment in *Young* and said at p. 136 S.C.R., p. 14 C.C.C.:

It seems to me desirable and timely to end the uncertainty which surrounds the availability of a stay of proceedings to remedy abuse of process. Clearly, there is a need for this Court to clarify its position on such a fundamental and wide-reaching doctrine.

It can now be said that abuse of process has emerged in Canada as a comprehensive, coherent and expansive doctrine enabling courts to stay proceedings where such abuse has occurred. The essential features of the doctrine can be stated in summary form.

1. Whether an abuse of process has occurred depends upon an objective judicial assessment of the total effect or result of the proceedings. It is not necessary to establish, in addition, any impropriety or improper motive on the part of the police or the prosecutor. In *R. v. Keyowski*, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97, Madame Justice Wilson said at p. 659 S.C.R., p. 271 C.R.R.:

To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. ... Prosecutorial conduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion ... amounts to an abuse of process.

2. It is not necessary that the Crown, represented by the police or the prosecutor, be the "abuser". It is true that the categories of abuse of process deduced by Laskin C.J.C. from his survey of decided cases in *Rourke* at pp. 1028-33 S.C.R., pp. 135-37 C.C.C., in the main consisted of abuses by the executive. These included: charges withdrawn and re-laid, excessive and unexplained delay in bringing the accused to trial after the charge and accused denied ability to make full answer and defence. In addition, he described another category of abuse of process at p. 1031 S.C.R., p. 137 C.C.C.:

One such situation, recognized long ago in case law, arises where use is sought to be made of the criminal courts to collect a debt or to realize on some civil claim ...

In such a situation, the Crown is unaware of the improper motive of the complainant laying the criminal charge, and is not a party to the complainant's plan to use the criminal law to serve his private purpose. The courts have uniformly rejected the Crown argument that its lack of direct

involvement in any misconduct can defeat a claim of abuse of process: see *R. v. Janvier* (1985), 41 Sask. R. 90, [1985] 5 W.W.R. 59 (Q.B.), at pp. 64-65 W.W.R. and *R. v. Inuvik Coastal Airways Ltd.*, [1984] N.W.T.R. 92 (S.C.), at pp. 122-23. The decisions of this court in *R. v. Leroux* (1928), 50 C.C.C. 52, [1928] 3 D.L.R. 688, 62 O.L.R. 336, and *R. v. Leclair* (1956), 115 C.C.C. 297, 23 C.R. 216, [1956] O.W.N. 336, exemplify the principle affirmed by Laskin C.J.C. in *Rourke*, supra. In *Leroux*, Grant J.A. stated at p. 341 O.L.R.:

... the complainant, by threatening prosecution, endeavoured to obtain payment of a debt. What was done in this case amounted to an abuse of the process of the Court and should not be tolerated.

R. v. Inuvik Coastal Airways Ltd., supra, is a recent example of the rule that it is an abuse of process to use the criminal law to enforce the terms of a contract.

3. The categories of abuse of process are not closed, as Laskin C.J.C. recognized in *Rourke* at p. 1034 S.C.R., p. 139 C.C.C.:

... the decisions ... do indicate by their very diversity the utility of a general principle of abuse of process which Judges should be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons.

The expansive nature of the doctrine, which must be applied on a case by case basis, is noted by Alan W. Mewett and Morris Manning in *Criminal Law*, 2nd ed. (Toronto: Butterworths, 1985) where, after reviewing a number of decisions, the authors state at pp. 422-23:

These cases merely illustrate the types of situations that may raise the issue of abuse of process. As Estey J. suggested in *Amato* they are not, and cannot be, exhaustive. It is for the courts to determine, having regard to all the circumstances of the case, whether in each particular case, there has been an abuse and whether it ought to stay proceedings on that ground.

A recent example of the openness of the doctrine was its extension by the Supreme Court of Canada in *R. v. Mack*, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dube JJ., December 15, 1988 [now reported [1988] 2 S.C.R. 903, 37 C.R.R. 277, 44 C.C.C. (3d) 513, 67 C.R. (3d) 1, 90 N.R. 173, [1989] 1 W.W.R. 577] to include entrapment as an abuse of process rather than a substantive criminal defence as Laskin C.J.C. had forecast in his dissenting judgment in *Rourke*, supra. Recently, the Supreme Court of Canada recognized in *Mack* that the doctrine is not limited to established categories by extending it to include entrapment as an abuse of process rather than a substantive criminal defence.

4. The doctrine of abuse of process applies only in the "clearest of cases". The court must take into account the total impact of the process against the party complaining of abuse. *Wilson J.* in

Keyowski, *supra*, held that whether the abuse complained of fell into the "clearest of cases" category must be determined on a case by case basis.

5. The accused has the onus of establishing on a balance of probabilities that an abuse of process has occurred. In *R. v. D. (T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.) Martin J.A. said at p. 182 C.R.:

The onus of establishing that there has been an abuse of process is on the respondent. He must establish on a balance of probabilities that the Crown, by seeking to proceed on a second trial, is acting in an oppressive or vexatious manner or that the prosecution is offensive to the principles of fundamental justice and fair play.

Was there an abuse of process in this case?

Whether there was an abuse of process must be determined by a broad assessment of all facts relevant to the prosecution. It is not an inquiry which should be approached in a narrow, legalistic and technical manner. In this case, it must include not only an assessment of the actions of the police from the date of the complaint by Fox, October 31, 1985, but also the motives and acts of Fox leading up to the laying of the complaint and pursuing it thereafter.

The search and seizure conducted by the police in January 1986 is an integral part of the "process" in issue in this appeal and cannot be disregarded and segregated from the prosecution initiated three months later. It is no answer to say that Roch could have demanded the return of his property by invoking s. 446(8) [rep. & sub. 1985, c. 19, s. 74] of the Criminal Code, R.S.C. 1970, c. C-34. The damage was done by the seizing and, in any event, the results of any such application were problematic at best, particularly when it is realized that the subsection, which was enacted by S.C. 1985, c. 19, s. 74, had only been proclaimed in force in December 1985, a month before the seizure. Roch acted on the advice of his solicitor in co-operating with the police and told them where his compilation tapes could be located.

I agree with my brother Krever that there is no evidence of prosecutorial misconduct, police negligence, or lack of good faith on the part of Constable MacDougall. While, in my opinion, Roch's position in this appeal is not impaired because of Constable MacDougall's non-appearance as a witness, the position of the Crown may have been. The Crown may have lost an opportunity to answer some troubling questions about the conduct of the police. Why was a search and seizure deemed necessary to support a simple charge of breach of copyright? Why did the police not seek an explanation of the correspondence about Roch's application for a licence from Roch or his solicitor, both of whom were co-operating with them? Why did the police delay the laying of the charges until almost three months after the seizure, the maximum period permitted for retention of the seized property under s. 446(2) [rep. & sub. 1985, c. 19, s. 74]? It is not the role of this court, with the wisdom of hindsight, to say what the police should or should not have done in the course of their investigation. Our concern is only with the results of the acts or omissions of Fox and the police. Our task is to determine whether those actions, in their totality, amounted to an abuse of

process.

The critical question in this case is whether there was an abuse of process because the criminal law was invoked in order to assert purely private interests. Copyright owners can fully protect their rights in civil proceedings. They can claim damages for infringement of copyright; they can seek injunctive relief to prevent the continuance of such infringement; and they can request the delivery up of infringing copies. After years of inaction in the face of the well known practice of disc jockeys in preparing and using compilation tapes, CRIA might have been expected to announce its intention to establish a licensing system and enforce the copyrights of its members in civil proceedings. This course was not followed in Roch's case although it was for all the other Canadian disc jockeys. Instead Fox, acting for himself and CRIA, decided for two reasons to initiate the criminal prosecution of Roch.

The first reason was that Fox had to persuade the copyright owners of the value and feasibility of the licensing system which he wished to establish. This is stated in Judge Menzie's ninth conclusion [p. 193 C.P.R.] which reads:

9. Fox saw an easy opportunity to make an example of one party in the industry for purposes of selling his regulation views to the industry at large.

No objection was taken to this finding. Fox, indeed, admitted to Judge Menzies that this was his purpose in the following exchange:

THE COURT: Q. And you would agree, Mr. Fox, with me, would you not, that what you're trying to do here is convince the industry to license themselves ... isn't that what you're trying to do?

A. Yes.

Fox's purpose was accomplished by the seizure of Roch's tapes, records and equipment which completely terminated his business. Shortly thereafter, CRIA approved the new licensing system which Fox announced to the Canadian Disc Jockey Association meeting in March 1986.

The second and more sinister reason for the prosecution of Roch was described by Judge Menzies in his seventh conclusion [p. 193 C.P.R.]:

7. The purpose of the police raid of January 15, 1986 was not to gather evidence but to put Roch out of business thereby making an example of him.

The Crown properly objected to the attribution of this purpose to the police but, in the view I take of this case, this objection does not impair the decision of Judge Menzies. That it was the purpose of Fox is beyond question. There is no requirement that the motives of Fox or CRIA must be imputed

to the police because the motives of the police are irrelevant, as I explained above, where the criminal law is invoked to serve private interests. Fox's purpose was to intimidate Canadian disc jockeys by the example made of Roch and, as a result, to enforce compliance with the planned licensing system. He boasted that prosecution by the RCMP would be an inexpensive method of enforcement.

All of this was baldly stated by Fox in a threatening speech he made to the Canadian Disc Jockey Association convention in March of 1986 on which he was questioned by Roch's counsel:

Q. Did you also state "I will take no pleasure in engaging in any enforcement action that involves any of you people here. I will certainly get a great deal of pleasure in dealing with you as a group and hopefully coming to some arrangement where we can all be satisfied. I invite each of you to work with me and making sure that we all deal with one another honestly, openly and fairly"?

A. Yes, I did.

Q. And did you also say "my style is to politely but forcibly introduce myself first by way of this letter, but if that doesn't solve the problem, then enforcement is the next logical step"?

A. Yes, I did.

Q. Did you also say "I have another unlimited resource that I suppose everyone has at their disposal and that is the law enforcement agencies coast to coast. Whether it be the R.C.M.P., regional police, local police. In most cases I try to avoid a great deal of travel. I find that my liaison with law enforcement agencies across Canada is quite sufficient so that I can furnish them with my formal complaint and they will act on it thereafter"?

A. Yes, I did.

Q. You also said "I prefer to think that when someone comes to our attention and is delivered by registered mail a cease and desist order, that they will behave pursuant to the ceasing of this order and discontinue their privacy activities and find a legal way to continue business. That is the way all of us want to be treated. We don't want somebody waltzing in wearing hobnail boots and giving us a kick in the ass". Is that

what you said?

A. Yes, I did.

(Emphasis added)

The evidence shows that the members of the Canadian Disc Jockey Association attending that meeting were well aware that Roch had been put out of business and economically ruined by the prosecution initiated by Fox. The threat to members of the Canadian Disc Jockey Association was obvious: either comply with the licensing scheme or risk the "hobnail boots" treatment given to Roch.

In my opinion, the reported decisions which deal with attempts to use the criminal law to collect debts or enforce contracts exemplify the broader principle that it is an abuse of process to invoke the criminal law in order to advance private rights. Neither law nor logic compel the restriction of the doctrine of abuse of process to the narrow categories of debt and contract. It can be involved in this and other cases where the criminal law is manipulated for private advantage. In this case, Fox devised and executed a cunning and almost Machiavellian plan to promote his concept of an audio licensing system through the prosecution of Roch. Roch was seized on as the victim. He presented Fox and CRIA with a convenient opportunity to ensure compliance with the proposed licensing system by intimidation. The plan was accomplished by the deceit and duplicity of Fox and CRIA. While Roch negotiated in good faith with CRIA for a licence, he was marked by Fox for prosecution. The police were deliberately misled by Fox who did not advise them of these negotiations. In the result, Roch's business was destroyed and his financial ruin provided the intimidating example Fox and CRIA desired to enforce compliance with the new licensing system.

Conclusion

In dealing with the exercise of a judicial discretion, by a judge of first instance, an appellate court is not at liberty to substitute its own opinion for that of the judge. It may only intervene if it is persuaded that the discretion has not been judicially exercised. In particular, the appellate court must find that the judge of first instance has proceeded on a wrong principle or that his conclusions are not supported by the evidence.

Judge Menzies carefully followed *R. v. Young*, supra, and *R. v. Jewitt*, supra, and correctly stated the legal principles governing his decision. The facts found by Judge Menzies also fully justified his conclusion that an abuse of process had occurred. An appellate court cannot interfere with the findings of fact of a judge of first instance unless there has been a "palpable and overriding error" in the assessment of the facts: see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, and *Lewis v. Todd*, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257, 34 N.R. 1. There was no such palpable or overriding error in this case.

In my opinion, the facts established by Judge Menzies met, as he found, the first part of the test propounded by Dubin J.A. in *Young*, supra, in that what took place violated "the community's sense of fair play and decency". The cumulative effect of the actions of Fox, CRIA and of the police also satisfied, as Judge Menzies decided, the second part of the tests in *Young* in that they were "oppressive and vexatious proceedings". I am also of the view that the facts and circumstances of this case in their entirety were properly regarded by Judge Menzies as falling within "the clearest of cases" which Dubin J.A. in *Young* stated would justify the exercise of the court's discretion to stay proceedings because of abuse of process. I can, with respect, find no warrant in the previous judicial decisions for limiting "the clearest of cases" to those involving only executive action and excluding cases, like the present, where the criminal process has been flagrantly manipulated by private interests.

For the reasons given above, I agree with Hollingworth J. that Judge Menzies properly exercised his discretion. I would, therefore, dismiss the appeal with costs.

TARNOPOLSKY J.A. (concurring):-- I have had the privilege of reading the persuasive judgments of my two colleagues and now have the difficult task of choosing between them. We all agree that in the circumstances of this case the respondent Roch had reason to feel unfairly dealt with by CRIA and Mr. Fox and we even agree with the trial judge that the Association and Mr. Fox used the criminal process for their own ends. However, I agree with my colleague Krever J.A. that that is not enough.

For one thing, as he points out, the financial ruin of Roch's company, Miles of Music, resulted from the search and seizure, not the prosecution. There were other means, not resorted to, to challenge these. Second, and more important, there was no evidence to indicate how much the police and the Crown knew about Fox's motives. Abuse of process, as my colleague Dubin J.A. asserted in *R. v. Young* (1984), 46 O.R. (2d) 520, 10 C.R.R. 307, 13 C.C.C. (3d) 1, 40 C.R. (3d) 289, 3 O.A.C. 254 (C.A.), is "of special application" to be used only "in the clearest of cases". As my colleague Martin J.A. pointed out in *R. v. D. (T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.), the onus is on the respondent to establish either "that the Crown has acted in an oppressive or vexatious manner or that the prosecution is offensive to the principles of fundamental justice and fair play". Without evidence as to how much the police knew of Fox's motives or why Roch was prosecuted and not others who, like him, did not have a licence, we cannot determine that there was oppressive or vexatious action, or that the prosecution "is offensive to the principles of fundamental justice or fair play". I should add that although I agree with my colleague Blair J.A. that the abuse of process doctrine is not directed solely at "executive action", I also believe that some knowing participation by the police or the Crown must be shown.

Accordingly, I agree with the judgment of Krever J.A., including his exhortation that, the jurisprudential point having been obtained by the Crown, further prosecution in this case now seems unnecessary.

Appeal allowed.

TAB 11

Indexed as:
R. v. Power

Her Majesty The Queen, Appellant;
v.
Eugene Paul Power, Respondent.

[1994] 1 S.C.R. 601

[1994] 1 R.C.S. 601

[1994] S.C.J. No. 29

[1994] A.C.S. no 29

File No.: 23566.

Supreme Court of Canada

1993: December 3 / 1994: April 14.

**Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier,
Cory, McLachlin and Major JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

Courts -- Residual discretion of appellate court on appeal from acquittal where error at trial reasonably capable of affecting the verdict -- Criminal Code providing for upholding the acquittal or ordering new trial -- Charge of impaired driving causing death and injury -- Proof of impaired driving required to found charge -- Crown declining to call further evidence when breathalyzer evidence found inadmissible for alleged Charter violation -- Accused acquitted -- Evidence found to be wrongly excluded on appeal -- Court of Appeal upholding acquittal and refusing to order new trial -- Whether, on a trial by judge and jury, s. 686(4) of the Criminal Code (dealing with the power of courts of appeal on appeals from acquittals either to uphold the acquittal or to order a new trial) includes a residual discretion for a court of appeal to refuse to order a new trial where there was an error at trial which could reasonably have affected the verdict -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(4).

Criminal law -- Appeal from acquittal -- Courts -- Residual discretion of appellate court on appeal from acquittal where error at trial reasonably capable of affecting the verdict -- Criminal Code providing for upholding the acquittal or ordering new trial -- Charge of impaired driving causing death and injury -- Proof of impaired driving required to found charge -- Crown declining to call further evidence when breathalyzer evidence found inadmissible for alleged Charter violation -- Accused acquitted -- Evidence found to be wrongly excluded on appeal -- Court of Appeal upholding acquittal and refusing to order new trial -- Whether, on a trial by judge and jury, s. 686(4) of the Criminal Code (dealing with the power of courts of appeal on appeals from acquittals either to uphold the acquittal or to order a new trial) includes a residual discretion for a court of appeal to refuse to order a new trial where there was an error at trial which could reasonably have affected the verdict.

Respondent was charged with impaired driving following a motor vehicle collision where one of his passengers was killed and another two injured. The constable attending at the accident advised respondent of his s. 10 Charter rights to be promptly informed of the reasons for his arrest and to retain and instruct counsel. He then formally demanded a breathalyzer sample from respondent who smelled of alcohol and was staggering. The constable in charge of respondent at the police station inquired as to whether he understood his right to contact counsel and helped him to do so. Both respondent and his lawyer knew that one of the passengers had died at the time of their first telephone consultation. After the consultation, respondent initially refused to provide a breath sample but relented when advised by the police that he would be charged with refusing to provide a sample. The lawyer and respondent consulted again before a second breath sample was taken.

At trial, respondent's lawyer objected to the admission of the results of the breath samples on the ground that the police had violated respondent's s. 10 Charter rights. The trial judge, on a voir dire, concluded respondent's Charter rights had been violated because he had not been made aware of the extent of the jeopardy which he faced before his consultation with his lawyer. He decided that the evidence should be excluded under s. 24(2) of the Charter for its admission would bring the administration of justice into disrepute. Crown counsel declined to call further evidence and the trial judge charged the jury to acquit. The Court of Appeal dismissed an appeal from the acquittal. At issue here was whether, with respect to a verdict on a trial by judge and jury, s. 686(4) of the Criminal Code (which deals with the power of courts of appeal on appeals from acquittals either to uphold the acquittal or to order a new trial) included a residual discretion for a court of appeal to refuse to order a new trial where there was an error at trial which could reasonably have affected the verdict.

Held (Sopinka, Cory and Major JJ. dissenting): The appeal should be allowed.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: No abuse of process occurred here. Furthermore, s. 686(4) of the Criminal Code does not confer any discretion on a court of appeal other than the discretion to dismiss or allow an appeal. As a matter of law, principle and policy, the

court of appeal is not empowered to inquire into prosecutorial discretion.

In criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases" -- i.e., conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. The evidence must be overwhelming that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. Since the Attorney General through his or her prosecutorial function expresses the community's sense of justice, the courts should be careful before attempting to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

Here, the conduct of the prosecution did not meet the high threshold required to constitute an abuse of process. There was no evidence that the Crown prosecutor's conduct was prompted by bad faith or an improper motive, nor did the prosecution intend to frustrate the administration of justice or even to circumvent the rules of criminal law regarding interlocutory appeals. Misconduct of such a nature as to shock the community's sense of fairness or to warrant the application of the doctrine of abuse of process was not established by the Crown's decision not to adduce further evidence.

Section 686(4) of the Criminal Code does not confer a court of appeal with any discretion, however limited, beyond the general power to control its process in case of abuse. The jurisprudence does not support such an extension of discretion and no policy consideration warrants such a broad interpretation of s. 686(4). Quite the contrary. It is contrary not only to the rule of law but also to the good and efficient administration of justice for the courts of appeal to invade the exclusive domain of the Crown and to interfere with prosecutorial discretion. The courts' reluctance to interfere with prosecutorial discretion stems from the doctrine of separation of powers where the criminal law is in the domain of the executive. Further, the judicial review of prosecutorial discretion could involve the Crown's disclosing the reasons underlying its conduct of a case. Such disclosure could generate masses of documents for review, adversely affect the flexibility that derives from prosecutorial confidentiality, and involve the courts in potentially extensive exercises in "second-guessing" a prosecutor's judgment in order to determine if the reasons behind his or her judgment were merely a subterfuge. The Crown cannot function as a prosecutor before the court while also serving under its general supervision and the court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it. Even if a discretion to review prosecutorial decisions did exist, the Court of Appeal should have ordered a new trial.

The only evidence which the Court of Appeal could and did assess was the evidence presented at the voir dire and at the preliminary inquiry. It is highly speculative to conjecture about the verdict based on this evidence. Evidence led at a voir dire to establish admissibility does not assist in the determination of the innocence or guilt. It does not touch upon the determination of guilt or

innocence but rather deals with facts that have nothing to do with the commission of the offence, such as the means by which the relevant evidence was obtained. On a preliminary hearing, the Crown has the discretion to present only that evidence which makes out a prima facie case. Speculation about the verdict cannot serve as the basis for review of an exercise of prosecutorial discretion that falls short of an abuse of process.

The Court of Appeal should have ordered a new trial on the basis that the excluded evidence was crucial to the Crown's case. Once the breathalyzer evidence was ruled inadmissible, any further evidence that might have been led would not necessarily have assisted the Crown in proving that the respondent's ability to drive was in fact impaired. Without the breathalyzer evidence, the Crown in all probability would have been unable to prove beyond a reasonable doubt that respondent's ability to drive was impaired. This element is crucial in cases of impaired driving causing death or bodily harm. Furthermore, this evidence was of the utmost importance because it seemed that the respondent was raising alternative causes for the accident, such as road and weather conditions and the mechanical repair of the car.

Per Sopinka, Cory and Major JJ. (dissenting): Although s. 686(4) of the Criminal Code does not specify the grounds upon which a Crown appeal from acquittal may be taken, s. 676(1)(a) provides that an appeal lies from an acquittal on any ground that involves a question of law alone. Their combined effect is that the Court of Appeal "may" allow the appeal. This confers a discretion on the court which is not statutorily defined. The Crown, notwithstanding an error of law, has the obligation of satisfying the Court of Appeal that the verdict would not necessarily have been the same absent the error.

Cases where the Crown calls all of its evidence can arguably differ from those where the Crown deliberately chooses to bring about a directed verdict by not calling available evidence. The test in *Vézeau v. The Queen* for the exercise of the discretion conferred by s. 686(4) does not exhaust the definition of that discretion so as to preclude the Court, in appropriate circumstances, from adding to or qualifying the application of that test. Jurisprudence supports a limited discretion on the part of the Court of Appeal to decline to allow an appeal in some circumstances where the Crown unreasonably shuts down its case with the result that a verdict of acquittal is directed. Apart from the capacity to stay for abuse of process, an appellate court is entitled to consider whether the Crown has acted unreasonably in refusing to call further evidence at trial because of an adverse evidentiary ruling and can refuse to order a new trial in such circumstances. The threshold requirement is that, apart from the evidence excluded, the Crown's case was sufficient to be put to the jury. This threshold is met when the Crown's remaining evidence meets the essential elements of the offence, but the Crown chooses not to call that evidence. The final determination will depend upon a weighing of other factors, including the relative strength of the evidence not called, the relative importance of the evidence excluded by the impugned ruling, the degree of prejudice which further proceedings present to the accused and the reasons for the decision of the Crown not to call further evidence.

As a general rule a decision to shut down the Crown's case simply to appeal an adverse ruling will be held to be unreasonable. On the other hand, where the evidence which has been excluded is relatively important and the remaining evidence, although perhaps sufficient to make out a prima facie case, is so weak that the prosecutor concludes that continuing with the trial is a waste of time, a decision to terminate the proceedings may be reasonable. Any special prejudice over and above prejudice that can be inferred from any prolongation of criminal proceedings will be, if proved, an important factor to be weighed by the Court of Appeal. This discretion must be exercised sparingly.

In considering the other evidence which the appellant decided not to call, it is necessary to identify the elements of the offence in question and to consider whether the other evidence was sufficient to warrant putting the appellant's case to the jury. In reaching this determination, the test to be applied is whether the other evidence, "if believed by a properly charged jury acting reasonably, would justify a conviction". Here, to substantiate its case, the appellant would have to demonstrate that: (i) the respondent was operating the vehicle in question; (ii) the respondent's ability to drive was impaired by alcohol; and, (iii) the impaired driving ability of the respondent caused the deaths and bodily harm which occurred.

The eye witnesses provided ample evidence of respondent's driving and could testify to a number of factors sufficient to establish his impaired state without resort to breathalyzer evidence. The Crown, to prove causation, had to adduce sufficient evidence to demonstrate respondent's impairment was at least a contributing cause of death and injury, outside the de minimis range. The issue of causation requires consideration of competing theories as to the explanation for occurrence of the accident which resulted in injury and death. Impairment need not be shown to be the sole cause in order to convict, since it may well be that, even though a combination of factors was involved, impairment was still more than a de minimis cause of the death and injury which occurred. Here, the additional evidence of impairment lent to the case by the breathalyzer would not have had a significant effect on the role played by road conditions and mechanical disrepair, nor was it essential to establishing the respondent's impairment.

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By L'Heureux-Dubé J.

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S.C.R. 880; Vézeau v. The Queen, [1977] 2 S.C.R. 277; R. v. Banas and Haverkamp (1982), 65 C.C.C. (2d) 224; R. v. Voykin (1986), 29 C.C.C. (3d) 280; R. v. Bailey (1983), 4 C.C.C. (3d) 21; R. v. Whittle (1992), 78 C.C.C. (3d) 49; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.), [1989] 1 S.C.R. 238; Beauregard v. Canada, [1986] 2 S.C.R. 56; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Re Balderstone and The Queen (1983), 8 C.C.C. (3d) 532, leave to appeal refused, [1983] 2 S.C.R. v; R. v. Beare, [1988] 2 S.C.R. 387; United States of America v. Cotroni, [1989] 1 S.C.R. 1469; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Verrette, [1978] 2 S.C.R. 838; Smythe v. The Queen, [1971] S.C.R. 680; R. v. T. (V.), [1992] 1 S.C.R. 749; United States v. Redondo-Lemos, 955 F.2d 1296 (1992); United States v. Giannattasio, 979 F.2d 98 (1992); Welch v. The King, [1950] S.C.R. 412; Caccamo v. The Queen, [1976] 1 S.C.R. 786; Patterson v. The Queen, [1970] S.C.R. 409.

By Sopinka J. (dissenting)

R. v. Smith, [1991] 1 S.C.R. 714; R. v. Banas and Haverkamp (1982), 65 C.C.C. (2d) 224; R. v. Voykin (1986), 29 C.C.C. (3d) 280; R. v. Mack, [1988] 2 S.C.R. 903; R. v. Jewitt, [1985] 2 S.C.R. 128; R. v. Bailey (1983), 4 C.C.C. (3d) 21; R. v. Keyowski, [1988] 1 S.C.R. 657; Vézeau v. The Queen, [1977] 2 S.C.R. 277; White v. The King, [1947] S.C.R. 268; R. v. Paquette (1974), 19 C.C.C. (2d) 154; R. v. Morin, [1988] 2 S.C.R. 345; R. v. Potvin, [1993] 2 S.C.R. 880; R. v. Collins (1993), 79 C.C.C. 204; R. v. Whittle (1992), 78 C.C.C. (3d) 49; R. v. Monteleone, [1987] 2 S.C.R. 154; R. v. Smith (1992), 73 C.C.C. (3d) 285; R. v. Andres, [1982] 2 W.W.R. 249; Graat v. The Queen, [1982] 2 S.C.R. 819; R. v. Dubois (1990), 62 C.C.C. (3d) 90; R. v. Kucher (1979), 48 C.C.C. (2d) 115; R. v. Pinske (1988), 30 B.C.L.R. (2d) 114, aff'd [1989] 2 S.C.R. 979; R. v. Morin, [1992] 1 S.C.R. 771.

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Temby, Ian. "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985), 59 Austl. L.J. 197.

Vanek, David. "Prosecutorial Discretion" (1987-88), 30 Crim. L.Q. 219.

APPEAL from a judgment of the Newfoundland Court of Appeal (1993), 105 Nfld. & P.E.I.R. 271, 331 A.P.R. 271, 81 C.C.C. (3d) 1, 45 M.V.R. (2d) 214, dismissing an appeal from acquittal by Aylward J. sitting with jury. Appeal allowed, Sopinka, Cory and Major JJ. dissenting.

Wayne Gorman, for the appellant. David Orr, for the respondent.

Solicitor for the appellant: The Department of Justice, St. John's. Solicitors for the respondent: Noonan, Oakley, Orr, St. John's.

The judgment of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

1 L'HEUREUX-DUBÉ J.:-- This appeal concerns the interpretation and application of s. 686(4) of the Criminal Code, R.S.C., 1985, c. C-46, to the facts of the case. The sole issue is whether the Court of Appeal erred in entering a verdict of acquittal instead of ordering a new trial for the respondent after it concluded that the trial judge had committed an error of law in excluding breathalyzer evidence which was admissible.

2 The majority of the Court of Appeal, Goodridge C.J. dissenting, dismissed the Crown's appeal of respondent's acquittal on the ground that there had been an abuse of process in that, instead of proceeding with the trial, the Crown, unreasonably in their view, declined to call further evidence which resulted in the acquittal of respondent on all counts. My colleague, Justice Sopinka, while declining to dismiss the appeal on that ground, would do so "on the ground that the court of appeal

has a limited discretion to dismiss an appeal in such circumstances and that this was a proper case for its exercise" (p. 635). I respectfully disagree.

3 I share the view expressed by Goodridge C.J. in dissent that no abuse of process occurred in the present case. Furthermore, I cannot agree with my colleague that s. 686(4) of the Code confers any discretion on a court of appeal other than the discretion to dismiss or allow an appeal. In particular, I cannot agree, as a matter of law, principle and policy, that a court of appeal is empowered to inquire into prosecutorial discretion.

Section 686(4) of the Criminal Code reads as follows:

686. . . .

- (4) Where an appeal is from an acquittal, the court of appeal may
 - (a) dismiss the appeal; or
 - (b) allow the appeal, set aside the verdict and
 - (i) order a new trial, or
 - (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

4 My colleague has summarized the facts and the judgments which relieves me of the necessity of dealing with them at length. Suffice it to say that, on April 20, 1989, a car driven by the respondent was involved in an accident in which one of his passengers died and two others were injured. The respondent was charged with one count of impaired driving causing death and two counts of impaired driving causing bodily harm. At trial, the breathalyzer evidence, which was the most probative evidence tendered by the Crown, was found to have been obtained in breach of the respondent's right to counsel in s. 10(b) of the Canadian Charter of Rights and Freedoms. As such, the evidence was declared inadmissible and was excluded. The Crown elected to call no further evidence and the respondent was, consequently, acquitted. The Court of Appeal, having found no Charter breach, held that the evidence was admissible as a matter of law. While such an appeal would normally be allowed and a new trial ordered according to s. 686(4) of the Criminal Code, the Court entered a verdict of acquittal on the basis that there had been an abuse of process by the Crown.

5 At the outset, it is important to note that the Court of Appeal was unanimous in holding that the trial judge had erred in excluding the properly admissible breathalyzer evidence. This is no longer an issue before us. As to the discretion of a court of appeal in Crown's appeals under s. 686(4) of the Criminal Code, the Court of Appeal was also unanimous in holding that s. 686(4) does not oust courts' power to sanction an abuse of process. Beyond that, I share Goodridge C.J.'s affirmation for the reasons he exposes (1993), 105 Nfld. & P.E.I.R. 271, at p. 305, that:

... the Court of Appeal must either dismiss the appeal or allow the appeal and set aside the verdict, and, if it allows the appeal and sets aside the verdict, it must either order a new trial or, unless the verdict appealed from is that of a jury, enter the verdict which should have been entered at trial. [Emphasis added.]

I will discuss the following issues in turn:

1. The Abuse of Process; 2. The Discretion under s. 686(4) of the Criminal Code; 3. Prosecutorial Discretion.

1. Abuse of Process

6 Although it is today undisputed that courts have an inherent and residual discretion to prevent an abuse of the court's process, this was not always the case. For a long period of time, authority for such a proposition was sparse and was generally made in obiter dicta. (See *R. v. Leroux* (1928), 50 C.C.C. 52 (Ont. C.A.), at pp. 56-57, per Grant J.A. for the court, *R. v. Bell* (1929), 51 C.C.C. 388 (B.C.C.A.), at pp. 391-92, per Macdonald C.J.A., and *R. v. Leclair* (1956), 115 C.C.C. 297 (Ont. C.A.), at pp. 302-3, per Mackay J.A. for the court.)

7 In *R. v. Osborn* (1968), 4 C.C.C. 185, Jessup J.A., writing for the Ontario Court of Appeal, relied on the majority decision of the House of Lords in *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401, to hold that every court, regardless of whether it exercises civil or criminal jurisdiction, has an inherent discretionary power to prevent an abuse of process through oppressive or vexatious proceedings. He cautioned, however, that such discretion should be exercised sparingly and only in exceptional circumstances (at pp. 189-91). On appeal before our Court (*R. v. Osborn*, [1971] S.C.R. 184), three justices (Pigeon J., Martland and Judson JJ. concurring) held that no such discretion existed, three (Hall J., Ritchie and Spence JJ. concurring) held that it was not necessary to decide the question and the seventh, Fauteux J. (as he then was), simply concurred in the result, which left the state of the law in doubt.

8 The issue was again raised in *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, where the alleged abuse of process stemmed from a lengthy delay on the part of the police before arresting the

accused. Pigeon J., writing for the majority, concluded at p. 1043:

For the reasons I gave in *The Queen v. Osborn*, [1971] S.C.R. 184, I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.

The minority, per Laskin C.J., concurring in the result, following *Connelly v. Director of Public Prosecutions*, supra, and *Director of Public Prosecutions v. Humphrys*, [1976] 2 All E.R. 497 (H.L.), would have recognized that criminal trial courts have an inherent jurisdiction to prevent abuse of their process, keyed to particular situations. Subsequent decisions of this Court have alluded in obiter dicta to the existence of a doctrine of abuse of process (*Erven v. The Queen*, [1979] 1 S.C.R. 926, at p. 957 (per Pratte J.), *R. v. Krannenburg*, [1980] 1 S.C.R. 1053, at p. 1061 (per Dickson J.), and *Amato v. The Queen*, [1982] 2 S.C.R. 418, at pp. 454-55 (per Estey J.)). In the wake of *Rourke*, supra, provincial appellate courts divided on the issue. Some applied *Rourke*, supra, and held that the doctrine of abuse of process was not available in criminal proceedings (*R. v. Lebrun* (1978), 7 C.R. (3d) 93 (B.C.C.A.)). Others applied the doctrine but restricted it to exceptional circumstances (*Re Ball and The Queen* (1978), 44 C.C.C. (2d) 532 (Ont. C.A.), *Re Abarca and The Queen* (1980), 57 C.C.C. (2d) 410 (Ont. C.A.), and *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.)). *R. v. Jewitt*, [1985] 2 S.C.R. 128, put an end to the controversy by unanimously affirming the availability of the doctrine of abuse of process in criminal proceedings. The Court, at pp. 136-37, borrowed the comments of Dubin J.A. in *R. v. Young*, supra, that a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". The Court also adopted, at p. 137, "the caveat added by the [Ontario] Court [of Appeal] in *Young* that this is a power which can be exercised only in the 'clearest of cases'". Dickson C.J., at pp. 132-33, reproduced in part the following comments of Viscount Dilhorne of the House of Lords in *Director of Public Prosecutions v. Humphrys*, supra, at p. 509 and p. 511:

Where an indictment has been properly preferred ... has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise the existence of such a degree of omnipotence is, as my noble and learned friend, Lord Edmund-Davies, has said, unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is not a general power to control the procedure of a court so as to avoid unfairness. If at the time of *Connelly* it had been possible to try the murder and robbery charges together, then it might well have been held unfair, oppressive and an abuse of process for them to be tried separately, each charge being based on the same evidence. But that is very different from

saying that a judge has power to stop a prosecution for perjury just because he thinks it should not have been brought and that it will show that the verdict at the trial at which it is alleged the perjury was committed should have been guilty.

...

If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances. [Emphasis added.]

9 In *R. v. Keyowski*, [1988] 1 S.C.R. 657, the Court unanimously reaffirmed the principle enunciated in *R. v. Jewitt*, supra. While she held that a stay of proceedings for abuse of process was not limited to cases where there is evidence of prosecutorial misconduct, Wilson J. for the Court, at p. 659, was careful to point out that the remedy will only be granted in the "clearest of cases". In *R. v. Mack*, [1988] 2 S.C.R. 903, a stay of proceedings was entered on the basis that (per Lamer J., at p. 939) "in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens". In *R. v. Conway*, [1989] 1 S.C.R. 1659, writing for the majority, I expressed the following view, at p. 1667:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, supra, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

10 I added, however, on the same page, that a stay of proceedings for abuse of process will only be granted in the "clearest of cases". This was reiterated in *R. v. Scott*, [1990] 3 S.C.R. 979, per Cory J. See also *R. v. Potvin*, [1993] 2 S.C.R. 880.

11 I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper

administration of justice that it warrants judicial intervention.

12 To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. As will be developed in more detail further in these reasons, the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

13 Applying this test to the facts of this case, it is evident that in no way did the conduct of the prosecution meet the high threshold required to constitute an abuse of process. There is not one iota of evidence that the Crown prosecutor's conduct was prompted by bad faith or an improper motive, a fact recognized by Cameron J.A., nor did the prosecution intend to frustrate the administration of justice or even to circumvent the rules of criminal law regarding interlocutory appeals contrary to what Marshall J.A. suggests. I agree with Cameron J.A. when she writes at p. 290:

Counsel for the respondent, in oral submission, argued that this appeal is tantamount to an interlocutory appeal. I do not accept that submission. This is not a request, before verdict, for a determination of the correctness of a ruling so that a party may adjust the presentation of its case in light of the decision. Had the trial judge been upheld by this court, the Crown would not have been able to then proceed with the trial.

14 Goodridge C.J., for his part, wrote, at p. 306:

If the power to order a new trial is discretionary, upon what basis is a new trial to be denied the Crown in a successful appeal from acquittal. Logically the only basis upon which a new trial could be denied is if the ordering of a new trial would be an abuse of process.

15 After citing Wilson J. in *R. v. Keyowski*, supra, Goodridge C.J. continued:

The test for granting a stay is whether "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency". If the court has power to deny a new trial in a case such as this, the test should be the same.

16 And further at p. 307:

The respondent should not be heard to complain unless the decision made by Crown counsel was so clearly wrong as to render what would amount to a delayed guilty verdict an abuse of process and, as earlier said, that position is one that should be taken at trial and not on appeal.

17 I agree with Goodridge C.J. that no abuse of process has been demonstrated here.

18 That the Crown prosecutor may have acted precipitously or may have exercised poor judgment in deciding not to adduce further evidence, even if true, fails to establish misconduct of such a nature as to shock the community's sense of fairness or to warrant the application of the doctrine of abuse of process.

19 Moreover, Sopinka J.'s assertion that this case is a borderline case, and the test of reasonableness which he applies, only confirm the unavailability of the doctrine of abuse of process. In applying that doctrine here, the majority of the Court of Appeal was, in my view, in error.

20 That being said, over and above the doctrine of abuse of process which permeates the whole of the criminal process, does s. 686(4) of the Criminal Code confer a discretion on an appellate court other than that to allow or dismiss a Crown's appeal when it concludes that there was a reversible error in the trial court? It is to this question that I now turn.

2. The Discretion under s. 686(4) of the Criminal Code

21 Although my colleague agrees with the Crown that the test set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, may not be appropriate in a Crown appeal from a directed verdict of acquittal by reason of no evidence, he goes on to say that *Vézeau*, supra, did not purport to exhaust the discretion conferred by s. 686(4). In his opinion, at p. 646, "there is support in our jurisprudence for a limited discretion on the part of the Court of Appeal to decline to allow an appeal in some circumstances in which the Crown unreasonably shuts down its case with the result that a verdict of acquittal is directed". I respectfully disagree.

22 My colleague relies on *R. v. Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224 (Ont. C.A.), *R. v. Voykin* (1986), 29 C.C.C. (3d) 280 (Alta. C.A.), and *R. v. Bailey* (1983), 4 C.C.C. (3d) 21 (Ont. C.A.). As Goodridge C.J. pointed out, at p. 304, all of those cases "seem to have involved a situation where new trials were ordered because the successful appeals from acquittal occurred in cases where critical evidence had been ruled inadmissible". In *Bailey*, supra, which purported to follow *Banas*, the circumstances were such that there did not seem to be anything in the record to indicate that the evidence ruled inadmissible was critical. My colleague Sopinka J. also relied on *R. v. Whittle* (1992), 78 C.C.C. (3d) 49 (Ont. C.A.). As this case is on appeal before us, I prefer not to comment on it.

23 However, had the conduct of the Crown in those cases been such that a stay of proceedings would have been warranted, as Martin J.A. seems to infer in his obiter dicta in *Banas*, supra, it might very well be that the Court would have found an abuse of process. It may well be that a Court of Appeal might find an abuse of process in a case where the Crown refuses to continue a trial, despite sufficient evidence to found a verdict, for the sole purpose of obtaining an interlocutory appeal on an adverse ruling. Such an appeal would not be available to the accused in the parallel situation, and the accused would be forced to undergo an unnecessary second trial. As such, a case might be made that the Crown's conduct constitutes an unfair and abusive exercise of the prosecutorial discretion conferred upon it.

24 None of those cases relied on by my colleague Sopinka J., in my view, supports the proposition that s. 686(4) provides for a limited discretion in a court of appeal other than the general discretion of courts to control their process and prevent its abuse.

25 Furthermore, there is no policy consideration that warrants such a broad interpretation of s. 686(4) of the Criminal Code. My colleague does not mention any, nor do the parties. Quite the contrary, an efficient administration of justice warrants that courts not meddle in a trial within a trial, base their finding on pure speculation and second-guess the prosecution.

26 In holding that under s. 686(4) of the Code an appellate court is entitled to consider whether the Crown has acted unreasonably, my colleague invites the courts of appeal to invade the exclusive domain of the Crown and to interfere with prosecutorial discretion, as well as to foster rulings based on pure speculation as to what might have happened had the prosecution chosen a different path. This, in my view, is not only impermissible and contrary to the rule of law but also contrary to the interest in a good and efficient administration of justice.

27 For these reasons, I am of the view that s. 686(4) of the Criminal Code does not confer a court of appeal any discretion, however limited, beyond the general power to control its process in case of abuse. I now turn to the issue of prosecutorial discretion.

3. Prosecutorial Discretion

28 My colleague himself, at p. 649, alluding to the type of discretion he sees in s. 686(4) of the Criminal Code, warns that courts "should be mindful of the fact that exercising this power must be done sparingly in that it constitutes a review of prosecutorial discretion". This, at a minimum, indicates the danger with which such interference by courts is fraught. There are other dangers, not the least of which involves the possibility of interfering with the separation of powers under our constitution.

29 In contrast to the U.S. Constitution, no general "separation of powers" doctrine is spelled out in the Constitution Act, 1867. However, as Professor Peter W. Hogg notes in *Constitutional Law of Canada* (3rd ed. 1992), at pp. 184-85, such a separation of powers does in fact exist. As Dickson C.J. wrote, for the Court, in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at

pp. 469-70:

There is in Canada a separation of powers among the three branches of government -- the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy. [Emphasis added.]

(See also: *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, *Beauregard v. Canada*, [1986] 2 S.C.R. 56, *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, Patrice Garant, *Droit administratif*, vol. 2 (3rd ed. 1991), and Gilles Pépin, "La compétence des tribunaux administratifs de décider de la constitutionnalité d'une loi, notamment de sa compatibilité avec la Charte canadienne des droits et libertés", in *Canadian Bar Association -- Continuing Legal Education Seminar on Administrative Law, Administrative Law: Past Present and Future Where We've Been* (Ottawa 1989).) It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive, as Jean-Claude Hébert explains in "Le contrôle judiciaire de certains pouvoirs de la couronne", in *Droit pénal - Orientations nouvelles* (1987), 129, at pp. 136-37:

[TRANSLATION] In Canada, it is the executive which assumes primary responsibility for administering the criminal law, as was held by a majority of the Supreme Court in *Skogman v. The Queen*. This stems from the fact that there must be an authority which decides whether the judicial process should be set in motion and what form the prosecution will take. Decisions concerning the operation of criminal justice involve important considerations relating to the public interest. From this perspective, the actions of the Attorney General are hybrid in that there is a perpetual moving to and fro between his legal and political functions. That is why the Attorney General must answer politically to Parliament for the manner in which the Crown exercises its powers. [Emphasis added.]

30 Donna C. Morgan in "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 *Crim. L.Q.* 15, at pp. 20-21, probes the origins of prosecutorial powers:

Most [prosecutorial powers] derive...from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the

Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.

...

Still other powers that derive directly from the prerogative now reside in the Criminal Code.... Others ... have been limited or otherwise modified by Parliament. Finally, another group of prosecutorial powers ... are creatures of statute.

31 And at pp. 18-19, she expands on the independence of prosecutors:

Along with the exalted status of his office come high expectations as to the Attorney-General's performance of his functions. A large measure of constitutional trust is reposed within him, and he bears a heavy obligation to conduct himself with dignity and fairness. In many situations, he is described as acting either judicially or quasi-judicially. When exercising his "grave" discretion in prosecutorial matters, he must take into account not only the position of the individual, but what the public interest demands. In doing so, he must stand alone, acting independently of political or other external influences. He is to be neither instructed or restrained, save by his final accountability to Parliament. [Emphasis added.]

32 In "Prosecutorial Discretion" (1987-88), 30 Crim. L.Q. 219, at p. 219, David Vanek explains the meaning of prosecutorial discretion:

Prosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences. The Attorney-General is the chief law officer of the Crown and a member of the Cabinet. He heads a ministry of the government that exercises the authority over the administration of justice and the constitution and the maintenance and organization of the courts that is conferred upon the provincial government by the constitution.... [T]he Attorney-General is the prosecutor and hence, in effect, a litigant in every criminal case except.... In practice, the Attorney-General acts in individual cases through the numerous Crown Attorneys and Assistant Crown Attorneys who are appointed as his agents to prosecute for criminal offences on his behalf. [Emphasis added.]

33 In "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 Crim. L.Q. 378, at pp.

378-80, J. A. Ramsay expands on the rationale underlying judicial deference to prosecutorial discretion:

Crown counsel in Ontario are responsible ultimately to the Attorney-General, who is responsible to the Legislature.... The Ministry of the Attorney-General exercises careful supervision of prosecutions for which it is responsible. Proceedings are conducted in public and any member of the public is free to bring the conduct of Crown counsel to the attention of the Attorney-General. In practice, Crown counsel must be prepared to account for their actions on every single case they prosecute.

...

It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal. [Emphasis added.]

34 That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review.

35 In *Re Balderstone and The Queen* (1983), 8 C.C.C. (3d) 532 (Man. C.A.), (leave to appeal refused by the Supreme Court of Canada on December 15, 1983, [1983] 2 S.C.R. v), Monnin C.J. wrote, at p. 539:

The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General -- barring flagrant impropriety -- he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do. [Emphasis added.]

36 La Forest J. stated in *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 410-11:

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay

charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

The Criminal Code provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.

This Court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice; see *R. v. Lyons*, supra, at p. 348; see also *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 303-4. The Court did add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, a remedy under s. 24 of the Charter would lie.... [Emphasis added.]

(See also: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 348, *R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 350, and *Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686.)

37 Our Court in *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at p. 761, commented on the rationale for not interfering with prosecutorial discretion:

It is important to understand the rationale for this judicial deference to the prosecutor's discretion. In this regard, the reasons of Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*, [1976] 2 All E.R. 497 (H.L.), at p. 511, are instructive:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval. (Emphasis added.)

Consider also Powell J.'s comments in *Wayte v. United States*, 470 U.S. 598 (1985). Though the factual content of the case at bar is fundamentally different from that with which the U.S. Court was faced (selective

prosecution of violators of a law requiring Selective Service registration), his caution respecting the institutional competence of the courts bears repeating. At pages 607-8 Powell J. remarks:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute. [Emphasis added, in addition to material emphasized in original, from "Such factors ... to undertake."]

38 Since a myriad of factors can affect a prosecutor's decision either to bring charges, to prosecute, to plea bargain, to appeal, etc., courts are ill-equipped to evaluate those decisions properly. (See: Steven Alan Reiss, "Prosecutorial Intent in Constitutional Criminal Procedure" (1987), 135 U. Pa. L. Rev. 1365, at p. 1373.)

39 The judicial review of prosecutorial discretion may also involve disclosure by the Crown of precise details about the process by which it decides to charge, to prosecute and to take other actions. Such a procedure could generate masses of documents to review and could eventually reveal the Crown's confidential strategies and preoccupations. For example, the confidential nature of the charging process serves important institutional functions, including rehabilitative goals and the goal of increasing general deterrence. The latter is met only by preventing the public from knowing which crimes will be given emphasis in enforcement. Professor Richard S. Frase ("The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion" (1979-1980), 47 U. Chi. L. Rev. 246) points to further elements which militate against the review of prosecutorial discretion, at p. 297:

... (3) publication [in a judicial review, of the Crown's guidelines or policies] inevitably would result in more frequent attempts to invoke judicial review of prosecution policy and decisions, and such review would further clog an already overburdened criminal court system; and (4) if prosecutors knew that their policy would be published, they would be reluctant to formulate it, or to change it once it was formulated.

Indeed, confidentiality permits prosecutors to employ flexible and multifaceted enforcement policies, while disclosure promotes inflexible and static policies which are not necessarily desirable.

40 Moreover, should judicial review of prosecutorial discretion be allowed, courts would also be asked to consider the validity of various rationales advanced for each and every decision, involving the analysis of policies, practices and procedure of the Attorney General. The court would then have to "second-guess" the prosecutor's judgment in a variety of cases to determine whether the reasons advanced for the exercise of his or her judgment are a subterfuge. This method of judicial review is not only improper and technically impracticable, but, as Kozinski J. observed in *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), at p. 1299:

Such decisions [to charge, to prosecute and to plea-bargain] are normally made as a result of a careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated. Even were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with prosecutors not knowing when to prosecute and judges not having time to judge. [Emphasis added.]

Such a situation would be conducive to a very inefficient administration of justice. Furthermore, the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it. Judicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor's discretion was correctly exercised, would destroy the very system of justice it was intended to protect (*United States v. Redondo-Lemos*, *supra*, at p. 1300).

41 In *Director of Public Prosecutions v. Humphrys*, *supra*, at p. 511, Viscount Dilhorne provides a further reason why judicial screening of prosecutorial discretion is not mandated:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval. [Emphasis added.]

In our system, a judge does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them. As well, in *United States v. Giannattasio*, 979 F.2d 98 (7th Cir. 1992), the trial judge had originally directed the prosecutor to select only five counts because the former had only a week in which he could hear the case. In the trial judge's view, the government would get the

same benefit from five convictions as from fifteen. When the case was called for trial, the prosecutor refused to proceed on the basis of five counts and the trial judge dismissed the entire indictment. Writing for the Court of Appeals, Posner J. reversed the order of dismissal and said, at p. 100:

If Dr. Giannattasio committed fifteen Medicare frauds, a judge cannot tell the Justice Department to prosecute him for only five of the frauds, or to prosecute him for five now and the rest later, if necessary. Of course there are judicially enforceable checks on discretion to indict. But they are protections for defendants, not for judges. [Emphasis added.]

42 I agree with Sidney I. Lezak and Maureen Leonard ("The Prosecutor's Discretion: Out of the Closet -- Not Out of Control" (1984), 63 Or. L. Rev. 247, at p. 251) that:

Fifth, law enforcement considerations support continued prosecutorial discretion. The need to obtain information about other crimes or other criminals, and the difficulty of proving the crime at trial often play a part in decisions to grant immunity or reduce charges.

Sixth, although the pressure of public opinion is a "wild card" factor which is difficult to evaluate, aggressive news coverage or oversight of specific criminal proceedings by special interest groups affects the exercise of discretion. Hence, public opinion assumes an increasingly important position in the prosecutor's decisional matrix. An interesting example is the change in prosecution policies that appeared when it became increasingly unpopular to convict draft evaders and protesters of the Vietnam War. [Emphasis added.]

(See, also: Ian Temby, Q.C., "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985), 59 Austl. L.J. 197, at pp. 197, 199-200 and 202.)

43 My colleague's invitation to the court of appeal to interfere with prosecutorial discretion, absent abuse of process, goes against the grain of doctrine and jurisprudence. It also carries with it the dangers that have been outlined above. In my view, there is neither a need nor a justification for an interpretation of s. 686(4) of the Criminal Code which extends the discretion of the courts in this manner. As Goodridge C.J. underlined, the wording of s. 686(4) of the Criminal Code does not warrant such an interpretation, particularly in view of our Court's decision in *Welch v. The King*, [1950] S.C.R. 412. Principle and policy dictate against it, and the case law does not favour it.

44 For these reasons, I conclude that courts of appeal possess no residual discretion under s. 686(4).

45 Had I agreed with my colleague that such a discretion does exist, I still would have come to the conclusion that the Court of Appeal should have ordered a new trial instead of inscribing a verdict of acquittal for the following reasons.

46 The only evidence which the Court of Appeal could and did assess was the evidence presented at the voir dire and at the preliminary inquiry.

47 On the one hand, it is clear that the evidence led at a voir dire to establish the admissibility of evidence relevant to issues in the case, does not assist in the determination of the innocence or guilt of an accused. This evidence deals with facts that have nothing to do with the commission of the offence; e.g. the means by which the relevant evidence was obtained.

48 On the other hand, with respect to the preliminary inquiry, the observation of de Grandpré J. in *Caccamo v. The Queen*, [1976] 1 S.C.R. 786, at pp. 809-10, that "the sole purpose of the preliminary inquiry is to satisfy the magistrate that there is sufficient evidence to put the accused on trial and that, therefore, the Crown has the discretion to present only that evidence which makes out a prima facie case", is appropriate. Moreover, as Judson J. emphasized in *Patterson v. The Queen*, [1970] S.C.R. 409, at p. 412:

The purpose of a preliminary inquiry is clearly defined by the Criminal Code -- to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial. We are not concerned here with the power of a trial judge to compel production during the trial nor with the extent to which the prosecution, in fairness to an accused person, ought to make production after the preliminary hearing and before trial.

It should also be underlined that evidence adduced at a preliminary inquiry is incomplete. Indeed, a number of witnesses, who will be called to testify at trial, are not called at the preliminary inquiry and vice versa. In my view, therefore, the evidence adduced at a preliminary inquiry does not properly reflect the whole of the evidence that will be presented at trial on the merits, nor does it give sufficient indication of the strength of the evidence that will be presented at trial.

49 As such, it is highly speculative to conjecture about the verdict that could result at trial based on the evidence presented at the preliminary inquiry and at the voir dire. To conclude otherwise would force the Crown to present the whole of its case at the preliminary inquiry so that, if at trial there is an adverse ruling excluding evidence following which the Crown decides to present no further evidence, it will not be penalized. The Court of Appeal would then have access to almost all of the evidence that would have been put to the jury at the trial and would, therefore, be able to assess the whole of the evidence. To enforce such a rule would lead to an unnecessary waste of resources and time, since cases where the Crown will decide not to adduce further evidence and to appeal, pursuant to the exclusion of evidence, are rare and always involve the risk that the appeal will be dismissed. Speculation about the verdict cannot serve as the basis for review of an exercise

of prosecutorial discretion that falls short of an abuse of process.

50 Finally, I would also conclude that the Court of appeal should have ordered a new trial on the basis that the excluded evidence was crucial to the Crown's case. As Crown counsel has argued in his factum:

There was evidence of alcohol consumption other than the results of the analysis of the Respondent's breath. However, none of this evidence was as compelling, as incriminating or as important as the evidence that was improperly excluded. The remaining evidence may have been sufficient to raise a prima facie case but the Crown would not have been able to obtain a conviction on those charges on the basis of the remaining evidence.

51 And further:

The other evidence of impairment in this case consisted almost entirely of the observations of police officers. Their evidence in this case, while admissible, is of no more weight than [that of] other witnesses that testified that the Respondent's ability to drive was not impaired. Particularly significant is the evidence of Mr. Jeffrey Porter. Mr. Porter was in the vehicle at and before the accident and testified that the Respondent seemed okay to drive.... While the police officers could comment on the Respondent's degree of intoxication, they could not comment on whether the Respondent's ability to drive was impaired. This is the crucial point in the type of charges involved in this case and this illustrates why the evidence of Ms. Dittmar was so important for the Crown to be able to prove the charges contained in the Indictment. [Emphasis in the original.]

As my colleague Sopinka J. has stated, at p. 650, in cases of impaired driving causing death or bodily harm:

... the appellant would have to demonstrate that: (i) the respondent was operating the vehicle in question; (ii) the respondent's ability to drive was impaired by alcohol; and (iii) the impaired driving ability of the respondent caused the death and bodily harm which occurred. [Emphasis added.]

Clearly, the first condition would be met as there was ample evidence that the respondent had been driving the vehicle in question. However, to meet the next two conditions, the appellant would have had to prove that the respondent's ability to drive was impaired by alcohol. Thus, it was crucial for the Crown to be able to present its evidence on this issue, especially since it appeared that the evidence which would be adduced at trial on this issue was going to be contradictory.

52 Three friends of the respondent, Porter, Aylward and McGrath, testified at the preliminary

hearing that the respondent had consumed between six and eight beers in a period of approximately three to four hours which ended approximately an hour and a half before his driving. Two police officers, Stanley and Tilley, both testified to the respondent's showing physical signs of impairment, including bloodshot and watery eyes, a strong smell of alcohol, slurred speech, and staggering. However, defence counsel suggested on the voir dire that the accident itself would have caused the respondent to be "pretty damn shaken up". From this, we can infer that the defence counsel was trying to suggest reasons for these physical characteristics described by the police officers other than consumption of alcohol. In other words, it could be argued that the shock of the accident and the knowledge of the death of a passenger, who was a friend, caused most of these symptoms.

53 Both of the police officers testified that they formed the opinion that the respondent was under the influence of alcohol. Constable Jackman believed that the respondent was impaired while Constable Tilley was not sure if the alcohol had affected the respondent's judgment. Contrasted with the defence's explanation of the respondent's conduct, the observations of the police officers demonstrate that there could be conflicting evidence led at trial on the issue of impairment. Therefore, it was necessary for the Crown to present the breathalyzer evidence combined with the expert evidence on its meaning in order to assess whether the respondent was impaired. This was clearly the best and most convincing evidence even without assuming that the other evidence would not have been contradicted. Of course it would have been challenged.

54 Elizabeth Dittmar, the declared expert in absorption and elimination of alcohol from the blood, offered an opinion at the preliminary inquiry regarding the degree of impairment and the effect of such impairment which did not rely on the breathalyzer result. Her opinion was given in answer to a hypothetical question based on the quantity of alcohol consumed by the respondent, the time frame, the physical descriptions given by the police officers, and the respondent's size. However, it appears clearly that, without the breathalyzer, the evidence she was able to give was weak. For instance, Dittmar was only able to estimate that the respondent's blood alcohol level would have been between 35 and 120 mg/100 ml of blood at the time of the accident. However, she stated that, when the alcohol level reaches 100 mg/100 ml, she would conclude with certainty that the ability of a person is impaired. Consequently, because there was no way of knowing if the respondent's alcohol level was under or over 100 mg/100 ml, there could be no conclusive determination as to the respondent's ability to drive if the court only took into account evidence of alcohol consumption other than that produced by the breathalyzer.

55 Moreover, this evidence was far from compelling in this case because the blood alcohol level provided by the breathalyzer evidence read 170 mg/100 ml an hour and a half after the accident. This implied, according to the expert Dittmar, that, at the time of the accident, the respondent's alcohol level would have been between 185 and 210 mg/100 ml of blood. Thus, it appears that this evidence would have made possible a conclusive determination as to the impairment of the respondent and its influence on his driving ability since it showed clearly his blood alcohol level was over 100 mg/100 ml.

56 From this, one can conclude that had the Crown presented further evidence at trial, after the trial judge had ruled the breathalyzer evidence inadmissible, the value of the expert's evidence would have been significantly reduced and would not necessarily have assisted the Crown in proving that the respondent's ability to drive was in fact impaired. Most likely, the Crown would have been unable to prove its case beyond a reasonable doubt. The breathalyzer evidence was crucial to the Crown's case in that it would have allowed the Crown to present expert evidence that would have proved without a doubt that the respondent's ability to drive was impaired, an element which is crucial in cases of impaired driving causing death or bodily harm. In the present case, this evidence could not realistically be adduced in such a convincing way by any other means.

57 Furthermore, this evidence was of the outmost importance because it seemed that the respondent was raising alternative causes for the accident; i.e., the wet and slippery road conditions and the car's condition. Indeed, Constable Harnum testified that, at the time of the accident, "the road conditions were wet". Mr. Porter, a passenger, testified that the road was slippery and that, just prior to the accident, the rear of the vehicle began to slide. The mechanic who inspected the vehicle after the accident testified that one of the tires was bald and the left front brake was worn to the point that no lining remained. When the respondent's counsel suggested to the mechanic that the accident could have resulted from a blown tire, he answered that he did not check for that and could not say that it was not so. Therefore, it appears that without the breathalyzer evidence, the Crown may not have been in a position to prove that the respondent's ability to drive was impaired by alcohol and that the impaired driving ability of the respondent caused the death and bodily harm which occurred. Thus, I am of the view that this evidence was crucial to the Crown's case.

58 I conclude, therefore, that even had I shared my colleague's view that s. 686(4) of the Criminal Code confers a residual discretion to a court of appeal, which I do not, I would hold that the facts of this case do not point to an unreasonable decision on the part of the Crown such as to warrant the exercise of that discretion.

59 I base my reasons, however, on the fact that a court of appeal does not have the discretion, under s. 686(4) of the Criminal Code, absent abuse of process, to decline to allow an appeal when a reversible error of law is found in the trial judge's decision.

60 In the result, I would allow the appeal, reverse the judgment of the Court of Appeal and order a new trial.

The reasons of Sopinka, Cory and Major JJ. were delivered by

61 SOPINKA J. (dissenting):-- The issue in this appeal concerns the power of a court of appeal under s. 686(4) of the Criminal Code, R.S.C., 1985, c. C-46, to dismiss an appeal, notwithstanding an error at trial, on the ground that the prosecutor in an unreasonable exercise of prosecutorial discretion deliberately refrained from calling available evidence resulting in a directed verdict of acquittal. I would dismiss the appeal on the ground that the court of appeal has a limited discretion to dismiss an appeal in such circumstances and that this was a proper case for its exercise.

Facts

62 On April 20, 1989, the respondent was involved in a motor vehicle accident. The car which the respondent was driving contained several passengers. One of the passengers died following the accident and another two were injured, one of them seriously. The respondent was charged with one count of impaired driving causing death and two counts of impaired driving causing bodily harm. The respondent's trial was held before Aylward J. of the Supreme Court of Newfoundland, Trial Division, and a jury.

63 The evidence revealed that Constable Stanley, who arrived first at the scene of the accident cautioned the respondent, advised him of his rights under s. 10 of the Canadian Charter of Rights and Freedoms and made a breathalyzer demand. Stanley had determined from other persons at the scene that the respondent was the person driving the vehicle and noted that he smelled of alcohol and was staggering. Stanley then took the respondent to the police station and delivered him into the control of Constable Tilley, who asked him if he understood his right to contact counsel and assisted the respondent in doing so. In fact, a telephone book was supplied and Tilley called several lawyers before finding one of them available. When the respondent's counsel was contacted, Tilley informed him that the officers had received word that one of the passengers had died. Tilley then turned the phone over to the respondent so that he could have a private discussion with his counsel. Prior to the respondent's conversation with his lawyer, he heard the officers say that one of the passengers had died and was told that two others were in serious condition.

64 After consulting with legal counsel, the respondent refused to provide the police with a sample of his breath. However, once informed that a charge for failing to comply with a demand for a breath sample would be laid if he refused, the respondent complied. His counsel telephoned the station after the first sample was given and spoke with the respondent again. After this, a second sample was taken. Both samples contained 170 mg of alcohol in 100 ml of blood.

65 The respondent indicated that he was aware that one friend had died and two others were seriously injured, that the demand for a breath sample indicated that if he failed he would be charged with impaired driving and that if he refused to provide the breath sample he could be charged with refusing to do so. At trial, the respondent's counsel objected to the admission of the breath samples results on the ground that the police had acted in violation of ss. 10(a) and (b) of the Charter.

66 A voir dire on the admissibility of the breath samples and statements made by the respondent at the police station was held and Aylward J. concluded that the evidence ought to be excluded under s. 24(2) of the Charter because the respondent had been denied his rights under s. 10 of the Charter. Crown counsel requested a recess and, after 30 minutes, returned to tell the court that it did not plan to call further evidence. Given that, prior to the voir dire, the Crown had called only one witness, a police officer who took photographs of the aftermath of the accident, the trial judge charged the jury to deliver a verdict of acquittal. On January 29, 1991, the respondent was

acquitted.

67 The appellant appealed to the Court of Appeal of Newfoundland on the ground that the analysis of the breath samples should have been admitted into evidence. On April 6, 1993, the Court of Appeal dismissed the appeal from acquittal. The majority of the Court concluded that the trial judge had erred in excluding evidence which was unarguably important, but that the appeal should be dismissed on the basis that the appeal had been unnecessary given that the Crown could have called further substantial evidence at trial, but chose not to. Goodridge C.J., dissenting, held that the provisions of s. 686(4) of the Criminal Code were mandatory and that s. 686(4) required the court to order a new trial if it determined that the appeal should be allowed.

Judgments Below

Supreme Court of Newfoundland (Aylward J., ruling on voir dire)

68 Aylward J. determined that the s. 10 rights of the respondent had been violated because he had not been made aware of the extent of the jeopardy which he faced prior to his consultation with counsel. He then determined that, pursuant to s. 24(2) of the Charter, the breath sample results should be excluded since the Charter violation was serious and the admission of the evidence would bring the administration of justice into disrepute. Given that the Crown elected to call no further evidence, he directed the jury to deliver a verdict of acquittal, and the respondent was acquitted.

Court of Appeal (1993), 105 Nfld. & P.E.I.R. 271

Marshall J.A.

69 Relying on this Court's decision in *R. v. Smith*, [1991] 1 S.C.R. 714, Marshall J.A. concluded that the ss. 10(a) and (b) rights of the respondent had not been violated since, although he had not been told of the exact charges he faced, he was aware of the purpose of performing the breathalyzer and the circumstances in which it was performed. As such, he concluded that the breath sample evidence should not have been excluded.

70 In determining whether the appeal should be allowed, Marshall J.A. noted that the appellant elected not to call further evidence after the ruling on the voir dire, even though there was substantial other evidence relating to the impairment of the respondent, apart from the breath samples. In these circumstances, he concluded that the appellant had effectively launched an interlocutory appeal of the adverse evidentiary ruling. Given that such an appeal was not available to an accused in a criminal trial, he determined that it would unfairly prejudice the respondent to allow the appeal of the appellant and order a new trial.

71 Relying on the ability of an appellate court to stay proceedings as an abuse of process and the decisions in *R. v. Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224 (Ont. C.A.), and *R. v. Voykin* (1986), 29 C.C.C. (3d) 280 (Alta. C.A.), Marshall J.A. concluded that the appeal should be

dismissed. In so doing, he made the following findings at pp. 280-81:

... the additional evidence was ostensibly of sufficient weight and substance to have sustained a conviction, if accepted by the jury, without the breathalyzer testimony. Accordingly, it could not have been considered futile for the [appellant] to have continued with the trial after the breathalyzer results had been ruled inadmissible. In such circumstances it is not tenable to view this appeal in its essence and nature as other than an interlocutory motion by the [appellant] aimed at the admission of excluded evidence. While the breathalyzer was unarguably important evidence, it was not the only substantial evidence to which the [appellant] had recourse.

Cameron J.A. concurring

72 Cameron J.A. also concluded that there had been no s. 10 Charter violation and that the breath sample evidence should therefore not have been excluded. While she did not agree that the appeal was interlocutory in nature because it was (at p. 290) "not a request, before verdict, for a determination of the correctness of a ruling so that a party [could] adjust the presentation of its case in light of the decision", Cameron J.A. agreed that the appeal should be dismissed.

73 Cameron J.A. found that, since the appellant had met the burden of demonstrating the verdict would not necessarily have been the same had the error not been made by the trial judge, s. 686(4) required the Court of Appeal to order a new trial unless an abuse of process could be shown. Relying on the decisions of this Court in *R. v. Mack*, [1988] 2 S.C.R. 903, and *R. v. Jewitt*, [1985] 2 S.C.R. 128 and on *Banas*, supra, *R. v. Bailey* (1983), 4 C.C.C. (3d) 21 (Ont. C.A.), and *Voykin*, supra, she found that, although no prejudice to the respondent had been demonstrated, it could be inferred from the length of the delay and that, given the substantial other evidence available to the appellant, the appeal had been unnecessary. As such, she determined that a new trial should not be ordered since the evidence which was excluded was not essential to the Crown's case, concluding as follows at p. 292:

... there was other evidence available respecting the quantity of alcohol consumed by the respondent on the day of the accident and the observations of police officers and others of his demeanour immediately after the accident. While I cannot say what verdict would have been reached had this evidence gone to the jury, I am satisfied there was sufficient evidence, other than that excluded by the trial judge's ruling, to put the matter to the jury. Certainly, the [appellant] could not maintain it was futile to continue. I conclude it would indeed be oppressive to proceed with what might have been an unnecessary appeal and this behaviour by

the [appellant] is sufficient in itself to give rise to abuse of process. For that reason, though I agree the trial judge erred in excluding the breathalyzer evidence, I would deny the appeal.

Goodridge C.J. dissenting

74 Goodridge C.J. also concluded that the Charter rights of the respondent had not been violated, so that the trial judge erred in excluding the breathalyzer evidence. As such, he determined that the appeal should be allowed. Having reached this conclusion, Goodridge C.J. moved on to consider whether, pursuant to s. 686(4), a new trial should be ordered.

75 Goodridge C.J. stated that this was not an interlocutory appeal but an appeal from an acquittal. He emphasized at p. 305 that, under s. 686(4), on an appeal from an acquittal, "the Court of Appeal must either dismiss the appeal or allow the appeal and set aside the verdict, and, if it allows the appeal and sets aside the verdict, it must either order a new trial or, unless the verdict appealed from is that of a jury, enter the verdict which should have been entered at trial".

76 Goodridge C.J. added at p. 306 that the only basis on which a new trial could be denied was "if the ordering of a new trial would be an abuse of process". Referring to the decision of the Supreme Court of Canada in *R. v. Keyowski*, [1988] 1 S.C.R. 657, and to *Banas*, supra, Goodridge C.J. concluded at pp. 306-7 that:

I doubt that it is proper for a court of appeal...to make a decision that a new trial would be an abuse of process. A court of appeal should order a new trial where the appeal from acquittal is successful.... It is at the trial level that the question of abuse of process should be first decided. A court of appeal should not pass judgment in the first instance on a legal question when there may be facts relating to that question that have not been determined....

The only prejudice to the respondent lies in the fact that if the first trial had proceeded and resulted in a guilty verdict, his fate would have been determined at that time. Such a verdict, if there is to be one, is now delayed. The delay arises from the fact that the respondent raised a point of law in respect of which he was ultimately unsuccessful.... The ruling of the trial judge required [appellant] counsel to make a discretionary decision as to whether he should proceed. The respondent should not be heard to complain unless the decision made by [appellant] counsel was so clearly wrong as to render what would amount to a delayed guilty verdict an abuse of process and...that position is one that should be taken at trial and not on appeal.

Issue

77 Does s. 686(4) of the Criminal Code include a residual discretion for a court of appeal to refuse to order a new trial in a case where there was an error at trial which could reasonably have affected the verdict?

Statutory Provision

Criminal Code, R.S.C., 1985, c. C-46, s. 686(4):

686. . . .

(4) Where an appeal is from an acquittal, the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Powers of the Court of Appeal

78 The powers of the Court of Appeal in indictable offences are set out in s. 686 of the Criminal Code. In an appeal by the accused in respect of an error of law at trial, a court of appeal has a discretion to dismiss the appeal if the error did not occasion a substantial miscarriage of justice. This discretionary power is circumscribed by a specific definition in s. 686(1)(b)(iii) of the Code. Section 686(4) deals with appeals by the Crown from acquittal. Although this subsection does not specify the grounds upon which such an appeal may be taken, s. 676(1)(a) provides that an appeal lies from an acquittal on any ground that involves a question of law alone. The combined effect of these two provisions is that in an appeal by the Crown from an acquittal based on an error of law, the Court of Appeal "may" allow the appeal. This confers a discretion on the court but in this case the discretion is not statutorily defined.

79 In *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, at p. 291, Martland J. discussed the legislative history of these provisions and pointed out that an earlier version of these provisions provided that the powers of a Court of Appeal in an appeal by the Crown were to be applied *mutatis mutandis* with the powers in respect of an appeal by the accused. In the latter case a curative provision in the terms of the present s. 686(1)(b)(iii) applied. See *White v. The King*, [1947] S.C.R. 268. The amendment (S.C. 1953-54, c. 51) did not remove the discretion but left it undefined. Apparently, Parliament was content to leave it to the courts to define the circumstances in which the discretion was to be exercised. An appeal by the Crown from an acquittal, in contrast with an appeal by the accused from conviction, is a relatively unusual provision not common to all jurisdictions with systems similar to ours. It would, therefore, be appropriate for Parliament to accord more discretion to the courts as to the circumstances in which an error at trial should result in a new trial or conviction in an appeal by the Crown.

80 In *Vézeau* this Court decided that the exercise of the discretion to allow an appeal by the Crown grounded on an error of law included the power, which existed before the amendment, to refuse to allow an appeal if the error did not occasion a substantial miscarriage of justice. At page 291, Martland J. adopted the approach of the Ontario Court of Appeal in *R. v. Paquette* (1974), 19 C.C.C. (2d) 154, in the following paragraph:

[Section 686(4)] does not contain any provision equivalent to s. 613(1)(b)(iii). The powers of the court under this subsection were considered by the Court of Appeal for Ontario in *R. v. Paquette*, at p. 162. After quoting subs. (4), the Court goes on to say:

It is to be observed that the term "no substantial wrong or miscarriage of justice" is not incorporated in this subsection as it is in the situation of an appeal by an accused. However, in this case we think it appropriate to analogize the test, and we would hold that the Crown has satisfied us that it cannot be said that but for the misdirection the verdict of the jury would necessarily have been the same. [Emphasis added.]

Consequently, notwithstanding an error of law, the Crown now has the obligation of satisfying the Court of Appeal that the verdict would not necessarily have been the same absent the error. See *Vézeau*, at p. 292, and *R. v. Morin*, [1988] 2 S.C.R. 345.

81 The Court of Appeal has, apart from the discretion defined in *Vézeau*, the power to correct an abuse of process. Indeed, that is the power which appears to have been the basis for the exercise of discretion by the majority of the Court of Appeal in this case. While the more usual exercise of this power occurs in review of the decision of the trial judge with respect to an abuse of process that occurred at trial, exceptionally it may be exercised by the Court of Appeal in first instance where the abuse occurs during the appeal proceedings. See *R. v. Potvin*, [1993] 2 S.C.R. 880, at pp.

915-16. In view of the conclusion that I have reached it is unnecessary for me to consider whether the conduct of the Crown in this case amounted to an abuse of process.

82 In the argument before this Court a question was raised as to whether the Crown could satisfy the Vézeau test in the circumstances. If an acquittal would necessarily have resulted had the breathalyzer evidence been admitted, the Crown would fail to discharge its burden under that test. The conclusion in this regard would depend to a great extent on whether the Crown, in seeking to establish what would have occurred absent the error, could resort to the evidence it could but did not call. The argument against such use is that the Crown should not be allowed to rely on untested evidence, which it chose not to call, in order to secure a new trial. The response of the appellant Crown to this submission was that in a Crown appeal from a directed verdict of acquittal by reason of no evidence, the Vézeau test is not appropriate. Reference was made to *R. v. Collins* (1993), 79 C.C.C. 204 (Ont. C.A.), wherein Arbour J.A. concluded that in a jury case an appeal from a directed verdict of acquittal should generally be allowed if the trial judge erred in withdrawing the case from the jury on the basis of no evidence. Her reasons illustrate the difficulty in applying the Vézeau test in these circumstances. Not only must the court speculate as to what would have occurred if the case had not been withdrawn from the jury, but the Crown is effectively deprived of a jury trial in the event that the Court of Appeal concludes that an acquittal was inevitable.

83 Without expressing an opinion on the correctness of the opinion, that in a Collins-type of situation, the Court of Appeal should focus on the error of the trial judge rather than its possible effect on the ultimate verdict, it seems that there is a distinction between a case in which the Crown calls all of its evidence, and a case such as this in which the Crown deliberately chooses to bring about a directed verdict by not calling available evidence. In the latter case it can be argued that it is wrong to focus on the error of the trial judge which triggered the decision of the Crown because the directed verdict was not the result of an error of the trial judge but of the decision to withhold evidence. While these are issues that will no doubt have to be resolved in a proper case, I do not propose to attempt to do so here. Not only is it unnecessary to do so in order to resolve this case, but the issue also was apparently not raised in the Court of Appeal and was not dealt with in the reasons of either the majority or minority.

84 The decision of this Court in Vézeau in providing a test for the exercise of the discretion conferred by s. 686(4) did not purport to exhaust the definition of that discretion so as to preclude the Court, in appropriate circumstances, from adding to or qualifying the application of that test. To conclude that new provisions limited the exercise of discretion to reinstatement of the test which obtained prior to the amendment would render the amendment meaningless. In my opinion, there is support in our jurisprudence for a limited discretion on the part of the Court of Appeal to decline to allow an appeal in some circumstances in which the Crown unreasonably shuts down its case with the result that a verdict of acquittal is directed. The justification for such a discretion is indicated in several appellate court decisions.

85 In *Banas*, *supra*, the Ontario Court of Appeal, per Martin J.A., concluded that tape recordings

of private communications which had been excluded at trial ought to have been admitted and agreed that the recordings were at the heart of the Crown's case. In allowing the Crown appeal from the directed verdict of acquittal and ordering a new trial, Martin J.A. concluded as follows, at p. 230:

We do not think that the Crown, in the circumstances, is precluded from appealing the directed verdict because Crown counsel decided not to continue with the trial which he considered would be fruitless and which would not result in a conviction due to the erroneous exclusion of vital evidence. We are satisfied that if the trial Judge had not excluded the evidence of the intercepted private communications the verdict of the jury would not necessarily have been the same. However we wish to point out that if in a particular case we considered that Crown counsel had unreasonably declined to present substantial evidence in his possession which would support a conviction merely in order to appeal an adverse ruling on the admissibility of evidence, we would not hesitate to hold that the Crown in those circumstances was precluded from appealing an acquittal. We are, however, satisfied that this it not what occurred here. [Emphasis added.]

86 Similarly, in *Voykin*, supra, in determining that business records had been wrongfully excluded by the trial judge, resulting in the acquittal of the accused, Hetherington J.A. for the Alberta Court of Appeal stated, at p. 281:

We agree with the statements of Mr. Justice Martin in [*Banas*, supra] ... to the effect that a Court of Appeal should not countenance an appeal by the Crown of an adverse ruling as to the admissibility of evidence if a conviction could have been obtained without the evidence which was excluded. We do not accept the contention of counsel for [the accused] ... that this issue is one for the trial judge. It is for a Court of Appeal to decide whether the Crown has launched an unnecessary appeal. [Emphasis added.]

87 Furthermore, in *Bailey*, supra, the Ontario Court of Appeal determined that a trial judge had wrongfully refused to allow a Crown witness to testify on the basis of spousal incompetence, which resulted in the Crown's decision not to call further evidence and ultimately led to an acquittal. The court, however, per Morden J.A., relying on the words of Martin J.A. in *Banas*, supra, concluded that the excluded evidence was not essential to the Crown's case and dismissed the appeal stating the following, at p. 25:

In these circumstances it cannot be said that it was the trial judge's error, alone, that might have affected the result. The result may also have been affected by Crown counsel's decision not to call any evidence. While I am

prepared to assume that [the Crown witness'] evidence was important, to use a general term, there is no indication of what part it would have played in the Crown's case and no basis for concluding that it would have been fruitless for the Crown to have continued without it.

88 Finally, in *R. v. Whittle* (1992), 78 C.C.C. (3d) 49, after the trial judge had excluded certain inculpatory statements made by the accused, the Crown offered no evidence and the trial judge directed a verdict of acquittal. On appeal, the exclusion of the evidence was held to be in error. Although there was some evidence which could have been led by the Crown and which might have been sufficient for a prima facie case, the court was satisfied that the test in *Vézeau* had been satisfied. Notwithstanding this conclusion, the court went on to consider the legal consequence of the failure of the Crown to adduce available evidence. Goodman J.A. for the court reasoned that the principle stated by Martin J.A. in *Banas*, supra, was a qualification of *Vézeau*. At pages 69-70, he states:

To that principle has been added the qualification that if the appellate court were of the opinion that Crown counsel had unreasonably declined to present substantial evidence in his possession which would support a conviction merely in order to appeal an adverse ruling on the admissibility of evidence, it would be precluded from appealing an acquittal. [Emphasis in original.]

He went on to conclude, at p. 70, that counsel had not acted unreasonably:

I have, however, no reason to doubt that Crown counsel sincerely believed that the evidence available to the prosecution, absent the statements ruled to be inadmissible, did not have sufficient probative force to constitute a prima facie case. I am of the further opinion, based on the submissions made to the court and the facts available on the record, that he did not decline to adduce further evidence merely in order to appeal the adverse ruling. [Emphasis added.]

89 These cases indicate that, apart from the capacity to stay for abuse of process, an appellate court is entitled to consider whether the Crown has acted unreasonably in refusing to call further evidence at trial because of an adverse evidentiary ruling and to refuse to order a new trial in such circumstances. As with abuse of process, this discretion must be exercised sparingly, taking into account a number of factors. The threshold requirement for invocation of this discretion is that, apart from the evidence excluded, the case of the Crown was sufficient to be put to the jury. As such, where the remaining evidence of the Crown meets the essential elements of the offence, but the Crown chooses not to call that evidence, then the threshold requirement for exercising appellate discretion to refuse to order a new trial is met. However, the final determination will depend upon a weighing of other factors, including, the relative strength of the evidence not called, the relative

importance of the evidence excluded by the impugned ruling, the degree of prejudice which further proceedings present to the accused and the reasons for the decision of the Crown not to call further evidence.

90 As a general rule a decision to shut down the Crown's case simply to appeal an adverse ruling will be held to be unreasonable. On the other hand, where the evidence which has been excluded is relatively important and the remaining evidence, although perhaps sufficient to make out a prima facie case, is so weak that the prosecutor concludes that continuing with the trial is a waste of time, a decision to terminate the proceedings may be reasonable. If any special prejudice over and above prejudice that can be inferred from any prolongation of criminal proceedings is proved, it will be an important factor to be weighed by the Court of Appeal. The court should be mindful of the fact that exercising this power must be done sparingly in that it constitutes a review of prosecutorial discretion. The exercise of prosecutorial discretion in the bona fide interests of efficient justice and not merely for tactical advantage must be respected. It follows from the above that the explanation submitted by the Crown for its decision, particularly at trial, will play an important part in the review of that decision by the Court of Appeal.

Application to the Case at Bar

91 While close to the line, I would uphold the exercise of the discretion by the Newfoundland Court of Appeal to refuse to order a new trial in the present case. I would not, however, do so on the ground relied on by both Marshall and Cameron J.J.A. who concluded that the appeal should be dismissed because the appeal was unnecessary and thereby constituted an abuse of process. Rather, I have concluded that an appellate court also has a discretion, albeit a limited one, to refuse to allow an appeal from an acquittal in circumstances where the Crown, in an unreasonable exercise of prosecutorial discretion, decided not to call further evidence following an evidentiary ruling adverse to its position. I would apply that appellate court discretion to the facts of this case, according to the factors which were set out above.

The Other Evidence

92 In considering the other evidence which the appellant decided not to call, it is necessary to identify the elements of the offence in question and to consider whether the other evidence was sufficient to warrant putting the appellant's case to the jury. In reaching this determination, the test to be applied is whether the other evidence, "if believed by a properly charged jury acting reasonably, would justify a conviction": *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 161. In this case, three charges were laid against the respondent: two counts of impaired driving causing bodily harm contrary to s. 255(2) of the Criminal Code and one count of impaired driving causing death contrary to s. 255(3). In order to substantiate its case, the appellant would have to demonstrate that: (i) the respondent was operating the vehicle in question; (ii) the respondent's ability to drive was impaired by alcohol; and (iii) the impaired driving ability of the respondent caused the death and bodily harm which occurred.

93 With respect to the first element of the offences, the evidence from the preliminary hearing indicated that four individual witnesses could have identified the respondent as the person driving the vehicle in question. Jeffrey Porter, Gordon Aylward and Glen McGrath were all passengers in the vehicle and testified at the preliminary hearing that the respondent had been the person driving the vehicle at the time of the accident. Additionally, an eyewitness to the accident, William Keary, also identified the respondent as the driver of the vehicle. As such, there would appear to have been ample other evidence with respect to this element of the appellant's case.

94 With respect to the second aspect, it was not necessary to have breathalyzer evidence to prove that the respondent's ability to operate a motor vehicle was impaired by alcohol, nor to show that sobriety tests had been performed so long as observations of the respondent indicated that his behaviour represented a "marked departure from the norm": *R. v. Smith* (1992), 73 C.C.C. (3d) 285 (Alta. C.A.), and *R. v. Andres*, [1982] 2 W.W.R. 249 (Sask. C.A.). Even without the breathalyzer evidence, the Crown could have relied on the testimony of three witnesses who had been drinking with the respondent all afternoon and could identify the quantity of beer he had consumed and on the observations and opinions of two police officers as to the degree of intoxication of the respondent: *Graat v. The Queen*, [1982] 2 S.C.R. 819. Jeffrey Porter, Gordon Aylward and Glen McGrath all testified at the preliminary hearing that the respondent had consumed approximately six or seven bottles of beer in the three or four hour period before the accident occurred. Although both Porter and Aylward, who testified that they had consumed a similar amount of alcohol during the same time period, stated their opinion that the respondent was "okay" to drive, both Constables Stanley and Tilley testified at the preliminary hearing that, in their opinion, the bloodshot eyes, strong odour of alcohol and slurred speech of the respondent indicated that he was intoxicated. In fact, Constable Tilley, who performed the breathalyzer stated that it was his opinion, based on his observations of the respondent, that the respondent was well over the legal blood-alcohol limit for driving a motor vehicle. Moreover, the Crown could have introduced the evidence of its expert, Elizabeth Dittmar, with respect to the effects on driving ability of the quantity of alcohol consumed by a person the size of the respondent since she was a qualified expert in the field: *R. v. Dubois* (1990), 62 C.C.C. (3d) 90, and *R. v. Kucher* (1979), 48 C.C.C. (2d) 115. In my opinion, the body of other evidence with respect to this aspect of the offences was certainly not so deficient that withdrawal of the case from the jury would have been justified.

95 As to the third element of the offence, causation, it was incumbent upon the Crown to adduce sufficient evidence to demonstrate that the impairment of the respondent was "at least a contributing cause of death [and injury], outside the de minimis range": *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (C.A.) at p. 123, *aff'd*, [1989] 2 S.C.R. 979. Of necessity, the issue of causation requires consideration of competing theories as to the explanation for occurrence of the accident which resulted in injury and death. The case at bar is no exception, since the evidence tendered at the preliminary inquiry disclosed alternative possibilities with respect to causation: impaired driving capacity, poor road conditions and mechanical disrepair. However, I would reiterate that, in order to found the basis for a conviction, it need not be demonstrated that impairment was the sole cause, since it may well be that, even though a combination of factors were involved, impairment was still

more than a de minimis cause of the death and injury which occurred: Pinske, supra. The evidence pertaining to the quantity of alcohol consumed by the respondent, as well as the observations and opinions of the police officers involved in the investigation, present a substantial body of evidence relating to impairment, which might have been augmented by the expert witness. The other evidence relating to the impact of poor road conditions must also be factored into the causation equation. Jeffrey Porter, one of the passengers in the vehicle allegedly driven by the respondent, testified at the preliminary hearing that, prior to impact, the rear of the vehicle began to slide and the eyewitness, William Keary, indicated that the vehicle slid around the corner before impact and that the road conditions were "damp". Moreover, Randolph Chafe, the mechanic who inspected the vehicle allegedly driven by the respondent after the accident gave evidence at the preliminary inquiry that the left rear tire of the vehicle was bald and the left brake lining worn off completely. While these circumstances tend to weaken the Crown's case, their weight was for the jury to assess. There was ample evidence to go to the jury.

Relative Importance of the Excluded Evidence

96 The breathalyzer evidence which was excluded by the impugned ruling would, if accepted, have tended to show that the respondent had consumed more alcohol than the other evidence relating to consumption might have indicated. At the preliminary inquiry, the expert was able to state conclusively, on the basis of the breathalyzer readings of 170 mg of alcohol in 100 ml of blood, that the blood alcohol level of the respondent at the time of the accident would have been 180 to 210 mg of alcohol per 100 ml of blood. Further, she indicated that an individual's ability to safely operate a motor vehicle is definitely impaired when the blood alcohol concentration reaches or exceeds 100 mg of alcohol in 100 ml of blood. When cross-examined at the preliminary hearing and asked to assess the blood alcohol level of the respondent based upon his weight, the amount consumed and the period over which it was consumed, according to the version of the evidence most favourable to the respondent, the expert could offer only a range of concentrations between 35 and 120 mg of alcohol per 100 ml of blood. Nevertheless, the fact that the breathalyzer could have provided stronger evidence of impairment did not render it crucial to the appellant's case, in wake of substantial other evidence of alcohol consumption and observations and opinions of impairment.

97 It was argued by the appellant that the evidence of causative factors other than impairment rendered the breathalyzer evidence even more essential to its case. I am unable to accept that submission on the basis that it does not necessarily follow that technical evidence of a higher blood alcohol level would undercut the significance of other factors relating to causation in this case. Moreover, impairment need not be the only cause of death and injury, but a contributing factor, beyond the de minimis level: Pinske, supra. Substantial other evidence of impairment was available to the appellant in this case, evidence similar in nature to that which would have been used to support such a case prior to development of the breathalyzer test. In my view, the additional evidence of impairment lent to the case by the breathalyzer would not have had a significant effect on the role played by road conditions and mechanical disrepair, nor was it essential to establishing the impairment of the respondent.

Degree of Prejudice

98 As Marshall J.A. noted, no specific evidence of prejudice to the respondent was tendered. It is possible, however, to infer from the two-year period in which the appeal of the original verdict of acquittal has been in the legal system that the respondent has probably suffered a certain degree of prejudice: *R. v. Morin*, [1992] 1 S.C.R. 771. In the circumstances, having regard to the strength of the other factors, prejudice is not an important factor in this case.

Explanation by the Crown

99 No explanation was offered by the Crown at trial. Immediately following the ruling, counsel for the Crown asked and was granted a brief adjournment. When he returned, the following occurred:

By the Court: Proceed.

JURY POLLED - ALL PRESENT

By the Court: Mr. Steeves.

Mr. Steeves: My Lord, the crown will elect not to call any further evidence based on some of your earlier remarks.

The appellant's factum does not purport to address the reason why the decision was made although the evidence which I have reviewed is put forward, *ex post facto*, as justifying the decision.

Conclusion

100 Assessing all of the factors, I have concluded that the available evidence which the appellant chose not to call was more than sufficient to meet the threshold test. The relative importance of the excluded evidence was not such that to proceed with the trial would have been a lengthy and futile exercise and a waste of resources. Indeed, taking into account the absence of an explanation by the Crown, I am convinced that the decision was largely a tactical one to reverse the trial judge's ruling so as to enable the Crown to proceed with its best case.

101 I would dismiss the appeal.

TAB 12

Indexed as:
R. v. T. (V.) [V.T.]

Her Majesty The Queen, appellant;

v.

V.T., respondent.

[1992] 1 S.C.R. 749

[1992] 1 R.C.S. 749

[1992] S.C.J. No. 29

[1992] A.C.S. no 29

File No.: 22413.

Supreme Court of Canada

1992: January 29 / 1992: March 26.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Stevenson and
Iacobucci JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (35 paras.)

Criminal law -- Young offenders -- Accused found guilty of uttering threats -- Court of Appeal directing verdict of acquittal -- Whether youth court may decline to enter verdict of guilty on ground that charge should never have been laid -- Young Offenders Act, R.S.C., 1985, c. Y-1, ss. 3(1), 19(2).

The accused, a young person living in a group home, was charged with mischief, assault and uttering threats. The complainant, an employee of the home, had asked the accused, who was 14 at the time, to refrain from using foul language at the supper table. She greeted this request with another obscenity and pushed her plate across the table, spilling some of the contents in the complainant's lap. Later, in the office, the complainant attempted to discuss the incident with the

accused, who remained uncooperative. The situation degenerated to the point where the accused threw a newspaper and a videocassette at the complainant. She left the home and on her way out again lost her temper, causing some minor damage to the door frame and also telling the complainant that she would have some friends "get" him or "beat [him] up". The complainant testified that he took these threats seriously given the tone in which they were uttered and the fact that the accused may well have known individuals who would be interested in carrying them out. The youth court judge found the accused guilty on all three counts. The Court of Appeal set aside the finding of guilt on the charge of uttering threats. This appeal raises the issue of whether a youth court judge may decline to enter a verdict of guilty for conduct which exhibits all the requisite elements of the [page750] offence if he or she is of the view that the charge ought never to have been laid.

Held: The appeal should be allowed.

The Crown has a broad discretion in the carriage of criminal cases. This discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. And, while prosecutorial discretion is not absolute in its operation (a stay of proceedings is available in the clearest of cases to prevent violations of the principles of fundamental justice and abuse of the court's process, for example), it is nonetheless an important feature of our criminal procedure. To hold that a youth court judge has jurisdiction to dismiss a charge on the ground that it ought never to have been laid would thus represent a marked departure from the law as it currently exists. It is open to Parliament to effect such a change but it must make manifest its intention to do so. While s. 19(2) gives a youth court discretion to dismiss a charge, this provision alone does not contain the necessary clarity to effect such a change. Nor can a sufficient intention be found in the combined operation of ss. 19(2) and 3(1). Section 3(1)(d) contemplates the taking of "no measures" or "measures other than judicial proceedings" where this would not be inconsistent with the protection of society, but this provision must be read in conjunction with the rest of s. 3(1) which also provides that "young persons who commit offences should nonetheless bear responsibility for their contraventions" and that "society must ... be afforded the necessary protection from illegal behaviour". Hence, while s. 3(1) is not merely a "preamble", it does not reveal the kind of clear, singular intention necessary to alter the law of criminal procedure so radically.

Cases Cited

Referred to: R. v. A.K., B.C. Co. Ct., June 3, 1988, unreported; R. v. D.L., B.C. Prov. Ct., March 29, 1985, unreported; Smythe v. The Queen, [1971] S.C.R. 680; R. v. Verrette, [1978] 2 S.C.R. 838; R. v. Beare, [1988] 2 S.C.R. 387; R. v. Lyons, [1987] 2 S.C.R. 309; Re Harvey (1957), 119 C.C.C. 124; Re Balderstone and The Queen (1983), 4 D.L.R. (4th) 162; R. v. Poirier, [1989] M.J. No. 379, Man. Prov. Ct., June 7, 1989; Director of Public Prosecutions v. Humphrys, [1976] 2 All E.R. 497; Wayte v. United States, 470 U.S. 598 (1985); Rourke v. The Queen, [1978] 1 S.C.R. 1021; R. v. Jewitt, [1985] 2 S.C.R. 128; [page751] R. v. Young (1984), 40 C.R. (3d) 289; R. v. Keyowski,

[1988] 1 S.C.R. 657; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. S.(S.), [1990] 2 S.C.R. 254; R. v. M.(J.), [1991] B.C.J. No. 2123, B.C. Prov. Ct., May 30, 1991; R. v. Rowton (1865), 10 Cox C.C. 25; Adgey v. The Queen, [1975] 2 S.C.R. 426.

Statutes and Regulations Cited

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APPEAL from a judgment of the British Columbia Court of Appeal (1991), 64 C.C.C. (3d) 40, allowing the accused's appeal from her conviction on a charge of uttering threats. Appeal allowed.

Carol C. Baird, for the appellant. D. Wayne Robertson, for the respondent.

Solicitor for the appellant: The Attorney General of British Columbia, Vancouver. Solicitors for the respondent: Lindsay, Kenney, Vancouver.

The judgment of the Court was delivered by

1 L'HEUREUX-DUBÉ J.-- This appeal raises the issue of whether a Youth Court judge may decline to enter a verdict of guilty for conduct which, though apparently of a rather minor nature, exhibits all the requisite elements of the offence, if he or she is of the view that the charge ought never to have been laid. This is a narrow point but one of some significance in relation to the Young Offenders Act, R.S.C., 1985, c. Y-1 (hereinafter "the Act").

Factual Background

2 The circumstances surrounding this appeal are not in dispute and may be dealt with rather summarily.

3 On December 4, 1989, the respondent was fourteen years old and was involved in an incident at her residence, the Touchstone Group Home, in Richmond, British Columbia. The complainant, Mr. Louis Larson, an employee of the home and at all material times the respondent's parent within the meaning of the Act, requested that the respondent refrain from using foul language at the supper table. The respondent greeted this request with another obscenity and pushed her plate across the table, spilling some of the contents in the complainant's lap. Later, in the office, the complainant attempted to discuss the incident with the respondent, who remained uncooperative. The situation degenerated to the point where the respondent threw a newspaper and a videocassette at Mr. Larson. She left the home and on her way out again lost her temper, causing some minor damage to the door frame and also telling Mr. Larson that she would have some friends "get" him or "beat [him] up". Mr. Larson testified that he took these threats seriously given the tone in which they were uttered and the fact that the respondent may well have known individuals who would be interested in carrying them out.

4 Constable Simpson of the Richmond detachment of the RCMP happened to be in the home on unrelated matters on the night in question. The [page753] respondent was charged with one count of mischief in relation to property, one count of assault, and one count of uttering threats. She was found guilty on all three counts. Her appeal to the British Columbia Court of Appeal on the charge of uttering threats was allowed. Apparently, the parties have agreed that the finding of guilt on the charge of assault will be governed by the result of the instant appeal and that final disposition on both the assault charge and the charge of uttering threats will also await this Court's disposition.

Relevant Provisions of the Young Offenders Act

5

3. (1) It is hereby recognized and declared that

(a) while young persons should not in all instances be held accountable in the

same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

- (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

...

- (d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences; [Emphasis added.]

...

- (f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

...

- (h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide [page754] for continuing parental supervision are inappropriate.

(2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).

4. (1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
- (b) the person who is considering whether to use such measures is satisfied

that they would be appropriate, having regard to the needs of the young person and the interests of society;

- (c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;
- (d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person

- (a) denies his participation or involvement in the commission of the offence; or
- (b) expresses his wish to have any charge against him dealt with by the youth court.

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a young person alleged to have committed an offence as a condition of his being dealt with by alternative measures [page755] shall be admissible in evidence against him in any civil or criminal proceedings.

(4) The use of alternative measures in respect of a young person alleged to have committed an offence is not a bar to proceedings against him under this Act, but

- (a) where the youth court is satisfied on a balance of probabilities that the young person has totally complied with the terms and conditions of the alternative measures, the youth court shall dismiss any charge against him; and
- (b) where the youth court is satisfied on a balance of probabilities that the young person has partially complied with the terms and conditions of the alternative measures, the youth court may dismiss any charge against him

if, in the opinion of the court, the prosecution of the charge would, having regard to the circumstances, be unfair, and the youth court may consider the young person's performance with respect to the alternative measures before making a disposition under this Act.

(5) Subject to subsection (4), nothing in this section shall be construed to prevent any person from laying an information, obtaining the issue or confirmation of any process or proceeding with the prosecution of any offence in accordance with law.

19. (1) Where a young person pleads guilty to an offence charged against him and the youth court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.

(2) Where a young person pleads not guilty to an offence charged against him, or where a young person pleads guilty but the youth court is not satisfied that the facts support the charge, the court shall proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be. [Emphasis added.]

20. (1) Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties ... and the court shall then make any one of the following dispositions, or any number thereof that are not inconsistent with each other:

(a) by order direct that the young person be discharged absolutely, if the court considers it to be in [page756] the best interests of the young person and not contrary to the public interest; [Emphasis added.]

51. Except to the extent that they are inconsistent with or excluded by this Act, all the provisions of the Criminal Code apply, with such modifications as the circumstances require, in respect of offences alleged to have been committed by young persons.

B.C. Youth Court, August 15, 1990

6 Despite the sympathy he might have felt for the accused's argument that the behaviour in question, while technically constituting an offence, ought not to attract the attention of the courts, Davis Prov. Ct. J. felt bound by the appellate court decision of *R. v. A. K.*, B.C. Co. Ct., June 3, 1988, unreported. He drew particular attention to the following passage from that case (at pp. 3-4):

... then it falls upon the youth court judge, no matter how unpleasant or, indeed, how unnecessary it may seem to him, to deal with it, and moreover, to make a decision in law on the facts which he finds to have been proven. That is the plain duty of any judge, whether or not he may be in philosophical agreement with the procedure or the nature of the charge.

7 Accordingly, Davis Prov. Ct. J. found the respondent guilty of one count of uttering threats and one count of assault. (It appears from the transcript that the charge of mischief had already been dealt with.)

British Columbia Court of Appeal (1991), 64 C.C.C. (3d) 40

8 On the appeal only from the finding of guilt on the charge of uttering a threat, Macdonald J.A. (Lambert and Cumming JJ.A. concurring) set out the facts and then alluded to two differing lines of jurisprudence in cases such as this. One, embodied in the reasons of the B.C. Provincial Court in *R. v. D. L.*, March 29, 1985, unreported, interpreted the Act in the context of parental powers and the discretion conferred on the court to direct the person acting in loco parentis to take matters of discipline into their hands and deal with these more minor [page757] matters at home. The second line of jurisprudence is embodied in *A. K.*, supra, and is characterized by a reticence on the part of the court to overstep its perceived mandate.

9 Macdonald J.A. then discussed the Act and, in particular, ss. 3(1), 3(2) and 51. He concluded (at p. 45):

With all respect, it is my view that *R. v. A.K.* was wrongly decided. The prosecuting authorities are required before they lay charges against young persons to act under the guidance of s. 3(1)(d). If they fail to do so the youth court judges who have the ultimate responsibility for application of the Young Offenders Act are not, in my view, helplessly bound to convict every time all elements of an offence are proved. The contention that they are so bound does not give the statute and particularly s. 3(1)(d) the liberal construction required by s. 3(2). If a judge dismisses a charge on the basis that it should never have been laid, having in mind s. 3(1)(d), the result is not as stated in *R. v. A.K.* to declare a crime not to be a crime. An offence has been proved but nevertheless the judge may decline to register a conviction. He or she may dismiss the charge.

Coming back to the case at bar, I would not express an opinion upon the facts of this case. Crown counsel says that they are more aggravated than indicated in the appellant's factum and uttering a threat can be in some circumstances a serious matter. But as I read the reasons of Judge Davis I conclude that he only convicted because he was bound by *R. v. A.K.*

That being so, I would allow the appeal and direct a verdict of acquittal.

Analysis

10 The position advanced by the respondent, as I understand it, is akin to that adopted by the Court of Appeal. She submits that the Youth Court had jurisdiction to dismiss the charges on the ground that those charges ought never to have been laid. This argument is based on the following propositions: 1) pursuant to s. 19(2), the Youth Court has [page758] discretion to dismiss a charge; 2) the finding of guilt on the part of the respondent in these circumstances was inconsistent with the policies underlying the Act, particularly as reflected in s. 3(1); and, 3) by operation of s. 51, the Act specifically overrides the provisions of the Criminal Code.

11 Whatever the merits of this reasoning, it is clear that, if accepted as the proper interpretation of the Act, it would amount to a substantial alteration to normal criminal procedure and, in particular, to the principle of prosecutorial discretion. Consequently, prosecutorial discretion is a principle worthy of some discussion in the course of these reasons.

12 There is no doubt that the Crown acting through the Attorney General, and in turn through his or her prosecutors, has a wide amount of discretion in the carriage of criminal cases. Our own Court has recognized the principle numerous times and I would cite, as an example, the words of Fauteux C.J. in *Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686:

Obviously, the manner in which the Attorney General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable, but that again is foreign to the determination of the question now under consideration. Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power. The following statements made in [*R. v. Court of the Sessions of the Peace, ex parte Lafleur*, [1967] 3 C.C.C. 244] at page 248, by Montgomery J., with the concurrence of Chief Justice Tremblay and Pratte J., are to the point and I adopt them.

I cannot conceive of a system of enforcing the law where some one in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence. Inevitably there will be cases where one

man is prosecuted while another man, perhaps equally guilty, goes free. A single act, or series of acts, may render a person liable to prosecution in [page759] more than one charge, and someone must decide what charges are to be laid.

(See also: *R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 850.)

13 Later, in the context of the Canadian Charter of Rights and Freedoms, this Court had occasion to consider whether such discretion constituted an affront to the principles of fundamental justice. In *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410, La Forest J., speaking for the Court, states:

The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

(See also: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 348, and Morgan, "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of the Charter" (1986), 29 *Crim. L.Q.* 15, at pp. 17-24.)

14 Prosecutorial discretion has also been the subject of a number of lower court decisions. In *Re Harvey* (1957), 119 C.C.C. 124 (Ont. H.C.), at p. 125, McLennan J. notes that:

... the duty of a judicial officer under our system of the administration of criminal justice is to try charges which are brought before him, and not to substitute his own views as to what charge ought to be laid for those of the prosecuting officials. It should not be forgotten that if this practice were permitted, a Magistrate could lay a more serious charge than that laid by the Crown and if the members of the judicial branch in the administration [page760] of justice are at liberty to dictate the charges to be laid, chaos would inevitably result. [Emphasis added.]

15 The words of Monnin C.J.M. of the Manitoba Court of Appeal in *Re Balderstone and The Queen* (1983), 4 D.L.R. (4th) 162, at p. 169 (leave to appeal to this Court refused, [1983] 2 S.C.R. v) are to the same effect and, in my opinion, apposite:

The judicial and the executive must not mix. These are two separate and

distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General -- barring flagrant impropriety -- he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do. [Emphasis added.]

16 I also wish to refer to the judgment of Giesbrecht Prov. Ct. J. in *R. v. Poirier*, [1989] M.J. No. 379, Man. Prov. Ct., June 7, 1989, at pp. 11-12:

In the criminal law process prosecutorial discretion exists throughout the entire process, from the initial investigation stage through to the conclusion of the trial. The people involved in the process, be they police officers ... or other individuals charged with the responsibility of investigating breaches of various laws, or crown attorneys, are not the same nor will they necessarily act in the same way in exercising the discretion they have. This may lead to a situation where one person is charged with an offence, while another in seemingly identical circumstances is not; one person is prosecuted by indictment another by summary conviction; one person is dealt with under one provision of a particular statute while another is dealt with under a different, perhaps harsher provision. As is pointed out by Scollin J. of the Manitoba Court of Queen's Bench in *Tit and Tit v. Director of Vital Statistics (Manitoba)* [1986] 4 W.W.R. 238, at p. 240:

[page761]

"The world of democratic theory may be peopled by legal clones, but the real world is not."

17 It is important to understand the rationale for this judicial deference to the prosecutor's discretion. In this regard, the reasons of Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*, [1976] 2 All E.R. 497 (H.L.), at p. 511, are instructive:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval. [Emphasis added.]

18 Consider also Powell J.'s comments in *Wayte v. United States*, 470 U.S. 598 (1985). Though the factual content of the case at bar is fundamentally different from that with which the U.S. Court was faced (selective prosecution of violators of a law requiring Selective Service registration), his

caution respecting the institutional competence of the courts bears repeating. At pages 607-8 Powell J. remarks:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute. [Emphasis added.]

[page762]

19 I wish to be clear, however, that while the principle of prosecutorial discretion is an important precept in our criminal law, and exists for good reason, it is by no means absolute in its operation. It is now apparent, for example, that a stay of proceedings is available to prevent violations of the principles of fundamental justice and abuse of the court's process. In *R. v. Jewitt*, *infra*, our own Court relied heavily on the comments of the House of Lords in *Humphrys*, *supra*, at pp. 509-11, when it examined the question of whether or not the remedy was known in Canada:

Where an indictment has been properly preferred ... has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise the existence of such a degree of omnipotence is, as my noble and learned friend, Lord Edmund-Davies, has said, unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is not a general power to control the procedure of a court so as to avoid unfairness. If at the time of *Connelly* it had been possible to try the murder and robbery charges together, then it might well have been held unfair, oppressive and an abuse of process for them to be tried separately, each charge being based on the same evidence. But that is very different from saying that a judge has power to stop a prosecution for perjury just because he thinks it should not have been brought and that it will show that the verdict at the trial at which it is alleged the perjury was committed should have been guilty.

...

If there is the power which my noble and learned friends think there is to

stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances. [Emphasis added.]

20 In this country, the issue apparently remained in some doubt following the decision of this Court in *Rourke v. The Queen*, [1978] 1 S.C.R. 1021. However, *R. v. Jewitt*, [1985] 2 S.C.R. 128, resolved the matter. Dickson C.J., for the Court, relies on the passage from *Humphrys* cited above (which [page763] was seen to temper the general reluctance expressed in *Rourke*) as well as the decision of the Ontario Court of Appeal in *R. v. Young* (1984), 40 C.R. (3d) 289 and allows for the possibility of the remedy. The former Chief Justice is, however, careful to restrict the cases in which it might be available. At pages 136-37 he states:

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* ... and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases". [Emphasis added.]

21 This position was subsequently confirmed in *R. v. Keyowski*, [1988] 1 S.C.R. 657, and *R. v. Conway*, [1989] 1 S.C.R. 1659. Again, in both instances the Court was careful to point out that the remedy will only be granted in the "clearest of cases".

22 From the preceding discussion it should be apparent that, while not absolute, the principle of prosecutorial discretion is an important and useful part of our criminal law. Hence, as I mentioned above, the interpretation of the Act which is urged upon us by the respondent and which was accepted by the Court of Appeal would represent a marked departure from the law as it currently exists. This, in turn, heightens the scrutiny with which the argument must be examined. As stated in *Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 116:

It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural [page764] or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended.

(See also Cross, *Statutory Interpretation* (2nd ed. 1987), at pp. 169-72.)

23 Consequently, subject to such exceptions as the doctrine of abuse of process (which was not argued before us), while it is open to Parliament to confer discretion upon Youth Court judges to dismiss charges on the basis that those charges ought not to have been laid, indeed, subject to over-arching constitutional norms, it is open to Parliament to change the law in whatever way it sees fit, the legislation in which it chooses to make these alterations known must be drafted in such a way that its intention is in no way in doubt. The question for the purposes of this case becomes, therefore, whether Parliament has drafted the Young Offenders Act in such a way so as to make this intention manifest.

24 The type of clarity necessary to effect such a change cannot, in my opinion, be found in s. 19(2) alone. The wording of that section is not explicit enough to reflect an intent on the part of Parliament to confer on Youth Court judges the discretion to dismiss charges whenever it strikes their fancy. The respondent recognizes this and submits that Parliament's expression lies rather in the combined operation of ss. 19(2) and 3(1). Section 19(2), she points out, provides that a youth court may dismiss a charge. The court may do so, the argument continues, where the prosecutor has not acted in conformity with the principles underlying the Act. Those principles are contained in s. 3(1). The respondent relies particularly on s. 3(1)(d) which contemplates the taking of "measures other than judicial proceedings" or "no measures" where doing so would "not be inconsistent with the protection of society".

25 In light of my conclusions pertaining to the need of Parliament to make its intention manifest when effecting a change to the existing law, the argument of the respondent would appear to depend upon Parliament including a coherent, unified [page765] statement of the principles underlying the Young Offenders Act and the goals sought to be achieved by its enactment. Presumably, if Parliament wished to confer upon the Youth Court the discretion to dismiss charges where the prosecutor has not acted in conformity with the philosophy of the Act, it would leave no doubt as to the nature of that philosophy.

26 I am unable to accede to the submission of the appellant that s. 3(1) is merely a "preamble" and does not carry the same force one would normally attribute to substantive provisions, especially since Parliament has chosen to include the section in the body of the Act. Yet, I am equally unable to attribute to that section the clarity necessary to accept the respondent's interpretation. Section 3(1)(d) admittedly advocates the taking of no measures in certain circumstances. However, this subsection must be read in conjunction with the rest of s. 3 which states, inter alia, that "young persons who commit offences should nonetheless bear responsibility for their contraventions" (3(1)(a)), and that "society must ... be afforded the necessary protection from illegal behaviour" (3(1)(b)). These statements, on their face, would both militate against the action advocated by the Court of Appeal just as much as s. 3(1)(d) is said to militate in favour of it.

27 Some commentators have been relatively critical of the drafting of the Declaration of Principle as it appears in s. 3(1). Platt, in *Young Offenders Law in Canada* (1989), at (SS) 2.18, has said:

In many respects, the policies are an articulation of the principles of criminal law in the context of young persons. The difficulty is that they are not coherent and, in some instances, are positively inconsistent. It is because of this that s. 3(1) is such a fertile ground for both the defence and the prosecution in searching out Parliament's legislative intention.

28 However, while I am not unmindful of the apparent inconsistencies of the stated goals of the Act as contained in s. 3(1), in my opinion the better view is that advocated by Bala and Kirvan in Chapter 4 of *The Young Offenders Act: A Revolution* [page766] in *Canadian Juvenile Justice* (1991), at pp. 80-81:

It is apparent that there is a level of societal ambivalence in Canada about the appropriate response to young offenders. On the one hand, there is a feeling that adolescents who violate the criminal law need help to enable them to grow into productive, law-abiding citizens; this view is frequently reflected in media stories about inadequate facilities for treating young offenders. On the other hand, there is a widespread public concern about the need to control youthful criminality and protect society. This view is reflected in media stories and editorials commenting on the alleged inadequacy of the three-year maximum disposition that can be applied to young offenders, a particular public concern in regard to those youths who commit very serious, violent offences.

While it may not be inaccurate to suggest that the Declaration of Principle reflects a certain societal ambivalence about young offenders, it is also important to appreciate that it represents an honest attempt to achieve an appropriate balance for dealing with a very complex social problem. The YOA does not have a single, simple underlying philosophy, for there is no single, simple philosophy that can deal with all situations in which young persons violate the criminal law. While the declaration as a whole defines the parameters for juvenile justice in Canada, each principle is not necessarily relevant to every situation. The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made and the specific provisions of the YOA that govern the situation. There are situations in which there is a need to balance competing principles, but this is a challenge in cases in the adult as well as the juvenile system.

There is a fundamental tension in the YOA between such competing ideals as due process and treatment; in some situations, the act gives precedence to due process, though in exceptional circumstances treatment may be emphasized at the expense of due process. The underlying philosophical tensions in the YOA

reflect the very complex nature of youthful criminality. There is no single, simple philosophy and no single type of program that will "solve" the problem of youthful criminality. Judges and the other professionals who work with young persons who violate the criminal law require a [page767] complex and balanced set of principles like those found in the YOA.

(See also Doob and Beaulieu, "Variation in the Exercise of Judicial Discretion with Young Offenders" (1992), 34 Can. J. Crim. 35, at pp. 47-48.)

29 On this reading of the section, it becomes plain that Parliament was attempting to achieve disparate goals by including s. 3(1) in the Act. This is entirely understandable. However, in my view, it is also fatal to the argument as advanced by the respondent for it fails to reveal the kind of clear, singular intention necessary to accept the type of radical change in the law of criminal procedure which is advocated by the Court of Appeal and by the respondent.

30 In any event, I have come to the conclusion that the argument advanced by the respondent is not at all consonant with recent pronouncements of this Court on the nature of s. 3(1). In *R. v. S. (S.)*, [1990] 2 S.C.R. 254, the accused, a young person, had been charged with possession of stolen goods but before entering a plea brought a motion alleging that the failure of the Ontario government to designate an alternative measures program constituted a violation of his s. 15 rights as guaranteed by the Charter. He relied on ss. 3(1)(d) and (f), arguing that in conjunction with s. 4, they showed the government to be under a positive duty to initiate such programs. The trial judge accepted this argument as did the Court of Appeal. This Court reversed. Speaking through Dickson C.J., the Court held that no such mandatory duty could be inferred from the language Parliament had chosen in drafting the legislation. At page 274 Dickson C.J. states:

... the use of the term "should" in s. 3(1)(d) does not provide evidence of a mandatory duty. While I agree that s. 3(2) dictates that a liberal interpretation be given to the legislation, in my opinion that does not require the abandonment of the principles of statutory interpretation nor does it preclude resort to the ordinary meaning of words in interpreting a statute. In the context of [page768] s. 3(1)(d), I find that the word "should" denotes simply a "desire or request" ... and not a legal obligation.

31 In the circumstances of this case I am of the view that this pronouncement significantly undermines the submission of the respondent since she is arguing, in effect, that pursuant to s. 3(1)(d) the prosecutor is under a positive obligation to consider the bringing of no charges where doing so would be consistent with the underlying philosophy of the Act and, if the prosecutor fails to abide by this obligation and brings charges where they are not warranted, the Youth Court has authority to dismiss those charges. As seen from the decision in *R. v. S. (S.)*, no such positive obligation may be gleaned from the wording of s. 3(1)(d) and, consequently, none may be imputed

to the authorities.

32 Finally, I wish to note that, besides failing to be clearly reflected in the principles of the Act and being contrary to the jurisprudence of this Court, the interpretation advanced by the respondent and adopted by the Court of Appeal could, in my respectful opinion, lead to no small amount of difficulty. Consider the case of *R. v. M.(J.)*, [1991] B.C.J. No. 2123, B.C. Prov. Ct., May 30, 1991. The young person had been charged with assault after he had put his hands on the shoulders of a group home worker "and shoved her backwards 3 or 4 times. She did not fall, nor did she suffer any injuries". The Crown, relying on the Court of Appeal decision in the present case, and on the reasoning in *D. L.*, supra, sought to adduce evidence of past misconduct in order to show that the discretion of the prosecutor in deciding to lay charges had been properly exercised. Counsel for the young person, of course, objected strongly and relied on *R. v. Rowton* (1865), 10 Cox C.C. 25 and the general prohibition on admission of character evidence. Auxier Prov. Ct. J. was clearly put in a difficult position because the only evidence available to show proper exercise of discretion was inadmissible. This difficulty, I think, is reflected in her reasons (at p. 3):

[page769]

I feel I may only know the tip of the iceberg in this case but, as stated, am of the view that the only relevant evidence is that relating to the alleged offence. On those facts, all I see is a minor disciplinary matter, precisely of the type referred to in the *David L.* case. I follow the reasoning ... in that case and dismiss the charge.

33 I am of the view that it would be unwise for the courts to institutionalize such a dilemma. I would note that where a Youth Court judge is under the impression, for whatever reason, that though the strict elements of a charge have been established, the charges ought not to have been laid, he or she has the express power under s. 20(1)(a) to grant an absolute discharge. At this point, presumably, evidence of the young person's history would be available. I make no comment on whether an absolute discharge would have been the appropriate course of action in this case, but I cannot help but think that this would have responded to the concerns expressed by the trial judge and by the Court of Appeal in a manner consistent with the Act.

34 For these reasons I am bound to hold that the appeal must be allowed. However, since this case reflects considerable confusion on the nature of s. 19(2), I wish to add a few words on that subject. As is already apparent from these reasons, that section does not, in conjunction with s. 3(1) or otherwise, confer jurisdiction upon a Youth Court judge to dismiss charges against a young person merely because he or she feels that those charges ought not to have been laid. Instead, I am of the view that s. 19 simply seeks to protect the young person against the consequences of an ill-informed plea of guilty. Section 19(1) requires that the court be satisfied that the facts support the charge before accepting a guilty plea. (In adult proceedings, the court has discretion to perform such an inquiry but is under no obligation to do so: *Adgey v. The Queen*, [1975] 2 S.C.R. 426. See also:

Salhany, *Canadian Criminal Procedure* (5th ed. 1989), at pp. 220-21.) If the court is not satisfied that the facts support the charge, s. 19(2), as well as directing that a trial be held where the young person [page770] has entered a plea of not guilty, then requires the court to enter a plea of not guilty and proceed with the trial: Bala and Lilles, *The Young Offenders Act Annotated* (1984), at pp. 167-70. Although s. 19(2) provides that the court may "make an order dismissing the charge", I do not think that the section contains clear enough language to alter such a long-standing principle of criminal procedure as deference to the discretion of the prosecutor. Accordingly, the respondent's argument cannot succeed.

Disposition

35 I would allow the appeal, reverse the decision of the Court of Appeal and affirm the trial judge's finding of guilty on the charge of uttering threats. I would further direct that the matter be remitted to the court of first instance for disposition under s. 20.

TAB 13

105 S.Ct. 1524
Supreme Court of the United States

David Alan WAYTE, Petitioner

v.

UNITED STATES.

No. 83–1292.

Argued Nov. 6, 1984.

Decided March 19, 1985.

Synopsis

Government appealed dismissal by the United States District Court for the Central District of California, Terry J. Hatter, J., [549 F.Supp. 1376](#), of indictment charging defendant with knowingly and willfully failing to register with Selective Service System. The United States Court of Appeals for the Ninth Circuit, [710 F.2d 1385](#), reversed, and certiorari was granted. The Supreme Court, Justice Powell, held that Government's passive enforcement policy, under which the Government prosecuted only those who reported themselves as having violated the law, or who were reported by others, did not violate the First or Fifth Amendments.

Affirmed.

Justice Marshall dissented and filed opinion in which Justice Brennan joined.

West Headnotes (13)

[1] **District and Prosecuting Attorneys**

🔑 Charging discretion

Government retains broad discretion as to whom to prosecute.

[189 Cases that cite this headnote](#)

[2] **District and Prosecuting Attorneys**

🔑 Charging discretion

So long as prosecutor has probable cause to believe that accused committed offense defined by statute, decision whether to

prosecute, and what charge to bring or file before grand jury, generally rests entirely on his discretion.

[347 Cases that cite this headnote](#)

[3] **District and Prosecuting Attorneys**

🔑 Discretion in general

Although prosecutorial discretion is broad, it is not unfettered.

[154 Cases that cite this headnote](#)

[4] **Criminal Law**

🔑 Discriminatory or Selective Prosecution

Selectivity in enforcement of criminal laws is subject to constitutional restraints.

[45 Cases that cite this headnote](#)

[5] **Criminal Law**

🔑 Discriminatory or Selective Prosecution

Decision to prosecute may not be deliberately based upon unjustifiable standards such as race, religion or other arbitrary classification, including exercise of protected statutory and constitutional rights.

[414 Cases that cite this headnote](#)

[6] **Constitutional Law**

🔑 Decision to prosecute;discretion

It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. [U.S.C.A. Const.Amend. 5](#).

[123 Cases that cite this headnote](#)

[7] **Constitutional Law**

🔑 Decision to prosecute;discretion

Showing of discriminatory intent is not necessary to establish selective prosecution when equal protection claim is based on overtly discriminatory classification. [U.S.C.A. Const.Amend. 5](#).

[327 Cases that cite this headnote](#)

[8] Criminal Law

🔑 Particular cases

Even applying standards from grand jury selection context, defendant failed to establish prima facie case of selective prosecution, where defendant failed to establish that he was member of identifiable group that was a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.

[143 Cases that cite this headnote](#)

[9] Criminal Law

🔑 Particular cases

Defendant charged with knowingly and willfully failing to register with the Selective Service System failed to establish selective prosecution, absent showing that Government's policy of passive enforcement, under which it would investigate and prosecute only nonregistration cases of those who advised Selective Service that they had failed to register or who were reported by others as having failed to register, had discriminatory effect or was motivated by discriminatory purpose. [U.S.C.A. Const.Amend. 5](#); Military Selective Service Act, § 3, as amended, [50 U.S.C.A.App. § 453](#); Proclamation No. 4771, § 1–1 et seq., [50 U.S.C.A.App. § 453](#) note.

[291 Cases that cite this headnote](#)

[10] Constitutional Law

🔑 Right to Petition for Redress of Grievances

Constitutional Law

🔑 Freedom of Speech, Expression, and Press

Although right to petition and right to free speech are separate guarantees, they are related and generally subject to same constitutional analysis. [U.S.C.A. Const.Amend. 1](#).

[52 Cases that cite this headnote](#)

[11] Armed Services

🔑 Registration

“Right” not to register with Selective Service System is without foundation either in Constitution or history of our country.

[2 Cases that cite this headnote](#)

[12] Constitutional Law

🔑 Time, Place, or Manner Restrictions

Government regulation is justified if it is within constitutional power of Government; if it furthers important or substantial governmental interest; if governmental interest is unrelated to suppression of free expression; and if incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest. [U.S.C.A. Const.Amend. 1](#).

[16 Cases that cite this headnote](#)

[13] Armed Services

🔑 Compulsory Service or Draft Evasion

Constitutional Law

🔑 Selective service and the draft

Selective Service System's policy of passive enforcement under which it would investigate and prosecute only those who had advised Selective Service that they had failed to register or who were reported by others as having failed to register did not violate First Amendment, where policy furthered important governmental interest and policy placed no more limitation on speech than was necessary to ensure registration for national defense. [U.S.C.A. Const.Amend. 1](#).

[42 Cases that cite this headnote](#)

****1525 *598 Syllabus***

A July 1980 Presidential Proclamation directed certain young male citizens to register with the Selective Service System during a specified week. Petitioner fell within the

prescribed class but did not register. Instead, he wrote letters to Government officials, including the President, stating that he had not registered and did not intend to do so. These letters were added to a Selective Service file of young men who advised that they had failed to register **1526 or who were reported by others as having failed to register. Subsequently, Selective Service adopted a policy of passive enforcement under which it would investigate and prosecute only the nonregistration cases contained in this file. In furtherance of this policy, Selective Service in June 1981 sent a letter to each reported nonregistrant warning that a failure to register could result in criminal prosecution. Petitioner received such a letter but did not respond. Thereafter, Selective Service transmitted to the Department of Justice, for investigation and potential prosecution, the names of petitioner and others identified under the passive enforcement policy. The Department of Justice, after screening out those who appeared not to be required to register, referred the remaining names to the Federal Bureau of Investigation and appropriate United States Attorneys. Petitioner's name was one of those so referred. Then, pursuant to the Department of Justice's so-called "beg" policy, whereby United States Attorneys, assisted by the FBI, made an effort to persuade nonregistrants to change their minds, the United States Attorney for petitioner's district sent him a letter urging him to register or face possible prosecution. Again petitioner failed to respond. Nor did he register during an authorized grace period or after further urging by FBI agents to do so. Accordingly, he was indicted for knowingly and willfully failing to register in violation of the Military Selective Service Act. The District Court dismissed the indictment on the ground that the Government had failed to rebut petitioner's prima facie case of selective prosecution. The Court of Appeals reversed, holding that although petitioner had shown that others similarly situated had not been prosecuted for conduct similar to his, he had not shown that the Government focused its investigation on him *because* of his protest activities.

***599** *Held:* The Government's passive enforcement policy together with its "beg" policy did not violate either the First or Fifth Amendment. Pp. 1531–1534.

(a) Selective prosecution claims may appropriately be judged according to ordinary equal protection standards. These standards require petitioner to show both that the passive enforcement policy had a discriminatory

effect and that it was motivated by a discriminatory purpose. Petitioner has not met this burden. All he has shown is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech. The fact that the Government prosecuted those nonregistrants who reported themselves or who were reported by others demonstrates that the Government treated all reported nonregistrants equally, and did not subject vocal nonregistrants to any special burden. But even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. Absent a showing that the Government prosecuted petitioner *because* of his protest activities, his claim of selective prosecution fails. Pp. 1531–1532.

(b) With respect to the First Amendment, Government regulation is justified if (1) it is within the Government's constitutional power, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672. In this case, neither the first nor third requirement is disputed, and the passive enforcement policy meets both the second and fourth requirements. The reasons the Government offers in defense of the passive enforcement policy—it promotes prosecutorial efficiency, the nonregistrants' letters to Selective Service provided strong evidence of their intent not to comply, and prosecution of visible nonregistrants was an efficient way to promote general deterrence—are sufficiently compelling to satisfy the second **1527 requirement as to either those who reported themselves or those who were reported by others. The passive enforcement policy meets the fourth requirement, for it placed no more limitation on speech than was necessary to ensure registration and was the only effective interim solution available to carry out the Government's compelling interest. Pp. 1532–1534.

710 F.2d 1385 (CA9 1983), affirmed.

Attorneys and Law Firms

*600 *Mark D. Rosenbaum* argued the cause for petitioner. With him on the briefs were *Dan Stormer*, *Mary Ellen Gale*, *Dennis M. Perluss*, *Dan Marmalefsky*, *Laurence H. Tribe*, *William G. Smith*, and *Burt Neuborne*.

Solicitor General Lee argued the cause for the United States. With him on the brief were *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, *Mark I. Levy*, and *John F. De Pue*.*

* *Dennis E. Curtis* filed a brief for the Central Committee for Conscientious Objectors et al. as *amici curiae* urging reversal.

David Crump filed a brief for the Legal Foundation of America as *amicus curiae* urging affirmance.

Opinion

Justice POWELL delivered the opinion of the Court.

The question presented is whether a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, violates the First and Fifth Amendments.

I

On July 2, 1980, pursuant to his authority under § 3 of the Military Selective Service Act, 62 Stat. 605, as amended, 50 U.S.C.App. § 453,¹ the President issued Presidential Proclamation *601 No. 4771, 3 CFR 82 (1981). This Proclamation directed male citizens and certain male residents born during 1960 to register with the Selective Service System during the week of July 21, 1980. Petitioner fell within that class but did not register. Instead, he wrote several letters to Government officials, including the President, stating that he had not registered and did not intend to do so.²

Petitioner's letters were added to a Selective Service file of young men who advised that they had failed to register or who were reported by others as having failed to register. For reasons we discuss, *infra*, at 1534, Selective Service adopted a policy of passive enforcement under which it would investigate and prosecute only the cases

of nonregistration contained in this file. In furtherance of this policy, Selective Service sent a letter on June 17, 1981, to each reported violator who had not registered and for whom it had an address. *602 The letter explained the duty to register, stated that Selective Service had information that **1528 the person was required to register but had not done so, requested that he either comply with the law by filling out an enclosed registration card or explain why he was not subject to registration, and warned that a violation could result in criminal prosecution and specified penalties. Petitioner received a copy of this letter but did not respond.

On July 20, 1981, Selective Service transmitted to the Department of Justice, for investigation and potential prosecution, the names of petitioner and 133 other young men identified under its passive enforcement system—all of whom had not registered in response to the Service's June letter. At two later dates, it referred the names of 152 more young men similarly identified. After screening out the names of those who appeared not to be in the class required to register, the Department of Justice referred the remaining names to the Federal Bureau of Investigation for additional inquiry and to the United States Attorneys for the districts in which the nonregistrants resided. Petitioner's name was one of those referred.

Pursuant to Department of Justice policy, those referred were not immediately prosecuted. Instead, the appropriate United States Attorney was required to notify identified nonregistrants by registered mail that, unless they registered within a specified time, prosecution would be considered. In addition, an FBI agent was usually sent to interview the nonregistrant before prosecution was instituted. This effort to persuade nonregistrants to change their minds became known as the “beg” policy. Under it, young men who registered late were not prosecuted, while those who never registered were investigated further by the Government. Pursuant to the “beg” policy, the United States Attorney for the Central District of California sent petitioner a letter on October 15, 1981, urging him to register or face possible prosecution. Again petitioner failed to respond.

*603 On December 9, 1981, the Department of Justice instructed all United States Attorneys not to begin seeking indictments against nonregistrants until further notice. On January 7, 1982, the President announced a grace period to afford nonregistrants a further opportunity to

register without penalty. This grace period extended until February 28, 1982. Petitioner still did not register.

Over the next few months, the Department decided to begin prosecuting those young men who, despite the grace period and “beg” policy, continued to refuse to register. It recognized that under the passive enforcement system those prosecuted were “liable to be vocal proponents of nonregistration” or persons “with religious or moral objections.” Memorandum of March 17, 1982, from Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, Department of Justice, to D. Lowell Jensen, Assistant Attorney General, Criminal Division, App. 301. It also recognized that prosecutions would “undoubtedly result in allegations that the [case was] brought in retribution for the nonregistrant's exercise of his first amendment rights.” *Ibid.* The Department was advised, however, that Selective Service could not develop a more “active” enforcement system for quite some time. See *infra*, at 1534. Because of this, the Department decided to begin seeking indictments under the passive system without further delay. On May 21, 1982, United States Attorneys were notified to begin prosecution of nonregistrants. On June 28, 1982, FBI agents interviewed petitioner, and he continued to refuse to register. Accordingly, on July 22, 1982, an indictment was returned against him for knowingly and willfully failing to register with the Selective Service in violation of §§ 3 and 12(a) of the Military Selective Service Act, 62 Stat. 605 and 622, as amended, 50 U.S.C.App. §§ 453 and 462(a). This was one of the first indictments returned against any individual under the passive policy.

*604 II

Petitioner moved to dismiss the indictment on the ground of selective prosecution. **1529 He contended that he and the other indicted nonregistrants³ were “vocal” opponents of the registration program who had been impermissibly targeted (out of an estimated 674,000 nonregistrants⁴) for prosecution on the basis of their exercise of First Amendment rights. After a hearing, the District Court for the Central District of California granted petitioner's broad request for discovery and directed the Government to produce certain documents and make certain officials available to testify. The Government produced some documents and agreed to make some Government officials available

but, citing executive privilege, it withheld other documents and testimony. On October 29, 1982, the District Court ordered the Government to produce the disputed documents and witness. The Government declined to comply and on November 5, 1982, asked the District Court to dismiss the indictment in order to allow an appeal challenging the discovery order. Petitioner asked for dismissal on several grounds, including discriminatory prosecution.

On November 15, 1982, the District Court dismissed the indictment on the ground that the Government had failed to *605 rebut petitioner's prima facie case of selective prosecution.⁵ Following precedents of the Court of Appeals for the Ninth Circuit, the District Court found that in order to establish a prima facie case petitioner had to prove that (i) others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (ii) the Government's discriminatory selection was based on impermissible grounds such as race, religion, or exercise of First Amendment rights. 549 F.Supp. 1376, 1380 (Cal.1982). Petitioner satisfied the first requirement, the District Court held, because he had shown that all those prosecuted were “vocal” nonregistrants⁶ and because “[t]he inference is strong that the Government could have located non-vocal non-registrants, but chose not to.” *Id.*, at 1381. The District Court found the second requirement satisfied for three reasons. First, the passive enforcement program was “‘inherently suspect’” because “‘it focuse[d] upon the vocal offender ... [and was] vulnerable to the charge that those chosen for prosecution [were] being punished for their expression of ideas, a constitutionally protected right.’” *Ibid.*, quoting *606 *United States v. Steele*, 461 F.2d 1148, 1152 (CA9 1972). Second, the Government's awareness that a disproportionate number of vocal nonregistrants would be **1530 prosecuted under the passive enforcement system indicated that petitioner was prosecuted because of his exercise of First Amendment rights. 549 F.Supp., at 1382. Finally, the involvement of high Government officials in the prosecution decisions “strongly suggest[ed] impermissible selective prosecution.” *Id.*, at 1383. The District Court then held that the Government had failed to rebut the prima facie case.

The Court of Appeals reversed. 710 F.2d 1385 (CA9 1983). Applying the same test, it found the first requirement satisfied but not the second. The first was satisfied by petitioner's showing that out of the estimated

674,000 nonregistrants the 13 indicted had all been vocal nonregistrants. *Id.*, at 1387. As to the second requirement, the Court of Appeals held that petitioner had to show that the Government focused its investigation on him *because of* his protest activities. *Ibid.* Petitioner's evidence, however, showed only that the Government was aware that the passive enforcement system would result in prosecutions primarily of two types of men—religious and moral objectors and vocal objectors—and that the Government recognized that the latter type would probably make claims of selective prosecution. Finding no evidence of impermissible governmental motivation, the court held that the District Court's finding of a prima facie case of selective prosecution was clearly erroneous. *Id.*, at 1388. The Court of Appeals also found two legitimate explanations for the Government's passive enforcement system: (i) the identities of nonreported nonregistrants were not known, and (ii) nonregistrants who expressed their refusal to register made clear their willful violation of the law.⁷

*607 Recognizing both the importance of the question presented and a division in the Circuits,⁸ we granted certiorari on the question of selective prosecution. 467 U.S. 1214, 104 S.Ct. 2655, 81 L.Ed.2d 362 (1984). We now affirm.

III

[1] [2] In our criminal justice system, the Government retains “broad discretion” as to whom to prosecute. *United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 102 S.Ct. 2485, 2492, n. 11, 73 L.Ed.2d 74 (1982); accord, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent

to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the **1531 Government's enforcement policy. All these are substantial concerns that *608 make the courts properly hesitant to examine the decision whether to prosecute.

[3] [4] [5] As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not “ ‘unfettered.’ Selectivity in the enforcement of criminal laws is ... subject to constitutional constraints.” *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 2205, 60 L.Ed.2d 755 (1979) (footnote omitted). In particular, the decision to prosecute may not be “ ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,’ ” *Bordenkircher v. Hayes*, *supra*, 434 U.S., at 364, 98 S.Ct., at 668, quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962), including the exercise of protected statutory and constitutional rights, see *United States v. Goodwin*, *supra*, 457 U.S., at 372, 102 S.Ct., at 2488.

[6] [7] [8] [9] It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.⁹ See *Oyler v. Boles*, *supra*. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.¹⁰ *609 *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). All petitioner has shown here is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech. Indeed, he could not have done so given the way the “beg” policy was carried out. The Government did not prosecute those who reported themselves **1532 but later registered. Nor did it prosecute those who protested registration but did not report themselves or were not reported by others. In fact, the Government did

not even investigate those who wrote letters to Selective Service criticizing registration unless their letters stated affirmatively that they had refused to comply with the law. Affidavit of Edward A. Frankle, Special Assistant to the Director of Selective Service for Compliance, App. 635. The Government, *610 on the other hand, did prosecute people who reported themselves or were reported by others but who did not publicly protest. These facts demonstrate that the Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden. Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government.

Even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. The evidence he presented demonstrated only that the Government was aware that the passive enforcement policy would result in prosecution of vocal objectors and that they would probably make selective prosecution claims. As we have noted, however: “ ‘[D]iscriminatory purpose’ ... implies more than ... intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Personnel Administrator of Massachusetts v. Feeney*, *supra*, 442 U.S., at 279, 99 S.Ct., at 2296 (footnotes and citations omitted). In the present case, petitioner has not shown that the Government prosecuted him *because of* his protest activities. Absent such a showing, his claim of selective prosecution fails.

IV

[10] [11] [12] Petitioner also challenges the passive enforcement policy directly on First Amendment grounds.¹¹ In particular, he claims that “[e]ven though the [Government’s passive] enforcement policy did not overtly punish protected speech as *611 such, it inevitably created a content-based regulatory system with a concomitantly disparate, content-based impact on nonregistrants.”¹² Brief for Petitioner 23. This Court has held that when, as here, “ ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on

First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968). Government regulation is justified

“if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; **1533 and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.*, at 377, 88 S.Ct., at 1679.

Accord, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, 104 S.Ct. 2199, 2207, 81 L.Ed.2d 17 (1984); *Procurier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974). In the present case, neither the first nor third condition is disputed.

[13] There can be no doubt that the passive enforcement policy meets the second condition. Few interests can be more compelling than a nation’s need to ensure its own security. *612 It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning. Recognizing this fact, the Framers listed “provid[ing] for the common defence,” U.S. Const., Preamble, as a motivating purpose for the Constitution and granted Congress the power to “provide for the common Defence and general Welfare of the United States,” Art. I, § 8, cl. 1. See also *The Federalist* Nos. 4, 24, and 25. This Court, moreover, has long held that the power “to raise and support armies ... is broad and sweeping,” *United States v. O’Brien*, *supra*, 391 U.S., at 377, 88 S.Ct., at 1679; accord, *Lichter v. United States*, 334 U.S. 742, 755–758, 68 S.Ct. 1294, 1301–1303, 92 L.Ed. 1694 (1948); *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918), and that the “power ... to classify and conscript manpower for military service is ‘beyond question,’ ” *United States v. O’Brien*, *supra*, 391 U.S., at 377, 88 S.Ct., at 1679, quoting *Lichter v. United States*, *supra*, 334 U.S., at 756, 68 S.Ct., at 1302; accord, *Selective Draft Law Cases*, *supra*. With these principles in mind, the three reasons the Government offers in defense of this particular enforcement policy are sufficiently compelling to satisfy the second *O’Brien* requirement—as to either those who reported themselves or those who were reported by others.

First, by relying on reports of nonregistration, the Government was able to identify and prosecute violators without further delay. Although it still was necessary to investigate those reported to make sure that they were required to register and had not, the Government did not have to search actively for the names of these likely violators. Such a search would have been difficult and costly at that time. Indeed, it would be a costly step in any “active” prosecution system involving thousands of nonregistrants. The passive enforcement program thus promoted prosecutorial efficiency. Second, the letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant’s *613 intent not to comply—one of the elements of the offense.¹³ Third, prosecuting visible nonregistrants was thought to be an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law.

The passive enforcement policy also meets the final requirement of the *O’Brien* test, for it placed no more limitation on speech than was necessary to ensure registration for the national defense. Passive enforcement not only did not subject “vocal” nonregistrants to any special burden, *supra*, at 1532, but also was intended to be only an interim enforcement system. Although Selective Service was engaged in developing an active enforcement program when it investigated petitioner, it had by then found no practicable way of obtaining the names and current addresses of likely **1534 nonregistrants.¹⁴ Eventually, it obtained them by matching state driver’s license records with Social Security files. It took some time, however, to obtain the necessary authorizations and to set up this system. Passive enforcement was the only effective interim solution available to carry out the Government’s compelling interest.

We think it important to note as a final matter how far the implications of petitioner’s First Amendment argument would extend. Strictly speaking, his argument does not concern *614 passive enforcement but self-reporting. The concerns he identifies would apply to all nonregistrants who report themselves even if the Selective Service engaged only in active enforcement. For example, a nonregistrant who wrote a letter informing Selective Service of his failure to register could, when prosecuted under an active system, claim that the Selective Service was prosecuting him only because of his “protest.” Just as in this case, he could have some justification for

believing that his letter had focused inquiry upon him. Prosecution in either context would equally “burden” his exercise of First Amendment rights. Under the petitioner’s view, then, the Government could not constitutionally prosecute a self-reporter—even in an active enforcement system—unless perhaps it could prove that it would have prosecuted him without his letter. On principle, such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to “protest” the law. The First Amendment confers no such immunity from prosecution.

V

We conclude that the Government’s passive enforcement system together with its “beg” policy violated neither the First nor Fifth Amendment. Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The Court decides today that petitioner “has not shown that the Government prosecuted him *because of* his protest activities,” and it remands to permit his prosecution to go forward. However interesting the question decided by the Court may be, it is not necessary to the disposition of this case. Instead, the issue this Court must grapple with is far less momentous but no less deserving of thoughtful treatment. What it must decide is whether Wayte has earned the *615 right to discover Government documents relevant to his claim of selective prosecution.

The District Court ordered such discovery, the Government refused to comply, and the District Court dismissed the indictment. The Court of Appeals reversed on the grounds that Wayte had failed to prevail on the merits of his selective prosecution claim, and that the discovery order was improper. If Wayte is entitled to obtain evidence currently in the Government’s possession, the Court cannot dismiss his claim on the basis of only the evidence now in the record. To prevail here, then, all that Wayte needs to show is that the District Court applied the correct legal standard and did not abuse its discretion in determining that he had made a nonfrivolous showing of selective prosecution entitling him to discovery.

There can be no doubt that Wayte has sustained his burden. Therefore, his claim cannot properly be dismissed at this stage in the litigation. I respectfully dissent from this Court's decision to do so.

I

In order to understand the precise nature of the legal question before this Court, it is important to review in some detail the posture in which this case comes to us. In ****1535** July 1982, an indictment filed in the District Court for the Central District of California charged Wayte with knowingly and willfully failing to register for the draft. In September 1982, Wayte moved to have the indictment dismissed on the ground of selective prosecution.

In support of his claim, he presented 10 exhibits: 7 internal Justice Department memoranda discussing the mechanism for the prosecution of individuals who failed to register for the draft, a report by the United States General Accounting Office discussing alternatives to the registration program, a statement by the Director of Selective Service before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, and a ***616** transcript of a meeting of the Department of Defense's Military Manpower Task Force. According to Wayte, this evidence supported his claim that the Government had designed a prosecutorial scheme that purposefully discriminated against those who had chosen to exercise their First Amendment right to oppose draft registration. Wayte argued that he had demonstrated sufficient facts on his claim of selective prosecution to be entitled to an evidentiary hearing on that issue. In this regard, Wayte moved to discover a variety of Government documents that he asserted were relevant to his selective prosecution claim, and indicated his intention to subpoena seven out-of-district witnesses, including Edwin Meese III, the Counsellor to the President.

On September 30, 1982, the District Court found that the motion to dismiss the indictment on the ground of selective prosecution was "non-frivolous." The following day, it held a hearing in which the parties presented their disagreements over Wayte's discovery requests. The District Court granted some of Wayte's requests, denied

others, and ordered the Government to submit some documents for *in camera* inspection. At a hearing on October 5, the District Court denied the Government's motion for reconsideration of the discovery order and postponed ruling on the requested subpoenas until after a preliminary evidentiary hearing on Wayte's selective prosecution claim.

This hearing was held on October 7. Two witnesses testified: David J. Kline, a Senior Legal Advisor at the Justice Department's Criminal Division, and Richard Romero, an Assistant United States Attorney in the Central District of California and the principal prosecutor in Wayte's case. Kline's testimony dealt extensively with the Justice Department's policies for prosecuting individuals who violated the draft-registration statute.

At a nonevidentiary hearing on October 15, the District Court ruled that portions of three of the many documents that had been submitted *in camera* should be turned over to ***617** the defense. The three documents in question had previously been given to the defense in expurgated fashion. As to certain parts of them, however, the District Court determined that the defense's need for the still undisclosed materials outweighed the Government's interest in nondisclosure. Specifically, the District Court ordered disclosure of two sentences and one paragraph in one letter, and one paragraph in each of two memoranda. The District Court also indicated that some of the documents submitted for *in camera* review had been redacted in a manner that made them incomprehensible.

The Government was less than eager to comply with the District Court's order of October 15. The Government's response to that order indicated, in a paragraph that was later stricken at the Government's request following an admonishment by the District Court:

"It is obvious that the Court's appetite for more and more irrelevant disclosures of sensitive information has become insatiable. It is also apparent that with each new disclosure, made pursuant to near-impossible deadlines, the court feels compelled to impugn the motives of the Government." Record, Doc. No. 95, p. 3.

****1536** The Government invoked a "deliberative processes" privilege for documents that it had turned over to the District Court for *in camera* review. It also refused to allow Meese's testimony, on the ground that all information on which he could testify was privileged.

The saga continued on October 20, when the District Court ordered the production, for *in camera* review, of unredacted versions of documents that had previously been submitted in redacted form. The Government eventually complied with that order.

On October 29, the District Court ordered that certain portions of those documents be turned over to the defense. The list of documents was kept under seal. The District Court *618 applied the standard for determining whether an assertion of executive privilege is valid announced in *United States v. Nixon*, 418 U.S. 683, 711, 94 S.Ct. 3090, 3109, 41 L.Ed.2d 1039 (1974). The court determined:

“Applying the balancing test from *Nixon* to the facts, this court finds that the scales of justice tip decidedly in favor of the defendant's right to review several of the documents which this court has inspected *in camera*. The Government's generalized assertion of a ‘deliberative process’ executive privilege must yield to the defendant's specific need for documents, which this court has determined must be released to Mr. Wayte.” Record, Doc. No. 119, p. 5.

In the same order, the District Court also granted Wayte's request that Meese be ordered to testify at an evidentiary hearing. In this connection, the District Court made a series of findings: (1) that the Government's normal prosecutorial policies were not being followed for the prosecution of nonregistrants; (2) that Meese served as a nexus between the White House and the Justice Department on this issue; and (3) that Meese had been directly involved in decisions involving the Government's prosecutorial policies toward nonregistrants. It therefore determined that his testimony was relevant to Wayte's claim.

The Government refused to comply with the District Court's order of October 29. It explained:

“[I]t is our position that important governmental interests are at stake in connection with our claim of privilege, which we sincerely believe have not been shown to be overridden in this case. Nor can we concur in the Court's conclusion that a sufficient basis has been established to justify requiring the appearance and testimony of an official as senior as the Counsellor to the President. Contrary to the Court's finding in

its Order of October 29, 1982, we believe that the record amply demonstrates that decisions relating to the prosecution of nonregistrants were made within the Department of Justice and *619 that there is, therefore, no nexus between the White House and the selection of the defendant for prosecution.” Record, Doc. No. 123, p. 3.

The District Court held its last hearing on this matter on November 15. In an order and opinion filed that day, the District Court dismissed Wayte's indictment. 549 F.Supp. 1376 (1982). It found, first, that Wayte had alleged sufficient facts on his selective prosecution claim “to take the question beyond the frivolous stage,” *id.*, at 1379 (citing *United States v. Erne*, 576 F.2d 212, 216 (CA9 1978)), and thus had earned the right to discover relevant Government documents. Second, it found that the Government had refused to comply with the discovery order of October 29 and that it was the Government's position that “the only way to achieve appellate review of the Government's assertion of executive privilege is for the court to dismiss the indictment against the defendant.” 549 F.Supp., at 1378–1379; see *Alderman v. United States*, 394 U.S. 165, 181, 89 S.Ct. 961, 970, 22 L.Ed.2d 176 (1969) (“[D]isclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would **1537 prefer dismissal of the case to disclosure of the information”).

Having made these findings, the District Court turned to the merits of Wayte's underlying claim. It found that Wayte had gone beyond satisfying the standard for obtaining discovery, and that he had in fact made out a *prima facie* case of selective prosecution. 549 F.Supp., at 1379–1380. As a result, the burden shifted to the Government to prove that its policy was not based on impermissible motives. The District Court found that the Government had failed to rebut Wayte's *prima facie* case. *Id.*, at 1382–1385.

On appeal to the Court of Appeals for the Ninth Circuit, the Government conceded that “[t]he event that triggered dismissal for selective prosecution was the government's declination, following the surrender of Presidential documents to the court, to comply with orders directing that certain of *620 these documents be furnished to the defense and that Presidential Counsellor Edwin Meese be made available as a witness.” Brief

for United States in No. 82–1699 (CA9), p. 42. The Government gave two reasons for its refusal to comply with the District Court's order. First, it maintained that Wayte “did not even meet the colorable basis test so as to trigger a discovery obligation on the part of the government.” *Id.*, at 44. Second, it argued that Wayte had not shown that he had a particularized need for the privileged materials that was sufficiently substantial to outweigh the asserted need to preserve confidentiality. *Id.*, at 45. The Government acknowledged that the District Court had applied the correct standard for evaluating claims of privilege—that set out in *United States v. Nixon*, *supra*. The Government, however, disagreed with the manner in which the District Court had weighed the relevant factors.

In his brief to the Ninth Circuit, Wayte argued that one independent basis for the dismissal of the indictment was that the Government had refused to comply with the District Court's lawful discovery orders. Brief for Appellee in No. 82–1699 (CA9), pp. 20–31. Wayte's brief clearly stated that “the indictment could properly have been dismissed on that basis alone.” *Id.*, at 20. In this connection, Wayte argued that he had alleged sufficient facts to take his selective prosecution claim beyond the frivolous stage, that the District Court's orders concerned materials that were relevant to that claim, that the propriety of discovery orders must be reviewed under an abuse of discretion standard, that the District Court had not abused its discretion in ordering discovery in this case, and that the District Court properly rejected the Government's claim of privilege.

A divided panel of the Court of Appeals for the Ninth Circuit reversed the dismissal of Wayte's indictment. [710 F.2d 1385 \(1983\)](#). Writing for the majority, Judge Wright focused primarily on the merits of the underlying selective prosecution claim. He concluded that, on the record before the *621 court, Wayte had failed to show that he was selected for prosecution “because of his exercise of his constitutional rights.” *Id.*, at 1387.

The Court of Appeals dealt with the Government's failure to comply with the discovery order in only one brief paragraph:

“Because Wayte made no initial showing of selective prosecution, he was not entitled to discovery of government documents. That access to the documents might have been helpful to him does not in itself entitle

him to discovery. The government's refusal to comply with the discovery orders was justified.” *Id.*, at 1388 (citations omitted).

In an unsuccessful petition for rehearing, Wayte argued that the majority had overlooked the standard of review applicable to trial court discovery orders. Pet. for Rehearing and Suggestion of Appropriateness of Rehearing En Banc in No. 82–1699 (CA9), pp. 8–10. Wayte renewed his selective prosecution arguments before this **1538 Court. See Pet. for Cert. 9–12; Tr. of Oral Arg. 9–11.

II

A

This streamlined account of the stormy proceedings below makes clear that, from a legal perspective, this case is first and foremost a discovery dispute. If the District Court correctly resolved the discovery issue, Wayte was entitled to additional evidence. And if he was entitled to additional evidence, the Court cannot reject his claim on the merits, on the basis of only the evidence to which Wayte had access at the time of the District Court proceedings.¹

*622 The question of whether the discovery order was appropriate breaks down into three narrower inquiries. The first is whether Wayte made a sufficient showing of selective prosecution *623 to be entitled to any discovery. The second is whether the documents and testimony ordered released were relevant to Wayte's selective prosecution claim, that is, whether the scope of discovery was appropriate. The third is whether Wayte's need for the materials outweighed the Government's assertion of executive privilege. The Court of Appeals dealt with only the first of these questions, finding that an adequate showing had not been made. Thus, if that decision is incorrect, the proper disposition of this case is a remand to the Court of Appeals for a determination of the second and third questions. Certainly this Court is in no position to perform those inquiries, as the documents at stake, which were submitted to the District Court for *in camera* review, are not before us.

****1539 B**

A two-part inquiry leads to the resolution of the narrow discovery question before this Court: (1) what showing must a defendant make to obtain discovery on a claim of selective prosecution, and (2) under what standard does an appellate court review a district court's finding that the required showing was made.

The Courts of Appeals have adopted a standard under which a defendant establishes his right to discovery if he can show that he has a “colorable basis” for a selective prosecution claim. See, e.g., *United States v. Murdock*, 548 F.2d 599, 600 (CA5 1977); *United States v. Cammisano*, 546 F.2d 238, 241 (CA8 1976); *United States v. Berrios*, 501 F.2d 1207, 1211 (CA2 1974); *United States v. Berrigan*, 482 F.2d 171, 181 (CA3 1973). To make this showing, a defendant must allege sufficient facts in support of his selective prosecution claim “to take the question past the frivolous state.” *624 *United States v. Hazel*, 696 F.2d 473, 475 (CA6 1983); *United States v. Erne*, 576 F.2d, at 216. In general, a defendant must present “some evidence tending to show the existence of the essential elements of the defense.” *United States v. Berrios*, *supra*, at 1211.

This standard, which the District Court applied in this case, is consistent with our exhortation that “[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.” *United States v. Nixon*, 418 U.S., at 709, 94 S.Ct., at 3108. It also recognizes that most of the relevant proof in selective prosecution cases will normally be in the Government's hands. Cf. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). At the same time, the standard adequately protects the Government from attempts by the defense to seek discovery as a means of harassment or of delay. See *United States v. Murdock*, *supra*, at 600.

With respect to the second determination, which concerns the appropriate scope of review, there is no doubt that trial judges should enjoy great deference in discovery matters. District court decisions on discovery are therefore not subject to plenary review on appeal, but are instead reviewed under an abuse-of-discretion standard. As we stated in *United States v. Nixon*:

“Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with [Federal Rule of Criminal Procedure] 17(c).” 418 U.S., at 702, 94 S.Ct., at 3104.

The abuse-of-discretion standard acknowledges that appellate courts in general, and this Court in particular, should not *625 expend their limited resources making determinations that can profitably be made only at the trial level. Cf. *Anderson v. Bessemer City*, 470 U.S. 564, 573–576, 105 S.Ct. 1504, 1511–1513, 84 L.Ed.2d 518 (1985); *Florida v. Rodriguez*, 469 U.S. 1, 12, 105 S.Ct. 308, 314, 83 L.Ed.2d 165 (1984) (STEVENS, J., dissenting).

The Court of Appeals below, however, did not even mention the appropriate standard of review, much less explain how to apply it. To the extent that its conclusory statements shed any light on the basis for its decision, it appears that the Court of Appeals performed a *de novo* inquiry. Such review is especially inappropriate in this case, given the painstaking care that the District Court took in supervising the discovery process, and the narrowly tailored scope of its rulings.

III

The proper starting point, then, is to consider whether the District Court abused its discretion in determining that Wayte **1540 had presented sufficient facts to support a nonfrivolous claim of selective prosecution. I believe that the District Court acted well within the scope of its discretion.

To evaluate the merit of Wayte's claim, I consider the elements of a *prima facie* case of selective prosecution and ascertain whether Wayte has made a nonfrivolous showing as to the existence of these elements. It is important to bear in mind at this stage that Wayte need not have made out a full *prima facie* case in order to be entitled to discovery. A *prima facie* case, of course, is one that if un rebutted will lead to a finding of selective prosecution. It shifts to the Government the burden of

rebutting the presumption of unconstitutional action. See *Rose v. Mitchell*, 443 U.S. 545, 565, 99 S.Ct. 2993, 3005, 61 L.Ed.2d 739 (1979); *Duren v. Missouri*, 439 U.S. 357, 368, 99 S.Ct. 664, 670, 58 L.Ed.2d 579 (1979); *Castaneda v. Partida*, 430 U.S. 482, 495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana*, 405 U.S. 625, 631–632, 92 S.Ct. 1221, 1225–1226, 31 L.Ed.2d 536 (1972). But a defendant need not meet this high burden just to get discovery; the standard for discovery is merely nonfrivolousness.

Moreover, Wayte need not convince this Court, as he had no need to persuade the Court of Appeals, that it would have *626 made a finding of nonfrivolousness itself if it had sat as a finder of fact. All that he needs to show is that the District Court's finding of nonfrivolousness did not constitute an abuse of discretion. See *United States v. Cammisano*, 546 F.2d, at 242; *United States v. Berrios*, 501 F.2d, at 1211–1212. I turn, then, to consider whether a sufficient showing was made.

The Court correctly points out that Wayte's selective prosecution claims must be judged according to ordinary equal protection standards. *Ante*, at 1531; see *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 1072, 30 L.Ed. 220 (1886). Wayte presents an equal protection challenge to the “passive” enforcement system, under which Selective Service refers to the Justice Department for further investigation and possible prosecution *only* the “names of young men who fall into two categories: (1) those who wrote to Selective Service and said that they refused to register and (2) those whose neighbors and others reported them as persons who refused to register.” App. 239. Wayte argues that the scheme purposefully singled out these individuals as a result of their exercise of First Amendment rights. See Brief for Appellee in No. 82–1699 (CA9), pp. 3–8, 11–20.

To make out a prima facie case, Wayte must show first that he is a member of a recognizable, distinct class. Second, he must show that a disproportionate number of this class was selected for investigation and possible prosecution. Third, he must show that this selection procedure was subject to abuse or was otherwise not neutral. *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S.Ct., at 1280. The inquiry then is whether Wayte has presented sufficient evidence as to each of the elements to show that the claim is not frivolous.

Wayte has clearly established the first element of a prima facie case. The record demonstrates unequivocally that Wayte is a member of a class of vocal opponents to the Government's draft registration program. All members of that class exercised a First Amendment right to speak freely and *627 to petition the Government for a redress of grievances, and either reported themselves or were reported by others as having failed to register for the draft.

To establish the second element, Wayte must show that the “passive” enforcement policy identified for investigation and possible prosecution a disproportionate number of vocal opponents of draft registration. The record, as it stands given the Government's refusal to comply with the District Court's discovery order, does not contain a breakdown of how many of the approximately 300 young men referred by Selective Service to the Justice Department were “vocal.” However, the record suggests **1541 that responsible officials in the Justice Department were aware that the vast majority of these individuals would be vocal opponents of draft registration.

For example, a draft letter prepared by David J. Kline, the Justice Department official responsible for overall enforcement of the draft registration law, for Assistant Attorney General Jensen to send to Herbert C. Puscheck, Selective Service's Associate Director for plans and operations, stated:

“Unfortunately, we believe that if the government initiates prosecutions with only the present passive identification scheme in place, there exists a real risk that the United States will lose at least a few of those initial cases. There is a high probability that persons who write to the Service and that persons who are reported by others are vocal proponents of non-registration. Since a passive identification scheme necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly lead to claims that the prosecution is

brought in retribution for the non-registrant's exercise of his first amendment rights. *Indeed, with the present univers[e] of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the *628 same as the chances that he will be struck by lightning.*" App. 290–291 (emphasis added; citation omitted).

Similarly a memorandum from Jensen to various United States Attorney's Offices states:

"Selective Service's enforcement program is presently 'passive.' Non-registrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register." *Id.*, at 361–362.

Perhaps, by itself, this evidence would not suffice to establish the second element of a prima facie case. However, it is more than adequate to make nonfrivolous the claim that the "passive" enforcement scheme identified for possible prosecution a disproportionate number of vocal opponents of draft registration.

As to the third element, the decision to implement the "passive" enforcement system was certainly a decision susceptible to abuse. "This is indeed an exceptional area of national life where conscientious opposition to government policy has been intertwined with violations of the laws which implement the policy." *United States v. Falk*, 479 F.2d 616, 625 (CA7 1973) (en banc) (Fairchild, J., concurring). The correlation between vocal opposition and violations of the law makes it relatively easy to punish speech under the guise of enforcing the laws.

Here, the enforcement scheme was implemented with full knowledge that its effects would be particularly harsh on vocal opponents of the Government's policies. See App. 290–291, 361–362 (quoted *supra*, at 1541); cf. 549 F.Supp., at 1384 (Government "recognized the passive program had potentially serious first amendment problems"). Such knowledge makes the scheme directly vulnerable to the charge that its purpose was to punish individuals for the exercise of their *629 First Amendment rights. This

Court has recognized that "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence ... is one factor among others which may be considered by a court' " in determining whether a decision was based on an impermissible ground. *Columbus Board of Education v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979); see also *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, n. 25, 99 S.Ct. 2282, 2296, n. 25, 60 L.Ed.2d 870 (1979); *id.*, at 283, 99 S.Ct., at 2298 (MARSHALL, J., dissenting) ("To discern the purposes underlying facially neutral policies, **1542 this Court has ... considered the ... foreseeability of any disproportionate impact"); *United States v. Steele*, 461 F.2d 1148, 1152 (CA9 1972).

Thus, Wayte has established the first and third elements of a prima facie case, and has presented a colorable claim as to the second.² As a result, there can thus be no doubt that the District Court did not abuse its discretion when it found that Wayte's equal protection claim was not frivolous.

The Court, of course, has not viewed this case through the same lens. Instead of focusing on the elements of a prima facie case, and on whether Wayte presented sufficient evidence as to the existence of each of these elements to earn the right to discover relevant information in the Government's possession, the Court leaps over these two issues and proceeds directly to the merits of the equal protection claim. The Court's analysis is flawed in two respects. First, as I have shown, the Court ignores the simple fact that, if Wayte is entitled to discovery, his claim cannot be rejected on the merits for lack of evidence.

Second, and of equal importance, the Court errs in the manner in which it analyzes the merits of the equal protection claim. It simply focuses on the wrong problem when it states that "the Government treated all reported nonregistrants similarly" and that "those prosecuted in effect selected *630 themselves for prosecution by refusing to register after being reported and warned by the Government." *Ante*, at 1532. Those issues are irrelevant to the correct disposition of this case.

The claim here is not that the Justice Department discriminated among *known* violators of the draft registration law either in its administration of the "beg" policy, which gave such individuals the option of registering to avoid prosecution, or in prosecuting

only some reported nonregistrants. Instead, the claim is that the system by which the Department defined the class of possible prosecutees—the “passive” enforcement system—was designed to discriminate against those who had exercised their First Amendment rights. Such governmental action cannot stand if undertaken with discriminatory intent. As this Court has clearly stated, “for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is ‘patently unconstitutional.’” *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978); see also *United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982). If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool. Cf. *Connecticut v. Teal*, 457 U.S. 440, 450–451, 102 S.Ct. 2525, 2532–2533, 73 L.Ed.2d 130 (1982).

Under the Court's flawed approach, there would have been no equal protection violation in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), this Court's seminal selective prosecution decision. In *Yick Wo*, the Court reversed a conviction under a municipal ordinance that prohibited the construction of wooden laundries without a license. The Court held that such a conviction could not stand because the municipal licensors had discriminatorily denied licenses to individuals of Chinese origin. If the Court then had focused only on the prosecutions themselves, as it does now, it would have found no discrimination in the choice, among violators of the ordinance, *631 of the individuals to be

prosecuted. Indeed, all but one of these violators were of Chinese origin. Instead, the Court properly focused on the official action that led to those prosecutions. In *Yick Wo*, that prior action was the discriminatory denial of licenses, which affected the definition of the class from which prosecutees were chosen. In this case, the **1543 referrals made by Selective Service to the Justice Department for investigation and possible prosecution played a similar role and may also have been discriminatory. It is to that issue that the Court should have directed its attention.

I do not suggest that all prosecutions undertaken pursuant to passive enforcement schemes warrant evidentiary hearings on the question of selective prosecution. But where violations of the law are so closely intertwined with political activity, where the speech at issue is so unpalatable to the Government, and where the discriminatory effect is conceded, the need for a hearing is significant and in no way opens the door to an onslaught of such hearings in less compelling contexts.³

Here, I believe that Wayte has raised sufficient questions about the Government's intentions to be entitled to obtain access to evidence in the Government's possession. I therefore dissent from the Court's outright dismissal of his equal protection claim.

All Citations

470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547, 53 USLW 4319

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 3 provides in pertinent part:

“[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.”

The United States requires only that young men register for military service while most other major countries of the world require actual service. The International Institute for Strategic Studies, *The Military Balance 1983–1984* (1983); see *Selective Service System v. Minnesota Public Service Research Group*, 468 U.S. 841, 860, n. 2, 104 S.Ct. 3348, 3360, n. 2, 82 L.Ed.2d 632 (1984) (POWELL, J., concurring in part and concurring in judgment).

- 2 On August 4, 1980, for example, petitioner wrote to both the President and the Selective Service System. In his letter to the President, he stated:
“I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me.” App. 714.
In his letter to the Selective Service System, he similarly stated: “I have not registered for the draft. I plan never to register. I realize the possible consequences of my action, and I accept them.” *Id.*, at 716.
Six months later, petitioner sent a second letter to Selective Service:
“Last August I wrote to inform you of my intention not to register for the draft. Well, I did not register, and still plan never to do so, but thus far I have received no reply to my letter, much less any news about your much-threatened prosecutions.
“I must interpret your silence as meaning that you are too busy or disorganized to respond to letters or keep track of us draft-age youth. So I will keep you posted of my whereabouts.” *Id.*, at 710.
He also stated that, although he would “be traveling the nation ... encouraging resistance and spreading the word about peace and disarmament,” he could be reached at his home address in Pasadena, California. *Id.*, at 710–711.
- 3 The record indicates that only 13 of the 286 young men Selective Service referred to the Department of Justice had been indicted at the time the District Court considered this case. As of March 31, 1984, three more men had been indicted. The approximately 270 not indicted either registered, were found not to be subject to registration requirements, could not be found, or were under continuing investigation. The record does not indicate how many fell into each category.
- 4 On July 28, 1982, Selective Service stated that 8,365,000 young men had registered out of the estimated 9,039,000 who were required to do so. Selective Service Prosecutions: Oversight Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., 10 (1982). This amounted to a nonregistration rate of approximately 7.5 percent.
- 5 The District Court also decided various statutory and regulatory claims. In particular, it held that Presidential Proclamation No. 4771 had been improperly promulgated and dismissed the indictment on this ground as well. 549 F.Supp. 1376, 1391 (Cal.1982). The Court of Appeals for the Ninth Circuit reversed this particular holding and affirmed the District Court's rejection of the remaining regulatory claims. 710 F.2d 1385, 1388–1389 (1983). Only the constitutional claim is now at issue.
We do not decide the issue the dissent sees as central to this case: “whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution.” *Post*, at 1535. Even if there were substance to this discovery issue, it was neither raised in the petition for certiorari, briefed on the merits, nor raised at oral argument. Wayte has simply not asserted such a claim before this Court.
- 6 This term is misleading insofar as it suggests that all those indicted had made public statements opposing registration. In some cases, the only statement made by the nonregistrant prior to indictment was his letter to the Government declaring his refusal to register.
- 7 One judge dissented on the ground that the passive enforcement system represented a “deliberate policy ... designed to punish only those who had communicated their violation of the law to others.” 710 F.2d, at 1389 (Schroeder, J., dissenting). Finding “an enforcement procedure focusing solely upon vocal offenders ... inherently suspect,” *id.*, at 1390, she would have shifted the burden of persuasion on discriminatory intent to the Government.
- 8 Compare *United States v. Eklund*, 733 F.2d 1287 (CA8 1984) (en banc) (upholding criminal conviction under passive enforcement scheme), cert. pending, No. 83–1959, with *United States v. Schmucker*, 721 F.2d 1046 (CA6 1983) (ordering hearing on selective prosecution claim), cert. pending, No. 83–2035.
- 9 Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). “[Our] approach to Fifth Amendment equal protection claims has ... been precisely the same as to equal protection claims under the Fourteenth Amendment.” *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514 (1975).
- 10 A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification. See *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). No such claim is presented here, for petitioner cannot argue that the passive policy discriminated on its face.
The dissent argues that Wayte made a nonfrivolous showing of all three elements of a prima facie case as established in the context of grand jury selection. *Castaneda v. Partida*, 430 U.S. 482, 494–495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977). Neither the parties nor the courts below, however, discussed the prima facie case in these terms. Rather,

they used the phrase to refer to whether Wayte had made a showing, which, if un rebutted, would directly establish discriminatory effect and purpose. Even applying standards from the grand jury selection context, however, we believe that Wayte has failed to establish a prima facie case. For example, although the dissent describes the first element as merely whether the individual “is a member of a recognizable, distinct class,” *post*, at 1541, it is clear for reasons we discuss, *infra*, at 1532, that Wayte has not established the first element as actually defined by *Castaneda*: whether the individual is a member of an “identifiable group” that is “a recognizable, distinct class, *singled out for different treatment under the laws, as written or as applied.*” 430 U.S., at 494, 97 S.Ct., at 1280 (emphasis added). For these same reasons, we believe Wayte has failed to establish the other *Castaneda* elements, particularly the third. Furthermore, even assuming that Wayte did make out this kind of prima facie case, the “beg” policy would rebut it.

The dissent also argues that *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), would have been decided differently under the approach we take today. *Post*, at 1543. This misunderstanding stems from its belief that “the Government intentionally discriminated in defining the pool of potential prosecutees” in this case. *Post*, at —. This premise, however, mistakes the facts. The prosecution pool consisted of all reported nonregistrants, not just “vocal” nonregistrants, and there is no evidence of Government intent to prosecute individuals because of their exercise of First Amendment rights.

- 11 Petitioner alleges that the passive enforcement policy violated both his right to free speech and his right to petition. Because he does not argue that it burdened each right differently, we view these claims as essentially the same. Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–915, 102 S.Ct. 3409, 3425–3427, 73 L.Ed.2d 1215 (1982).
- 12 As an initial matter, we note doubt that petitioner has demonstrated injury to his First Amendment rights. The Government’s “beg” policy removed most, if not all, of any burden passive enforcement placed on free expression. Because of this policy, nonregistrants could protest registration and still avoid any danger of prosecution. By simply registering after they had reported themselves to the Selective Service, nonregistrants satisfied their obligation and could thereafter continue to protest registration. No matter how strong their protest, registration immunized them from prosecution. Strictly speaking, then, the passive enforcement system penalized continued violation of the Military Selective Service Act, not speech. The only right it burdened was the asserted “right” not to register, a “right” without foundation either in the Constitution or the history of our country. See *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918).
- 13 Section 12(a) of the Military Selective Service Act, 62 Stat. 622, as amended, 50 U.S.C.App. § 462(a), provides that a criminal nonregistrant must “evad[e] or refus[e]” to register. For conviction, the courts have uniformly required the Government to prove that the failure to register was knowing. *E.g.*, *United States v. Boucher*, 509 F.2d 991 (CA8 1975); *United States v. Rabb*, 394 F.2d 230 (CA3 1968). Neither party contests this requirement here.
- 14 Selective Service had tried to use Social Security records but found that the addresses there were hopelessly stale. And under the law, 26 U.S.C. § 6103, it could gain no useful access to Internal Revenue Service records—the only other recognized federal source of generally accurate information.
- 1 The Court expressly refuses to consider the question whether Wayte has earned the right to discover relevant Government documents; it maintains that this claim was not properly asserted here. See *ante*, at 1529–1530, n. 5. That conclusion is quite surprising. The grant of certiorari in this case was limited to “Question 1 presented by the petition,” 467 U.S. 1214, 104 S.Ct. 2655, 81 L.Ed.2d 362 (1984), which focused on a conflict among the Federal Circuits. Wayte offered only one reason for granting certiorari on that question:

“The *direct conflict* between the Sixth and Ninth Circuits on an issue concerning the exercise of First Amendment rights particularly in view of the pending prosecutions in other circuits raising the identical question, justifies the grant of certiorari to review the judgment below.” Pet. for Cert. 12 (emphasis added).

In the case to which Wayte referred, the Sixth Circuit had held that the defendant was “entitled to a hearing on his charge of selective prosecution.” *United States v. Schmucker*, 721 F.2d 1046, 1048 (1983). Given that the lower courts have applied the same standard for granting discovery orders and evidentiary hearings in this area, the Sixth Circuit’s holding also would entitle the defendant in that case to discovery, and the Sixth Circuit’s holding therefore is in “direct conflict” with the Ninth Circuit’s holding that Wayte was not entitled to discovery. Compare, *e.g.*, *United States v. Berrios*, 501 F.2d 1207, 1211 (CA2 1974), with *United States v. Erne*, 576 F.2d 212, 216 (CA9 1978). The discovery question could not have been raised more clearly in the lower courts and, contrary to the Court’s suggestion, it is squarely presented. In addition, to the extent that the Court chooses to address the merits of Wayte’s selective prosecution claim, *ante*, at 1531–1532, it must also decide the antecedent discovery question. First, the merits of that constitutional claim,

which were not briefed before this Court, are certainly no better presented than Wayte's discovery claim. Second, it makes little sense to decide whether, at the time that the Government chose to ignore the District Court's discovery order, Wayte had amassed sufficient evidence to prove that the Government acted in a discriminatory manner. The threshold question is, of course, whether Wayte presented enough evidence of a constitutional violation to be entitled to documents in the Government's possession. If he was entitled to such discovery, the merits should not be addressed until the record is complete.

Finally, it is curious that the Court here professes such concern about whether the discovery issue was properly presented. Indeed, the Court chooses to address Wayte's claim that the prosecution scheme placed a direct burden on the exercise of First Amendment rights. *Ante*, at 1532–1534. That claim was not presented or ruled upon by the District Court, was not presented or ruled upon on appeal, and was not raised in Wayte's petition for certiorari. To the extent that the Court discusses that claim on the ground that all of Wayte's constitutional claims are interrelated, it must also discuss the threshold constitutional claim: Whether Wayte made a sufficient showing of a constitutional violation to be entitled to discovery.

- 2 None of the evidence presented by the Government to the District Court places in any serious question the existence of these three elements.
- 3 In my mind, Wayte's claim that the “passive” enforcement scheme placed a direct burden on First Amendment freedoms, *ante*, at 1531–1532, should not be addressed at this stage in the litigation. The materials that Wayte sought to discover, and that he well may be entitled to discover, could be relevant to that claim. The Court of Appeals should resolve the issue of access to evidence on remand; the resolution of the merits of Wayte's claims should await a final determination of that issue.

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

HUDSON'S BAY COMPANY

Respondent

**BOOK OF AUTHORITIES
FOR THE COMMISSIONER'S
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