CT-2017-008

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*;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

HUDSON'S BAY COMPANY

Respondents

BOOK OF AUTHORITIES

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CT-2017-008

THE COMPETITION TRIBUNAL

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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*;

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TABLE OF CONTENTS

Tab

LEGISLATION

JURISPRUDENCE

8. *R. v. Kaipiainen*, [1954] O.R. 43 (C.A.).

9. *R. v. AP* [1996] OJ No 2986 (QL) (CA).

10. *Ares v. Venner*, 1970 CanLII5 (SCC) [1970] S.C.R. 608.

11. *Ault et al. V. AG Canada*, 2007 CanLII 55358 (ON SC).

12. *R. v. Kayaitok*, 2013 NUCJ 16.

13. *R. v. Smith*, 2011 ABCA 136 (CanLII).

14. *Ethier v. Canada (RCMP Commissioner*), 1993 CanLII 2935 (FCA), [1993] 2 F.C. 659 (C.A.).

15. *Canada (Director of Investigation and research, Competition Act) v. Southam Inc.* [1991] CCTD No. 15.

16. *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175.

17. *Fairview Donut Inc. et al., v. The TDL Group Corp. et al*., 2010 ONSC 789.

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19. *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41.

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SECONDARY SOURCES

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Tab 1

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 February 14, 2019

Last amended on January 15, 2019

À jour au 14 février 2019

Dernière modification le 15 janvier 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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; and

(b) the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*.

(c) and (d) [Repealed, 2012, c. 24, s. 79]

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; 2012, c. 24, s. 79.

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.

Powers of other persons

(3) The Governor in Council may authorize any person to exercise the powers and perform the duties of the Commissioner whenever the Commissioner and the Deputy Commissioners are absent or unable to act or, if one or

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 et de contrôler l'application de la *Loi sur l'emballage et l'étiquetage des produits de consommation*, de la *Loi sur le poinçonnage des métaux précieux* et de la *Loi sur l'étiquetage des textiles*.

c) et d) [Abrogés, 2012, ch. 24, art. 79]

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; 2012, ch. 24, art. 79.

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.

Autres intérimaires

(3) Le gouverneur en conseil peut autoriser toute autre personne à exercer les pouvoirs et fonctions du commissaire en cas d'absence ou d'empêchement de celui-ci et des sous-commissaires ou de vacance de leurs postes.

Administrative Remedies

Definition of *court*

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.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Determination of reviewable conduct and judicial order

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;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or

(ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

Recours administratifs

Définition de *tribunal*

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.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Décision et ordonnance

74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à 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 qu'il peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 750 000 $ pour la première ordonnance et de 1 000 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 10 000 000 $ pour la première ordonnance et de 15 000 000 $ pour toute ordonnance subséquente;

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant

être répartie entre elles de la manière qu'il estime indiquée.

Duration of order

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

Durée d'application

(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.

Saving

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

Disculpation

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

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) 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.

But de l'ordonnance

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

Aggravating or mitigating factors

(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) the effect on competition in the relevant market;

(g) the gross revenue from sales affected by the conduct;

(h) the financial position of the person against whom the order is made;

(i) the history of compliance with this Act by the person against whom the order is made;

(j) any decision of the court in relation to an application for an order under paragraph (1)(d);

Circonstances aggravantes ou atténuantes

(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) l'effet sur la concurrence dans le marché pertinent;

g) le revenu brut provenant des ventes sur lesquelles le comportement a eu une incidence;

h) la situation financière de la personne visée par l'ordonnance;

i) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

j) toute décision du tribunal à l'égard d'une demande d'ordonnance présentée au titre de l'alinéa (1)d);

k) toute somme déjà payée par la personne visée par l'ordonnance ou à payer par elle en vertu d'une

(k) any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and

(l) any other relevant factor.

k) tout autre montant payé ou ordonné à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard du comportement;

l) tout autre élément pertinent.

Meaning of subsequent order

(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.

Sens de l'ordonnance subséquente

(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.

Amounts already paid

(7) In determining an amount to be paid under paragraph (1)(d), the court shall take into account any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the products.

Sommes déjà payées

(7) Dans la détermination de la somme à payer au titre de l'alinéa (1)d), le tribunal tient compte de toute somme déjà payée par le contrevenant ou à payer par lui en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard des produits.

Implementation of the order

(8) The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order's implementation, including terms

(a) specifying how the payment is to be administered;

Exécution de l'ordonnance

(8) Le tribunal peut, dans l'ordonnance rendue au titre de l'alinéa (1)d), préciser les conditions qu'il estime nécessaires à son exécution, notamment :

a) prévoir comment la somme à payer doit être administrée;

Tab 2

CANADA

CONSOLIDATION

CODIFICATION

Canada Evidence Act

Loi sur la preuve au Canada

R.S.C., 1985, c. C-5

L.R.C. (1985), ch. C-5

Current to February 14, 2019

Last amended on October 18, 2017

À jour au 14 février 2019

Dernière modification le 18 octobre 2017

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

inspected shall be notified of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

Warrants to search

(7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of Parliament, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything in it shall, with respect to the books or records of the institution, be construed as limited to the searching of those premises for the purpose of inspecting and taking copies of entries in those books or records, and section 490 of the *Criminal Code* does not apply in respect of the copies of those books or records obtained under a warrant referred to in this section.

Computation of time

(8) Holidays shall be excluded from the computation of time under this section.

Definitions

(9) In this section,

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (*tribunal*)

financial institution means the Bank of Canada, the Business Development Bank of Canada and any institution that accepts in Canada deposits of money from its members or the public, and includes a branch, agency or office of any of those Banks or institutions; (*institution financière*)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration. (*procédure judiciaire*)

R.S., 1985, c. C-5, s. 29; 1994, c. 44, s. 90; 1995, c. 28, s. 47; 1999, c. 28, s. 149.

Business records to be admitted in evidence

30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains

doit être examiné doit recevoir avis de la demande deux jours francs au moins avant l'audition de la demande et, s'il est démontré au tribunal que l'avis ne peut être donné à la personne elle-même, cet avis peut être donné à l'adresse de l'institution financière.

Mandat de perquisition

(7) Le présent article n'a pas pour effet d'interdire la perquisition dans les locaux d'une institution financière sur l'autorisation d'un mandat de perquisition émis en vertu d'une autre loi fédérale, mais, à moins qu'il ne soit mentionné expressément sur le mandat, par la personne sous la signature de laquelle il a été émis, que ce mandat n'est pas limité par le présent article, l'autorisation, conférée par un tel mandat, de perquisitionner dans les locaux d'une institution financière, de saisir et d'emporter tout ce qui peut s'y trouver, est, en ce qui concerne les livres ou registres de cette institution, interprétée comme limitée à la perquisition dans ces locaux aux fins d'examiner les inscriptions dans ces livres ou registres et d'en prendre copie; les copies effectuées en exécution de ce mandat ne tombent pas sous le régime de l'article 490 du *Code criminel*.

Calcul des délais

(8) Dans le calcul des délais prévus au présent article, les jours fériés ne sont pas comptés.

Définitions

(9) Les définitions qui suivent s'appliquent au présent article.

institution financière La Banque du Canada, la Banque de développement du Canada et toute institution qui accepte au Canada des dépôts d'argent de ses membres ou du public. Sont inclus dans la présente définition une succursale, une agence ou un bureau d'une telle banque ou institution. (*financial institution*)

procédure judiciaire Toute procédure ou enquête, en matière civile ou pénale, dans laquelle une preuve est ou peut être donnée, y compris l'arbitrage. (*legal proceeding*)

tribunal Le tribunal, le juge, l'arbitre ou la personne devant qui une procédure judiciaire est exercée ou intentée. (*court*)

L.R. (1985), ch. C-5, art. 29; 1994, ch. 44, art. 90; 1995, ch. 28, art. 47; 1999, ch. 28, art. 149.

Les pièces commerciales peuvent être admises en preuve

30 (1) Lorsqu'une preuve orale concernant une chose serait admissible dans une procédure judiciaire, une pièce établie dans le cours ordinaire des affaires et qui

information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

contient des renseignements sur cette chose est, en vertu du présent article, admissible en preuve dans la procédure judiciaire sur production de la pièce.

Présomption à tirer du défaut de renseignements

(2) Lorsqu'une pièce établie dans le cours ordinaire des affaires ne contient pas de renseignements sur une chose dont on peut raisonnablement s'attendre à trouver la survenance ou l'existence consignées dans cette pièce, le tribunal peut, sur production de la pièce, admettre celle-ci aux fins d'établir ce défaut de renseignements et peut en conclure qu'une telle chose ne s'est pas produite ou n'a pas existé.

Copie des pièces

(3) Lorsqu'il n'est pas possible ou raisonnablement commode de produire une pièce décrite au paragraphe (1) ou (2), une copie de la pièce accompagnée d'un premier document indiquant les raisons pour lesquelles il n'est pas possible ou raisonnablement commode de produire la pièce et d'un deuxième document préparé par la personne qui a établi la copie indiquant d'où elle provient et attestant son authenticité, est admissible en preuve, en vertu du présent article, de la même manière que s'il s'agissait de l'original de cette pièce pourvu que les documents satisfassent aux conditions suivantes : que leur auteur les ait préparés soit sous forme d'affidavit reçu par une personne autorisée, soit sous forme de certificat ou de déclaration comportant une attestation selon laquelle ce certificat ou cette déclaration a été établi en conformité avec les lois d'un État étranger, que le certificat ou l'attestation prenne ou non la forme d'un affidavit reçu par un fonctionnaire de l'État étranger.

Cas où la pièce est établie sous une forme nécessitant des explications

(4) Lorsque la production d'une pièce ou d'une copie d'une pièce décrite au paragraphe (1) ou (2) ne révélerait pas au tribunal les renseignements contenus dans la pièce, du fait qu'ils ont été consignés sous une forme qui nécessite des explications, une transcription des explications de la pièce ou copie, préparée par une personne qualifiée pour donner les explications, accompagnée d'un document de cette personne indiquant ses qualités pour les donner et attestant l'exactitude des explications est admissible en preuve, en vertu du présent article, de la même manière que s'il s'agissait de l'original de cette pièce. Le document prend la forme soit d'un affidavit reçu par une personne autorisée, soit d'un certificat ou d'une déclaration comportant une attestation selon laquelle ce certificat ou cette déclaration a été établi en conformité avec les lois d'un État étranger, que le

Tab 3

Sameer Mapara *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada and Attorney General of Ontario *Interveners*

Indexed as: R. *v.* Mapara

Neutral citation: 2005 SCC 23.

File No.: 29750.

2004: December 16; 2005: April 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Evidence — Admissibility — Hearsay — Co-conspirator's exception — Double hearsay — Whether co-conspirator's exception to hearsay rule meets requirements of principled approach to hearsay — Whether double hearsay evidence of co-conspirator lacked necessity or reliability in circumstances of this case and ought to have been excluded.

Criminal law — Evidence — Admissibility — Interception of communications — Three-way communication — Named person in wiretap authorization initiating phone call with third party — Named person and accused alternately speaking with third party during call — Authorization requiring police to stop listening when named person not party to communication — Whether intercepts of telephone conversation between accused and third party should have been excluded — Whether named person still party to communication.

The accused and his co-conspirators, including B, W and C, were charged with first degree murder. The victim was shot to death in the accused's car lot. The Crown alleged that the accused's part in the conspiracy was to

Sameer Mapara *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada et procureur général de l'Ontario *Intervenants*

Répertorié : R. *c.* Mapara

Référence neutre : 2005 CSC 23.

N° du greffe : 29750.

2004 : 16 décembre; 2005 : 27 avril.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Preuve — Admissibilité — Ouï-dire — Exception relative aux coconspirateurs — Ouï-dire double — L'exception relative aux coconspirateurs respecte-t-elle les exigences de la méthode raisonnée applicable en matière de ouï-dire? — Est-ce qu'en l'espèce la preuve par double ouï-dire émanant d'un coconspirateur ne présentait pas les conditions requises en matière de fiabilité ou de nécessité et aurait dû être écartée?

Droit criminel — Preuve — Admissibilité — Interception de communications — Échange à trois — Appel téléphonique à un tiers initié par une personne nommée dans l'autorisation d'écoute électronique — Cette personne et l'accusé parlent tour à tour avec le tiers durant l'appel — Selon l'autorisation, les policiers devaient cesser d'écouter lorsque la personne nommée dans l'autorisation ne participait pas à la conversation — Les portions de la conversation téléphonique au cours desquelles l'accusé et le tiers parlaient ensemble auraient-elles dû être écartées? — La personne nommée dans l'autorisation continuait-elle d'être partie à la communication?

L'accusé et ses coconspirateurs, y compris B, W et C, ont été inculpés de meurtre au premier degré. La victime a été abattue dans le terrain de voitures de l'accusé. Le ministère public a prétendu que le rôle de l'accusé dans le

lure the victim to the lot. At the accused's trial, B testified that prior to the murder, W had told him that the accused had a job for them. The Crown's evidence also included an intercepted phone call between W and C, a target named in the wiretap authorization. During the call, C and the accused spoke alternately with W. At the same time, the accused received a call on his own phone from the victim and the accused's side of the conversation was picked up by the wiretap. He told the victim to meet him at the lot in 15 minutes and then informed W about this arrangement. Although the authorization required the monitor not to listen if C was not a party to the call, the trial judge held that C had never ceased to be a party to this call and admitted the wiretap evidence. The accused was convicted of first degree murder and the Court of Appeal upheld the conviction.

Held: The appeal should be dismissed. The co-conspirator's evidence and the wiretap evidence were admissible.

Per McLachlin C.J. and Bastarache, Binnie, Abella and Charron JJ.: Even when it applies to double hearsay, the co-conspirator's exception to the hearsay rule as set out in *Carter* meets the necessity and reliability requirements of the principled approach to hearsay and should not be set aside or altered. Necessity arises from the combined effect of the non-compellability of a co-accused, the undesirability of trying co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of a conspiracy. Reliability is satisfied by the *Carter* rule. The two-step *Carter* approach allows the trier of fact to consider a co-conspirator's hearsay statement made in furtherance of the conspiracy only after he or she has found (1) beyond a reasonable doubt, that the conspiracy existed and (2), based only on direct evidence against the accused, that the accused was probably a member of it. The *Carter* approach does not simply amount to corroborating the statement in issue but provides circumstantial indicators of reliability. This approach is fair to accused persons and allows effective prosecutions of conspiracies. It also avoids the delays and difficulties in trial procedure that would arise if, with respect to admissibility, the necessity and reliability of particular pieces of hearsay evidence were to be decided on a case-by-case basis. Finally, the accused did not establish that B's testimony constitutes one of those rare or exceptional cases where evidence falling within a valid exception to the hearsay rule does not, in the peculiar circumstances of the case, contain the indicia of necessity and reliability necessary for the

complot avait constitué à attirer la victime à cet endroit. Au cours du procès de l'accusé, B a témoigné que, avant le meurtre, W lui avait dit que l'accusé avait un travail pour eux. La preuve du ministère public incluait également l'enregistrement d'un appel téléphonique entre W et C, ce dernier étant nommé comme cible dans l'autorisation d'écoute électronique. Durant l'appel, C et l'accusé ont tour à tour parlé avec W. Toujours durant l'appel, l'accusé a reçu, sur son propre téléphone, un coup de fil de la victime et les propos de l'accusé ont été interceptés. L'accusé a dit à la victime de le rencontrer dans 15 minutes sur le terrain de voitures et il a ensuite informé W de cet arrangement. Suivant l'autorisation, le policier qui surveillait l'interception devait cesser d'écouter lorsque C n'était pas partie à l'appel, mais le juge du procès a conclu que C n'avait jamais cessé d'être partie à l'appel et il a admis la preuve fondée sur l'écoute électronique. L'accusé a été déclaré coupable de meurtre au premier degré et la Cour d'appel a confirmé la déclaration de culpabilité.

Arrêt : Le pourvoi est rejeté. La preuve émanant du coconspirateur et la preuve fondée sur l'écoute électronique étaient admissibles.

La juge en chef McLachlin et les juges Bastarache, Binnie, Abella et Charron : Même lorsqu'elle est appliquée au ouï-dire double, l'exception relative aux coconspirateurs énoncée dans l'arrêt *Carter* satisfait aux exigences en matière de fiabilité et de nécessité de la méthode d'analyse raisonnée de la règle du ouï-dire et elle ne devrait pas être écartée ou modifiée. La nécessité résulte de l'effet conjugué de la non-contraignabilité d'un coaccusé, de l'inopportunité de juger séparément des coconspirateurs et de la valeur probante de déclarations concomitantes faites en vue d'un complot. Il y a fiabilité lorsque la règle énoncée dans l'arrêt *Carter* est respectée. L'approche en deux étapes de cet arrêt permet au juge des faits de prendre en considération une déclaration relatée faite par un coconspirateur en vue du complot seulement après avoir conclu (1) que le complot a eu lieu hors de tout doute raisonnable, et (2) que l'accusé y a probablement participé vu uniquement la preuve directe retenue contre lui. La méthode *Carter* fournit des indicateurs circonstanciels de fiabilité qui ne font pas que corroborer les déclarations en question. Cette méthode ne cause pas d'injustice aux accusés et elle permet des poursuites efficaces dans les cas de complots. Elle permet également d'éviter les délais et les difficultés d'ordre procédural qui surgiraient au cours de l'instruction si, pour décider de l'admissibilité de certains éléments de preuve par ouï-dire, le juge devait se prononcer au cas par cas sur leur nécessité et leur fiabilité. Enfin, l'accusé n'a pas établi que le témoignage de B constitue l'un des cas rares ou exceptionnels où la preuve relevant d'une exception

admission of hearsay evidence. The frailties in B's evidence go to its ultimate weight and the trial judge properly charged the jury on this aspect. [18] [22-24] [28-31] [36-37]

There is no basis to interfere with the lower courts' finding that the phone call initiated by C, the named person in the authorization, was a three-way conversation involving C, the accused and W. Since C never ceased to be a party to the conversation, the police did not exceed the terms of the authorization. In the circumstances of this case, the conduct of the police in monitoring the communication between the accused and W cannot be characterized as a deliberate and unreasonable breach of the authorization. [39-41]

Per LeBel and Fish JJ.: While the principled approach must continue to play a significant role in the application of the co-conspirator's exception to the hearsay rule, it cannot be taken for granted that the essential indicia of reliability will always be present in such case. The first two stages of the *Carter* process do provide some circumstantial indicators of reliability, but too many deficiencies in that process may permit mistaken or untruthful hearsay to be admitted into evidence. The *Carter* process is also ill suited to accounting for all the different types of situations arising out of joint ventures in a criminal context. These concerns, as well as the dangers of hearsay and the need to avoid unfairness and wrongful convictions, call for a contextual approach to the application of the co-conspirator's exception. The process should provide sufficient flexibility to the trial judge to assess whether, in the particular factual context, a hearsay declaration possesses sufficient indicia of reliability and necessity. [45] [53-54]

The admissibility of co-conspirator's hearsay evidence should thus be determined according to the principled approach when the evidence was obtained or given in circumstances that raise serious concerns or suspicions as to reliability or necessity. A standard of serious concerns or suspicions recognizes that the traditional exceptions normally suffice but does not limit the application of the principled approach to the most exceptional cases. A *voir dire* to assess the hearsay evidence will remain the exception and will be required only when an accused raises serious and real concerns based on concrete and particularized reasons or with a specific evidentiary basis. These concerns are drawn from the circumstances

valide à la règle du ouï-dire ne présente pas, eu égard aux circonstances particulières de l'espèce, les indices de nécessité et de fiabilité requis pour l'admissibilité de la preuve par ouï-dire. Les lacunes du témoignage de B influent sur sa valeur probante ultime et le juge du procès a donné des directives adéquates au jury à cet égard. [18] [22-24] [28-31] [36-37]

Rien ne justifie de modifier la conclusion des juridictions inférieures selon laquelle l'appel téléphonique commencé par C, la personne nommée dans l'autorisation d'écoute électronique, était un échange à trois, à savoir C, l'accusé et W. Comme C n'a jamais cessé d'être partie à la conversation, les policiers n'ont pas dérogé aux conditions de l'autorisation. Dans les circonstances de l'espèce, la conduite du policier qui surveillait l'appel entre l'accusé et W ne saurait être qualifiée de violation délibérée et déraisonnable de l'autorisation. [39-41]

Les juges LeBel et Fish : Bien que la méthode d'analyse raisonnée doive continuer à jouer un rôle important dans l'application de l'exception relative aux coconspirateurs applicable en matière de ouï-dire, on ne saurait tenir pour acquis que les indices essentiels de fiabilité sont présents dans tous les cas où cette exception est invoquée. Les deux premières étapes de la méthode *Carter* offrent effectivement des indicateurs circonstanciels de fiabilité, mais cette méthode comporte trop de failles créant un risque d'admission en preuve de déclarations relatées erronées ou mensongères. Elle ne permet pas non plus de prendre en compte tous les types de situations susceptibles de se produire dans une entreprise commune criminelle. Ces préoccupations, ainsi que les dangers du ouï-dire et la nécessité d'éviter des condamnations injustes et erronées, commandent une approche contextuelle en matière d'application de l'exception relative aux coconspirateurs. La démarche doit être suffisamment souple pour permettre au juge du procès de déterminer si, d'après les faits de l'espèce, une déclaration relatée présente des indices suffisants de fiabilité et de nécessité. [45] [53-54]

L'admissibilité d'un élément de preuve au titre de l'exception relative aux coconspirateurs doit donc être déterminée selon la méthode d'analyse raisonnée de la règle du ouï-dire lorsque les circonstances dans lesquelles la preuve ou le témoignage a été obtenu ou recueilli, selon le cas, soulève des préoccupations et des doutes sérieux du point de vue de la nécessité ou de la fiabilité. La norme des préoccupations et des doutes sérieux reconnaît que les exceptions traditionnelles à la règle du ouï-dire suffiront normalement, mais elle ne limite pas l'application de la méthode d'analyse raisonnée aux seuls cas très exceptionnels. La tenue d'un voir-dire pour apprécier la preuve par ouï-dire demeurera l'exception et ne sera

in which the declaration was made. The evidence should be provisionally admitted when tendered and if serious concerns or suspicions are raised, then a *voir dire* into its admissibility under the principled approach should be held before the case is left with the trier of fact. Where an accused is unable to raise any serious or suspicious concerns, the trier of fact will apply the *Carter* steps at the end of the trial. In this case, the accused has not established that B's hearsay evidence raised serious concerns as to its reliability. [56] [58] [60-62] [64]

Cases Cited

By McLachlin C.J.

Applied: *R. v. Carter*, [1982] 1 S.C.R. 938; *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **referred to:** *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Chang* (2003), 173 C.C.C. (3d) 397; *R. v. Evans*, [1993] 3 S.C.R. 653.

By LeBel J.

Applied: *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **discussed:** *R. v. Carter*, [1982] 1 S.C.R. 938; **referred to:** *R. v. Pilarinos* (2002), 2 C.R. (6th) 273, 2002 BCSC 855; *R. v. Chang* (2003), 173 C.C.C. (3d) 397; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854; *R. v. Duncan* (2002), 1 C.R. (6th) 265; *R. v. Hape*, [2002] O.J. No. 168 (QL).

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Canadian Charter of Rights and Freedoms, ss. 7, 24(2).

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Layton, David. "*R. v. Pilarinos*: Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule" (2002), 2 C.R. (6th) 293.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 3rd ed. Toronto: Irwin Law, 2002.

requise que dans les cas où l'accusé soulève des préoccupations sérieuses et réelles quant à la nécessité ou à la fiabilité en apportant des raisons concrètes et détaillées ou en étayant ces préoccupations sur des éléments de preuve précis. Ces préoccupations doivent ressortir des circonstances dans lesquelles la déclaration a été faite. L'élément de preuve devrait être provisoirement admis lorsqu'il est présenté et, si des préoccupations et des doutes sérieux sont soulevés, il y alors lieu de tenir un voir-dire pour décider de son admissibilité au regard de la méthode raisonnée avant que l'affaire ne soit soumise au juge des faits. Dans les cas où l'accusé est incapable de soulever des préoccupations et des doutes sérieux, le juge des faits appliquera, à la fin du procès, les étapes prévues par l'arrêt *Carter.* En l'espèce, l'accusé n'a pas établi que la preuve par ouï-dire émanant de B soulevait des préoccupations et des doutes sérieux quant à sa fiabilité. [56] [58] [60-62] [64]

Jurisprudence

Citée par la juge en chef McLachlin

Arrêts appliqués : *R. c. Carter*, [1982] 1 R.C.S. 938; *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêts mentionnés :** *R. c. Khan*, [1990] 2 R.C.S. 531; *R. c. Chang* (2003), 173 C.C.C. (3d) 397; *R. c. Evans*, [1993] 3 R.C.S. 653.

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APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Saunders and Low JJ.A.) (2003), 179 B.C.A.C. 92, 295 W.A.C. 92, 180 C.C.C. (3d) 184, [2003] B.C.J. No. 452 (QL), 2003 BCCA 131, upholding the accused's conviction for first degree murder. Appeal dismissed.

Gil D. McKinnon, *Q.C.*, *Tom Arbogast* and *Letitia Sears*, for the appellant.

John M. Gordon, for the respondent.

Robert W. Hubbard and *Marion V. Fortune-Stone*, for the intervener the Attorney General of Canada.

Jamie Klukach and *Susan Magotiaux*, for the intervener the Attorney General of Ontario.

The judgment of McLachlin C.J. and Bastarache, Binnie, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 On October 7, 1998, Vikash Chand was shot seven times while changing a licence plate in the car lot of Rags to Riches Motor Cars, owned by the appellant, Mapara. Five people were charged with Chand's murder: the appellant, who was alleged to have lured Chand to the place of execution; Chow, who was alleged to have financed the killing and getaway; Shoemaker, who is alleged to have done the killing; Binahmad, the getaway driver who testified for the Crown; and Wasfi, who the Crown alleged organized the killing.

2 The appellant and Chow were tried jointly by judge and jury. They were convicted of first degree

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto : Butterworths, 1999.

Stewart, Hamish. « Hearsay after *Starr* » (2002), 7 *Rev. can. D.P.* 5.

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Whitzman, Stephen. « Proof of Conspiracy : The Co-conspirator's Exception to the Hearsay Rule » (1985-86), 28 *Crim. L.Q.* 203.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Donald, Saunders et Low) (2003), 179 B.C.A.C. 92, 295 W.A.C. 92, 180 C.C.C. (3d) 184, [2003] B.C.J. No. 452 (QL), 2003 BCCA 131, qui a confirmé la condamnation de l'accusé pour meurtre au premier degré. Pourvoi rejeté.

Gil D. McKinnon, *c.r.*, *Tom Arbogast* et *Letitia Sears*, pour l'appelant.

John M. Gordon, pour l'intimée.

Robert W. Hubbard et *Marion V. Fortune-Stone*, pour l'intervenant le procureur général du Canada.

Jamie Klukach et *Susan Magotiaux*, pour l'intervenant le procureur général de l'Ontario.

Version française du jugement de la juge en chef McLachlin et des juges Bastarache, Binnie, Abella et Charron rendu par

LA JUGE EN CHEF —

I. Introduction

Le 7 octobre 1998, Vikash Chand a été atteint de sept balles alors qu'il changeait une plaque d'immatriculation dans le terrain de voitures de Rags to Riches Motor Cars, propriété de l'appelant, Mapara. Cinq personnes ont été accusées du meurtre de Chand : l'appelant, qui aurait attiré Chand sur le lieu d'exécution; Chow, qui aurait financé le meurtre et la fuite; Shoemaker, qui aurait exécuté le meurtre; Binahmad, le conducteur du véhicule utilisé pour la fuite et témoin à charge; et Wasfi qui, selon le ministère public, aurait organisé le meurtre.

L'appelant et Chow ont subi leur procès conjointement devant juge et jury. Ils ont été reconnus

murder. Their appeals to the Court of Appeal of British Columbia were dismissed: (2003), 179 B.C.A.C. 92, 2003 BCCA 131. They now appeal to this Court. These are the reasons on Mapara's appeal.

coupables de meurtre au premier degré. Leurs appels devant la Cour d'appel de la Colombie-Britannique ont été rejetés : (2003), 179 B.C.A.C. 92, 2003 BCCA 131. Ils se pourvoient maintenant devant la Cour. Voici les motifs de notre jugement sur le pourvoi de l'appelant Mapara.

Mapara raises two grounds of appeal in this Court. First, he argues that Binahmad's evidence of a discussion incriminating him in the planning of the murder should have been rejected as unreliable double hearsay evidence. Second, he argues that wiretap evidence against him taken shortly before the murder did not fall within the terms of the authorization and should not have been admitted at trial.

3 Mapara invoque deux moyens à l'appui de son pourvoi. Premièrement, il soutient que le témoignage de Binahmad au sujet d'une discussion l'incriminant pour la planification du meurtre aurait dû être rejeté parce qu'il s'agit d'une preuve par double ouï-dire non fiable. Deuxièmement, il fait valoir que la preuve incriminante obtenue par écoute électronique peu avant le meurtre n'était pas visée par l'autorisation et n'aurait pas dû être admise au procès.

I conclude that neither argument can succeed, and would dismiss the appeal.

4 Je conclus qu'aucun des deux arguments ne saurait être retenu et je suis d'avis de rejeter le pourvoi.

II. Admissibility of Binahmad's Evidence of His Conversation With Wasfi

II. Admissibilité du témoignage de Binahmad au sujet de sa conversation avec Wasfi

5 Binahmad testified that sometime around late September 1997 he met with Wasfi at a Petro-Canada gas station, where Wasfi told Binahmad that "the little guy", who Binahmad understood to be Mapara, had a job for them. In the appellant's submission, this was important evidence. It was one of two main items of evidence that Mapara had been involved in the planning of Chand's murder; the other evidence against Mapara related to the allegation that he had lured Chand to the Rags to Riches lot to be killed. The Crown replies that the evidence of the conversation with Wasfi was unimportant since evidence that Mapara lured Chand to his death alone made Mapara's conviction for first degree murder inevitable.

Binahmad a témoigné que, vers la fin septembre 1997, il a rencontré Wasfi à une station service Petro-Canada, où celui-ci lui a dit que [TRADUCTION] « le petit homme », qui, d'après ce qu'il a compris, était Mapara, avait un travail pour eux. Selon l'argumentation de l'appelant, il s'agissait là d'une preuve importante. C'était l'un des deux principaux éléments de preuve indiquant que Mapara avait été impliqué dans la planification du meurtre de Chand; l'autre élément de preuve contre Mapara concernait l'allégation qu'il avait attiré Chand sur le terrain de voitures de Rags to Riches pour qu'il y soit assassiné. Le ministère public répond que la preuve de la conversation avec Wasfi n'avait pas d'importance puisque la preuve que Mapara a attiré Chand vers sa mort rendait, à elle seule, inévitable la condamnation de Mapara pour meurtre au premier degré.

6 In the appellant's submission, this was also unreliable evidence, being the double hearsay evidence of a co-conspirator who had reason to lie. Indeed, one aspect of this testimony was plainly false — Binahmad must have been mistaken as to the date of the conversation, since Wasfi was in prison at that time. The Crown replies that Binahmad's error as to the date was before the jury, and that the trial judge

Selon l'argumentation de l'appelant, ce témoignage était lui aussi non fiable puisqu'il s'agissait d'une preuve par double ouï-dire émanant d'un coconspirateur qui avait des raisons de mentir. En fait, un aspect de ce témoignage était tout simplement faux — Binahmad a dû se tromper sur la date de la conversation, car Wasfi était en prison à ce moment-là. Le ministère public répond que l'erreur

told the jury about the limited circumstances in which they could accept the evidence and properly warned the jury against the inherent unreliability of the evidence of co-conspirators like Binahmad.

7 The central issue, however, is not the importance or ultimate reliability of the evidence, but its admissibility. The appellant concedes that under the law as it presently stands, the evidence was admissible under an exception to the hearsay rule known as the co-conspirators' exception, which permits reception of evidence of what co-conspirators say out of court in furtherance of the conspiracy. This is known as the *Carter* rule, after this Court's decision in *R. v. Carter*, [1982] 1 S.C.R. 938. The appellant argues that this rule should be set aside or altered to make Binahmad's evidence of the conversation with Wasfi inadmissible.

8 The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object" (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 303). Following *Carter*, co-conspirators' statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy.

9 The appellant mounts several attacks on this rule as it applies to double hearsay evidence. His first argument is that it is unconstitutional because it denies an accused person's right under s. 7 of the *Canadian Charter of Rights and Freedoms* to make full answer and defence. The appellant was entitled to cross-examine not only Binahmad on the statement, but Wasfi, the hearsay declarant of the statement that "the little guy" had a job for them, it is

de Binahmad quant à la date était soumise à l'appréciation du jury et que le juge du procès a exposé aux jurés les circonstances restreintes dans lesquelles ils pouvaient accepter la preuve et les a mis en garde, comme il se devait, contre la non-fiabilité inhérente au témoignage de coconspirateurs comme Binahmad.

Toutefois, la question centrale n'est pas l'importance ou la fiabilité ultime de la preuve, mais son admissibilité. L'appelant concède que, en l'état actuel du droit, la preuve était admissible en vertu d'une exception à la règle du ouï-dire, dite exception relative aux coconspirateurs, qui permet de recevoir en preuve les déclarations extrajudiciaires faites par des coconspirateurs en vue du complot. Il s'agit de la règle *Carter*, qui tire son nom de l'arrêt *R. c. Carter*, [1982] 1 R.C.S. 938. L'appelant avance qu'il y a lieu d'écarter ou de modifier cette règle pour rendre inadmissible le témoignage de Binahmad au sujet de sa conversation avec Wasfi.

L'exception relative aux coconspirateurs peut s'énoncer ainsi : [TRADUCTION] « Les déclarations d'une personne impliquée dans un complot illicite sont recevables à titre d'aveux contre toutes les parties au complot si elles ont été faites pendant que se tramait le complot et en vue de la réalisation de l'objectif commun » (J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 303). Selon l'arrêt *Carter*, les déclarations des coconspirateurs seront admissibles contre l'accusé uniquement si le juge des faits est convaincu hors de tout doute raisonnable qu'un complot a eu lieu et si une preuve indépendante, directement admissible contre l'accusé, établit selon la prépondérance des probabilités que l'accusé y a participé.

L'appelant conteste en plusieurs points cette règle telle qu'elle s'applique à la preuve par double ouï-dire. Son premier argument porte que la règle est inconstitutionnelle parce qu'elle prive l'accusé du droit à une défense pleine et entière que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*. L'appelant prétend qu'il avait le droit de contre-interroger non seulement Binahmad relativement à sa déclaration, mais aussi Wasfi, l'auteur des

submitted. The inability to cross-examine Wasfi breached the appellant's right to full answer and defence, and the *Carter* rule as it applies to double hearsay is therefore unconstitutional.

propos rapportés selon lesquels « le petit homme » avait un travail pour eux. L'impossibilité de contre-interroger Wasfi porte atteinte au droit de l'appelant à une défense pleine et entière, et la règle *Carter* telle qu'elle s'applique au double ouï-dire est donc inconstitutionnelle.

I cannot accede to this argument. First, it was not presented in the courts below, and the appellant was refused leave to state a constitutional question by order of Bastarache J. on September 8, 2004. Second, on the substance of the matter, the argument adds little to the appellant's main contention that the co-conspirators' exception, as it applies to double hearsay, should be revisited by this Court. I now turn to this argument.

10 Je ne peux accepter cet argument. Premièrement, il n'a pas été présenté devant les cours d'instance inférieure, et l'appelant s'est vu refuser, par ordonnance du juge Bastarache en date du 8 septembre 2004, l'autorisation de formuler une question constitutionnelle. Deuxièmement, sur le fond de la question, l'argument n'ajoute guère à la prétention principale de l'appelant, à savoir que l'exception relative aux coconspirateurs, telle qu'elle s'applique au double ouï-dire, devrait être réexaminée par la Cour. Je vais maintenant examiner cet argument.

The appellant's second argument is that this Court should revisit the co-conspirators' exception to the hearsay rule in light of the principled approach to the hearsay rule set out in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40. He submits that *Starr* requires that all hearsay evidence, even if it falls within a traditional exception, be both necessary (in the sense that other sources of the evidence are not available) and reliable. The evidence here at issue is not reliable, and therefore should not have been received.

11 Le second argument de l'appelant porte que la Cour devrait revoir l'exception relative aux coconspirateurs selon la méthode d'analyse raisonnée de la règle du ouï-dire qui est énoncée dans *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40. L'arrêt *Starr* exige, selon lui, que toute preuve par ouï-dire, même si elle relève d'une exception traditionnelle, soit à la fois nécessaire (en ce sens qu'il n'existe pas d'autres sources de preuve disponibles) et fiable. La preuve en l'espèce n'est pas fiable et n'aurait donc pas dû être admise.

This argument over-simplifies and distorts the principled approach to hearsay evidence set out in cases such as *R. v. Khan*, [1990] 2 S.C.R. 531, and *Starr.* These cases seek to reconcile the traditional approach to hearsay evidence with the principles that lie behind it.

12 Cet argument simplifie à l'excès et déforme la méthode d'analyse raisonnée de l'admissibilité de la preuve par ouï-dire telle qu'elle est énoncée notamment dans *R. c. Khan*, [1990] 2 R.C.S. 531, et *Starr.* Ces arrêts s'efforcent de concilier le traitement traditionnel réservé à la preuve par ouï-dire avec les principes qui la sous-tendent.

The traditional rule is that all hearsay evidence is inadmissible, unless it falls within one of the exceptions to the hearsay rule. The party tendering hearsay evidence must fit it within one of the traditional categories. This rule has served well for centuries and continues to serve as a practical guide for the admissibility of hearsay evidence. However, as with most category-based rules, in some cases the results may appear arbitrary.

13 Selon la règle traditionnelle, toute preuve par ouï-dire est inadmissible, sauf si elle relève d'une des exceptions à la règle du ouï-dire. La partie soumettant une telle preuve doit la faire entrer dans une des catégories traditionnelles. Cette règle s'est révélée efficace pendant des siècles et continue de servir de guide pratique pour juger de l'admissibilité de la preuve par ouï-dire. Toutefois, comme pour la plupart des règles fondées sur des catégories, les résultats peuvent parfois paraître arbitraires.

14 This occasional arbitrariness was highlighted by the principled analysis of the hearsay rule and its exceptions developed by the American scholar Wigmore almost a century ago. Wigmore pointed out that the reasons for excluding hearsay evidence in general is that it is not the best evidence (direct evidence would be better), and it may be unreliable (it was not given under oath and cannot be tested by cross-examination). However, if these two defects are alleviated, hearsay evidence may be admitted. This, Wigmore opined, explains how most of the exceptions to the hearsay rule developed. The evidence is necessary, in that the person who made the hearsay statement is not readily available. And it is reliable, in the sense that something about it provides a circumstantial guarantee of trustworthiness. For these reasons, judges began to admit it. Their decisions were followed in other cases. Gradually, an exception emerged and became a fixed rule. Once fixed, however, the rule became rigid and could, in some cases, exclude evidence which should have been received having regard to the underlying criteria of necessity and reliability. It could also occasionally lead to the admission of evidence which should be excluded, judged by these criteria. This in turn could impede the search for the truth or unfairly prejudice the accused person.

Cet arbitraire occasionnel a été mis en lumière par l'analyse raisonnée de la règle du ouï-dire et de ses exceptions, élaborée par le juriste américain Wigmore il y a près d'un siècle. L'auteur a indiqué qu'en général, la preuve par ouï-dire est exclue parce que ce n'est pas la meilleure preuve (une preuve directe serait préférable) et qu'elle risque de pas être digne de foi (le témoignage n'a pas été fait sous serment et ne peut être soumis au contre-interrogatoire). Cependant, si ces deux défauts sont atténués, la preuve par ouï-dire est admissible. C'est ainsi, affirme Wigmore, que sont nées la plupart des exceptions à la règle du ouï-dire. La preuve est nécessaire du fait que la personne qui a fait la déclaration relatée n'est pas aisément disponible. Et elle est fiable, en ce sens qu'elle fournit une garantie circonstancielle de fiabilité. Pour ces raisons, des juges ont commencé à l'admettre. Leurs décisions ont été suivies dans d'autres affaires. Graduellement, une exception est apparue et a été érigée en règle de droit. Cependant, une fois érigée, la règle est devenue rigide et pouvait, dans certains cas, exclure une preuve qui aurait dû être admise au regard des critères sous-jacents de nécessité et de fiabilité. Elle pouvait aussi occasionnellement mener à l'admission d'une preuve qui aurait dû être exclue selon ces critères. Cette règle pouvait ainsi entraver la recherche de la vérité ou porter injustement préjudice à l'accusé.

15 The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the *Starr* decision, the following framework emerges for considering the admissibility of hearsay evidence:

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the

La méthode d'analyse raisonnée de l'admissibilité de la preuve par ouï-dire, qu'a développée la Cour depuis une vingtaine d'années, tente de conférer une certaine souplesse à la règle du ouï-dire pour éviter ces conséquences négatives. Il convient d'appliquer le cadre d'analyse suivant, tiré de *Starr*, pour déterminer l'admissibilité de la preuve par ouï-dire :

a) La preuve par ouï-dire est présumée inadmissible à moins de relever d'une exception à la règle du ouï-dire. Les exceptions traditionnelles continuent présomptivement de s'appliquer.

b) Il est possible de contester une exception à l'exclusion du ouï-dire au motif qu'elle ne présenterait pas les indices de nécessité et de

principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

(See generally D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 95-96.)

Admissibility of evidence is determined on the basis of "threshold reliability" provided by circumstantial indicators of reliability. The issue of "ultimate reliability" is for the trier of fact, in this case the jury.

The appellant invokes the second and third propositions set out above. His main argument is that the co-conspirators' exception to the hearsay rule does not accord with the fundamental criteria that underlie the exceptions to the hearsay rule, necessity and reliability. Alternatively, the question arises whether this is one of those "rare cases" where hearsay evidence falling within an exception to the hearsay rule should not be admitted because it lacks the necessary indicia of necessity and reliability.

I first address the appellant's main argument — the co-conspirators' exception to the hearsay rule does not reflect the necessary indicia of necessity and reliability. In *R. v. Chang* (2003), 173 C.C.C. (3d) 397, the Ontario Court of Appeal, *per* O'Connor A.C.J.O. and Armstrong J.A., rejected this argument. The criterion of necessity poses little difficulty. As stated in *Chang*, "necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately,

fiabilité requis par la méthode d'analyse raisonnée. On peut la modifier au besoin pour la rendre conforme à ces exigences.

c) Dans de « rares cas », la preuve relevant d'une exception existante peut être exclue parce que, dans les circonstances particulières de l'espèce, elle ne présente pas les indices de nécessité et de fiabilité requis.

d) Si la preuve par ouï-dire ne relève pas d'une exception à la règle d'exclusion, elle peut tout de même être admissible si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire.

(Voir, de façon générale, D. M. Paciocco et L. Stuesser, *The Law of Evidence* (3e éd. 2002), p. 95-96.)

16 L'admissibilité de la preuve est déterminée en fonction d'un « seuil de fiabilité » établi par des indicateurs circonstanciels de fiabilité. La question de la « fiabilité ultime » relève du juge des faits, en l'occurrence le jury.

17 L'appelant invoque la première et la troisième propositions établies ci-dessus. Il soutient principalement que l'exception relative aux coconspirateurs n'est pas conforme aux critères fondamentaux qui sous-tendent les exceptions à la règle du ouï-dire, à savoir la nécessité et la fiabilité. Subsidiairement, il s'agit de savoir si nous sommes en l'espèce en présence de l'un des « rares cas » où la preuve par ouï-dire relevant d'une exception à la règle du ouï-dire ne saurait être admise faute des indices de nécessité et de fiabilité requis.

18 Examinons d'abord l'argument principal de l'appelant : l'exception relative aux coconspirateurs ne présente pas les indices de nécessité et de fiabilité requis. Dans *R. c. Chang* (2003), 173 C.C.C. (3d) 397, le juge en chef adjoint O'Connor et le juge Armstrong, de la Cour d'appel de l'Ontario, ont rejeté cet argument. Le critère de la nécessité pose peu de difficultés. Comme il est mentionné dans *Chang*, [TRADUCTION] « la nécessité résultera de l'effet conjugué de la non-contraignabilité d'un coaccusé auteur de la déclaration, de

and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy" (para. 105).

19 The criterion of reliability requires closer scrutiny. The appellant raises the concern that co-conspirators' statements tend to be inherently unreliable because of the character of the declarants and the suspicious activities in which they are engaged.

20 A preliminary issue arises at this stage. The federal Crown argues that the co-conspirators' exception is not grounded in a concern for reliability, but rests rather on the reasoning that once it is established that the people concerned were involved in the same conspiracy, then the statements of one are admissions against all. Thus, "the rationale for the rule in Canada was grounded in principles governing admissions by party litigants": *Chang*, at para. 82. This exception is grounded in "a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all": *R. v. Evans*, [1993] 3 S.C.R. 653, *per* Sopinka J., at p. 664. Sopinka J. went on to suggest that circumstantial guarantees of trustworthiness are irrelevant to the party admissions exception to the hearsay rule:

> The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. [p. 664]

It follows on this reasoning that if the appellant was a co-conspirator with the witness, Binahmad, the appellant cannot be heard to complain that what he said to Binahmad was unreliable. Similarly, it is argued, he cannot complain about the unreliability of what a third co-conspirator, Wasfi, said to Binahmad. They were all plotting together, and what each says can be used against the other. Having entered into a criminal

l'inopportunité de juger séparément les coconspirateurs présumés et de la valeur probante de déclarations concomitantes faites en vue d'un complot reproché » (par. 105).

Le critère de la fiabilité exige un examen plus approfondi. L'appelant prétend que les déclarations des coconspirateurs sont intrinsèquement non dignes de foi en raison de la moralité de leurs auteurs et des activités suspectes dans lesquelles ils sont impliqués.

Une question préliminaire se pose à ce stade. Le ministère public prétend que l'exception relative aux coconspirateurs n'est pas fondée sur une question de fiabilité, mais repose plutôt sur le raisonnement selon lequel, une fois établie la participation des personnes concernées au même complot, les déclarations de l'une constituent alors des aveux contre toutes. Ainsi, [TRADUCTION] « la raison d'être de la règle au Canada trouve son origine dans les principes régissant les aveux des parties » : *Chang*, par. 82. Cette exception ne repose pas « sur les mêmes motifs que d'autres exceptions à la règle du ouï-dire. En fait, on peut se demander si la preuve constitue réellement du ouï-dire » : *R. c. Evans*, [1993] 3 R.C.S. 653, p. 664, le juge Sopinka. Le juge Sopinka a ajouté que les garanties circonstancielles de fiabilité ne sont pas pertinentes quant à l'exception à la règle du ouï-dire en matière d'aveux d'une partie :

> L'effet pratique de cette distinction doctrinale est qu'au lieu de chercher des garanties circonstancielles indépendantes de fiabilité, il suffit de présenter la preuve contre une partie. L'admissibilité de cette preuve repose sur la théorie du système contradictoire voulant que les déclarations antérieures d'une partie peuvent être admises contre la partie qui ne peut se plaindre de la non-fiabilité de ses propres déclarations. [p. 664]

Il découle de ce raisonnement que, si l'appelant a conspiré avec le témoin Binahmad, il ne saurait prétendre que ce qu'il lui a dit n'était pas digne de foi. De même, soutient-on, il ne peut invoquer la non-fiabilité des propos qu'un troisième coconspirateur, Wasfi, a tenus à Binahmad. Ils complotaient tous ensemble, et ce que chacun déclare peut être utilisé contre les autres. Ayant formé un complot criminel, l'accusé ne peut, pour sa défense,

conspiracy, the accused cannot in his defence rely on its very criminality and the unreliability of his co-conspirators.

The unique doctrinal roots of the co-conspirators' exception to the hearsay rule cannot be denied. However, as noted in *Chang*, "the fact that the co-conspirators' rule is grounded in those principles does not alter the fact that a statement that becomes admissible under the *Carter* process is hearsay and concerns about unreliability are very real" (para. 85). In this sense, the directive of *Starr* that the traditional exceptions should be examined for conformity with necessity and reliability remains pertinent.

I return, therefore, to the question of whether the co-conspirators' exception to the hearsay rule possesses sufficient circumstantial indicators of reliability. The *Carter* process allows the jury to consider a hearsay statement by a co-conspirator in furtherance of the conspiracy only after it has found (1) that the conspiracy existed beyond a reasonable doubt and (2) that the accused was probably a member of the conspiracy, by virtue only of direct evidence against him.

The appellant argues that *Carter* cannot satisfy the reliability requirement because it amounts to using corroborating evidence to bolster the reliability of hearsay declarations against the accused, contrary to *Starr*, *per* Iacobucci J., at para. 217.

I do not agree. The question is whether the first two stages of the *Carter* process provide circumstantial indicators of reliability that do not amount to simply corroborating the statements in issue. In my view, they do. Proof that a conspiracy existed beyond a reasonable doubt and that the accused probably participated in it does not merely corroborate the statement in issue. Rather, it attests to a common enterprise that enhances the general reliability of what was said in the course of pursuing that enterprise. It is similar in its effect to the *res gestae* exception to the hearsay rule, where surrounding context furnishes circumstantial indicators of reliability. The concern is not with whether

s'appuyer sur sa criminalité même et la non-fiabilité de ses coconspirateurs.

21 Les assises doctrinales particulières de l'exception relative aux coconspirateurs ne peuvent être niées. Toutefois, comme il a été mentionné dans *Chang*, [TRADUCTION] « le fait que la règle relative aux coconspirateurs est fondée sur ces principes ne change rien au fait qu'une déclaration qui devient admissible selon la méthode *Carter* demeure du ouï-dire et que les risques de non-fiabilité sont bien réels » (par. 85). En ce sens, la directive énoncée dans *Starr* selon laquelle les exceptions traditionnelles devraient répondre aux critères de nécessité et de fiabilité demeure pertinente.

22 Je reviens donc à la question de savoir si l'exception relative aux coconspirateurs comporte des indicateurs circonstanciels de fiabilité suffisants. La méthode *Carter* permet au jury de prendre en considération une déclaration relatée faite par un coconspirateur en vue du complot seulement après avoir conclu : (1) que le complot a eu lieu hors de tout doute raisonnable; (2) que l'accusé y a probablement participé vu uniquement la preuve directe retenue contre lui.

23 L'appelant fait valoir que la règle *Carter* ne satisfait pas à l'exigence de fiabilité parce que cela équivaut à utiliser une preuve corroborante pour renforcer la fiabilité de déclarations rapportées par ouï-dire contre l'accusé et ce, contrairement à l'arrêt *Starr*, le juge Iacobucci, par. 217.

24 Je ne suis pas de cet avis. La question est de savoir si les deux premières étapes de la méthode *Carter* fournissent des indicateurs circonstanciels de fiabilité qui ne font pas que corroborer les déclarations en question. À mon sens, la réponse est affirmative. En effet, la preuve qu'un complot a eu lieu hors de tout doute raisonnable et que l'accusé y a probablement participé ne vient pas simplement corroborer la déclaration en question. Elle atteste plutôt de l'existence d'une entreprise commune qui renforce la fiabilité générale des propos échangés au cours de la réalisation de cette entreprise. Son effet est comparable à l'exception de la *res gestae* à la règle du ouï-dire, c'est-à-dire le cas

a particular statement is corroborated, but rather with circumstantial indicators of reliability.

où des indicateurs circonstanciels de fiabilité ressortent du contexte. Il s'agit non pas de savoir si une déclaration particulière est corroborée, mais plutôt s'il existe des indicateurs circonstanciels de fiabilité.

25 The evidence under the first two stages of *Carter* is not inherently corroborative of the hearsay statement, in the sense of confirming the truth of its contents. Indeed the evidence establishing the conspiracy and the accused's probable participation may conflict with the hearsay evidence subsequently adduced. More often than not, the trier of fact will find corroboration, rather than conflict, in the direct evidence implicating the accused. However, this ultimate use of the evidence should not be confused with its initial role in establishing threshold reliability. Here it is relevant with respect to the context of the hearsay evidence, and not to its contents. The use of the *Carter* approach in the present inquiry thus stays within the boundaries of threshold reliability, as explained in *Starr*.

Selon les deux premiers volets de la méthode dégagée dans l'arrêt *Carter*, la preuve ne corrobore pas intrinsèquement la déclaration relatée, dans le sens où elle confirmerait la véracité de son contenu. En fait, la preuve établissant le complot et la participation probable de l'accusé peut entrer en conflit avec la preuve par ouï-dire présentée ultérieurement. Le plus souvent, le juge des faits trouvera corroboration plutôt que conflit dans la preuve directe incriminant l'accusé. Toutefois, il ne faut pas confondre cette utilisation ultime de la preuve avec son rôle initial dans l'établissement du seuil de fiabilité. En l'espèce, cette utilisation est pertinente quant au contexte de la preuve par ouï-dire, et non quant à son contenu. Le recours à la méthode *Carter* dans le présent débat demeure ainsi dans les limites du seuil de fiabilité, qui est expliqué dans *Starr*.

26 In addition to these preliminary conditions, the final *Carter* requirement, i.e., only those hearsay statements made in furtherance of the conspiracy can be considered, provides guarantees of reliability in the more immediate circumstances under which the statement is made. "In furtherance" statements "have the reliability-enhancing qualities of spontaneity and contemporaneity to the events to which they relate" (*Chang*, at paras. 122-23). They have *res gestae*-type qualities, being "the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence" (*Chang*, at para. 123). This "minimizes the motive and opportunity for contrivance" (*Chang*, at para. 124). The characters' doubtful reputation for veracity is not a factor at this stage of the analysis. Rather, it is to be taken into account by the jury when assessing the ultimate reliability of such characters' statements.

Outre ces conditions préliminaires, l'exigence ultime de la méthode *Carter*, à savoir que seules les déclarations relatées faites en vue de l'exécution du complot peuvent être prises en considération, fournit des garanties de fiabilité dans les circonstances plus immédiates de la déclaration. Les déclarations faites [TRADUCTION] « en vue de quelque chose » « sont fiables du fait de leur spontanéité et de leur contemporanéité par rapport aux événements visés » (*Chang*, par. 122-123). Elles s'apparentent à des *res gestae* en ce qu'elles correspondent [TRADUCTION] « aux actes mêmes par lesquels le complot est conçu ou exécuté, et sont faites au cours de la perpétration de l'infraction » (*Chang*, par. 123). Cela [TRADUCTION] « diminue l'importance du mobile et les possibilités de manigances » (*Chang*, par. 124). La réputation douteuse des accusés quant à la véracité de leurs dires n'est pas un facteur à considérer à ce stade de l'analyse. Elle n'entre en jeu que lorsque le jury apprécie la fiabilité ultime des déclarations de telles personnes.

In sum, the conditions of the *Carter* rule provide sufficient circumstantial guarantees of trustworthiness necessary to permit the evidence to be received.

This conclusion makes practical sense. First, the rule does not operate unfairly to accused persons. Indicia of reliability exist. In this way, unreliable evidence that is likely to mislead the jury can be excluded. It remains open to the accused to cross-examine the deponent, call contrary evidence, and argue the unreliability of the co-conspirators' evidence before the jury. Moreover, it is not unfair to expect people who enter into criminal conspiracies to accept that if they are charged, the evidence of their co-conspirators about what they said in furtherance of the conspiracy may be used against them. Finally, the hearsay rule is supplemented by the discretion of the trial judge to exclude evidence where its prejudicial effect outweighs its probative value, discussed below.

Second, the rule allows the Crown to effectively prosecute criminal conspiracies. It would become difficult and in many cases impossible to marshal the evidence of criminal conspiracy without the ability to use co-conspirators' statements of what was said in furtherance of the conspiracy against each other. To deprive the Crown of the right to use double hearsay evidence of co-conspirators as to what they variously said in furtherance of the conspiracy would mean that serious criminal conspiracies would often go unpunished.

Finally, to modify the *Carter* rule would increase delay and difficulties in trial procedure. Any approach that requires the trial judge to scrutinize the necessity and reliability of particular pieces of hearsay evidence in deciding its admissibility would undermine the efficiency of the traditional categories of exceptions to the hearsay rule and increase the number of *voir dire.* As stated in *Chang*:

27 En somme, les conditions posées par la règle *Carter* fournissent les garanties circonstancielles de fiabilité nécessaires pour permettre l'admission de la preuve.

28 Cette conclusion est sensée sur le plan pratique. Premièrement, la règle ne cause pas d'injustice aux accusés. Des indices de fiabilité existent. Ainsi, une preuve non fiable qui est susceptible d'induire le jury en erreur peut être exclue. Il demeure loisible à l'accusé de contre-interroger le déposant, de présenter une preuve contraire et de soutenir devant le jury la non-fiabilité du témoignage des coconspirateurs. De plus, il n'est pas déraisonnable de s'attendre à ce que les participants à des complots criminels acceptent, s'ils sont accusés, de voir utilisé contre eux le témoignage de leurs coconspirateurs relativement à ce qu'ils ont dit en vue du complot. Enfin, comme nous le verrons plus loin, la règle du ouï-dire est complétée par le pouvoir discrétionnaire du juge du procès d'exclure la preuve si son effet préjudiciable l'emporte sur sa valeur probante.

29 Deuxièmement, la règle permet au ministère public d'intenter des poursuites efficaces dans les cas de complots criminels. Il deviendrait difficile, voire souvent impossible, d'obtenir la preuve d'un complot criminel sans la possibilité d'utiliser contre chacun les déclarations des coconspirateurs sur les propos échangés en vue du complot, dans les cas où elles constituent du double ouï-dire. Priver le ministère public du droit d'utiliser la preuve par double ouï-dire à l'égard des coconspirateurs relativement à ce qu'ils ont dit en vue du complot signifierait que de graves complots criminels demeureraient souvent impunis.

30 Enfin, modifier la règle *Carter* augmenterait les délais et les difficultés d'ordre procédural lors de l'instruction. Toute interprétation qui exige que le juge du procès examine attentivement la nécessité et la fiabilité de certains éléments de preuve par ouï-dire pour décider de leur admissibilité compromettrait l'efficacité des catégories traditionnelles d'exceptions à la règle du ouï-dire et augmenterait le nombre de voir-dire. Comme il est affirmé dans *Chang* :

We are concerned that conspiracy trials, many of which are already complicated, may become more so if every time the Crown seeks to introduce co-conspirators' declarations, the trial judge is required to hold a *voir dire* to determine if there is compliance with the principled approach. We do not anticipate that will be the case. A *voir dire* addressing the principled approach should be the exception. It will only be required when an accused is able to point to evidence raising serious and real concerns about reliability emerging from the circumstances in which a declaration was made, which concerns will not be adequately addressed by use of the *Carter* approach. As a general rule, the presumption that evidence that meets the *Carter* requirements also meets the principled approach should obviate the need for a *voir dire.* [para. 132]

[TRADUCTION] Nous sommes préoccupés par le fait que les procès pour complot, souvent déjà compliqués, puissent le devenir encore plus si, chaque fois que le ministère public souhaite présenter des déclarations de coconspirateurs, le juge du procès doit tenir un voir-dire pour décider si la méthode d'analyse raisonnée est respectée. Nous ne prévoyons pas que ce sera le cas. Un voir-dire sur cette méthode devrait être l'exception. Il ne sera nécessaire que si l'accusé est capable d'indiquer des éléments de preuve soulevant de graves et réelles préoccupations quant à la fiabilité compte tenu des circonstances dans lesquelles une déclaration a été faite, préoccupations auxquelles on ne pourra répondre adéquatement en utilisant la méthode *Carter.* De façon générale, la présomption que la preuve qui satisfait aux exigences de la règle *Carter* respecte également la méthode d'analyse raisonnée devrait permettre d'éviter un voir-dire. [par. 132]

The appellant suggests simply that we make the *Carter* rule inapplicable to double hearsay evidence. However, the underlying rationale for doing so is that all hearsay evidence, even if it falls under an established exception, must be rejected if that particular piece of evidence does not meet the concerns of necessity and reliability. This implies a case-by-case vetting more resembling the ultimate reliability inquiry that is for the jury, than the threshold reliability inquiry relevant to admissibility.

L'appelant nous demande de rendre la règle *Carter* inapplicable à la preuve par double ouï-dire. Or, agir ainsi reviendrait à dire qu'il faut rejeter toute preuve par ouï-dire, même si elle relève d'une exception reconnue, dans les cas où l'élément de preuve considéré ne répond pas aux préoccupations en matière de nécessité et de fiabilité. Cela suppose une vérification au cas par cas qui s'apparente davantage au questionnement sur la fiabilité ultime relevant du jury qu'au questionnement sur le seuil de fiabilité pertinent quant à l'admissibilité.

31 I conclude that the co-conspirators' exception to the hearsay rule meets the requirements of the principled approach to the hearsay rule and should be affirmed.

Je conclus que l'exception relative aux coconspirateurs satisfait aux exigences de la méthode d'analyse raisonnée de la règle du ouï-dire et qu'il y a donc lieu de la confirmer.

32 The appellant also asks us to change the *Carter* rule to require the first two elements to be determined by the trial judge, rather than the jury, on the ground that allowing the jury to decide these elements renders the exception operationally unfair. While courts may adjust common law rules incrementally to avoid apparent injustice, they do so only where there is clear indication of a need to change the rule in the interests of justice. That is not established in this case. Indeed, the appellant's suggestion was considered and rejected in *Carter* precisely because of the danger that the jury might confuse the direct and the hearsay evidence against the accused and rely on the latter to convict the accused. The Court concluded that the three-stage approach was better suited to bring home to the jury the need

L'appelant nous demande également de modifier la règle *Carter* pour exiger que les deux premiers éléments soient tranchés par le juge du procès plutôt que par le jury, au motif que cette situation rend l'exception inéquitable en pratique. Bien que les tribunaux puissent adapter graduellement les règles de common law pour éviter une injustice manifeste, ils ne le font que dans la mesure où il y a une indication claire qu'un changement s'impose dans l'intérêt de la justice. La nécessité d'un tel changement n'a pas été établie en l'espèce. En fait, la prétention de l'appelant a été examinée et rejetée dans l'arrêt *Carter* précisément en raison du risque que le jury confonde la preuve directe et la preuve par ouï-dire contre l'accusé et s'appuie sur cette dernière pour le condamner. La Cour a conclu que la méthode en trois volets

to find independent evidence of the accused's participation in conspiracy. I would not accede to this request.

I conclude that the *Carter* rule stands and that the evidence in question was not excluded by the hearsay rule.

This leaves for consideration the argument that even if the co-conspirators' exception to the hearsay rule satisfies the need for indicia of necessity and reliability, this is one of those rare cases where evidence falling within a valid exception to the hearsay rule should nevertheless not be admitted because the required indicia of necessity and reliability are lacking in the particular circumstances of the case. The same considerations that lead to the conclusion that the co-conspirators' exception to the hearsay rule satisfies the requirements for indicia of necessity and reliability are applicable here. Necessity is established, in the absence of direct evidence from the co-accused declarants. Indicia of reliability are found in the requirements of the *Carter* rule for a conspiracy proved beyond a reasonable doubt, membership of the accused in it on a balance of probability, and the rule that only statements made in furtherance of the conspiracy are admitted. It therefore becomes difficult to conclude that evidence falling under the *Carter* rule would lack the indicia of reliability and necessity required for the admission of hearsay evidence on the principled approach. In all but the most exceptional cases the argument is spent at the point where an exception to the hearsay rule is found to comply with the principled approach to the hearsay rule.

Is this such a case? Certainly there are frailties in the evidence of the co-conspirator. Wasfi arguably had a motive to lie, namely a desire to falsely implicate the appellant, so Binahmad would think the appellant's money would be used in the killing. According to the appellant, Wasfi had his own reasons to have Chand killed, namely to obtain vengeance for the alleged rape of his girlfriend and to eliminate a debt. He implicated the appellant because Binahmad knew he himself could not finance the

était plus appropriée pour bien faire comprendre au jury la nécessité de trouver une preuve indépendante de la participation de l'accusé au complot. Je n'accède pas à cette demande.

33 Je conclus que la règle *Carter* demeure valable et que la preuve en question n'était pas exclue par la règle du ouï-dire.

34 Il reste à examiner l'argument selon lequel, même si l'exception relative aux coconspirateurs satisfait à l'exigence concernant l'existence d'indices de nécessité et de fiabilité, nous sommes en présence d'un des rares cas où la preuve relevant d'une exception valide à la règle du ouï-dire ne saurait néanmoins être admise, car les indices de nécessité et de fiabilité requis n'existent pas dans les circonstances particulières de l'espèce. Les mêmes considérations qui amènent à conclure que l'exception relative aux coconspirateurs satisfait aux exigences concernant l'existence d'indices de nécessité et de fiabilité s'appliquent en l'espèce. La nécessité est établie, faute de preuve directe émanant des déclarants coaccusés. Les indices de fiabilité se retrouvent dans les exigences de la règle *Carter* — la preuve hors de tout doute raisonnable d'un complot et celle de la participation de l'accusé à ce complot selon la prépondérance des probabilités — et dans la règle voulant que seules les déclarations faites en vue du complot soient admises. Il devient dès lors difficile de conclure que la preuve relevant de la règle *Carter* ne présente pas les indices de fiabilité et de nécessité requis pour l'admission de la preuve par ouï-dire selon la méthode d'analyse raisonnée. Sauf cas très exceptionnels, l'argument perd toute valeur à partir du moment où l'exception à la règle du ouï-dire est jugée conforme à la méthode d'analyse raisonnée.

35 Sommes-nous en présence d'un de ces cas? Le témoignage d'un coconspirateur comporte certainement des faiblesses. Wasfi avait sans doute une raison de mentir, à savoir le désir d'impliquer faussement l'appelant afin que Binahmad pense que l'argent de l'appelant servirait au meurtre. Selon l'appelant, Wasfi avait ses propres raisons de faire tuer Chand : se venger du viol allégué de sa petite amie et liquider une dette. Il a impliqué l'appelant parce que Binhamad savait qu'il ne pouvait lui-même

contract killing. Finally, the evidence showed that Wasfi was in jail at the time when Binahmad testified that the discussion took place.

36 These concerns, with the exception of the discrepancy as to the date of the conversation, do not go beyond concerns already addressed in the analysis of whether the co-conspirators' exception complies with the principled approach to the hearsay rule. They are characteristic of any conspiracy. Any weaknesses go to the ultimate weight of the evidence, which is for the jury to decide. Nor does Binahmad's error on when the conversation took place merit rejection of the evidence. This problem is one of ultimate reliability that the jury can decide. The trial judge reminded the jury in his charge about this difficulty, in the context of highlighting the defence position that both Wasfi and Binahmad were completely unreliable characters.

37 It follows that the appellant has not established that the evidence to which he objects constitutes one of those "rare cases" where evidence falling within a valid exception to the hearsay rule fails, in the peculiar circumstances of the case, to satisfy the indicia of necessity and reliability necessary for the admission of hearsay evidence.

III. Admissibility of Call No. 79

38 This phone call was initiated by Chow who called Wasfi, then handed over the phone to the appellant. After a brief exchange with Wasfi, the appellant returned the phone to Chow, who spoke with Wasfi for most of the remainder of the call, except for the very last part when the appellant comes back to talk to Wasfi. During this last interval, the appellant received a phone call from Chand and the appellant's side of the conversation with Chand was picked up by the wiretap. The intercept recorded the appellant telling the victim to meet him at the Rags to Riches lot in 15 minutes. When that call terminated, the appellant returned to his conversation with Wasfi and told him about this fortunate arrangement.

39 The appellant argues that the interception of his communications during this call was unlawful, as it exceeded the terms of the authorization. Chow was

financer l'assassinat. Enfin, la preuve indiquait que Wasfi était en prison au moment où, selon Binahmad, la discussion aurait eu lieu.

À part la contradiction quant à la date de la conversation, ces préoccupations sont du même ordre que celles déjà abordées dans l'examen de la question de la conformité de l'exception relative aux coconspirateurs avec la méthode d'analyse raisonnée de la règle du ouï-dire. Elles sont caractéristiques de tout complot. Toute faiblesse influe sur la valeur probante ultime de la preuve, et c'est au jury de décider. L'erreur de Binahmad quant au moment où la conversation a eu lieu ne justifie pas non plus le rejet de la preuve. Il s'agit d'un problème de fiabilité ultime que le jury peut trancher. Dans son exposé, le juge du procès a attiré l'attention du jury sur cette question lorsqu'il a rappelé la thèse de la défense selon laquelle Wasfi et Binahmad sont tous deux des individus dénués de crédibilité.

Il s'ensuit que l'appelant n'a pas établi que la preuve à laquelle il s'oppose constitue l'un des « rares cas » où la preuve relevant d'une exception valide à la règle du ouï-dire ne présente pas, eu égard aux circonstances particulières de l'espèce, les indices de nécessité et de fiabilité requis pour l'admissibilité de la preuve par ouï-dire.

III. Admissibilité de l'appel nº 79

Chow a composé le numéro de Wasfi, puis a passé le téléphone à l'appelant. Après un bref échange avec Wasfi, l'appelant a redonné le téléphone à Chow, qui a parlé avec son interlocuteur pendant presque tout le reste de la conversation téléphonique, exception faite d'un bref échange à la toute fin entre l'appelant et Wasfi. Durant ce dernier intervalle, l'appelant a reçu un appel de Chand, et cette partie de la conversation avec Chand a été interceptée par écoute électronique. Selon l'enregistrement, l'appelant disait à la victime de le rencontrer dans 15 minutes sur le terrain de Rags to Riches. Une fois l'appel terminé, l'appelant a repris sa conversation avec Wasfi et lui a fait part de cet heureux arrangement.

L'appelant soutient que l'interception de ses propos durant cet appel était illégale puisqu'elle excédait les conditions de l'autorisation. Chow était

named as a target in the authorization and his interception was therefore lawful. The call was being manually monitored. The authorization required the police to stop listening when Chow was not a party to the communication. Thus the issue is whether Chow continued to be a party to the conversation after the appellant took the cell phone from Chow. If the appellant had borrowed Chow's phone and called Wasfi, there is no doubt that the obligation to cease the interception would have been triggered. However, Chow initiated the call to Wasfi and both courts below found that he never ceased to be a party to the conversation, i.e., this was a three-way communication throughout, rather than a series of separate communications. Furthermore, as the respondent points out, the appellant himself characterized the call as a three-way conversation in cross-examination.

The appellant's case depends on this fundamental determination, which is of a factual nature. On the evidence before us, there is no basis to interfere with the findings in the courts below.

Given the relatively short duration of the call and the frequency with which the conversation moved back and forth between Chow, Mapara and Wasfi, it seems reasonable for the monitor listening to it to expect that Chow was constantly present in the background and likely to intervene in the conversation at any time. Practically speaking, it is difficult to say at which point they should have determined that Chow was no longer a party to the conversation, which became a communication solely between Mapara and Wasfi. I would not characterize the police conduct in monitoring this call as deliberate and unreasonable. Even if it could be said with regard to the very last part of the call, for instance, when Chow does not come back on the line, that there was an unlawful interception, this would not constitute a violation of sufficient seriousness to engage an inquiry under s. 24(2) of the *Charter* into whether the conduct brought the administration of justice into disrepute.

IV. Conclusion

I would dismiss the appeal and affirm the decision of the Court of Appeal.

désigné comme cible dans l'autorisation et l'interception de ses propos était donc légale. L'appel faisait l'objet d'une surveillance humaine. Selon l'autorisation, les policiers devaient cesser d'écouter lorsque Chow ne participait pas à la conversation. Il s'agit donc de savoir si Chow a continué d'y participer après avoir passé le téléphone à l'appelant. Si l'appelant avait emprunté le téléphone de Chow et avait appelé Wasfi, il y aurait eu clairement obligation de cesser l'interception de la conversation. Or c'est Chow qui a téléphoné à Wasfi et les deux cours d'instance inférieure ont décidé qu'il n'avait jamais cessé d'être partie à la conversation : il s'agissait d'un échange à trois pendant toute la conversation et non d'une série d'échanges séparés. De plus, comme le fait remarquer l'intimée, l'appelant lui-même a décrit cet appel comme un échange à trois lors de son contre-interrogatoire.

40 La défense de l'appelant repose sur cette question fondamentale, qui est de nature factuelle. Selon la preuve au dossier, il n'y a aucune raison de modifier les conclusions des cours d'instance inférieure.

41 Compte tenu de la durée relativement courte de l'appel et de la fréquence avec laquelle la conversation entre Chow, Mapara et Wasfi passait de l'un à l'autre, le préposé à l'écoute pouvait raisonnablement estimer que Chow était constamment présent en second plan et probablement prêt à intervenir dans la conversation à tout moment. Sur le plan pratique, il est difficile de dire à quel moment le policier aurait dû conclure que Chow ne participait plus à la conversation, qui s'est réduite à un échange entre Mapara et Wasfi. Je ne qualifierais pas de délibérée et déraisonnable la conduite du policier qui surveillait cet appel. Même si on pouvait dire relativement à la toute dernière partie de l'appel quand, par exemple, Chow ne reprend pas le combiné, qu'il s'agissait d'une interception illégale, cela ne constituerait pas une violation suffisamment grave pour qu'il faille se demander si, suivant le par. 24(2) de la *Charte*, la conduite de la police a déconsidéré l'administration de la justice.

IV. Conclusion

42 Je suis d'avis de rejeter le pourvoi et de confirmer la décision de la Cour d'appel.

The reasons of LeBel and Fish JJ. were delivered by

43 LeBel J. — I have read the reasons of Chief Justice McLachlin. Although I agree with her opinion on the admissibility of call No. 79 and with the proposed disposition of this case, I differ from her with respect to the interaction of the co-conspirator's exception to the hearsay rule and the principled approach set out in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40.

I. The Principled Approach to Hearsay Evidence — its Relevance

44 In *Starr*, our Court held that evidence falling within a traditional exception to the hearsay rule is presumptively admissible and that the exceptions should be interpreted in a manner consistent with the requirements of the principled approach: necessity and reliability (paras. 212-13). It was also recognized that, in spite of the application of an exception to the hearsay rule, evidence can be excluded in rare circumstances if it does not meet the principled approach's requirements of necessity and reliability (para. 214). Moreover, *Starr* does not differentiate between the types of hearsay exceptions. It appears therefore that all hearsay exceptions may potentially be subject to the requirements of the principled approach to the hearsay rule. This includes the co-conspirator's exception to hearsay, regardless of whether this exception is justified on the basis of the principles of agency, *res gestae* or admissions: see *R. v. Pilarinos* (2002), 2 C.R. (6th) 273, 2002 BCSC 855, at para. 68. The concern about the admission of unreliable evidence and the resulting impact on trial fairness must take priority: *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), at para. 86.

45 The requirements of the principled approach must continue to play a significant role in the application of the co-conspirator's exception as set out in *R. v. Carter*, [1982] 1 S.C.R. 938. To hold otherwise would seem to be incompatible with our Court's efforts over the last two decades to reshape the law of evidence as applicable to hearsay to temper the rigidity of the traditional hearsay rules.

Version française des motifs des juges LeBel et Fish rendus par

Le juge LeBel — J'ai lu les motifs de la juge en chef McLachlin. Bien que je souscrive à son opinion concernant l'admissibilité de l'appel nº 79 ainsi qu'au dispositif qu'elle propose en l'espèce, je suis en désaccord sur l'interaction entre l'exception à la règle du ouï-dire dans le cas des coconspirateurs, dite exception relative aux coconspirateurs, et la méthode raisonnée énoncée dans *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40.

I. La méthode d'analyse raisonnée de la preuve par ouï-dire — sa pertinence

Dans *Starr*, la Cour a statué que la preuve relevant d'une exception traditionnelle à la règle du ouï-dire est présumée admissible et que les exceptions doivent être interprétées d'une manière conforme aux exigences de la méthode d'analyse raisonnée, soit la nécessité et la fiabilité (par. 212-213). Elle y a également reconnu que, même en cas d'application d'une exception à la règle du ouï-dire, il peut y avoir lieu d'exclure la preuve dans les rares cas où elle ne satisfait pas aux exigences de nécessité et de fiabilité de la méthode raisonnée (par. 214). De plus, l'arrêt *Starr* n'établit pas de distinction entre les types d'exception à la règle du ouï-dire. Il semble donc que toutes les exceptions à la règle du ouï-dire puissent être éventuellement soumises aux exigences de la méthode d'analyse raisonnée. Cela inclut l'exception relative aux coconspirateurs, que cette exception puise sa justification dans les principes du mandat, de la *res gestae* ou des aveux : voir *R. c. Pilarinos* (2002), 2 C.R. (6th) 273, 2002 BCSC 855, par. 68. Il faut tenir compte en priorité du risque que l'admission d'éléments de preuve non fiables ait une incidence sur l'équité du procès : *R. c. Chang* (2003), 173 C.C.C. (3d) 397 (C.A. Ont.), par. 86.

Les exigences de la méthode d'analyse raisonnée doivent continuer à jouer un rôle important dans l'application de l'exception relative aux coconspirateurs énoncée dans *R. c. Carter*, [1982] 1 R.C.S. 938. Affirmer le contraire semblerait incompatible avec les efforts qu'a déployés la Cour ces deux dernières décennies pour reformuler le droit de la preuve par ouï-dire afin de tempérer la rigidité des règles

In this respect, Lamer C.J. emphasized in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, at para. 21, that, "[a]s the goal of our modifications of the principles governing hearsay has been to end the rigid artifice of pigeon-hole exceptions, it is important that new criteria remain flexible." Reliability and necessity have thus become the predominant criteria governing the admissibility of hearsay evidence.

Also, one has to bear in mind that, in developing the principled approach to the hearsay rule, our Court has been concerned with the potentially prejudicial effects of the intrinsic dangers of hearsay evidence, namely the absence of oath and cross-examination, and the inability of the trier of fact to assess the demeanour of the declarant: see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 787; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at paras. 74-75; *Starr*, at paras. 200 and 212. The existence of these dangers offers further justification for maintaining indicia of reliability and necessity as part of the analysis regarding the admissibility of hearsay statements under an established exception such as the co-conspirator rule.

Trial fairness and the principles of fundamental justice also militate in favour of considering these indicia in a manner that offers sufficient flexibility. As the majority said in *Starr*:

> This is particularly true in the criminal context given the "fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted": *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 24, quoted in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 71. It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception. [para. 200]

Courts have generally recognized that the co-conspirator's exception to the hearsay rule is subject to the requirements of the principled approach, or that the presumptive validity of the co-conspirator's evidence can be displaced in particular circumstances: see *R. v. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854, at paras. 30-31; *R. v. Duncan*

traditionnelles en la matière. À cet égard, le juge en chef Lamer a souligné, dans *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764, par. 21, que « [p]uisque notre modification des principes régissant le ouï-dire vise à mettre fin à l'artifice rigide des exceptions compartimentées, il importe que les nouveaux critères demeurent souples. » La fiabilité et la nécessité sont ainsi devenues les critères prédominants en matière d'admissibilité de la preuve par ouï-dire.

46 En outre, il ne faut pas perdre de vue qu'en élaborant la méthode d'analyse raisonnée de la règle du ouï-dire, la Cour était préoccupée par les effets potentiellement préjudiciables des dangers inhérents à la preuve par ouï-dire, à savoir l'absence de serment et de contre-interrogatoire, ainsi que l'impossibilité pour le juge des faits d'évaluer le comportement du déclarant : voir *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 787; *R. c. Hawkins*, [1996] 3 R.C.S. 1043, par. 74-75; *Starr*, par. 200 et 212. L'existence de ces dangers constitue une autre raison de conserver les indices de fiabilité et de nécessité dans le cadre de l'analyse de l'admissibilité des déclarations relatées en vertu d'une exception reconnue telle la règle relative aux coconspirateurs.

47 L'équité du procès et les principes de justice fondamentale commandent également de considérer ces indices avec suffisamment de souplesse. Comme la Cour à la majorité l'a déclaré dans *Starr* :

> Cela est particulièrement vrai en matière criminelle, étant donné que « la règle selon laquelle l'innocent ne doit pas être déclaré coupable est un principe de justice fondamentale garanti par la *Charte* » : *R. c. Leipert*, [1997] 1 R.C.S. 281, au par. 24, cité dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S. 668, au par. 71. Si on permettait au ministère public de présenter une preuve par ouï-dire non fiable contre l'accusé, peu importe qu'elle se trouve ou non à relever d'une exception existante, cela compromettrait l'équité du procès et ferait apparaître le spectre des déclarations de culpabilité erronées. [par. 200]

48 Les tribunaux reconnaissent généralement que l'exception relative aux coconspirateurs est assujettie aux exigences de la méthode d'analyse raisonnée ou que la présomption de validité du témoignage d'un coconspirateur peut être écartée dans des circonstances particulières : voir *R. c. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854, par. 30-31; *R. c. Duncan*

(2002), 1 C.R. (6th) 265 (Man. Prov. Ct.), at paras. 59-67; *Pilarinos*, at para. 68. It is interesting to note as well that in *Chang*, the Ontario Court of Appeal, despite its restrictive view of the application of the principled approach to the co-conspirator's exception, recognized that there may be occasions when the circumstances surrounding the making of a particular statement raise such serious suspicions about its reliability that the court will exclude the evidence even though it may comply with the co-conspirator rule: *Chang*, at para. 125.

49 Many commentators have also pointed out the unreliability of evidence that falls within the co-conspirator's exception to the hearsay rule: M. R. Goode, *Criminal Conspiracy in Canada* (1975), at p. 252; S. Whitzman, "Proof of Conspiracy: The Co-conspirator's Exception to the Hearsay Rule" (1985-86), 28 *Crim. L.Q.* 203, at p. 205; D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), at p. 682; H. Stewart, "Hearsay after *Starr*" (2002), 7 *Can. Crim. L.R.* 5, at pp. 15-16; D. Layton, "*R. v. Pilarinos*: Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule" (2002), 2 C.R. (6th) 293, at p. 303; B. P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (2000), 25 *Queen's L.J.* 1, at p. 49.

50 Because of this unreliability, both the courts and the commentators have raised serious concerns as to whether the procedure mandated by *Carter* meets the requirements of the principled approach. The following are among the chief concerns that have been raised. First, the reliability of a hearsay statement is not necessarily bolstered if it was made in a joint venture. The existence of a joint venture does not uniformly lead to an increased probability that the declarant's statement is accurate: see Layton, at pp. 303-4. As Bennett J. wrote in *Pilarinos*, at para. 66:

> Juriansz J. [in *R. v. Hape*, [2002] O.J. No. 168 (QL) (S.C.J.)] appears to conclude that if the stages of *Carter* are met, then a circumstantial guarantee of trustworthiness exists. This may be the result in some cases, but it will certainly not be the result in all cases, and it cannot

(2002), 1 C.R. (6th) 265 (C. prov. Man.), par. 59-67; *Pilarinos*, par. 68. Il est intéressant de noter également que la Cour d'appel de l'Ontario dans *Chang*, malgré sa conception restrictive de l'application de la méthode d'analyse raisonnée à l'exception relative aux coconspirateurs, a reconnu qu'il pouvait arriver que les circonstances d'une déclaration particulière soulèvent des doutes tellement graves quant à sa fiabilité que le tribunal exclura la preuve malgré sa conformité à la règle relative aux coconspirateurs : *Chang*, par. 125.

Nombre d'auteurs ont également souligné le peu de fiabilité de la preuve relevant de l'exception relative aux coconspirateurs : M. R. Goode, *Criminal Conspiracy in Canada* (1975), p. 252; S. Whitzman, « Proof of Conspiracy : The Co-conspirator's Exception to the Hearsay Rule » (1985-86), 28 *Crim. L.Q.* 203, p. 205; D. Stuart, *Canadian Criminal Law : A Treatise* (4e éd. 2001), p. 682; H. Stewart, « Hearsay after *Starr* » (2002), 7 *Rev. can. D.P.* 5, p. 15-16; D. Layton, « *R. v. Pilarinos* : Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule » (2002), 2 C.R. (6th) 293, p. 303; B. P. Archibald, « The Canadian Hearsay Revolution : Is Half a Loaf Better Than No Loaf at All? » (2000), 25 *Queen's L.J.* 1, p. 49.

En raison de ce peu de fiabilité, de sérieuses préoccupations ont été soulevées, tant dans la jurisprudence que dans la doctrine, relativement à la question de savoir si la méthode prescrite dans l'arrêt *Carter* répond aux exigences de la méthode d'analyse raisonnée. Les préoccupations majeures suivantes ont notamment été exprimées. Premièrement, une déclaration relatée ne gagne pas nécessairement en fiabilité pour avoir été faite dans le cadre d'une entreprise commune. L'existence d'une entreprise commune n'augmente pas forcément la probabilité que la déclaration du déclarant soit exacte : voir Layton, p. 303-304. Comme l'a écrit le juge Bennett dans *Pilarinos*, par. 66 :

> [TRADUCTION] Le juge Juriansz [dans *R. c. Hape*, [2002] O.J. No. 168 (QL) (C.S.J.)] paraît conclure que le respect des étapes prescrites dans l'arrêt *Carter* crée une garantie circonstancielle de fiabilité. Ce résultat peut certes se produire dans certains cas, mais il ne se

be taken as a given. The *Carter* test provides safeguards for the accused, but that does not necessarily equate with the hearsay statement being accompanied by a circumstantial guarantee of trustworthiness.

Second, insofar as the *Carter* process requires the trier of fact to look at corroborative evidence, it is in conflict with the principled approach to the hearsay rule as developed in *Starr*. The proof of a conspiracy derived from the first and second stages of *Carter*, although not inherently corroborative of the hearsay statement, will sometimes allow certain statements to be taken into account that are external to the immediate surrounding circumstances of those statements. The co-conspirator rule may thus run counter to the position of the majority in *Starr*, at para. 217, where it was held that only evidence that concerns the circumstances of the statement itself may be taken into consideration. See also *Duncan*, at para. 54.

Third, the *Carter* process does not allow the declarant's motive to lie, which will in some circumstances be relevant to the determination of threshold reliability, to be taken into consideration. Members of a criminal conspiracy often have motives to lie, especially given that criminal success is not achieved through meticulous fidelity to the truth: see Layton, at p. 304. Conspirators may wish to understate their own involvement and emphasize the role of their partners in crime in the hope of being shown leniency or gaining a personal advantage. In this respect, the agency theory for the co-conspirator rule might very well minimize the likelihood that a co-conspirator would misrepresent the intention of the others, although it should not be assumed that it will unfailingly do so. Even *res gestae*-type qualities do not implicitly and invariably provide sufficient safeguards.

Thus, it cannot be taken for granted that the essential indicia of reliability will always be present in the case of the co-conspirator's exception to the hearsay rule. Although the first two stages of the *Carter* process do provide some circumstantial indicators

produira sûrement pas dans tous les cas, et on ne peut le tenir pour acquis. Le critère de l'arrêt *Carter* offre des garanties à l'accusé, mais il ne confère pas automatiquement à la déclaration relatée une garantie circonstancielle de fiabilité.

51 Deuxièmement, dans la mesure où elle oblige le juge des faits à rechercher une preuve corroborante, la méthode *Carter* entre en conflit avec la méthode d'analyse raisonnée de la règle du ouï-dire, dégagée dans *Starr*. Même si elle ne corrobore pas en soi la déclaration relatée, la preuve d'un complot découlant de l'application de la première et de la seconde étape de *Carter* permettra parfois de prendre en compte certaines déclarations extérieures aux circonstances immédiates qui les ont entourées. La règle relative aux coconspirateurs peut donc aller à l'encontre de la position majoritaire adoptée dans *Starr*, par. 217, où l'on a conclu que seule peut être prise en considération la preuve ayant trait aux circonstances de la déclaration elle-même. Voir aussi *Duncan*, par. 54.

52 Troisièmement, la méthode *Carter* ne permet pas de prendre en considération la raison que le déclarant peut avoir de mentir, élément qui, dans certaines circonstances, sera pertinent pour déterminer le seuil de fiabilité. Les membres d'un complot criminel auront souvent des raisons de mentir, surtout si l'on considère que la réussite de leur entreprise criminelle ne repose pas sur une fidélité méticuleuse à la vérité : voir Layton, p. 304. Il est possible que des coconspirateurs veuillent minimiser leur propre participation ou accentuer celle de leurs associés dans l'entreprise criminelle, dans l'espoir d'obtenir la clémence du tribunal ou un avantage personnel. À cet égard, il se peut fort bien que la théorie du mandat étayant la règle relative aux coconspirateurs sous-estime la probabilité qu'un coconspirateur déforme l'intention des autres, mais il ne faut pas présumer que ce soit toujours le cas. Même les qualités propres à la *res gestae* n'offrent pas implicitement et invariablement des garanties suffisantes.

53 Par conséquent, on ne saurait tenir pour acquis que les indices essentiels de fiabilité sont présents dans tous les cas où l'exception relative aux coconspirateurs est invoquée. Bien que les deux premières étapes de la méthode *Carter* offrent effectivement

of reliability, too many deficiencies in that process may allow mistaken or untruthful hearsay declarations to be admitted in evidence. The *Carter* process is also ill suited to accounting for all the different types of situations arising out of joint ventures in a criminal context.

54 These concerns, as well as the dangers of hearsay and the need to avoid unfairness and wrongful convictions, call for a contextual approach to the application of the co-conspirator's exception to the hearsay rule. The process should provide sufficient flexibility to the trial judge to assess whether, in the particular factual context, a hearsay declaration possesses sufficient indicia of reliability and necessity.

55 In her reasons in this case, the Chief Justice finds that the *Carter* rule alone provides sufficient circumstantial guarantees of trustworthiness and accords with the fundamental criteria of necessity and reliability. In light of the above, I disagree with that conclusion. In my view, the *Carter* process does not in itself provide sufficient safeguards.

II. Application of the Principled Approach

56 The admissibility of evidence based on the co-conspirator's exception should be determined according to the principled approach to the hearsay rule when the circumstances in which the evidence was obtained or given raise real and serious concerns as to reliability or necessity. In such circumstances, the trial judge should be required to scrutinize the evidence to ensure that it meets the criteria of the principled approach: *Chang*, at para. 127. There is a need to depart from the *Carter* process and allow careful scrutiny where the theoretical justification for the co-conspirator's exception collides with the facts or circumstances of the case. The rationale for the exception has then been displaced and the trier of fact must avoid relying on that evidence when following the *Carter* process: see the comments made by L'Heureux-Dubé J. in *Starr*, at para. 57, although I disagree with the assertion that an exception will be challenged only when there are "facts, generally applicable to a class of

des indicateurs circonstanciels de fiabilité, cette méthode comporte trop de failles créant un risque d'admission en preuve de déclarations relatées erronées ou mensongères. Elle ne permet pas non plus de prendre en compte tous les types de situations susceptibles de se produire dans une entreprise commune criminelle.

Ces préoccupations, ainsi que les dangers du ouï-dire et la nécessité d'éviter des condamnations injustes et erronées commandent une approche contextuelle de l'application de l'exception relative aux coconspirateurs. La démarche doit être suffisamment souple pour permettre au juge du procès de déterminer si, d'après les faits de l'espèce, une déclaration relatée présente des indices suffisants de fiabilité et de nécessité.

Dans ses motifs de jugement en l'espèce, la Juge en chef estime que la règle *Carter* offre à elle seule des garanties circonstancielles de fiabilité suffisantes tout en étant conforme aux critères fondamentaux de nécessité et de fiabilité. Vu ce qui précède, je ne partage pas cette conclusion. À mon avis, la méthode *Carter* ne présente pas en soi des garanties suffisantes.

II. Application de la méthode d'analyse raisonnée

L'admissibilité d'un élément de preuve au titre de l'exception relative aux coconspirateurs doit être déterminée selon la méthode d'analyse raisonnée de la règle du ouï-dire lorsque les circonstances dans lesquelles la preuve ou le témoignage a été obtenu ou recueilli, selon le cas, soulève des préoccupations réelles et sérieuses du point de vue de la nécessité ou de la fiabilité. Dans ces circonstances, le juge du procès doit examiner attentivement la preuve pour vérifier si elle respecte les critères de la méthode d'analyse raisonnée : *Chang*, par. 127. Il est justifié de s'écarter de la méthode *Carter* pour procéder à un examen attentif dans les cas où le fondement théorique de l'exception relative aux coconspirateurs entre en conflit avec les faits ou les circonstances de l'affaire. L'exception perd alors sa raison d'être et le juge des faits doit éviter de s'appuyer sur la preuve en cause lorsqu'il applique la méthode *Carter* : voir les commentaires de la juge L'Heureux-Dubé dans *Starr*, par. 57, quoique je ne sois pas d'accord avec

persons", which weaken the theoretical justification of an exception to hearsay.

In her reasons, the Chief Justice recognizes that in the "most exceptional cases" the exception to hearsay might not comply with the principled approach to the hearsay rule (para. 34). This is too high a threshold. The principled approach cannot be curtailed to a point where it allows for untruthful and mistaken hearsay declarations to be admitted under a rule that fails to attain its objectives. Instead, the Court should adopt another standard that will provide sufficient guarantees of reliability and preserve the efficiency of trials while ensuring trial fairness.

The standard of serious concerns or suspicions is not as restrictive as the solution proposed by the majority in this case. It recognizes that the traditional hearsay exceptions will normally suffice, but it does not limit the application of the principled approach solely to the "most exceptional" ones. The serious concerns or suspicions standard better responds to the concerns raised in *Starr* as to the reliability of evidence tendered under a traditional exception to the hearsay rule even if only in "rare" cases (para. 214).

Circumstances of strong suspicion could be present where there are clear indications that a statement could not have been made, that it was intended to mislead or that the declarant lied, or that coercion or inducements were used to obtain the statement. However, this list is not exhaustive.

I wish to stress that a *voir dire* to assess hearsay evidence of co-conspirators on the basis of the principled approach will remain the exception. It will be required only when a party raises real and serious concerns about necessity or reliability by providing concrete and particularized reasons, or by pointing to a specific evidentiary basis for the alleged concerns. Those concerns will have to emerge from the circumstances in which a declaration was made or is being tendered: *Chang*, at para. 132. The burden of

l'affirmation selon laquelle une exception ne devrait être remise en question qu'en présence de « faits, généralement applicables à une catégorie de personnes », minant la justification théorique de l'exception.

57 Dans ses motifs, la Juge en chef reconnaît que, dans des « cas très exceptionnels », l'exception à l'irrecevabilité du ouï-dire pourrait ne pas être conforme à la méthode d'analyse raisonnée (par. 34). Ce seuil est trop élevé. On ne saurait, en restreignant ainsi les paramètres de l'approche raisonnée, permettre l'admission de déclarations relatées mensongères et erronées en vertu d'une règle qui ne répond pas à ses objectifs. La Cour devrait plutôt adopter une autre norme qui offrira des garanties de fiabilité suffisantes et permettra de préserver l'efficacité des procès tout en assurant leur équité.

58 La norme des préoccupations et des doutes sérieux n'est pas aussi restrictive que la solution proposée par les juges majoritaires en l'espèce. Elle reconnaît que les exceptions traditionnelles à la règle du ouï-dire suffiront normalement, mais elle ne limite pas l'application de la méthode d'analyse raisonnée aux seuls « cas très exceptionnels ». La norme des préoccupations ou des doutes sérieux répond mieux aux préoccupations soulevées dans *Starr* en ce qui concerne la fiabilité de la preuve présentée en vertu d'une exception traditionnelle à la règle du ouï-dire, fût-ce dans de « rares » cas (par. 214).

59 Il pourrait exister de forts doutes dans les cas où il y a de nettes indications qu'une déclaration n'a pas pu être faite, qu'elle visait à tromper ou que le déclarant a menti, ou encore que son obtention résulte de la contrainte ou d'encouragements. Cette liste n'est toutefois pas exhaustive.

60 J'aimerais souligner qu'un voir-dire sur l'admissibilité de la preuve par ouï-dire émanant de coconspirateurs suivant la méthode d'analyse raisonnée demeurera l'exception. Il n'y aura lieu de tenir un voir-dire que dans les cas où une partie soulève des préoccupations sérieuses et réelles quant à la nécessité ou à la fiabilité en apportant des raisons concrètes et détaillées ou en étayant ces préoccupations sur des éléments de preuve précis. Ces préoccupations devront ressortir des circonstances dans lesquelles

raising such concerns is borne by the party opposing the admission of the statement.

61 A difficult question arises as to when the principled approach to the hearsay rule should be followed. Generally, the admissibility of evidence is determined when it is tendered, subject to the discretion of a trial judge to require assurances by counsel that the criteria for admissibility will ultimately be satisfied. A problem arises here because, as we know, the *Carter* process takes place at the end of the trial when the trier of fact is called upon to assess the evidence. It has been suggested in some cases that the principled approach should be followed at the conclusion of all the evidence (*Duncan*, at para. 65; *Pilarinos*, at para. 70) or at the point where the *Carter* steps are proven (*R. v. Hape*, [2002] O.J. No. 168 (QL) (S.C.J.), at para. 15). I prefer an approach that provides sufficient flexibility to the trial judge to determine the appropriate time to hold a *voir dire* while ensuring that it is held before *Carter* is applied at the end of the trial. Therefore, I am of the opinion that the trial judge has the discretion to determine when a *voir dire* is necessary to screen a declaration against the necessity or reliability criteria, as long as it is held before the case is left with the trier of fact: *Chang*, at para. 130.

62 Thus, the evidence should be provisionally admitted when tendered. The principled approach will come into play if a party satisfies its burden to raise serious concerns or suspicions as to reliability or necessity. If the trial judge finds that the burden is met, then a *voir dire* should be held to determine whether or not the hearsay declaration meets the requirements of the principled approach. Where a party is unable to raise any serious concerns or suspicions, the trier of fact will apply the *Carter* steps as usual at the end of the trial.

la déclaration a été faite ou est présentée : *Chang*, par. 132. C'est à la partie qui s'oppose à l'admission de la déclaration qu'incombe la charge de soulever ces préoccupations.

Une question difficile se pose quant au moment où il convient d'appliquer la méthode d'analyse raisonnée à la règle du ouï-dire. De façon générale, l'admissibilité de la preuve est déterminée au moment de sa présentation, sous réserve du pouvoir discrétionnaire du juge du procès d'exiger que les procureurs lui donnent l'assurance que les critères d'admissibilité seront ultimement respectés. Or un problème se pose en l'espèce car, comme nous le savons, la méthode *Carter* s'applique à la fin du procès, lorsque le juge des faits est appelé à apprécier la preuve. On a suggéré, dans certaines affaires, d'appliquer la méthode d'analyse raisonnée une fois la preuve des deux parties close (*Duncan*, par. 65; *Pilarinos*, par. 70) ou une fois les étapes de l'arrêt *Carter* franchies (*R. c. Hape*, [2002] O.J. No. 168 (QL) (C.S.J.), par. 15). Je préfère une approche qui accorde au juge du procès la souplesse voulue pour décider du moment indiqué pour tenir un voir-dire, en s'assurant de le tenir avant l'application de l'arrêt *Carter* à la fin du procès. Je suis d'avis que le juge du procès possède le pouvoir discrétionnaire de décider à quel moment il est nécessaire de tenir un voir-dire pour vérifier si une déclaration satisfait aux critères de nécessité ou de fiabilité, pourvu que ce voir-dire ait lieu avant que l'affaire ne soit soumise au juge des faits : *Chang*, par. 130.

Par conséquent, l'élément de preuve devrait être provisoirement admis lorsqu'il est présenté. La méthode raisonnée sera appliquée si une partie satisfait au fardeau de preuve applicable à cet égard et soulève des préoccupations ou des doutes sérieux quant à la nécessité ou à la fiabilité. Si le juge du procès estime que la partie s'est acquittée de ce fardeau, il doit alors tenir un voir-dire pour déterminer si la déclaration relatée respecte les exigences de la méthode raisonnée. Dans les cas où la partie est incapable de soulever des préoccupations ou des doutes sérieux, le juge des faits appliquera comme d'habitude, à la fin du procès, les étapes prévues par l'arrêt *Carter.*

The approach highlighted above will help to achieve a balance between the efficiency and the fairness of the trial process. In addition, public confidence is less likely to be diminished by the admission of mistaken and untruthful statements as a result of the mechanical application of an inflexible method. Such a compromise becomes necessary when fundamental principles of justice are at stake and there is a risk of wrongful conviction.

63 L'approche préconisée contribuera à réaliser un équilibre entre l'efficacité du procès et son équité. De plus, la confiance du public risque moins de s'éroder du fait de l'admission en preuve de déclarations erronées et mensongères par suite de l'application mécanique d'une méthode rigide. Pareil compromis s'impose lorsque les principes fondamentaux de justice sont en jeu et qu'il y a risque de déclarations de culpabilité erronées.

On the facts of this case, I agree with my colleagues that the appellant has not established that the evidence to which he objects raises serious and real concerns as to its reliability. Had it been known at the relevant time, the fact that Wasfi was in jail when his discussion with Binahmad allegedly occurred might well have changed my conclusion. However, that fact was not discovered until after the *voir dire* held by Oppal J. into the admissibility of Binahmad's evidence: A.R., vol. IX, at p. 1541. As to the presence in this case of motives to lie, they are not sufficient in my view to raise serious concerns. I therefore agree with the Chief Justice on the disposition of this case.

64 Vu les faits de la présente espèce, je conviens avec mes collègues que l'appelant n'a pas établi que la preuve à laquelle il s'oppose soulève des préoccupations sérieuses et réelles quant à sa fiabilité. Le fait que Wasfi était en prison à l'époque où la discussion entre lui et Binahmad aurait eu lieu, s'il avait été connu au moment pertinent, aurait pu modifier ma conclusion. Ce fait, toutefois, n'a été découvert qu'après le voir-dire tenu par le juge Oppal sur l'admissibilité du témoignage de Binahmad : D.A., vol. IX, p. 1541. Quant aux raisons de mentir dans cette affaire, elles ne suffisent pas, à mon avis, pour soulever des préoccupations sérieuses. Je souscris donc à l'opinion de la Juge en chef quant à l'issue du présent pourvoi.

Appeal dismissed.

Pourvoi rejeté.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Procureur de l'appelant : Gil D. McKinnon, Vancouver.

Solicitor for the respondent: Ministry of the Attorney General of British Columbia, Vancouver.

Procureur de l'intimée : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

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

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

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

Procureur de l'intervenant le procureur général de l'Ontario : Ministère du Procureur général de l'Ontario, Toronto.

Tab 4

Her Majesty The Queen *Appellant*

v.

Ramnarine Khelawon *Respondent*

and

Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) *Interveners*

Sa Majesté la Reine *Appelante*

c.

Ramnarine Khelawon *Intimé*

et

Procureur général de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) *Intervenants*

Indexed as: R. *v.* Khelawon

Neutral citation: 2006 SCC 57.

File No.: 30857.

2005: December 16; 2006: December 14.

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

Répertorié : R. *c.* Khelawon

Référence neutre : 2006 CSC 57.

N° du greffe : 30857.

2005 : 16 décembre; 2006 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Criminal law — Evidence — Hearsay — Admissibility — Trial judge admitting deceased complainants' hearsay statements to police into evidence — Whether statements admissible under principled exception to hearsay rule — Factors to be considered in determining whether hearsay statements sufficiently reliable to be admissible.

Droit criminel — Preuve — Ouï-dire — Admissibilité — Juge du procès admettant en preuve les déclarations relatées que des plaignants décédés avaient faites à la police — Ces déclarations étaient-elles admissibles en vertu de l'exception raisonnée à la règle du ouï-dire? — Facteurs à considérer pour décider si des déclarations relatées sont suffisamment fiables pour être admissibles.

In 1999, C, a cook who worked at a retirement home, found S, a resident of the home, badly injured in his room. His belongings were packed in garbage bags. S told C that the accused, the manager of the home, had beaten him and threatened to kill him if he did not leave the home. C took S to her apartment and cared for him for a few days. She then brought S to a doctor. The doctor testified that he found three fractured ribs and bruises that were consistent with S's allegation of assault but which also could have resulted from a fall. The next day, C took S to the police and S gave a videotaped statement alleging that the accused had assaulted him and threatened to kill him. The statement was not under oath but S answered "yes" when asked if he understood it was important to tell the truth and that he could be charged if he did not tell the truth. Medical records seized from the retirement home described S as "angry", "aggressive", "depressed" and "paranoid", and

En 1999, C, une cuisinière dans une maison de retraite, a trouvé S, un résident de cet établissement, blessé grièvement dans sa chambre. Ses effets personnels étaient entassés dans des sacs à ordures. S a raconté à C que l'accusé, directeur de l'établissement, l'avait battu et avait menacé de le tuer s'il ne quittait pas la maison de retraite. C a conduit S à son appartement et s'est occupée de lui pendant quelques jours. Elle a ensuite conduit S chez un médecin. Ce dernier a témoigné qu'il avait décelé trois côtes fracturées et des ecchymoses qui pouvaient avoir résulté de l'agression alléguée par S, mais aussi d'une chute. Le lendemain, C a conduit S au poste de police, où S a fait une déclaration enregistrée sur bande vidéo, dans laquelle il alléguait que l'accusé l'avait agressé et avait menacé de le tuer. Cette déclaration n'a pas été faite sous serment, mais S a répondu « oui » lorsqu'on lui a demandé s'il comprenait qu'il était important de dire la vérité et

revealed that he had been treated for paranoid psychosis and depression. At trial, a psychiatrist who testified at the *voir dire* concluded that S had the capacity to communicate evidence and understood at the time he made his statement to the police that it was important to tell the truth. The defence argued that C influenced S to complain out of spite because the accused previously had terminated C's employment.

The police attended the retirement home where more residents complained that they had been assaulted by the accused. The accused was charged in respect of five complainants but, by the time of the trial, four complainants, including S and D, had died of causes unrelated to the alleged assaults and the fifth was no longer competent to testify. Only one complainant had testified at the preliminary inquiry. The central issue at trial was whether the complainants' hearsay statements should be received in evidence. The trial judge admitted some of the hearsay based in large part on the striking similarity between the statements. The trial judge ultimately found videotaped statements given by S and D to the police sufficiently credible to found convictions for aggravated assault and uttering a death threat in respect of S, as well as assault causing bodily harm and assault with a weapon in respect of D. The accused was acquitted on the remaining counts. On appeal, a majority of the Court of Appeal excluded all of the hearsay statements and acquitted the accused on all charges. The dissenting judge would have upheld the convictions in respect of S. The Crown appealed as of right from the acquittals in respect of S and was denied leave to appeal from the acquittals in respect of D.

Held: The appeal should be dismissed and the acquittals affirmed.

Hearsay evidence is presumptively inadmissible unless an exception to the hearsay rule applies, primarily because of a general inability to test its reliability. The essential defining features of hearsay are the fact that the out-of-court statement is adduced to prove the truth of its contents and the absence of a contemporaneous opportunity to cross-examine the declarant. Hearsay includes an out-of-court statement made by a witness who testifies in court if the statement is tendered to prove the truth of its contents. In some

que des accusations pourraient être portées contre lui s'il mentait. Les dossiers médicaux saisis à la maison de retraite décrivaient S comme étant « en colère », « agressif », « dépressif » et « paranoïaque », en plus de révéler qu'il avait été traité pour une psychose paranoïaque et une dépression. Au procès, une psychiatre ayant témoigné lors du voir-dire a conclu que S avait la capacité de communiquer les faits dans son témoignage et qu'il comprenait l'importance de dire la vérité au moment où il a fait sa déclaration à la police. La défense a prétendu que C avait amené S à porter plainte pour se venger de l'accusé qui avait mis fin à son emploi auparavant.

Des policiers se sont rendus à la maison de retraite où d'autres résidents se sont plaints d'avoir été agressés par l'accusé. Ce dernier a fait l'objet d'accusations à l'égard de cinq plaignants, mais, au moment du procès, quatre plaignants, dont S et D, étaient décédés de causes non liées aux agressions alléguées, et le cinquième n'était plus habile à témoigner. Un seul plaignant avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir s'il y avait lieu d'admettre en preuve les déclarations relatées des plaignants. Le juge du procès a admis une partie de la preuve par ouï-dire en raison, dans une large mesure, de la similitude frappante des déclarations. En fin de compte, il a estimé que les déclarations enregistrées sur bande vidéo que S et D avaient faites à la police étaient suffisamment crédibles pour justifier des déclarations de culpabilité de voies de fait graves et de menaces de mort à l'endroit de S, ainsi que d'agression ayant causé des lésions corporelles et d'agression armée à l'endroit de D. L'accusé a été acquitté quant aux autres chefs. En appel, la Cour d'appel à la majorité a exclu toutes les déclarations relatées et a acquitté l'accusé relativement à toutes les accusations. Le juge dissident aurait maintenu les déclarations de culpabilité relatives à S. Le ministère public a formé un pourvoi de plein droit contre les acquittements relatifs à S et s'est vu refuser l'autorisation d'appeler à l'égard de ceux relatifs à D.

Arrêt : Le pourvoi est rejeté et les acquittements sont confirmés.

La preuve par ouï-dire est présumée inadmissible à moins qu'une exception à la règle du ouï-dire ne s'applique, essentiellement en raison de l'incapacité générale d'en vérifier la fiabilité. Les caractéristiques déterminantes essentielles du ouï-dire sont le fait que la déclaration extrajudiciaire soit présentée pour établir la véracité de son contenu et l'impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration. Le ouï-dire inclut une déclaration extrajudiciaire d'un témoin qui dépose en cour lorsque cette

circumstances, hearsay evidence presents minimal dangers and its exclusion rather than its admission would impede accurate fact finding. Hence over time a number of traditional exceptions to the exclusionary rule were created by the courts. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if indicia of reliability and necessity are established on a *voir dire*. The reliability requirement is aimed at identifying those cases where the concerns arising from the inability to test the evidence are sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. The reliability requirement will generally be met by showing (1) that there is no real concern about whether the statement is true or not because of the circumstances in which it came about; or (2) that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested by means other than contemporaneous cross-examination. These two principal ways of satisfying the reliability requirement are not mutually exclusive categories and they assist in identifying the factors that need to be considered on the admissibility inquiry. [2-3] [35] [37] [42] [49] [61-63] [65]

The trial judge acts as a gatekeeper in making the preliminary assessment of the threshold reliability of a hearsay statement and leaves the ultimate determination of its worth to the fact finder. The factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. Comments to the contrary in previous decisions of this Court, including *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, should no longer be followed. In determining admissibility, the court should adopt a more functional approach focussed on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. Whether certain factors will go only to ultimate reliability will depend on the context. In each case, the inquiry is limited to determining the evidentiary question of admissibility. Corroborating or conflicting evidence may be considered in the admissibility inquiry in appropriate cases. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need for the trial judge to inquire further into the

déclaration est présentée pour établir la véracité de son contenu. Dans certains cas, la preuve par ouï-dire présente des dangers minimes et son exclusion au lieu de son admission gênerait la constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions traditionnelles à la règle d'exclusion. La preuve par ouï-dire qui ne relève pas d'une exception traditionnelle peut tout de même être admissible suivant la méthode d'analyse raisonnée, si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire. L'exigence de fiabilité vise à déterminer les cas où les préoccupations découlant de l'impossibilité de vérifier la preuve sont suffisamment surmontées pour justifier l'admission de cette preuve à titre d'exception à la règle d'exclusion générale. En général, il est possible de satisfaire à l'exigence de fiabilité en démontrant (1) qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite, ou (2) que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est faite. Ces deux principales façons de satisfaire à l'exigence de fiabilité ne constituent pas des catégories mutuellement exclusives et peuvent aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité. [2-3] [35] [37] [42] [49] [61-63] [65]

Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du seuil de fiabilité d'une déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur. Les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Plus exactement, tous les facteurs pertinents devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Les observations contraires formulées dans la jurisprudence de notre Cour, dont l'arrêt *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40, ne devraient plus être suivies. Pour se prononcer sur l'admissibilité, le tribunal devrait adopter une approche plus fonctionnelle axée sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. La question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse dépendra du contexte. Dans chaque cas, l'examen ne porte que sur la question de l'admissibilité en matière de preuve. Lors de l'examen de l'admissibilité, il est possible, dans les cas appropriés, de prendre en considération une preuve

likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not. [2] [4] [92-93]

In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively inadmissible. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary or the reliability of which is neither readily apparent from the trustworthiness of its contents nor capable of being meaningfully tested by the ultimate trier of fact. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. As in all cases, the trial judge has a residual discretion to exclude admissible hearsay evidence where its prejudicial effect is out of proportion to its probative value. [2-3]

R. v. Khan, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, are examples where the reliability requirement was met because the circumstances in which hearsay statements came about provided sufficient comfort in their truth and accuracy. *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, and *R. v. Hawkins*, [1996] 3 S.C.R. 1043, provide examples where threshold reliability was based on the presence of adequate substitutes for traditional safeguards relied upon to test the evidence. Similarly, in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, the striking similarities between the complainant's prior inconsistent out-of-court statement and the accused's independent statement were so compelling that the very high reliability of the complainant's statement rendered its substantive admission necessary. [67-68] [73] [82] [86] [88]

S's videotaped statement to the police was inadmissible. Although S's death before trial made his hearsay statement necessary, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. A number of serious issues arise including: whether S was mentally

corroborante ou contradictoire. Dans le cas où l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire que le juge du procès vérifie davantage si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non. [2] [4] [92-93]

En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée inadmissible. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le juge des faits. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la règle. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire résiduel d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante. [2-3]

Les arrêts *R. c. Khan*, [1990] 2 R.C.S. 531, et *R. c. Smith*, [1992] 2 R.C.S. 915, sont des exemples où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles des déclarations relatées avaient été faites étaient suffisamment rassurantes quant à leur véracité et à leur exactitude. Les arrêts *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, et *R. c. Hawkins*, [1996] 3 R.C.S. 1043, sont des exemples où le seuil de fiabilité reposait sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve. De même, dans l'arrêt *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764, les similitudes frappantes entre la déclaration extrajudiciaire incompatible que la plaignante avait faite antérieurement et celle que l'accusé avait faite de façon indépendante étaient si convaincantes qu'il était nécessaire d'admettre quant au fond la déclaration de la plaignante en raison de sa très grande fiabilité. [67-68] [73] [82] [86] [88]

La déclaration enregistrée sur bande vidéo que S avait faite à la police était inadmissible. Même s'il était nécessaire de recourir à la déclaration relatée de S parce que celui-ci était décédé avant l'ouverture du procès, cette déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle avait été faite ne constituaient pas

competent; whether he understood the consequences of making his statement; whether he was influenced by C; whether his statement was motivated by dissatisfaction about the management of the home; and, whether his injuries were caused by a fall. S's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and on the trier of fact's ability to properly assess its worth. While the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of S's allegations. The admission of the evidence risked impairing the fairness of the trial. Furthermore, S's evidence could have been taken before his death in the presence of a commissioner and the accused or his counsel thereby preserving both the evidence and the rights of the accused. [7] [108]

Cases Cited

Modified: *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **explained:** *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; **discussed:** *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho v. Wright*, 497 U.S. 805 (1990); **referred to:** *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.
Canadian Charter of Rights and Freedoms, s. 7.
Criminal Code, R.S.C. 1985, c. C-46, ss. 709 to 714.

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Paciocco, David M. "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence*. Toronto: Irwin Law, 2004, 17.

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un gage raisonnable de fiabilité inhérente. Un certain nombre de questions sérieuses se posent, notamment celles de savoir si S jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il a été influencé par C, si sa déclaration était motivée par une insatisfaction à l'égard de l'administration de la maison de retraite et si ses blessures étaient dues à une chute. L'impossibilité de contre-interroger S limitait substantiellement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits d'en déterminer correctement la valeur. Même si l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de S. L'admission de cette preuve risquait de compromettre l'équité du procès. En outre, la déposition de S aurait pu être prise, avant son décès, par un commissaire en présence de l'accusé ou de son avocat, ce qui aurait permis de préserver à la fois la preuve et les droits de l'accusé. [7] [108]

Jurisprudence

Arrêt modifié : *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêts interprétés :** *R. c. Khan*, [1990] 2 R.C.S. 531; *R. c. Smith*, [1992] 2 R.C.S. 915; *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Hawkins*, [1996] 3 R.C.S. 1043; **arrêts analysés :** *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho c. Wright*, 497 U.S. 805 (1990); **arrêts mentionnés :** *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. O'Brien*, [1978] 1 R.C.S. 591; *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23; *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505; *R. c. Rose*, [1998] 3 R.C.S. 262; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7.
Code criminel, L.R.C. 1985, ch. C-46, art. 709 à 714.
Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Doctrine citée

Paciocco, David M. « The Hearsay Exceptions : A Game of "Rock, Paper, Scissors" », in *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence*. Toronto : Irwin Law, 2004, 17.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston : Little, Brown, 1923.

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Armstrong and Blair JJ.A.) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), setting aside the accused's convictions. Appeal dismissed.

John S. McInnes and *Eliott Behar*, for the appellant.

Timothy E. Breen, for the respondent.

Alexander Budlovsky, for the intervener the Attorney General of British Columbia.

Louis P. Strezos and *Joseph Di Luca*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CHARRON J. —

1. Overview

1 This appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. In particular, guidance is sought on what factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible. This Court's decision in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, has generally been interpreted as standing for the proposition that circumstances "extrinsic" to the taking of the statement go to ultimate reliability only and cannot be considered by the trial judge in ruling on its admissibility. The decision has generated much judicial commentary and academic criticism on various grounds, including the difficulty of defining what constitutes an "extrinsic" circumstance and the apparent inconsistency between this holding in *Starr* and the Court's consideration of a semen stain on the declarant's clothing in *R. v. Khan*, [1990] 2 S.C.R. 531, the declarant's motive to lie in *R. v. Smith*, [1992] 2 S.C.R. 915, and most relevant to this case, the striking

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Armstrong et Blair) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), qui a annulé les déclarations de culpabilité prononcées contre l'accusé. Pourvoi rejeté.

John S. McInnes et *Eliott Behar*, pour l'appelante.

Timothy E. Breen, pour l'intimé.

Alexander Budlovsky, pour l'intervenant le procureur général de la Colombie-Britannique.

Louis P. Strezos et *Joseph Di Luca*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LA JUGE CHARRON —

1. Aperçu

Le présent pourvoi porte sur l'admissibilité des déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, qui s'applique cas par cas et repose sur la nécessité et la fiabilité. Plus particulièrement, des indications sont requises sur les facteurs à considérer pour décider si une déclaration relatée est suffisamment fiable pour être admissible. L'arrêt de notre Cour *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40, est généralement interprété comme signifiant que les circonstances « extrinsèques » dans lesquelles la déclaration a été recueillie n'ont une incidence que sur sa fiabilité en dernière analyse et ne peuvent pas être prises en considération par le juge du procès lorsqu'il se prononce sur son admissibilité. Cet arrêt a suscité une multitude de commentaires dans la jurisprudence et de critiques dans la doctrine pour diverses raisons, dont la difficulté de définir ce qui constitue une circonstance « extrinsèque » et l'incohérence manifeste entre cette conclusion de l'arrêt *Starr* et le fait que la Cour a pris en considération une tache de sperme trouvée sur les vêtements de la déclarante dans l'affaire *R. c. Khan*,

similarities between statements in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

[1990] 2 R.C.S. 531, la raison de mentir de la déclarante dans l'affaire *R. c. Smith*, [1992] 2 R.C.S. 915, et, ce qui est le plus pertinent en l'espèce, les similitudes frappantes entre les déclarations dans l'affaire *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764.

En général, tout élément de preuve pertinent est admissible. La règle excluant le ouï-dire est une exception bien établie à ce principe général. Bien qu'aucun raisonnement unique n'en sous-tende l'évolution historique, l'exclusion dont les déclarations relatées sont présumées faire l'objet tient essentiellement à l'incapacité générale d'en vérifier la fiabilité. Si le déclarant n'est pas présent en cour, il peut se révéler impossible de mettre à l'épreuve sa perception, sa mémoire, sa relation du fait en question ou sa sincérité. Il se peut que la déclaration elle-même ne fasse pas l'objet d'un compte rendu exact. Des erreurs, des exagérations ou des faussetés délibérées peuvent passer inaperçues et mener à des verdicts injustes. Ainsi, la règle interdisant le ouï-dire est censée accroître l'exactitude des conclusions de fait du tribunal et non entraver sa fonction de recherche de la vérité. Toutefois, la difficulté de déterminer la valeur de la preuve par ouï-dire varie selon le contexte. Dans certains cas, cette preuve présente des dangers minimes et son *exclusion* au lieu de son admission gênerait la constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions à la règle. Tout comme les exceptions traditionnelles à la règle d'exclusion ont été largement conçues en fonction des circonstances où les dangers liés à l'admission de la preuve étaient suffisamment atténués, il doit en être de même pour l'exception générale raisonnée à la règle du ouï-dire. Lorsqu'il est nécessaire de recourir à ce type de preuve, une déclaration relatée peut être admise si son contenu est fiable en raison de la manière dont elle a été faite ou si les circonstances permettent, en fin de compte, au juge des faits d'en déterminer suffisamment la valeur. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du « seuil de fiabilité » de la déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur.

3 The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.

La distinction entre seuil de fiabilité et fiabilité en dernière analyse reflète la différence importante entre admettre un élément de preuve et s'y fier. Le juge du procès détermine l'admissibilité en fonction des règles de preuve applicables. C'est au juge des faits qu'il appartient en fin de compte de décider, au regard de l'ensemble de la preuve, s'il y a lieu de se fier à cet élément de preuve pour trancher les questions en litige. L'omission de respecter cette distinction aurait pour effet non seulement de prolonger indûment les audiences portant sur l'admissibilité, mais également de fausser le processus de constatation des faits. En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée *inadmissible*. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire pour trancher la question en litige ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le juge des faits. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la règle. Les préoccupations relatives à l'équité du procès imprègnent non seulement la décision concernant l'admissibilité, mais encore guident l'exercice du pouvoir discrétionnaire résiduel du juge du procès d'exclure des éléments de preuve même si leur nécessité et leur fiabilité peuvent être démontrées. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante.

4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

Comme je l'expliquerai, je suis arrivée à la conclusion que les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Les observations contraires formulées dans la jurisprudence de notre Cour ne devraient plus être suivies. Plus exactement, tous les facteurs pertinents devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Dans chaque cas, l'examen doit être fonction des dangers particuliers que présente la preuve et ne porter que sur la question de l'admissibilité.

In May 1999, five elderly residents of a retirement home told various people that they were assaulted by the manager of the home, the respondent, Ramnarine Khelawon. At the time of trial, approximately two and a half years later, four of the complainants had died of causes unrelated to the assaults, and the fifth was no longer competent to testify. Only one of the complainants had testified at the preliminary inquiry. The central issue at trial was whether the hearsay statements provided by the complainants had sufficient threshold reliability to be received in evidence. Grossi J. held that the hearsay statements from each of the complainants were sufficiently reliable to be admitted in evidence, based in large part on the "striking" similarity between them. He ultimately found Mr. Khelawon guilty of the offences in respect of two of the complainants, Mr. Skupien and Mr. Dinino, and acquitted him on the remaining counts. Mr. Khelawon was sentenced to two and a half years of imprisonment for the offences relating to Mr. Skupien and an additional two years for the offences related to Mr. Dinino.

5 En mai 1999, cinq personnes âgées résidant dans une maison de retraite ont dit à différentes personnes que le directeur de l'établissement, l'intimé Ramnarine Khelawon, les avaient agressées. Au moment du procès, environ deux ans et demi plus tard, quatre des plaignants étaient décédés de causes non liées aux agressions et le cinquième n'était plus habile à témoigner. Un seul des plaignants avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir si les déclarations relatées des plaignants atteignaient un seuil de fiabilité suffisant pour qu'elles puissent être admises en preuve. Le juge Grossi a conclu que les déclarations relatées de chacun des plaignants étaient suffisamment fiables pour être admises en preuve, en raison, dans une large mesure, de leur similitude « frappante ». En fin de compte, il a déclaré M. Khelawon coupable des infractions relatives à deux des plaignants, soit MM. Skupien et Dinino, et l'a acquitté à l'égard des autres chefs. M. Khelawon a été condamné à une peine d'emprisonnement de deux ans et demi pour les infractions relatives à M. Skupien et à une peine additionnelle de deux ans pour celles relatives à M. Dinino.

On appeal to the Court of Appeal for Ontario, Rosenberg J.A. (Armstrong J.A. concurring) excluded all statements and acquitted Mr. Khelawon. Blair J.A., in dissent, would have upheld the convictions in respect of Mr. Skupien only. The Crown appeals to this Court as of right, seeking to restore the convictions relating to Mr. Skupien. The Crown also sought but was denied leave in respect of the charges relating to Mr. Dinino.

6 Lors de l'appel devant la Cour d'appel de l'Ontario, le juge Rosenberg (avec l'appui du juge Armstrong) a exclu toutes les déclarations et a acquitté M. Khelawon. Le juge Blair, dissident, aurait pour sa part maintenu les déclarations de culpabilité relatives à M. Skupien seulement. Dans son pourvoi de plein droit devant notre Cour, le ministère public sollicite le rétablissement des déclarations de culpabilité relatives à M. Skupien. Il a également sollicité l'autorisation d'appeler des accusations relatives à M. Dinino, mais celle-ci lui a été refusée.

In my view, Mr. Skupien's videotaped statement to the police was inadmissible. Although Mr. Skupien's death before the commencement of the trial made it necessary to resort to his evidence in this form, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. To the contrary, they gave rise to a number of serious issues including: whether Mr. Skupien was

7 À mon avis, la déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police était inadmissible. Même s'il était nécessaire de recourir à ce type de témoignage de M. Skupien parce que celui-ci était décédé avant l'ouverture du procès, la déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle a été faite ne constituaient pas un gage raisonnable de fiabilité inhérente. Au contraire, elles soulevaient un certain nombre de

mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee who had been fired by Mr. Khelawon, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth. The statements made by other complainants posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. In all the circumstances, particularly given that the Crown's case against Mr. Khelawon was founded on the hearsay statement, the admission of the evidence risked impairing the fairness of the trial and should not have been permitted. As Rosenberg J.A. aptly noted, the admission of the evidence under the principled approach to the hearsay rule is not the only way the evidence of witnesses who may not be available for trial may be preserved. Sections 709 to 714 of the *Criminal Code*, R.S.C. 1985, c. C-46, expressly contemplate this eventuality and provide a procedure for the taking of the evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused.

8 For reasons that follow, I would therefore dismiss the appeal and affirm the acquittals.

2. Background

9 Mr. Khelawon was charged with aggravated assault on Teofil Skupien and threatening to cause him death. He was also charged with aggravated assault and assault with a weapon on Atillio Dinino, and assault causing bodily harm on three other complainants. The offences were alleged to have occurred during the month of May 1999 and, at the time, all the complainants were residents

questions sérieuses, notamment celles de savoir si M. Skupien jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il avait été influencé, dans ses allégations, par une employée mécontente qui avait été congédiée par M. Khelawon, si sa déclaration était motivée par une insatisfaction générale à l'égard de l'administration de la maison de retraite et si ses blessures étaient dues à une chute plutôt qu'à l'agression. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait substantiellement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur. Les déclarations des autres plaignants présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Compte tenu de l'ensemble des circonstances et, en particulier, du fait que la preuve du ministère public contre M. Khelawon reposait sur la déclaration relatée, l'admission de ce témoignage risquait de compromettre l'équité du procès et n'aurait pas dû être autorisée. Comme l'a judicieusement fait remarquer le juge Rosenberg, l'admission de la preuve suivant la méthode d'analyse raisonnée de la règle du ouï-dire n'est pas la seule façon de préserver le témoignage de personnes qui peuvent être dans l'impossibilité de se présenter au procès. Les articles 709 à 714 du *Code criminel*, L.R.C. 1985, ch. C-46, envisagent expressément cette éventualité et établissent une procédure de prise de déposition par un commissaire en présence de l'accusé ou de son avocat, ce qui permet de préserver à la fois la preuve et les droits de l'accusé.

Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi et de confirmer les acquittements.

2. Contexte

M. Khelawon a été accusé de voies de fait graves et de menaces de mort à l'endroit de Teofil Skupien. Il a également été accusé de voies de faits graves et d'agression armée à l'endroit d'Atillio Dinino ainsi que d'agression ayant causé des lésions corporelles à trois autres plaignants. Ces infractions auraient été commises au cours du mois de mai 1999 et, à l'époque, tous les plaignants étaient des

at the Bloor West Village Retirement Home. Mr. Khelawon was the manager of the retirement home and his mother was the owner. As indicated earlier, none of the complainants was available to testify at trial. Hence, the central issue concerned the admissibility of their hearsay statements made to various people. There were 10 statements in total, four of which consisted of videotaped statements made to the police. The trial, held before Grossi J. without a jury, proceeded essentially as a *voir dire* into the admissibility of the evidence, with counsel agreeing that it would not be necessary to repeat the evidence about any statements later ruled admissible. None of the statements fit within any traditional exception to the hearsay rule. Their admissibility, rather, was contingent upon the Crown meeting the twin requirements of necessity and reliability under the principled approach to the hearsay rule, as established in *Khan*, *Smith* and, later, *Starr.*

résidents de Bloor West Village Retirement Home. M. Khelawon était le directeur de l'établissement et sa mère en était la propriétaire. Comme je l'ai indiqué précédemment, aucun des plaignants n'était disponible pour témoigner au procès. En conséquence, la principale question concernait l'admissibilité des déclarations relatées qu'ils avaient faites à diverses personnes. Il y avait en tout 10 déclarations, dont quatre à la police qui étaient enregistrées sur bande vidéo. Le procès tenu devant le juge Grossi siégeant sans jury s'est déroulé essentiellement comme un voir-dire sur l'admissibilité de la preuve, les avocats ayant convenu qu'il ne serait pas nécessaire de reprendre la preuve concernant les déclarations qui seraient par la suite jugées admissibles. Aucune des déclarations n'était visée par quelque exception traditionnelle à la règle du ouï-dire. Pour qu'elles soient admissibles, le ministère public devait plutôt satisfaire à la double exigence de nécessité et de fiabilité selon la méthode d'analyse raisonnée de la règle du ouï-dire, établie dans les arrêts *Khan*, *Smith* et, par la suite, *Starr.*

The charges concerning Mr. Skupien are the only matters before this Court. I will therefore summarize the evidence concerning Mr. Skupien's statements in more detail. I will also describe the circumstances surrounding the taking of the statements from the other complainants to the extent that it is relevant to dispose of this appeal. The Crown sought to introduce three statements made by Mr. Skupien: the first to an employee of the retirement home, the second to the doctor who treated him for his injuries, and the third to the police. Only the latter was admitted at trial. I will describe each statement in turn.

10 Les accusations relatives à M. Skupien sont les seules soumises à notre Cour. Je vais donc faire un résumé plus détaillé de la preuve concernant les déclarations de M. Skupien. Je vais également décrire les circonstances entourant l'obtention des déclarations des autres plaignants dans la mesure où elles sont pertinentes pour trancher le présent pourvoi. Le ministère public a cherché à produire trois déclarations de M. Skupien : la première faite à une employée de la maison de retraite, la deuxième, au médecin qui a soigné ses blessures, et la troisième, à la police. Seule la dernière déclaration a été admise en preuve au procès. Je décrirai chacune des déclarations à tour de rôle.

2.1 *Mr. Skupien's Statement to Ms. Stangrat*

2.1 *La déclaration de M. Skupien à M^me^ Stangrat*

Mr. Skupien was 81 years old and, at the time of the events in question, he had lived at the Bloor West Village Retirement Home for four years. Mr. Skupien's initial complaint was made to one of the employees at the retirement home, Joanna Stangrat. Ms. Stangrat, also known under several other names, was a cook who had been working

11 Au moment des faits en question, M. Skupien était âgé de 81 ans et vivait depuis quatre ans dans l'établissement Bloor West Village Retirement Home. Il a adressé sa première plainte à l'une des employés de la maison de retraite, M^me^ Joanna Stangrat. Celle-ci, connue également sous plusieurs autres noms, était cuisinière à la maison de retraite

at the retirement home for a few months. She had come to know Mr. Skupien because he would often visit the kitchen and would sometimes walk her to the subway at the end of her shifts. Ms. Stangrat played a prominent role in the case concerning Mr. Skupien. In part, it was the theory of the defence at trial that she had influenced Mr. Skupien and the other complainants in making their complaints out of spite because Mr. Khelawon had given her a notice of termination a few weeks earlier.

12 On May 8, 1999, Ms. Stangrat noticed that Mr. Skupien did not come to breakfast. She went to check on him in his room and found him lying on his bed. His face was red and there was blood around his mouth. When she got closer to him she saw bruising on his eye and nose. His eyes were swollen. When Mr. Skupien saw her, he asked her to come in and close the door. He appeared to be in shock and very shaky. Ms. Stangrat noticed two full green garbage bags on the floor. She closed the door and asked him what had happened and what was in the green garbage bags. Mr. Skupien told her what had happened the previous evening. He also showed her bruises on his upper left chest area.

13 Mr. Skupien told Ms. Stangrat that he had to leave before twelve o'clock that day because "Tony", the name Mr. Khelawon went by, would come back and kill him. Mr. Skupien described to Ms. Stangrat how Mr. Khelawon had come into his room in anger at about 8:00 p.m. the previous evening, and had punched him repeatedly in the face and ribs. After beating him up, Mr. Khelawon had packed the clothes into the green garbage bags and left them on the floor. Ms. Stangrat asked Mr. Skupien why Mr. Khelawon would attack him in this way. He told her that Tony was angry because Mr. Skupien had been going to the kitchen when he had no reason to go there. When the assault ended, Mr. Khelawon threatened Mr. Skupien that either he moved out of the home by noon the next day or he would return and kill him. Mr. Skupien asked her what he should do. Ms. Stangrat told him

depuis quelques mois. Elle connaissait M. Skupien parce que celui-ci se rendait souvent à la cuisine et l'accompagnait parfois jusqu'au métro à la fin de son quart de travail. M^me^ Stangrat a joué un rôle important dans le dossier concernant M. Skupien. La thèse de la défense voulait notamment qu'elle ait amené M. Skupien et les autres plaignants à porter plainte pour se venger de M. Khelawon qui lui avait remis un avis de cessation d'emploi quelques semaines auparavant.

Le 8 mai 1999, M^me^ Stangrat a remarqué que M. Skupien n'était pas venu prendre son petit déjeuner. Elle s'est rendue à sa chambre pour vérifier s'il allait bien et l'a trouvé étendu sur son lit. Son visage était rouge et il avait du sang autour de la bouche. Lorsqu'elle s'est approchée de lui, elle a constaté que son œil et son nez étaient contusionnés. Ses yeux étaient enflés. Lorsque M. Skupien l'a aperçue, il lui a demandé d'entrer et de fermer la porte. Il semblait être en état de choc et très mal en point. M^me^ Stangrat a remarqué la présence sur le plancher de deux grands sacs à ordures verts remplis. Elle a fermé la porte et lui a demandé ce qui s'était passé et ce que contenaient les deux sacs à ordures. M. Skupien lui a raconté ce qui s'était passé le soir précédent. Il lui a aussi montré les ecchymoses qu'il avait sur la partie supérieure gauche de sa poitrine.

M. Skupien a dit à M^me^ Stangrat qu'il devait quitter la maison de retraite avant midi ce même jour parce que « Tony », le surnom de M. Khelawon, reviendrait pour le tuer. Il a expliqué à M^me^ Stangrat que M. Khelawon était entré dans sa chambre en colère vers 20 h le soir précédent et l'avait roué de coups de poing au visage et dans les côtes. Après l'avoir battu, M. Khelawon avait entassé ses vêtements dans les sacs à ordures verts qu'il avait ensuite laissés sur le plancher. M^me^ Stangrat a demandé à M. Skupien pourquoi M. Khelawon l'avait ainsi attaqué. Celui-ci a répondu que Tony lui reprochait de se rendre à la cuisine alors qu'il n'avait aucune raison d'y aller. Après avoir agressé M. Skupien, M. Khelawon l'a menacé en lui disant de quitter la maison de retraite avant midi le lendemain, sinon il reviendrait pour le tuer. M. Skupien a demandé à M^me^ Stangrat ce qu'il devait faire. Elle

she would phone her daughter to come and get him and that he should stay in his room until she was finished her duties for the day.

Ms. Stangrat arranged for Mr. Skupien to stay at her daughter's home later that day, and then to her apartment. Mr. Skupien was in pain but he was scared and did not want to see a doctor at that time. Ms. Stangrat kept Mr. Skupien at her apartment where she and a friend of hers alternated caring for him. A few days later, Mr. Skupien agreed to go to the doctor. Ms. Stangrat and her friend took him to see Dr. Pietraszek.

2.2 *Mr. Skupien's Statement to the Treating Physician*

On May 12, 1999, Dr. Pietraszek examined Mr. Skupien. He found visible bruising to Mr. Skupien's face as well as bruises to his back and on the left side of his chest and noted that Mr. Skupien appeared to be in pain while breathing. X-rays revealed that he had suffered fractures to three ribs. Dr. Pietraszek testified that Mr. Skupien told him he had been hit in the face and body with something that was either a cane or a pipe. He denied any suggestion that Ms. Stangrat had related the story but acknowledged that she was present and may have helped him in describing what had happened. Dr. Pietraszek considered that the injuries were consistent with Mr. Skupien's account of how they were caused. He also testified that the injuries could have resulted from a fall.

2.3 *Mr. Skupien's Videotaped Statement to the Police*

The following day, on May 13, 1999, Ms. Stangrat took Mr. Skupien to the police. Detective Karpow took his complaint. He observed bruising to the left side of Skupien's face, in the eye area. He arranged for Mr. Skupien to give a videotaped statement. Both Detective Karpow and Constable John Birrell were present. The statement was not

lui a dit qu'elle téléphonerait à sa fille pour qu'elle vienne le chercher et lui a conseillé de rester dans sa chambre jusqu'à ce qu'elle ait terminé ses tâches de la journée.

14 M^me^ Stangrat a fait en sorte que M. Skupien demeure chez sa fille plus tard le même jour, et ensuite à son propre appartement. M. Skupien était souffrant, mais il refusait alors de consulter un médecin parce qu'il avait peur. M^me^ Stangrat l'a gardé à son appartement où elle et une de ses amies se sont occupées de lui à tour de rôle. Quelques jours plus tard, M. Skupien a accepté de se rendre chez le médecin. M^me^ Stangrat et son amie l'ont amené voir le D^r^ Pietraszek.

2.2 *La déclaration de M. Skupien au médecin traitant*

15 Le 12 mai 1999, le D^r^ Pietraszek a examiné M. Skupien. Il a constaté la présence d'ecchymoses dans son visage ainsi que dans son dos et sur la partie gauche de sa poitrine. Il a aussi remarqué que M. Skupien semblait éprouver de la douleur en respirant. Des radiographies ont permis de constater que trois de ses côtes étaient fracturées. Dans son témoignage, le D^r^ Pietraszek a affirmé que M. Skupien lui avait dit avoir été frappé au visage et sur le corps avec ce qui lui avait semblé être une canne ou un tuyau. Le médecin a rejeté toute idée que M^me^ Stangrat ait raconté cette histoire, mais il a reconnu qu'elle était présente et qu'elle pouvait avoir aidé M. Skupien à décrire ce qui s'était passé. Le D^r^ Pietraszek a estimé que les blessures pouvaient avoir été causées de la façon relatée par M. Skupien. Il a également témoigné que les blessures pouvaient être dues à une chute.

2.3 *La déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police*

16 Le lendemain, soit le 13 mai 1999, M^me^ Stangrat a conduit M. Skupien au poste de police. Le détective Karpow a reçu sa plainte. Il a remarqué la présence d'ecchymoses sur la partie gauche du visage de M. Skupien, près de l'œil. Le détective s'est arrangé pour que M. Skupien fasse une déclaration enregistrée sur bande vidéo. Le détective Karpow

given under oath; however, Mr. Skupien was asked if he understood that it was very important that he tell the truth and that if he did not tell the truth "[he] could be charged with that". Mr. Skupien answered "Yes" to both questions. After a few other preliminary questions, he was asked what his complaint was. Mr. Skupien described how, on May 7, 1999, Tony came to his room and said: "enough is enough". He then began beating him by slapping and punching him in the face, the ribs and all over, telling him not to go into the kitchen. He said that if he did not leave, he would come by 12 o'clock the next day and shoot him. Mr. Skupien then went on at some length to make several complaints about the general management of the retirement home until Detective Karpow brought him back to the matter at hand by asking him further questions about the incident and the events that followed. Mr. Skupien was generally responsive to the officer's questions.

et l'agent John Birrell étaient présents. La déclaration n'a pas été faite sous serment, mais on a demandé à M. Skupien s'il comprenait qu'il était très important de dire la vérité et que, s'il mentait, [TRADUCTION] « des accusations en ce sens pourraient être portées contre [lui] ». M. Skupien a répondu « oui » aux deux questions. Après quelques autres questions préliminaires, on lui a demandé en quoi consistait sa plainte. Il a alors expliqué comment, le 7 mai 1999, Tony s'était rendu à sa chambre et lui avait dit « en voilà assez ». Il s'était ensuite mis à le battre en lui administrant des gifles et des coups de poing au visage, dans les côtes et un peu partout, et en lui interdisant d'aller à la cuisine. Tony avait dit à M. Skupien que s'il ne partait pas, il reviendrait à midi le lendemain pour l'abattre. M. Skupien a ensuite pris la peine d'ajouter plusieurs plaintes concernant l'administration générale de la maison de retraite, jusqu'à ce que le détective Karpow lui rappelle l'objet de sa démarche en lui posant d'autres questions sur l'épisode en cause et la suite des événements. M. Skupien a généralement bien répondu aux questions du policier.

17 After the interview was completed, Mr. Khelawon was arrested.

À la suite de cet entretien, M. Khelawon a été arrêté.

2.4 *Further Investigation*

2.4 *L'enquête plus approfondie*

18 Ms. Stangrat gave the police a list of other people that she thought they should speak to at the retirement home. The next day, on May 14, 1999, several police officers attended the home to seek these people out. Because there were no markings on the doors, the police had to search through the residence, speaking to residents and nursing staff. When some of the people were located, they were found to be "unresponsive" and no meaningful interviews could be conducted with them. Others, however, were able and willing to speak. The police would identify themselves as police, then ask the residents how things were going at the home and if anything had happened to them that they wanted to talk about. The police arranged to take videotaped statements from those who wanted to speak to them. These included three of the other

M^me^ Stangrat a remis aux policiers une liste d'autres personnes auxquelles, selon elle, ils devraient aller s'adresser à la maison de retraite. Le lendemain, soit le 14 mai 1999, plusieurs policiers sont allés rencontrer ces personnes à la maison de retraite. Comme il n'y avait pas d'inscriptions sur les portes, les agents ont dû visiter tout l'établissement, s'entretenant avec des résidents et des membres du personnel infirmier. Parmi les personnes trouvées, certaines se sont montrées [TRADUCTION] « peu réceptives », d'où l'impossibilité d'avoir un entretien utile avec elles. D'autres, toutefois, ont pu et ont voulu parler. Après avoir divulgué leur identité, les policiers demandaient aux résidents comment ça allait à la maison de retraite et s'ils souhaitaient discuter de ce qui pouvait leur être arrivé. Les policiers se sont arrangés pour enregistrer sur bande

complainants, Mr. Dinino, Ms. Poliszak and Mr. Grocholska. The fourth complainant, Mr. Peiszterer, could not communicate with the police; however, his son provided a videotaped statement.

2.5 *Medical Records*

On May 15, 1999, Detective Karpow attended at the retirement home and met with Dr. Michalski, a physician who attended regularly at the home to see the residents. On May 18, 1999, the police returned to the home and seized the medical records and a journal containing nursing notes.

Documentation from Mr. Skupien's file revealed that he had been living in an apartment before suffering a stroke in February 1995. He was transferred to the retirement home in April 1995. A report dated April 13, 1995 noted his condition after the stroke. He suffered occasional periods of confusion, could not go outside on his own, needed help with meal preparation and banking, and had to be reminded to take his medication, but was able to perform all self-care tasks.

Dr. Michalski's file noted frequent contact with Mr. Skupien during his stay at the retirement home. From time to time, he was described as "depressed", "aggressive", "angry", and "paranoid". A diagnosis of paranoid psychoses was made in June 1998 and medication was prescribed. In July 1998, "some improvement in paranoia" was noted. In August 1998, he was described as "angry, hostile" and his dosage was increased. In August 1998, he was described as "confused". The possibility of dementia was first noted. In September 1998, he was diagnosed with "depression" and prescribed medication. In September 1998, improvement with the depression was noted, and although apparently "eliminated" in January 1999, depression was again noted in February 1999. The notes

vidéo les déclarations des personnes qui voulaient leur parler, dont celles de trois autres plaignants, M. Dinino, M^me^ Poliszak et M. Grocholska. Le quatrième plaignant, M. Peiszterer, n'a pas été en mesure de communiquer avec la police, mais son fils a fourni une déclaration enregistrée sur bande vidéo.

2.5 *Les dossiers médicaux*

19 Le 15 mai 1999, le détective Karpow s'est rendu à la maison de retraite où il a rencontré le D^r^ Michalski, un médecin appelé régulièrement à y soigner les résidents. Le 18 mai 1999, la police est retournée à la maison de retraite et a saisi les dossiers médicaux et un journal contenant des notes du personnel infirmier.

20 La documentation tirée du dossier de M. Skupien a révélé que celui-ci habitait en appartement jusqu'à ce qu'il soit victime d'un accident vasculaire cérébral (AVC) en février 1995. Il a été transféré à la maison de retraite en avril 1995. Un rapport daté du 13 avril 1995 fait état de sa condition après l'AVC. Il connaissait parfois des périodes de confusion, il ne pouvait sortir seul à l'extérieur et il avait besoin d'aide pour préparer ses repas, effectuer ses opérations bancaires et se rappeler de prendre ses médicaments, mais il était en mesure d'accomplir toutes les tâches en matière de soins personnels.

21 Le dossier du D^r^ Michalski faisait état de rencontres fréquentes avec M. Skupien pendant son séjour à la maison de retraite. Parfois, il était décrit comme étant [TRADUCTION] « dépressif », « agressif », « en colère » et « paranoïaque ». En juin 1998, un diagnostic de psychose paranoïaque a été établi et des médicaments ont été prescrits. En juillet 1998, « la paranoïa a diminué quelque peu ». En août 1998, M. Skupien a été décrit comme étant « en colère et agressif » et la dose a été augmentée. En août 1998, il était qualifié de « confus ». La possibilité de démence était notée pour la première fois. En septembre 1998, un diagnostic de « dépression » a été établi et des médicaments ont été prescrits. Toujours en septembre 1998, une note indique que la dépression est

also reflect a number of complaints of fatigue, weakness and dizziness.

2.6 *Expert Evidence on the Voir Dire*

22 Dr. Susan Lieff, a geriatric psychiatrist, was qualified to provide opinion evidence on the *voir dire* with respect to Mr. Skupien's capacity to understand the importance of telling the truth and communicate evidence. She also provided an opinion with respect to Mr. Dinino. Her opinion was based solely on her review of the videotaped interviews and medical records. With regard to Mr. Skupien, Dr. Lieff testified that the videotape did not reveal any impaired judgment, delusions or hallucinations, or intellectual pathology. He seemed to comprehend what was asked and responded appropriately. In Dr. Lieff's view, Mr. Skupien's affirmative answer "Yes", when advised of the need to be truthful, reflected a clear understanding. Dr. Lieff did not consult with Dr. Michalski but took issue with his diagnosis of "dementia". In her opinion, the symptoms observed by Dr. Michalski were more likely side-effects of the anti-psychotic medication he was taking at the time. Dr. Lieff concluded that Mr. Skupien understood that it was important to tell the truth and that he had the capacity to communicate evidence.

3. Trial Judge's Ruling on Admissibility

23 As a preliminary issue, the trial judge ruled that the four complainants who had given videotaped statements were competent at the time within the meaning of s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which he interpreted as requiring that "witnesses must know the importance of telling the truth and must be able to communicate the evidence". In support of this finding, the trial judge relied on his own viewing of the videotapes and on Dr. Lieff's opinion evidence. (The

atténuée et, même si elle était apparemment « éliminée » en janvier 1999, la dépression a de nouveau été notée en février 1999. Ces notes font également état d'un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements.

2.6 *Le témoignage d'expert lors du voir-dire*

La D^re^ Susan Lieff, une psychiatre gériatrique, a été autorisée à présenter, lors du voir-dire, un témoignage d'opinion sur la capacité de M. Skupien de comprendre l'importance de dire la vérité et de communiquer les faits dans son témoignage. Elle a également exprimé une opinion au sujet de M. Dinino. Son opinion était fondée uniquement sur son examen des entretiens enregistrés sur bande vidéo et des dossiers médicaux. En ce qui concerne M. Skupien, la D^re^ Lieff a témoigné que l'enregistrement ne révélait aucun affaiblissement de jugement, aucun délire, aucune hallucination ni aucune pathologie mentale. Il paraissait comprendre les questions posées et il donnait des réponses pertinentes. Selon la D^re^ Lieff, le « oui » que M. Skupien a répondu lorsqu'il a été informé de la nécessité de dire la vérité indiquait qu'il avait bien compris ce qu'on lui disait. La D^re^ Lieff n'a pas consulté le D^r^ Michalski, mais elle a contesté son diagnostic de « démence ». À son avis, les symptômes observés par le D^r^ Michalski s'apparentaient davantage à des effets secondaires du médicament antipsychotique que M. Skupien prenait à l'époque. La D^re^ Lieff a conclu que M. Skupien comprenait l'importance de dire la vérité et qu'il était capable de communiquer les faits dans son témoignage.

3. La décision du juge du procès concernant l'admissibilité

À titre préliminaire, le juge du procès a conclu que les quatre plaignants ayant fait des déclarations enregistrées sur bande vidéo avaient à l'époque la capacité requise au sens de l'art. 16 de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, qu'il a interprété comme exigeant que [TRADUCTION] « les témoins connaissent l'importance de dire la vérité et soient capables de communiquer les faits dans leur témoignage ». Il a fondé sa conclusion sur son propre visionnement des bandes vidéo et sur

mental capacity of the hearsay declarant is a relevant factor on an inquiry into the statement's admissibility as it may impact on the reliability of the hearsay statement; however, it is important to note that s. 16 has no application here. Section 16 sets out the threshold competency requirement for receiving the testimony of a witness *in court*. The threshold is a low one and the witness's testimony, if received, is then subject to cross-examination in the usual way, including on any relevant matter concerning the witness's mental state. The inquiry into the admissibility of a hearsay statement may require more extensive probing into the declarant's mental competency at the time of making the statement when there is no opportunity to cross-examine the declarant.)

le témoignage d'opinion de la D^re^ Lieff. (La capacité mentale du déclarant est pertinente pour examiner l'admissibilité d'une déclaration relatée étant donné qu'elle peut avoir une incidence sur la fiabilité de cette déclaration; cependant, il importe de souligner que l'art. 16 ne s'applique pas en l'espèce. Cet article établit la capacité minimale requise pour qu'un témoignage soit admis *en cour*. Ce seuil est bas et si le témoignage est reçu, il fait ensuite l'objet du contre-interrogatoire habituel qui porte notamment sur toute question pertinente concernant l'état d'esprit du témoin. L'examen de l'admissibilité d'une déclaration relatée peut requérir un examen plus approfondi de la capacité mentale du déclarant au moment où il a fait la déclaration, dans le cas où il est impossible de le contre-interroger.)

After determining the s. 16 issue, the trial judge considered the necessity criterion. Although certain questions were raised at trial as to whether this criterion was met with respect to some of the complainants' statements, none of the issues concerned Mr. Skupien and hence need not be reviewed here.

24 Après avoir tranché la question de l'art. 16, le juge du procès s'est penché sur le critère de la nécessité. Bien que des questions soulevées au procès aient visé à déterminer si certaines déclarations des plaignants satisfaisaient à ce critère, aucune de ces questions ne concernaient M. Skupien et c'est pourquoi il n'est pas nécessaire de les examiner en l'espèce.

Finally, the trial judge turned to the question of threshold reliability. He determined that all videotaped statements to the police met the reliability requirement. In support of this finding, he noted that there was "nothing untoward in the police procedure in taking the statements" and, although three of the complainants' statements were taken at the retirement home, rather than at the police station, he found that the "circumstances of taking the statements [were] as formal and solemn as could be expected in the situation". He noted that there was "no animosity directed at the accused" by the complainants in their statements other than voicing their complaint. The complainants "appeared forthright", they were "not evasive", and they did not "attempt to overstate their injuries". There were no "exceedingly leading" questions and, to the extent that there was leading, it went to weight rather than admissibility. All the statements were contemporaneous or made shortly after the events that they described. They knew their assailant well and there was no realistic alternative suspect. Further, both

25 Enfin, le juge du procès a examiné la question du seuil de fiabilité. Il a conclu que toutes les déclarations enregistrées sur bande vidéo qui ont été faites à la police satisfaisaient à l'exigence de fiabilité. À l'appui de cette conclusion, il a souligné qu'il n'y avait [TRADUCTION] « rien de malencontreux dans la procédure suivie par la police pour recueillir les déclarations », et il a conclu que, bien que trois des déclarations des plaignants aient été recueillies à la maison de retraite plutôt qu'au poste de police, « les circonstances dans lesquelles les déclarations ont été recueillies [étaient], en l'occurrence, aussi formelles et solennelles que possible ». Le juge du procès a fait remarquer que, dans leurs déclarations, les plaignants ne faisaient que formuler leurs plaintes respectives « sans montrer de l'animosité pour l'accusé ». Les plaignants « paraissaient francs », ils n'étaient « pas évasifs » et ils « ne tentaient pas d'exagérer leurs blessures ». Les questions posées n'étaient pas « trop suggestives », et les seules questions suggestives touchaient la valeur probante plutôt que l'admissibilité. Toutes

Mr. Skupien and Mr. Dinino had corroborating injuries.

les déclarations avaient été effectuées au moment où les faits décrits étaient survenus, ou peu après. Les plaignants connaissaient bien leur agresseur et il n'y avait aucune autre possibilité réaliste de soupçonner quelqu'un d'autre. De plus, MM. Skupien et Dinino avaient tous les deux des blessures corroborantes.

26 The crux of the trial judge's ruling, however, appears to have been his application of the decision of this Court in *U. (F.J.)* in which the complainant's out-of-court statement was admitted on the ground of its "striking similarity" with the accused's statement concerning the same events. Throughout his reasons, the trial judge made repeated references to the similarity between the statements and concluded that "the cumulative combination of similar points renders the overall similarity between the statements sufficiently distinctive to reject coincidence as a likely explanation". While he found that the oral statements were also "sufficiently similar to fit the principle in *R. v. U. (F.J.)*", he held, citing para. 217 in *Starr* as authority, that "to admit them would be oath-helping in that I have the video statements".

Toutefois, la décision du juge du procès semble reposer essentiellement sur son application de l'arrêt *U. (F.J.)* de notre Cour, où la déclaration extrajudiciaire de la plaignante a été admise en preuve à cause de sa « similitude frappante » avec la déclaration de l'accusé concernant les mêmes faits. Dans ses motifs, le juge du procès a mentionné, à maintes reprises, la similitude entre les déclarations et a conclu que [TRADUCTION] « la combinaison cumulative de points semblables rend[ait] la similitude globale entre les déclarations suffisamment distinctive pour rejeter la coïncidence comme explication probable ». Tout en estimant que les déclarations orales étaient également « suffisamment similaires pour être visées par le principe de l'arrêt *R. c. U. (F.J.)* », il a conclu, en se fondant sur le par. 217 de l'arrêt *Starr*, que « les admettre en preuve équivaudrait à admettre un témoignage justificatif du fait que je suis en possession des déclarations sur bande vidéo ».

27 In the trial judge's view, the only real hearsay danger raised by the admission of the statements was the absence of cross-examination but, citing *Smith* as authority, he concluded that reliable evidence should not be excluded for this reason alone. The public interest in "the elderly receiving good care" allowed him "to take video statements together to bolster the complainants' credibility". He therefore ruled the videotaped statements admissible and the oral statements inadmissible.

Selon le juge du procès, le seul véritable danger en matière de ouï-dire que comportait l'admission en preuve des déclarations était l'absence de contre-interrogatoire, mais, s'appuyant sur l'arrêt *Smith*, il a décidé qu'une preuve fiable ne devrait pas être exclue pour ce seul motif. L'intérêt public à ce que [TRADUCTION] « les personnes âgées soient bien traitées » l'autorisait à « considérer les déclarations sur bande vidéo dans leur ensemble pour renforcer la crédibilité des plaignants ». Il a donc conclu à l'admissibilité des déclarations enregistrées sur bande vidéo et à l'inadmissibilité des déclarations orales.

28 At the conclusion of the trial, Grossi J. ultimately found only two of the videotaped statements sufficiently credible to found a conviction, those of Mr. Dinino and Mr. Skupien. Since this appeal concerns the admissibility ruling only, it is

À la fin du procès, le juge Grossi a décidé, en fin de compte, que seules deux des déclarations enregistrées sur bande vidéo étaient suffisamment crédibles pour justifier une déclaration de culpabilité, à savoir celles de MM. Dinino et Skupien. Comme le présent

not necessary to review the reasons for conviction. It is common ground between the parties that if Mr. Skupien's statements are inadmissible, the convictions must be set aside and the appeal dismissed.

pourvoi ne porte que sur la décision concernant l'admissibilité, il n'est pas nécessaire d'examiner les motifs de la déclaration de culpabilité. Les parties conviennent que si les déclarations de M. Skupien sont inadmissibles, les déclarations de culpabilité doivent être annulées et le pourvoi, rejeté.

4. Court of Appeal for Ontario (2005), 195 O.A.C. 11

4. Cour d'appel de l'Ontario (2005), 195 O.A.C. 11

Mr. Khelawon appealed his convictions on the ground that the trial judge erred in admitting the videotaped statements. The Court of Appeal was unanimous in finding that Mr. Dinino's statement was not sufficiently reliable to warrant admission. A majority of the court found that Mr. Skupien's statement was also inadmissible due to its unreliability.

29 M. Khelawon a interjeté appel contre ses déclarations de culpabilité en faisant valoir que le juge du procès avait commis une erreur en admettant en preuve les déclarations enregistrées sur bande vidéo. La Cour d'appel a statué à l'unanimité que la déclaration de M. Dinino n'était pas suffisamment fiable pour être admise en preuve. Les juges majoritaires ont estimé que la déclaration de M. Skupien était également inadmissible en raison de sa non-fiabilité.

All three justices interpreted the trial judge's reasons as holding that without the similarity among the statements of the various complainants, none met the requirement of reliability and would therefore have been inadmissible (Rosenberg J.A., at para. 90; Blair J.A., at para. 29). The court therefore focussed on this aspect of the evidence and, indeed, the source of the disagreement between the majority and the dissent was whether the similarity of the statements was a permissible consideration in assessing reliability under the principled approach.

30 Les trois juges ont tous interprété les motifs du juge du procès comme signifiant que, n'eût été la similitude entre les déclarations des divers plaignants, aucune d'elles n'aurait satisfait à l'exigence de fiabilité, de sorte qu'elles auraient toutes été inadmissibles (le juge Rosenberg, par. 90; le juge Blair, par. 29). La cour a donc mis l'accent sur cet aspect de la preuve et, en fait, le désaccord entre les juges majoritaires et le juge dissident tenait à la question de savoir si la similitude entre les déclarations pouvait être prise en considération pour apprécier la fiabilité suivant la méthode d'analyse raisonnée.

Rosenberg J.A., writing for the majority, held that the principle from *U. (F.J.)* could be applied only where the statements relate to the same event, and in most cases would be applied only where the declarant is available for cross-examination (para. 114). Here, the statements related to different incidents. Although a trier of fact might conclude, using similar fact reasoning, that the same person committed all of the crimes, this is an issue going to ultimate reliability, not threshold reliability (para. 115). Only the latter is relevant in determining admissibility. In addition, Rosenberg J.A. held that the comparator statements must also be substantively admissible, because the final decision as to the likelihood of coincidence or collusion

31 Le juge Rosenberg, s'exprimant au nom des juges majoritaires, a conclu que le principe de l'arrêt *U. (F.J.)* ne pouvait s'appliquer que lorsque les déclarations concernent les mêmes faits et que, dans la plupart des cas, il ne serait appliqué que s'il est possible de contre-interroger le déclarant (par. 114). En l'espèce, les déclarations concernaient des faits différents. Un juge des faits pourrait conclure, suivant le raisonnement des faits similaires, que la même personne a commis tous les crimes, mais c'est là une question de fiabilité en dernière analyse et non de seuil de fiabilité (par. 115). Seul le dernier est pertinent pour déterminer l'admissibilité. De plus, selon le juge Rosenberg, les déclarations de comparaison doivent également être admissibles quant au fond,

rests with the trier of fact (para. 128), and it would be odd for the trier of fact to be assessing ultimate reliability without access to "the very piece of evidence that convinced the trial judge that the statement was reliable" (para. 130). Grossi J.'s decision, therefore, was an impermissible expansion of the principle in *U. (F.J.)*. Rosenberg J.A. also held, at para. 92, that such an expansion was inconsistent with the statement of Iacobucci J. in *Starr*, at para. 217, that "corroborating . . . evidence" should not be considered in determining threshold reliability.

32 In dissent, Blair J.A. held that the central notion underpinning the *U. (F.J.)* "exception" was that absent collusion, prior knowledge, or improper influence, "striking similarities between statements belie coincidence and therefore bolster the reliability of the statement under consideration" (para. 44). While he held that the absence of cross-examination remained a factor to be weighed in assessing threshold reliability, he was of the view that its absence, in and of itself, was not an impediment to the principled application of the *U. (F.J.)* exception. He also found that the exception could apply where the statements related to different events, stating that, for the purpose of finding threshold reliability, he could see no "logical difference" between statements concerning the same accused "doing the same thing on the same occasion" and "the same accused doing the same thing on different occasions" (para. 48), drawing on the rationale for similar-fact reasoning, since both involve admitting evidence on the basis of the "improbability of coincidence" (para. 49). Finally, he found that a finding that the comparator statements are not substantively admissible should not exclude them from the reliability analysis, pointing out that otherwise reliable statements could be held inadmissible for a variety of reasons, including a finding that they were not necessary (para. 53).

parce que la décision finale concernant la probabilité de coïncidence ou de collusion appartient au juge des faits (par. 128), et il serait étrange que celui-ci apprécie la fiabilité en dernière analyse sans avoir accès à [TRADUCTION] « l'élément de preuve même qui a convaincu le juge du procès que la déclaration était fiable » (par. 130). La décision du juge Grossi constituait donc un élargissement inacceptable de la portée du principe de l'arrêt *U. (F.J.)*. Le juge Rosenberg a également décidé, au par. 92, qu'un tel élargissement était incompatible avec l'affirmation du juge Iacobucci dans l'arrêt *Starr*, au par. 217, selon laquelle il n'y a pas lieu de tenir compte d'une « preuve corroborante » pour établir le seuil de fiabilité.

Le juge Blair, dissident, a conclu que la notion fondamentale sous-tendant « l'exception » de l'arrêt *U. (F.J.)* veut que, en l'absence de collusion, de connaissance préalable ou d'influence indue, [TRADUCTION] « les similitudes frappantes entre les déclarations écartent toute coïncidence et renforcent donc la fiabilité de la déclaration examinée » (par. 44). Bien qu'il ait décidé que l'absence de contre-interrogatoire demeurait un élément à soupeser en appréciant le seuil de fiabilité, le juge Blair était d'avis que cette absence, en soi, ne faisait pas obstacle à l'application raisonnée de l'exception de l'arrêt *U. (F.J.)*. Il a également conclu que cette exception pouvait s'appliquer quand les déclarations concernaient des faits différents, ajoutant que, pour déterminer le seuil de fiabilité, il ne voyait — compte tenu de la raison d'être du raisonnement des faits similaires — aucune « différence logique » entre une déclaration voulant que le même accusé « ait accompli le même acte à la même occasion » et une déclaration voulant que « le même accusé ait accompli le même acte à différentes occasions » (par. 48), étant donné que les deux situations comportent l'admission d'un élément de preuve fondée sur « l'improbabilité d'une coïncidence » (par. 49). Enfin, il a estimé que les déclarations de comparaison jugées inadmissibles quant au fond ne devraient pas être exclues de l'analyse de la fiabilité, faisant remarquer que des déclarations par ailleurs fiables pourraient être jugées inadmissibles pour diverses raisons, dont la conclusion qu'elles n'étaient pas nécessaires (par. 53).

On the basis of these conclusions, Blair J.A. held that the trial judge had not erred in considering the similarity among the statements in determining their threshold reliability. He then went on to apply "the *U. (F.J.)* exception" to the statements at issue on appeal, and held that although the videotaped statement of Mr. Dinino was inadmissible, the videotaped statement of Mr. Skupien was.

33 Compte tenu de ces conclusions, le juge Blair a statué que le juge du procès n'avait commis aucune erreur en tenant compte de la similitude des déclarations pour en déterminer le seuil de fiabilité. Il a ensuite appliqué [TRADUCTION] « l'exception de l'arrêt *U. (F.J.)* » aux déclarations visées par l'appel et a conclu que, même si la déclaration de M. Dinino enregistrée sur bande vidéo était inadmissible, celle de M. Skupien aussi enregistrée sur bande vidéo était par ailleurs admissible.

5. Rule Against Hearsay

5.1 *General Exclusionary Rule*

The basic rule of evidence is that all relevant evidence is admissible. There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is *not* admissible. Hearsay evidence is not excluded because it is irrelevant — there is no need for a special rule to exclude irrelevant evidence. Rather, as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule. Although hearsay evidence includes communications expressed by conduct, I will generally refer to hearsay statements only.

5. La règle interdisant le ouï-dire

5.1 *Une règle d'exclusion générale*

34 La règle de preuve fondamentale veut que tous les éléments de preuve pertinents soient admissibles. Cette règle fondamentale comporte un certain nombre d'exceptions. L'une des principales exceptions est la règle interdisant le ouï-dire : sauf exception, la preuve par ouï-dire *n*'est *pas* admissible. La preuve par ouï-dire n'est pas exclue parce qu'elle n'est pas pertinente — une règle spéciale n'est pas nécessaire pour exclure une preuve non pertinente. Comme nous le verrons, c'est plutôt la difficulté de vérifier la preuve par ouï-dire qui sous-tend la règle d'exclusion et, en général, l'atténuation de cette difficulté qui constitue le fondement des exceptions à la règle. Bien que la preuve par ouï-dire comprenne la conduite expressive, je m'en tiendrai généralement aux déclarations relatées.

5.2 *Definition of Hearsay*

At the outset, it is important to determine what is and what is not hearsay. The difficulties in defining hearsay encountered by courts and learned authors have been canvassed before and need not be repeated here: see *R. v. Abbey*, [1982] 2 S.C.R. 24, at pp. 40-41, *per* Dickson J. It is sufficient to note, as this Court did in *Starr*, at para. 159, that the more recent definitions of hearsay are focussed on the central concern underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion. See, for example, *R. v. O'Brien*, [1978] 1 S.C.R. 591, at pp. 593-94. Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose

5.2 *Définition du ouï-dire*

35 Au départ, il importe de déterminer ce qui constitue du ouï-dire et ce qui n'en constitue pas. Les difficultés que les tribunaux et les auteurs de doctrine ont eues à définir le ouï-dire ont déjà fait l'objet d'un examen approfondi et il n'est pas nécessaire de les reprendre en l'espèce : voir *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 40-41, le juge Dickson. Il suffit de noter, comme notre Cour l'a fait au par. 159 de l'arrêt *Starr*, que les plus récentes définitions du ouï-dire sont axées sur la préoccupation majeure qui sous-tend cette règle du ouï-dire, soit la difficulté de vérifier la fiabilité de l'affirmation du déclarant. Voir, par exemple, l'arrêt *R. c. O'Brien*, [1978] 1 R.C.S. 591, p. 593-594. Notre

demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn.

5.2.1 Statements Adduced for Their Truth

36 The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the trier of fact's inability to test the

système accusatoire attache une grande importance à l'assignation de témoins qui déposent sous la foi du serment ou d'une affirmation solennelle et dont le comportement peut être observé par le juge des faits, et le témoignage, vérifié au moyen d'un contre-interrogatoire. Nous considérons que ce processus représente la meilleure façon de vérifier la preuve testimoniale. Parce qu'elle se présente sous une forme différente, la preuve par ouï-dire suscite des préoccupations particulières. La règle d'exclusion générale reconnaît la difficulté pour le juge des faits d'apprécier le poids à donner, s'il y a lieu, à une déclaration d'une personne qui n'a été ni vue ni entendue et qui n'a pas eu à subir un contre-interrogatoire. On craint que la preuve par ouï-dire non vérifiée se voie accorder plus de poids qu'elle n'en mérite. Les caractéristiques déterminantes essentielles du ouï-dire sont donc les suivantes : (1) le fait que la déclaration soit présentée pour établir la véracité de son contenu et (2) l'impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration. J'examinerai chacune de ces caractéristiques déterminantes à tour de rôle.

5.2.1 Déclarations présentées pour établir la véracité de leur contenu

Le but dans lequel la déclaration extrajudiciaire est présentée revêt de l'importance lorsqu'il s'agit de déterminer ce qui constitue du ouï-dire, car c'est seulement lorsque la preuve est présentée pour établir la véracité de son contenu qu'il devient nécessaire d'en vérifier la fiabilité. Prenons l'exemple suivant. Au procès d'un accusé inculpé de conduite avec facultés affaiblies, un policier témoigne qu'il a intercepté l'automobile de l'accusé à la suite d'un appel d'un inconnu l'informant que le véhicule était conduit par une personne en état d'« ébriété avancée » qui venait tout juste de quitter une taverne de quartier. Si la déclaration concernant l'état d'ébriété du conducteur est présentée dans le seul but d'établir les motifs que le policier avait d'intercepter le véhicule, il importe peu de savoir si la déclaration de l'auteur inconnu de l'appel était exacte, exagérée ou même fausse. Même si la déclaration est totalement dénuée de fondement, cela n'enlève rien à l'explication que le policier a donnée au sujet de ses actes. Si, par contre, la déclaration est présentée

reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.

dans le but de prouver que l'accusé avait effectivement les facultés affaiblies, l'incapacité du juge des faits d'en vérifier la fiabilité suscite des préoccupations réelles. Ce n'est donc que dans ce dernier cas que la preuve relative à la déclaration de l'auteur de l'appel constitue du ouï-dire et est assujettie à la règle d'exclusion générale.

5.2.2 Absence of Contemporaneous Cross-Examination

The previous example, namely where the witness tells the court what A told him, is the more obvious form of hearsay evidence. A is not before the court to be seen, heard and cross-examined. However, the traditional law of hearsay also extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents. This extended definition of hearsay has been adopted in Canada: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 763-64; *Starr*, at para. 158. It is important to understand the rationale for treating a witness's out-of-court statements as hearsay.

When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. Consider the following example to illustrate the concerns raised by this evidence.

In an out-of-court statement, W identifies the accused as her assailant. At the trial of the accused on a charge of assault, W testifies that the accused is *not* her assailant. The Crown seeks to tender the out-of-court statement as proof of the fact that the

5.2.2 L'impossibilité de contre-interroger au moment précis où la déclaration est faite

37 L'exemple précédent, à savoir lorsque le témoin raconte au tribunal ce que A lui a dit, est la forme la plus évidente de preuve par ouï-dire. A n'est pas devant le tribunal de manière à pouvoir être vu, entendu et contre-interrogé. Toutefois, la règle traditionnelle du ouï-dire s'applique également à la déclaration extrajudiciaire du témoin qui dépose en cour lorsque cette déclaration extrajudiciaire est présentée pour établir la véracité de son contenu. Cette définition élargie du ouï-dire a été adoptée au Canada : *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 763-764; *Starr*, par. 158. Il est important de comprendre pourquoi les déclarations extrajudiciaires d'un témoin sont considérées comme étant du ouï-dire.

38 Lorsque, devant le tribunal, le témoin réitère ou adopte — sous la foi du serment ou d'une affirmation solennelle — une déclaration extrajudiciaire antérieure, il va de soi qu'aucune question de ouï-dire ne se pose. Ce n'est pas la déclaration elle-même qui constitue un élément de preuve, mais plutôt le témoignage, qui peut être vérifié de la façon habituelle en observant le témoin et en lui faisant subir un contre-interrogatoire. Toutefois, la question du ouï-dire se pose lorsque le témoin ne réitère pas ou n'adopte pas le contenu de la déclaration extrajudiciaire, et que la déclaration elle-même est présentée pour établir la véracité de son contenu. Prenons l'exemple suivant pour illustrer les préoccupations suscitées par cet élément de preuve.

39 Dans une déclaration extrajudiciaire, W désigne l'accusé comme étant son agresseur. Au procès de l'accusé pour voies de fait, W témoigne que l'accusé *n*'est *pas* son agresseur. Le ministère public cherche à présenter la déclaration extrajudiciaire

accused did assault W. In these circumstances, the trier of fact is asked to accept the out-of-court statement over the sworn testimony of the witness. Given the usual premium placed on the value of in-court testimonial evidence, a serious issue arises as to whether it is at all necessary to introduce the statement. In addition, the reliability of that statement becomes crucial. How trustworthy is it? In what circumstances did W make that statement? Was it made casually to friends at a social function, or rather, to the police as a formal complaint? Was W aware of the potential consequences of making that statement, did she intend that it be acted upon? Did she have a motive to lie? In what condition was W at the time she made the statement? Many more questions can come to mind on matters that relate to the reliability of that out-of-court statement. When the trier of fact is asked to consider the out-of-court statement as proof that the accused in fact assaulted W, assessing its reliability may prove to be difficult.

pour prouver que l'accusé a effectivement agressé W. Dans ces circonstances, on demande au juge des faits de retenir la déclaration extrajudiciaire plutôt que le témoignage sous serment du témoin. Compte tenu de l'importance habituellement accordée au témoignage devant le tribunal, une question sérieuse se pose, soit celle de savoir s'il est absolument nécessaire de présenter la déclaration. De plus, la fiabilité de cette déclaration devient déterminante. Jusqu'à quel point est-elle fiable? Dans quelles circonstances W a-t-elle fait cette déclaration? L'a-t-elle faite à brûle-pourpoint à des amis lors d'une activité sociale, ou plutôt à la police à titre de plainte formelle? W était-elle consciente des conséquences que pouvait avoir cette déclaration, voulait-elle qu'on y donne suite? Avait-elle une raison de mentir? Dans quel état était W au moment où elle a fait la déclaration? Bien d'autres questions peuvent venir à l'esprit au sujet de la fiabilité de cette déclaration extrajudiciaire. Lorsqu'on demande au juge des faits de considérer que la déclaration extrajudiciaire prouve que l'accusé a effectivement agressé W, il peut se révéler difficile d'apprécier la fiabilité de cette preuve.

40 Concerns over the reliability of the statement also arise where W does not recant the out-of-court statement but testifies that she has no memory of making the statement, or worse still, no memory of the assault itself. The trier of fact does not see or hear the witness making the statement and, because there is no opportunity to cross-examine the witness *contemporaneously* with the making of the statement, there may be limited opportunity for a meaningful testing of its truth. In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.

Des préoccupations concernant la fiabilité de la déclaration naissent également lorsque W ne revient pas sur sa déclaration extrajudiciaire, mais témoigne qu'elle ne se souvient pas l'avoir faite, ou pis encore, qu'elle n'a aucun souvenir de l'agression elle-même. Le juge des faits ne voit pas ou n'entend pas le témoin faire la déclaration et, puisque qu'il n'y a aucune possibilité de contre-interroger le témoin *au moment précis* où il fait sa déclaration, la possibilité de vérifier utilement la véracité de cette déclaration peut être limitée. De plus, il peut y avoir lieu de se demander si la déclaration antérieure est reproduite intégralement et fidèlement.

41 Hence, although the underlying rationale for the general exclusionary rule may not be as obvious when the declarant is available to testify, it is the same — the difficulty of testing the reliability of the out-of-court statement. The difficulty of assessing W's out-of-court statement is the reason why it falls within the definition of hearsay and is subject to the general exclusionary rule. As one may readily appreciate, however, the degree of difficulty

Ainsi, bien qu'il se puisse que la raison d'être de la règle d'exclusion générale ne soit pas aussi évidente lorsque le déclarant est disponible pour témoigner, elle reste la même, soit la difficulté de vérifier la fiabilité de la déclaration extrajudiciaire. La difficulté d'apprécier la déclaration extrajudiciaire de W explique pourquoi elle est visée par la définition du ouï-dire et est assujettie à la règle d'exclusion générale. Toutefois, on le comprendra aisément, la

may be substantially alleviated in cases where the declarant is available for cross-examination on the earlier statement, particularly where an accurate record of the statement can be tendered in evidence. I will come back to that point later. My point here is simply to explain why, by definition, hearsay extends to out-of-court statements tendered for their truth even when the declarant is before the court.

5.3 *Hearsay Exceptions: A Principled Approach*

It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, § 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

difficulté peut être atténuée substantiellement lorsque le déclarant peut être contre-interrogé au sujet de sa déclaration antérieure, en particulier lorsqu'il est possible de déposer en preuve un compte rendu exact de la déclaration. Je reviendrai sur cette question plus loin. Je ne tiens ici qu'à expliquer pourquoi, par définition, le ouï-dire englobe les déclarations extrajudiciaires présentées pour établir la véracité de leur contenu, et ce, même lorsque le déclarant est devant le tribunal.

5.3 *Les exceptions à la règle du ouï-dire : une méthode d'analyse raisonnée*

42

On reconnaît depuis longtemps qu'une application rigide de la règle d'exclusion entraînerait la perte injustifiée d'éléments de preuve très précieux. La déclaration relatée peut, en raison de la manière dont elle a été faite, être intrinsèquement fiable, ou il peut exister suffisamment de moyens de la vérifier en dépit du fait qu'elle est relatée. Partant, un certain nombre d'exceptions de common law ont peu à peu fait leur apparition. Une application rigide de ces exceptions s'est révélée, à son tour, problématique et a donné lieu, dans certains cas, à l'exclusion inutile d'éléments de preuve ou, dans d'autres cas, à leur admission injustifiée. Wigmore a préconisé une application plus souple de la règle, fondée sur les deux principes directeurs qui sous-tendent les exceptions de common law traditionnelles, à savoir la nécessité et la fiabilité (*Wigmore on Evidence* (2e éd. 1923), vol. III, § 1420, p. 153). Notre Cour a d'abord retenu cette approche dans l'arrêt *Khan* et en a, par la suite, reconnu la primauté dans l'arrêt *Starr*. Le cadre d'analyse applicable selon l'arrêt *Starr* a été résumé récemment dans l'arrêt *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23, par. 15 :

a) La preuve par ouï-dire est présumée inadmissible à moins de relever d'une exception à la règle du ouï-dire. Les exceptions traditionnelles continuent présomptivement de s'appliquer.

b) Il est possible de contester une exception à l'exclusion du ouï-dire au motif qu'elle ne présenterait pas les indices de nécessité et de fiabilité requis par la méthode d'analyse raisonnée. On peut la modifier au besoin pour la rendre conforme à ces exigences.

(c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

43 In this case, we are concerned with the admission of evidence under item (d). In particular, the courts below were divided over two main questions: (1) what factors must be considered in deciding whether the evidence is sufficiently reliable to be admitted; and (2) whether the "exception" recognized by this Court in *U. (F.J.)* can be extended to the facts of this case. I will comment first on the second question.

44 In my view, the discussion over whether the "*U. (F.J.)* exception" applies here exemplifies the concern expressed in *U. (F.J.)* itself, that the "new approach to hearsay does not itself become a rigid pigeon-holing analysis" (para. 35). In *U. (F.J.)*, there was a similar debate over whether the "*B. (K.G.)* exception" to the rule against the substantive admission of prior inconsistent statements extended to circumstances where the reliability of the complainant's statement was based, not so much on the circumstances in which it came about as was the case in *B. (K.G.)*, but on its striking similarity to a statement made by the accused. Lamer C.J. explained how his decision in *B. (K.G.)* was an application of the principled approach to hearsay, and how "[i]n addition . . . a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements" (para. 40). He concluded his analysis by anticipating that yet other situations may arise. He stated the following (at para. 45):

I anticipate that instances of statements so strikingly similar as to bolster their reliability will be rare.

c) Dans de « rares cas », la preuve relevant d'une exception existante peut être exclue parce que, dans les circonstances particulières de l'espèce, elle ne présente pas les indices de nécessité et de fiabilité requis.

d) Si la preuve par ouï-dire ne relève pas d'une exception à la règle d'exclusion, elle peut tout de même être admissible si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire.

Dans la présente affaire, il est question d'admission de preuve selon l'al. d). En particulier, les tribunaux d'instance inférieure étaient partagés quant à deux questions principales : (1) Quels facteurs doit-on considérer pour décider si la preuve est suffisamment fiable pour être admise? (2) L'« exception » reconnue par notre Cour dans l'arrêt *U. (F.J.)* peut-elle s'appliquer aux faits de la présente affaire? Je vais d'abord commenter la deuxième question.

À mon avis, le débat entourant la question de savoir si « l'exception de l'arrêt *U. (F.J.)* » s'applique en l'espèce illustre le souci exprimé dans l'arrêt *U. (F.J.)* lui-même, à savoir que la « nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories » (par. 35). Dans l'arrêt *U. (F.J.)*, un débat semblable a porté sur la question de savoir si « l'exception de l'arrêt *B. (K.G.)* » à la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles s'appliquait dans le cas où la fiabilité de la déclaration du plaignant tenait non pas tant aux circonstances dans lesquelles elle avait été faite, comme l'affaire dans *B. (K.G.)*, mais plutôt à sa similitude frappante avec une déclaration de l'accusé. Le juge en chef Lamer a expliqué comment sa décision dans l'affaire *B. (K.G.)* était une application de la méthode d'analyse raisonnée au ouï-dire et comment en outre « l'établissement d'un seuil de fiabilité est parfois possible, dans les cas où le témoin peut être contre-interrogé, lorsqu'il existe une similitude frappante entre deux déclarations » (par. 40). Il a conclu son analyse en prévoyant que d'autres situations peuvent encore se présenter. Voici ce qu'il a affirmé (par. 45) :

Je m'attends à ce que soient rares les cas de déclarations dont la similitude est frappante au point d'étayer

In keeping with our principled and flexible approach to hearsay, other situations may arise where prior inconsistent statements will be judged substantively admissible, bearing in mind that cross-examination alone provides significant indications of reliability. It is not necessary in this case to decide if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statements.

As I will discuss later, both *B. (K.G.)* and *U. (F.J.)* highlight the particular concerns raised in cases of prior inconsistent statements. However, following Lamer C.J.'s own words of caution against "rigid pigeon-holing analysis", it is my view that neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria. The majority judgment in *B. (K.G.)* itself leaves room for appropriate substitutes for the criteria it sets out. Further, to interpret these cases as creating new categories of exceptions would not be in keeping with the flexible case-by-case principled approach. We would simply be replacing the traditional set of exceptions with a new and (for the time being) less ossified one. Rather, these cases provide guidance — not fixed categories — on the application of the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility.

I will review *B. (K.G.)* and *U. (F.J.)* in this light as well as some other relevant decisions from this Court. Since the issues raised on this appeal relate to the assessment of reliability, my analysis will be focussed on that criterion. However, as I will explain, necessity and reliability should not be considered in isolation. One criterion may impact on the other. For example, as we shall see, in some cases the need for the evidence may, in large part, be based on the fact that the hearsay statement is highly reliable and the fact-finding process would be distorted without it. However, before I discuss the factors relating to reliability, I want to

leur fiabilité. Conformément à notre démarche en matière de ouï-dire fondée sur des principes et souple, il peut y avoir d'autres situations où les déclarations antérieures incompatibles seront jugées admissibles quant au fond, compte tenu du fait que le contre-interrogatoire seul donne d'importants indices de fiabilité. En l'espèce, il n'est pas nécessaire de décider si le contre-interrogatoire seul donne une assurance suffisante quant au seuil de fiabilité pour permettre l'admission, quant au fond, de déclarations antérieures incompatibles.

45 Comme je l'expliquerai plus loin, les arrêts *B. (K.G.)* et *U. (F.J.)* font tous les deux ressortir les préoccupations particulières suscitées dans des cas de déclaration antérieure incompatible. Toutefois, compte tenu de la mise en garde du juge en chef Lamer contre une « analyse rigide de catégories », j'estime que ni l'arrêt *B. (K.G.)* ni l'arrêt *U. (F.J.)* ne devraient être interprétés comme créant des catégories d'exceptions — fondées sur des critères fixes — à la règle interdisant le ouï-dire. Le jugement majoritaire dans l'affaire *B. (K.G.)* permet lui-même de remplacer par des substituts adéquats les critères qu'il énonce. De plus, interpréter ces arrêts comme créant de nouvelles catégories d'exceptions ne serait pas conforme à la méthode souple d'analyse raisonnée applicable cas par cas. Nous nous trouverions simplement à remplacer la série d'exceptions traditionnelles par une nouvelle série moins sclérosée (pour l'instant). Au lieu d'établir des catégories fixes, ces arrêts donnent plutôt des indications sur l'application cas par cas de la méthode d'analyse raisonnée en décrivant les préoccupations pertinentes et les facteurs à considérer pour déterminer l'admissibilité.

46 J'examinerai sous cet angle les arrêts *B. (K.G.)* et *U. (F.J.)*, de même que certains autres arrêts pertinents de notre Cour. Puisque les questions soulevées dans le présent pourvoi concernent l'appréciation de la fiabilité, mon analyse portera sur ce critère. Toutefois, comme je l'expliquerai, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. Par exemple, comme nous le verrons, la nécessité de la preuve peut, dans certains cas, découler en grande partie du fait que la déclaration relatée est très fiable et que le processus de constatation des faits serait faussé sans elle. Toutefois, avant d'analyser

say a word on the overarching principle of trial fairness.

5.4 *Constitutional Dimension: Trial Fairness*

47 Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."

48 As indicated earlier, our adversary system is based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination. It is mainly because of the inability to put hearsay evidence to that test, that it is presumptively inadmissible. However, the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes

les facteurs liés à la fiabilité, je tiens à dire un mot sur le principe dominant de l'équité du procès.

5.4 *La dimension constitutionnelle : l'équité du procès*

Avant d'admettre les déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, le juge du procès doit décider, lors d'un voir-dire, que la nécessité et la fiabilité ont été établies. Il incombe à la personne qui cherche à présenter la preuve d'établir ces critères selon la prépondérance des probabilités. En matière criminelle, l'examen peut comporter une dimension constitutionnelle parce que la difficulté de vérifier la preuve ou, à l'inverse, l'impossibilité de présenter une preuve fiable peut compromettre la capacité de l'accusé de présenter une défense pleine et entière, qui est un droit garanti par l'art. 7 de la *Charte canadienne des droits et libertés* : *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505. Le droit de présenter une défense pleine et entière est, à son tour, lié à un autre principe de justice fondamentale, à savoir le droit à un procès équitable : *R. c. Rose*, [1998] 3 R.C.S. 262. La préoccupation relative à l'équité du procès est l'une des raisons primordiales de rationaliser les exceptions traditionnelles à la règle du ouï-dire conformément à la méthode d'analyse raisonnée. Comme l'a précisé le juge Iacobucci, au par. 200 de l'arrêt *Starr*, quant à la preuve du ministère public, « [s]i on permettait au ministère public de présenter une preuve par ouï-dire non fiable contre l'accusé, peu importe qu'elle se trouve ou non à relever d'une exception existante, cela compromettrait l'équité du procès et ferait apparaître le spectre des déclarations de culpabilité erronées. »

Comme je l'ai indiqué précédemment, notre système accusatoire repose sur l'hypothèse voulant que le contre-interrogatoire représente le meilleur moyen de révéler les causes d'inexactitude ou de manque de fiabilité. C'est principalement en raison de l'incapacité de la vérifier de cette façon que la preuve par ouï-dire est présumée inadmissible. Toutefois, le droit constitutionnel garanti par l'art. 7 de la *Charte* n'est pas en soi le droit de confronter ou contre-interroger des témoins opposés. Le

cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its

processus judiciaire accusatoire, qui comprend le contre-interrogatoire, n'est que le moyen de parvenir à la fin recherchée. L'équité du procès, en tant que principe de justice fondamentale, est la fin qui doit être atteinte. L'équité du procès englobe plus que les droits de l'accusé. Bien qu'elle comprenne indubitablement le droit de présenter une défense pleine et entière, l'équité du procès doit aussi être évaluée à la lumière de préoccupations sociales plus globales : voir *R. c. Mills*, [1999] 3 R.C.S. 668, par. 69-76. Dans le contexte d'un examen de l'admissibilité, l'une de ces préoccupations est l'intérêt qu'a la société à ce que le processus judiciaire permette de découvrir la vérité.

49

La gamme plus vaste d'intérêts compris dans l'équité du procès se reflète dans le double principe de la nécessité et de la fiabilité. Le critère de la nécessité repose sur l'intérêt qu'a la société à découvrir la vérité. Étant donné qu'il n'est pas toujours possible de satisfaire au critère optimal du contre-interrogatoire effectué au moment précis où la déclaration est faite, au lieu de simplement perdre la valeur de la preuve en question, il devient nécessaire dans l'intérêt de la justice de se demander si cette preuve devrait néanmoins être admise sous sa forme relatée. Le critère de la fiabilité vise à assurer l'intégrité du processus judiciaire. Bien qu'elle soit nécessaire, la preuve n'est pas admissible, sauf si elle est suffisamment fiable pour écarter les dangers que comporte la difficulté de la vérifier. Comme nous le verrons, deux motifs différents, qui ne s'excluent pas mutuellement, permettent généralement de satisfaire à l'exigence de fiabilité. Dans certains cas, il se peut que, en raison des circonstances dans lesquelles la déclaration relatée a été faite, le contenu de cette déclaration soit si fiable qu'il aurait été peu ou pas utile de contre-interroger le déclarant au moment précis où il s'est exprimé. Dans d'autres cas, il peut arriver que la preuve ne soit pas aussi convaincante, mais les circonstances permettront de la vérifier suffisamment autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est présentée. Dans ces circonstances, l'admission de la preuve compromettra rarement l'équité du procès. Toutefois, vu que l'équité du procès peut englober des facteurs allant

probative value is outweighed by its prejudicial effect.

au-delà de l'examen rigoureux de la nécessité et de la fiabilité, le juge du procès a le pouvoir discrétionnaire d'exclure la preuve par ouï-dire lorsque son effet préjudiciable l'emporte sur sa valeur probante, et ce, même si les deux critères sont respectés.

6. The Admissibility Inquiry

6.1 *Distinction Between Threshold and Ultimate Reliability: A Source of Confusion*

50 As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*.

51 The distinction between threshold and ultimate reliability has been made in a number of cases (see, for example, *B. (K.G.)* and *R. v. Hawkins*, [1996] 3 S.C.R. 1043), but we are mainly concerned here with the elaboration of this principle in *Starr*. In particular, the following excerpt from the Court's analysis has been the subject of much of the discussion and commentary (at paras. 215 and 217):

> In this connection, it is important when examining the reliability of a statement under the principled approach to distinguish between threshold and ultimate reliability. Only the former is relevant to admissibility: see *Hawkins*, *supra*, at p. 1084. Again, it is

6. L'examen de l'admissibilité

6.1 *La distinction entre seuil de fiabilité et fiabilité en dernière analyse : source de confusion*

Comme nous l'avons vu, le juge du procès décide uniquement si la preuve par ouï-dire est admissible. Il appartient au juge des faits de décider, à l'issue du procès, s'il s'en remettra, en fin de compte, à la déclaration relatée pour trancher les questions en litige, après l'avoir examinée en fonction de l'ensemble de la preuve. Au stade de l'admissibilité, il importe de ne pas empiéter sur la compétence du juge des faits. Si le procès a lieu devant un juge et un jury, il est essentiel que les questions de fiabilité en dernière analyse soient laissées au jury — dans un procès criminel, c'est un impératif constitutionnel. Si le juge siège sans jury, il importe tout autant qu'il ne préjuge pas de la fiabilité en dernière analyse de la preuve avant d'avoir entendu l'ensemble de la preuve au dossier. Il faut donc établir une distinction entre « fiabilité en dernière analyse » et « seuil de fiabilité ». Lors d'un voir-dire portant sur l'admissibilité, l'examen se limite au seuil de fiabilité.

La distinction entre seuil de fiabilité et fiabilité en dernière analyse (ou fiabilité ultime ou absolue) a été établie dans un certain nombre d'arrêts (voir, par exemple, *B. (K.G.)* et *R. c. Hawkins*, [1996] 3 R.C.S. 1043). Cependant, nous nous intéressons surtout en l'espèce à l'explication de ce principe contenue dans l'arrêt *Starr*. Une bonne partie des discussions et des commentaires a porté notamment sur l'extrait suivant de l'analyse de la Cour (par. 215 et 217) :

> À cet égard, lorsque la fiabilité d'une déclaration est examinée selon la méthode fondée sur des principes, il importe d'établir une distinction entre le seuil de fiabilité et la fiabilité absolue. Seul le seuil de fiabilité est pertinent relativement à l'admissibilité : voir

not appropriate in the circumstances of this appeal to provide an exhaustive catalogue of the factors that may influence threshold reliability. However, our jurisprudence does provide some guidance on this subject. Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan*, *supra*; *Smith*, *supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins*, *supra*; *U. (F.J.)*, *supra*; *B. (K.G.)*, *supra*).

. . .

At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability. [Underlining added.]

The Court's statement that "[t]hreshold reliability is concerned not with whether the statement is true or not" has created some uncertainty. While it is clear that the trial judge does not determine whether the statement will ultimately be relied upon as true, it is not so clear that in every case threshold reliability is *not* concerned with whether the statement is true or not. Indeed, in *U. (F.J.)*, the rationale for admitting the complainant's hearsay statement was based on the fact that "the only likely explanation" for its striking similarity with the independent statement of the accused was that "they were both telling the truth" (para. 40).

Hawkins, précité, à la p. 1084. Là encore, il ne convient pas, dans les circonstances du présent pourvoi, de fournir une liste détaillée des facteurs qui peuvent influer sur le seuil de fiabilité. Toutefois, notre jurisprudence est utile dans une certaine mesure à ce sujet. Le seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non; c'est une question de fiabilité absolue. Il concerne plutôt la question de savoir si les circonstances ayant entouré la déclaration elle-même offrent des garanties *circonstancielles* de fiabilité. Ces garanties pourraient découler du fait que le déclarant n'avait aucune raison de mentir (voir *Khan* et *Smith*, précités) ou du fait qu'il y avait des mesures de protection qui permettaient de déceler les mensonges (voir *Hawkins*, *U. (F.J.)* et *B. (K.G.)*, précités).

. . .

À l'étape de l'admissibilité de la preuve par ouï-dire, le juge du procès ne devrait pas tenir compte de la réputation générale de sincérité du déclarant, ni d'aucune déclaration antérieure ou ultérieure, compatible ou incompatible. Ces facteurs n'ont pas trait aux circonstances de la déclaration elle-même. De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). En résumé, en vertu de la méthode fondée sur des principes, le tribunal ne doit pas empiéter sur la compétence du juge des faits ni subordonner l'admissibilité de la preuve par ouï-dire à la question de savoir si la preuve est absolument fiable. Il devra cependant examiner si les circonstances ayant entouré la déclaration confèrent suffisamment de crédibilité pour pouvoir conclure que le seuil de fiabilité est atteint. [Je souligne.]

52

L'affirmation de la Cour selon laquelle « [l]e seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non » a créé une certaine incertitude. Même s'il est évident que le juge du procès ne décide pas si la déclaration sera tenue pour véridique en définitive, il n'est pas aussi évident que, dans toute affaire, le seuil de fiabilité *ne* concerne *pas* la question de savoir si la déclaration est véridique ou non. En fait, dans l'arrêt *U. (F.J.)*, on a justifié l'admission de la déclaration relatée de la plaignante par le fait que « la seule explication probable » de la similitude frappante entre cette déclaration et la déclaration faite de façon indépendante par l'accusé était que « tous les deux disaient la vérité » (par. 40).

53 Further, it is not easy to discern what is or is not a circumstance "surrounding the statement itself". For example, in *Smith*, the fact that the deceased may have had a motive to lie was considered by the Court in determining threshold admissibility. As both Rosenberg J.A. and Blair J.A. point out in their respective reasons, "in determining whether the declarant had a motive to lie, the judge will necessarily be driven to consider factors outside the statement itself or the immediately surrounding circumstances" (para. 97).

54 Much of the confusion in this area of the law has arisen from this attempt to categorically label some factors as going only to ultimate reliability. The bar against considering "corroborating or conflicting evidence", because it is only relevant to the question of ultimate reliability, is a further example. Quite clearly, the corroborative nature of the semen stain in *Khan* played an important part in establishing the threshold reliability of the child's hearsay statement in that case.

55 This part of the analysis in *Starr* therefore requires clarification and, in some respects, reconsideration. I will explain how the relevant factors to be considered on an admissibility inquiry cannot invariably be categorized as relating either to threshold or ultimate reliability. Rather, the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and the available means, if any, of overcoming them. I will then return to the impugned passage in *Starr*, dealing more specifically with the question of supporting evidence since that reference appears to have raised the most controversy.

6.2 *Identifying the Relevant Factors: A Functional Approach*

6.2.1 Recognizing Hearsay

56 The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This

De plus, il n'est pas facile de discerner ce qui est et ce qui n'est pas une circonstance « ayant entouré la déclaration elle-même ». Par exemple, lorsqu'elle s'est prononcée sur le seuil d'admissibilité dans l'affaire *Smith*, la Cour a tenu compte du fait que la victime pouvait avoir eu une raison de mentir. Comme l'ont souligné les juges Rosenberg et Blair dans leurs motifs respectifs, [TRADUCTION] « pour décider si le déclarant avait une raison de mentir, le juge sera nécessairement amené à considérer des facteurs extérieurs à la déclaration elle-même ou aux circonstances immédiates qui l'ont entourée » (par. 97).

La confusion qui règne dans ce domaine du droit tient en grande partie à cette tentative de classer certains facteurs comme touchant uniquement la fiabilité en dernière analyse. Un autre exemple est l'interdiction de tenir compte d'une « preuve corroborante ou contradictoire » parce qu'elle n'est pertinente qu'en ce qui concerne la question de la fiabilité en dernière analyse. De toute évidence, la nature corroborante de la tache de sperme, dans l'affaire *Khan*, a joué un rôle important dans l'établissement du seuil de fiabilité de la déclaration relatée de l'enfant.

Cette partie de l'analyse de l'arrêt *Starr* a donc besoin d'être clarifiée et, à certains égards, d'être reconsidérée. J'expliquerai comment les facteurs à considérer lors de l'examen de l'admissibilité ne peuvent pas toujours être classés comme ayant trait soit au seuil de fiabilité, soit à la fiabilité en dernière analyse. La pertinence d'un facteur dépendra plutôt des dangers particuliers découlant du fait que la déclaration constitue du ouï-dire, et des moyens possibles, s'il en est, de les écarter. Je reviendrai ensuite au passage contesté de l'arrêt *Starr*, en m'attardant plus précisément à la question de la preuve à l'appui étant donné que cette mention paraît avoir soulevé le plus de controverse.

6.2 *Détermination des facteurs pertinents : une approche fonctionnelle*

6.2.1 Reconnaissance du ouï-dire

La première question à trancher avant de procéder à l'examen de l'admissibilité d'une preuve par ouï-dire est bien sûr celle de savoir si la preuve

may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents *and* (2) there is no opportunity for a contemporaneous cross-examination of the declarant.

Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci J. in *Starr* identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

6.2.2 Presumptive Inadmissibility of Hearsay Evidence

Once the proposed evidence is identified as hearsay, it is presumptively *inadmissible*. I stress the

proposée constitue du ouï-dire. Cela peut paraître assez évident, mais c'est une première étape importante. Les objections malencontreuses à l'admissibilité d'une déclaration extrajudiciaire, qui tiennent à une méprise sur ce qui constitue du ouï-dire, ne sont pas rares. Comme nous l'avons vu, les déclarations extrajudiciaires ne constituent pas toutes du ouï-dire. Rappelons-nous les caractéristiques déterminantes du ouï-dire. Une déclaration extrajudiciaire constituera du ouï-dire, premièrement, si elle est présentée pour établir la véracité de son contenu *et*, deuxièmement, s'il y a impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration.

57 S'arrêter au départ aux caractéristiques déterminantes du ouï-dire permet de mieux orienter l'examen de l'admissibilité. Comme nous l'avons vu, la première caractéristique particulière du ouï-dire oblige à examiner le but dans lequel la preuve est présentée. Ce n'est que si elle est présentée pour établir la véracité de son contenu que la preuve constitue du ouï-dire. Le fait que la déclaration extrajudiciaire soit présentée pour établir la *véracité* de son contenu devrait être examiné dans le contexte des questions en litige afin que le tribunal soit mieux en mesure d'évaluer l'effet potentiel de la présentation de cette preuve relatée.

58 Deuxièmement, si on s'arrête au départ à la seconde caractéristique déterminante du ouï-dire, soit l'impossibilité de contre-interroger le déclarant au moment précis où il fait sa déclaration, l'examen de l'admissibilité porte aussitôt sur les dangers d'admettre la preuve par ouï-dire. Dans l'arrêt *Starr*, le juge Iacobucci a décrit l'impossibilité de vérifier la preuve comme étant la « préoccupation majeure » qui sous-tend la règle du ouï-dire. Dans l'arrêt *U. (F.J.)*, le juge en chef Lamer a exprimé le même point de vue, mais plus directement en ces termes : « Le ouï-dire n'est pas admissible comme preuve parce que sa fiabilité ne peut être vérifiée » (par. 22).

6.2.2 La présomption d'inadmissibilité de la preuve par ouï-dire

59 Dès que la preuve proposée est désignée comme étant du ouï-dire, elle est présumée

nature of the hearsay rule as a general exclusionary rule because the increased flexibility introduced in the Canadian law of evidence in the past few decades has sometimes tended to blur the distinction between admissibility and weight. Modifications have been made to a number of rules, including the rule against hearsay, to bring them up to date and to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process. However, the traditional rules of evidence reflect considerable wisdom and judicial experience. The modern approach has built upon their underlying rationale, not discarded it. In *Starr* itself, where this Court recognized the primacy of the principled approach to hearsay exceptions, the presumptive exclusion of hearsay evidence was reaffirmed in strong terms. Iacobucci J. stated as follows (at para. 199):

> By excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system.

6.2.3 Traditional Exceptions

60 The Court in *Starr* also reaffirmed the continuing relevance of the traditional exceptions to the hearsay rule. More recently, this Court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework, as noted in para. 42 above. Therefore, if the trial judge determines that the evidence falls within one of the traditional common law exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions.

6.2.4 Principled Approach: Overcoming the Hearsay Dangers

61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under

inadmissible. J'insiste sur le fait que la règle du ouï-dire est par nature une règle d'exclusion générale, car l'assouplissement accru du droit canadien de la preuve au cours des dernières décennies a parfois eu tendance à estomper la distinction entre admissibilité et valeur probante. Des modifications ont été apportées à un certain nombre de règles — dont la règle interdisant le ouï-dire — afin de les mettre à jour et d'assurer qu'elles favorisent la réalisation des objectifs de recherche de la vérité, d'efficacité du système judiciaire et d'équité du processus accusatoire, au lieu de l'entraver. Toutefois, les règles de preuve traditionnelles témoignent d'une sagesse et d'une expérience judiciaire considérables. L'approche moderne a consolidé, et non écarté, leur raison d'être fondamentale. Dans l'arrêt *Starr* lui-même, où notre Cour a reconnu la primauté de la méthode d'analyse raisonnée des exceptions à la règle du ouï-dire, la présomption d'exclusion de la preuve par ouï-dire a été réaffirmée de manière non équivoque. Le juge Iacobucci s'est ainsi exprimé (par. 199) :

> En écartant les éléments de preuve susceptibles de donner lieu à des verdicts inéquitables et en assurant que les parties aient généralement la possibilité de confronter des témoins opposés, la règle du ouï-dire est une pierre angulaire d'un système de justice équitable.

6.2.3 Les exceptions traditionnelles

Dans l'arrêt *Starr*, la Cour a aussi réaffirmé que les exceptions traditionnelles à la règle du ouï-dire sont toujours pertinentes. Plus récemment, dans l'arrêt *Mapara*, notre Cour a confirmé le maintien des exceptions traditionnelles en établissant le cadre d'analyse applicable, exposé plus haut au par. 42. Par conséquent, si le juge du procès conclut que la preuve relève de l'une des exceptions de common law traditionnelles, cette conclusion est définitive et la preuve est jugée admissible sauf si, dans de rares cas, l'exception elle-même est contestée, comme le précisent ces deux arrêts.

6.2.4 La méthode d'analyse raisonnée : écarter les dangers du ouï-dire

Étant donné que la préoccupation majeure sous-jacente est l'impossibilité de vérifier la preuve par

the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways: see, for example, *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); D. M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, at p. 29.

ouï-dire, il s'ensuit que, selon la méthode d'analyse raisonnée, l'exigence de fiabilité vise à déterminer les cas où cette difficulté est suffisamment surmontée pour justifier l'admission de la preuve à titre d'exception à la règle d'exclusion générale. Comme certains tribunaux et commentateurs ont pris soin de le souligner, il y a deux manières de satisfaire à l'exigence de fiabilité : voir, par exemple, *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199 (C.A. Ont.); D. M. Paciocco, « The Hearsay Exceptions : A Game of "Rock, Paper, Scissors" », dans *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence* (2004), 17, p. 29.

One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

62 Une manière consiste à démonter qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite. Le bon sens veut que, si on peut avoir suffisamment confiance en la véracité et l'exactitude de la déclaration, le juge des faits devrait en tenir compte indépendamment du fait qu'elle est relatée. À cet égard, Wigmore a donné l'explication suivante :

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [§ 1420, p. 154]

> [TRADUCTION] Dans de nombreux cas, on peut facilement voir qu'une telle épreuve requise [c'est-à-dire le contre-interrogatoire] ajouterait peu comme garantie parce que ses objets ont en grande partie déjà été atteints. Si une déclaration a été faite dans des circonstances où même un sceptique prudent la considérerait comme très probablement fiable (en temps normal), il serait trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint. [§ 1420, p. 154]

Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues must be resolved. It is one thing for a person to make a damaging

63 Une autre manière de satisfaire à l'exigence de fiabilité consiste à démontrer que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées. Rappelons-nous que, dans notre système accusatoire, la meilleure façon de vérifier la preuve est de faire témoigner le déclarant sous serment devant le tribunal, tout en lui faisant subir un contre-interrogatoire minutieux. Cette méthode privilégiée n'est pas seulement un vestige de traditions passées. Elle demeure une méthode éprouvée et fiable, particulièrement

statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

lorsqu'il faut résoudre des questions de crédibilité. C'est une chose de faire une déclaration préjudiciable à propos d'autrui dans un contexte où il se peut que cette déclaration n'ait pas vraiment d'importance; c'est une toute autre chose que le déclarant répète sa déclaration dans le cadre de procédures formelles où il doit en garantir la véracité et l'exactitude, être observé et entendu, et être appelé à l'expliquer ou à la défendre. Cette dernière situation, en plus de fournir un compte rendu exact de ce qu'a réellement dit le témoin, nous rassure beaucoup plus quant à la fiabilité de la déclaration. Toutefois, dans certains cas, il n'est pas possible de vérifier la preuve de la meilleure façon, mais les circonstances sont telles que le juge des faits sera néanmoins en mesure d'en vérifier suffisamment la véracité et l'exactitude. Là encore, le bon sens nous indique qu'il ne faudrait pas perdre l'avantage de cette preuve lorsqu'il existe d'autres façons adéquates de la vérifier.

64 These two principal ways of satisfying the reliability requirement can also be discerned in respect of the traditional exceptions to the hearsay rule. Iacobucci J. notes this distinction in *Starr*, stating as follows:

> For example, testimony in former proceedings is admitted, at least in part, because many of the traditional dangers associated with hearsay are not present. As pointed out in Sopinka, Lederman and Bryant, *supra*, at pp. 278-79:
>
> > . . . a statement which was earlier made under oath, subjected to cross-examination and admitted as testimony at a former proceeding is received in a subsequent trial *because the dangers underlying hearsay evidence are absent*.
>
> Other exceptions are based not on negating traditional hearsay dangers, but on the fact that the statement provides circumstantial guarantees of reliability. This approach is embodied in recognized exceptions such as dying declarations, spontaneous utterances, and statements against pecuniary interest. [Emphasis added by Iacobucci J.; para. 212.]

Il est également possible de distinguer ces deux principales façons de satisfaire à l'exigence de fiabilité dans le cas des exceptions traditionnelles à la règle du ouï-dire. Le juge Iacobucci note ainsi cette distinction dans l'arrêt *Starr* :

> Par exemple, le témoignage fait dans le cadre d'une instance antérieure est admis, du moins en partie, parce que bien des dangers qui se rattachent traditionnellement à la preuve par ouï-dire ne se posent pas. Comme il a été souligné dans Sopinka, Lederman et Bryant, *op. cit.*, aux pp. 278 et 279 :
>
> > [TRADUCTION] . . . une déclaration qui a été faite antérieurement sous la foi du serment, qui a fait l'objet d'un contre-interrogatoire et qui a été admise en tant que preuve testimoniale lors d'une instance antérieure est admise lors d'un procès ultérieur *parce que les dangers que comporte la preuve par ouï-dire ne se posent pas*.
>
> D'autres exceptions sont fondées non pas sur la suppression des dangers traditionnels de la preuve par ouï-dire, mais sur le fait que la déclaration offre des garanties circonstancielles de fiabilité. Cette méthode se retrouve dans des exceptions reconnues comme les déclarations de mourants, les déclarations spontanées et les déclarations au détriment des intérêts financiers de leur auteur. [Souligné par le juge Iacobucci; par. 212.]

65 Some of the traditional exceptions stand on a different footing, such as admissions from parties

Certaines exceptions traditionnelles ont une assise différente, tels les aveux de parties

(confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

Khan is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. Similarly in *Smith*, the focus of the admissibility inquiry was also on those circumstances that tended to show that the statement was true. On the other hand, the admissibility of the hearsay statement in *B. (K.G.)* and *Hawkins* was based on the presence of adequate substitutes for testing the evidence. As we shall see, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes. In *U. (F.J.)*, the Court considered both those circumstances tending to show that the statement was true and the presence of adequate substitutes for testing the evidence. *U. (F.J.)* underscores the heightened concern over reliability in the case of prior inconsistent statements where the trier of fact is invited to accept an out-of-court statement over the sworn testimony from the same declarant. I will briefly review how the analysis of the Court in each of those cases was focussed on overcoming the particular hearsay dangers raised by the evidence.

6.2.4.1 *R. v. Khan, [1990] 2 S.C.R. 531*

As stated earlier, *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about

(confessions en matière criminelle) et les déclarations de coconspirateurs : voir l'arrêt *Mapara*, par. 21. Dans ces cas, les préoccupations relatives à la fiabilité tiennent à des considérations autres que l'incapacité de la partie en question de vérifier l'exactitude de sa propre déclaration ou de celles de ses coconspirateurs. Partant, les critères d'admissibilité ne sont pas établis de la même façon. Toutefois, dans les cas où la règle d'exclusion repose sur les dangers habituels du ouï-dire, la distinction entre les deux principales façons de satisfaire à l'exigence de fiabilité — bien qu'elle ne crée aucunement des catégories mutuellement exclusives — peut aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité.

66 L'affaire *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. De même, dans l'affaire *Smith*, l'examen de l'admissibilité était aussi axé sur les circonstances qui tendaient à démontrer la véracité de la déclaration. Par contre, dans les affaires *B. (K.G.)* et *Hawkins*, l'admissibilité de la déclaration relatée reposait sur l'existence d'autres moyens adéquats de vérifier la preuve. Comme nous le verrons, la possibilité de contre-interroger le déclarant permet dans une large mesure de satisfaire à l'exigence de substituts adéquats. Dans l'arrêt *U. (F.J.)*, la Cour a pris en considération tant les circonstances tendant à démontrer la véracité de la déclaration que l'existence d'autres moyens adéquats de vérifier la preuve. L'arrêt *U. (F.J.)* souligne que la préoccupation relative à la fiabilité augmente dans le cas de déclarations antérieures incompatibles, où le juge des faits est invité à retenir une déclaration extrajudiciaire au lieu du témoignage sous serment du même déclarant. J'examinerai brièvement comment, dans chacune de ces affaires, l'analyse de la Cour était axée sur la possibilité d'écarter les dangers particuliers du ouï-dire soulevés par la preuve.

6.2.4.1 *R. c. Khan, [1990] 2 R.C.S. 531*

67 Comme je l'ai déjà dit, l'arrêt *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait

provided sufficient comfort in its truth and accuracy. The facts are well known. *Khan* involved a sexual assault on a very young child by her doctor. The child was incompetent to testify. The child's statements to her mother about the incident were inadmissible under any of the traditional hearsay exceptions. However, the child's statement had several characteristics that suggested the statement was true. Those characteristics answered many of the concerns that one would expect would be inquired into in testing the evidence, had it been available for presentation in open court in the usual way. McLachlin J., in the following oft-quoted statement, summarized them in this way:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. [p. 548]

The facts also revealed that the statement was made almost immediately after the event. That feature removed any concern about inaccurate memory. The fact that the child had no reason to lie alleviated the concern about sincerity. Because the statement was made naturally and without prompting, there was no real danger that it came about because of the mother's influence. Most importantly, as stated in the above excerpt, the event described was one that would ordinarily be outside the experience of a child of her age giving it a "peculiar stamp of reliability". Finally, the statement was confirmed by a semen stain on the child's clothing. These characteristics each went to the truth and accuracy of the statement and, taken together, amply justified its admission. The criterion of reliability was met. There is nothing controversial about the factors considered in *Khan*, except for the supportive evidence of the semen stain. I will come back to that point later.

été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. Les faits sont bien connus. Il y était question d'une agression sexuelle commise par un médecin sur une très jeune enfant. L'enfant était inhabile à témoigner. Les déclarations que l'enfant avait faites à sa mère au sujet de l'épisode n'étaient pas admissibles en application des exceptions traditionnelles à la règle du ouï-dire. Toutefois, la déclaration de l'enfant présentait plusieurs caractéristiques qui donnaient à penser que la déclaration était véridique. Ces caractéristiques répondaient à de nombreuses préoccupations qui auraient été censées être examinées à l'étape de la vérification de la preuve si celle-ci avait pu être présentée en cour de la façon habituelle. La juge McLachlin les a ainsi résumées dans un énoncé souvent cité :

> Je conclus qu'en l'espèce la déclaration de la mère aurait dû être reçue en preuve. Elle était nécessaire puisque le témoignage de vive voix de l'enfant avait été rejeté. Elle était également fiable. L'enfant n'avait aucune raison d'inventer son histoire qu'elle a racontée naturellement sans être incitée à le faire. En outre, le fait qu'on ne pouvait s'attendre à ce que l'enfant connaisse ce genre d'acte sexuel confère à sa déclaration une fiabilité toute particulière. Enfin, sa déclaration a été corroborée par une preuve matérielle. [p. 548]

Les faits révélaient aussi que la déclaration avait suivi presque immédiatement les faits reprochés. Cette caractéristique écartait toute crainte de souvenir inexact. Le fait que l'enfant n'avait aucune raison de mentir atténuait la préoccupation relative à la sincérité. Puisque la déclaration avait été faite naturellement et sans avoir été provoquée, il n'y avait pas de véritable danger qu'elle ait été faite sous l'influence de la mère. Qui plus est, comme l'indique la citation précédente, les faits décrits dépassaient l'expérience normale d'une enfant de son âge, ce qui conférait à la déclaration une « fiabilité toute particulière ». Enfin, la déclaration était confirmée par la présence d'une tache de sperme sur les vêtements de l'enfant. Chacune de ces caractéristiques touchait la véracité et l'exactitude de la déclaration et, ensemble, elles justifiaient amplement son admission. Le critère de fiabilité était rempli. À l'exception de la preuve à l'appui constituée de la tache de sperme, les facteurs considérés dans l'affaire *Khan* n'avaient rien de controversé. Je reviendrai plus loin sur cette question.

6.2.4.2 *R. v. Smith, [1992] 2 S.C.R. 915*

In *Smith*, this Court's inquiry into the circumstantial guarantees of reliability was also focussed on those circumstances that tended to show that the statement was true.

Smith was charged with the murder of K. The Crown's evidence included the testimony of K's mother about four telephone calls K made to her on the night of the murder. Defence counsel did not object to this evidence. Smith was convicted at trial. The Court of Appeal allowed the appeal and ordered a new trial on the ground that the phone calls were hearsay, and only the first two were admissible for the purpose of establishing K's state of mind. In refusing to apply the curative proviso, the Court of Appeal found that the hearsay had been used to place Smith with K at the time of her death, thereby "buttressing certain identification evidence of questionable reliability" (pp. 922-23). The Crown appealed to this Court.

After ruling that the state of mind, or "present intentions" exception did not apply to the phone calls, Lamer C.J. went on to elaborate on and then apply the approach outlined in *Khan*. After quoting extensively from Wigmore on the underlying rationale for the hearsay rule and its exceptions, he elaborated on the reliability prong of the principled analysis and stated as follows (at p. 933):

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. [Emphasis added.]

In determining whether the phone calls were reliable, Lamer C.J. held that the first two were, but the third was not (the fourth was not in issue on appeal to this Court). With respect to the first two, there was no reason to doubt K's veracity — "[s]he had no known reason to lie" — and the traditional dangers associated with hearsay — perception, memory and

6.2.4.2 *R. c. Smith, [1992] 2 R.C.S. 915*

68 Dans l'arrêt *Smith*, l'examen des garanties circonstancielles de fiabilité effectué par notre Cour était axé également sur les circonstances tendant à démontrer la véracité de la déclaration.

69 M. Smith était accusé du meurtre de K. La preuve du ministère public incluait le témoignage de la mère de K au sujet de quatre appels téléphoniques que K lui avait faits la nuit du meurtre. L'avocat de la défense ne s'est pas opposé à la présentation de cette preuve. M. Smith a été déclaré coupable en première instance. La Cour d'appel a accueilli l'appel et ordonné la tenue d'un nouveau procès pour le motif que les appels téléphoniques constituaient du ouï-dire et que seuls les deux premiers appels étaient admissibles pour établir l'état d'esprit de K. En refusant d'appliquer la disposition réparatrice, la Cour d'appel a conclu que le ouï-dire avait servi à établir que K était avec M. Smith au moment de son décès, ce qui avait eu pour effet « de renforcer une certaine preuve d'identification d'une fiabilité douteuse » (p. 922-923). Le ministère public s'est pourvu devant notre Cour.

70 Après avoir décidé que l'exception de l'état d'esprit ou des « intentions existantes » ne s'appliquait pas aux appels téléphoniques, le juge en chef Lamer a explicité puis appliqué la méthode exposée dans l'arrêt *Khan*. Après avoir cité longuement Wigmore au sujet de la raison d'être de la règle du ouï-dire et de ses exceptions, il s'est attardé au volet « fiabilité » de la méthode d'analyse raisonnée et a déclaré ce qui suit (p. 933) :

> Si une déclaration qu'on veut présenter par voie de preuve par ouï-dire a été faite dans des circonstances qui écartent considérablement la possibilité que le déclarant ait menti ou commis une erreur, on peut dire que la preuve est « fiable », c'est-à-dire qu'il y a une garantie circonstancielle de fiabilité. [Je souligne.]

71 Au sujet de la fiabilité des appels téléphoniques, le juge en chef Lamer a décidé que les deux premiers appels étaient fiables, mais que le troisième ne l'était pas (le quatrième n'étant pas en cause devant notre Cour). Dans le cas des deux premiers appels, il n'y avait aucune raison de douter de la véracité des propos de K — « [e]lle n'avait aucune raison connue

credibility — "were not present to any significant degree" (p. 935). As we can see, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and found that these usual concerns were largely alleviated because of the way in which the statements came about. Hence, the Court concluded that the absence of the ability to cross-examine K should go to the weight given to this evidence, not its admissibility.

de mentir » — et les dangers traditionnellement associés au ouï-dire, à savoir les problèmes de perception, de mémoire et de crédibilité, « étaient dans une large mesure inexistants » (p. 935). Comme nous pouvons le constater, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces préoccupations habituelles étaient grandement atténuées en raison de la façon dont les déclarations avaient été faites. La Cour a donc conclu que l'incapacité de contre-interroger K devait influer sur le poids accordé à cette preuve et non sur son admissibilité.

72 With respect to the third phone call, however, Lamer C.J. held that "the conditions under which the statement was made do not . . . provide that circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination" (p. 935). First, he held that she may have been mistaken about Smith returning to the hotel, or about his purpose in returning (p. 936). Second, he held that she might have lied to prevent her mother from sending another man to pick her up. With respect to this second possibility, Lamer C.J. held that the fact that K had been travelling under an assumed name with a credit card which she knew was either stolen or forged demonstrated that she was "at least capable of deceit" (p. 936). Again, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and concluded that these "hypotheses" showed that the circumstances of the statement were not such as to "justify the admission of its contents" since it was impossible to say that the evidence was unlikely to change under cross-examination (p. 937). It is important to note that the Court did not go on to determine whether, on its view of the evidence, the declarant was mistaken or whether she had lied — those would be matters for the ultimate trier of fact to decide. On the admissibility inquiry, it sufficed that the circumstances in which the statement was made gave rise to these issues to bar its admission.

Toutefois, en ce qui a trait au troisième appel téléphonique, le juge en chef Lamer a statué que « les conditions dans lesquelles la déclaration a été faite ne fournissent pas la garantie circonstancielle de fiabilité qui justifierait son admission sans possibilité de contre-interroger » (p. 935). Premièrement, il a conclu que K a pu se tromper quant au retour de M. Smith à l'hôtel ou quant à la raison de son retour (p. 936). Deuxièmement, il a décidé qu'elle pouvait avoir menti pour empêcher sa mère d'envoyer un autre homme la chercher. Quant à cette seconde possibilité, le juge en chef Lamer a estimé que le fait que K voyageait sous un nom d'emprunt en utilisant une carte de crédit qu'elle savait volée ou contrefaite démontrait qu'elle était « à tout le moins capable de tromper » (p. 936). Là encore, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces « hypothèses » démontraient que les circonstances dans lesquelles la déclaration avait été faite n'étaient pas de nature à « justifie[r] l'admission de son contenu » puisqu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire (p. 937). Il importe de noter que la Cour n'a pas ensuite décidé si, selon sa perception de la preuve, la déclarante était dans l'erreur ou avait menti — ce sont là des questions qui devaient être tranchées en fin de compte par le juge des faits. Lors de l'examen de l'admissibilité, il suffisait que les circonstances dans lesquelles la déclaration avait été faite aient soulevé ces questions pour en empêcher l'admission.

6.2.4.3 *R. v. B. (K.G.), [1993] 1 S.C.R. 740*

B. (K.G.) provides an example where threshold reliability was essentially based on the presence of adequate substitutes for the traditional safeguards relied upon to test the evidence.

The issue in *B. (K.G.)* was the substantive admissibility of prior inconsistent statements made by three of B's friends, in which they told the police that B was responsible for stabbing and killing the victim in the course of a fight. The three recanted their statements at trial. (They subsequently plead guilty to perjury.) The Crown sought to admit the prior statements to police for the truth of their contents. Although the trial judge had no doubt the recantations were false, he followed the traditional common law ("orthodox") rule that the statements could be used only to impeach the witnesses. In light of the doubtfulness of the other identification evidence, the trial judge acquitted B.

The issue before this Court was whether the orthodox rule in respect of prior inconsistent statements should be maintained. In reviewing its history, Lamer C.J. noted that, although the prohibition on hearsay was not always recognized as the basis for the rule, similar "dangers" were cited as reasons against admission, namely absence of an oath or affirmation, inability of the trier of fact to assess demeanour, and lack of contemporaneous cross-examination (pp. 763-64). After reviewing the academic criticism, the views of law reform commissioners, legislative changes in Canada and elsewhere, and developments in the law of hearsay, Lamer C.J. concluded that it was the province and duty of the Court to formulate a new rule (p. 777). He held that "evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in *Khan* and *Smith*" with the requirements of reliability and necessity "adapted and refined in this

6.2.4.3 *R. c. B. (K.G.), [1993] 1 R.C.S. 740*

73 L'arrêt *B. (K.G.)* est un exemple où le seuil de fiabilité reposait essentiellement sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve.

74 La question litigieuse dans l'arrêt *B. (K.G.)* portait sur l'admissibilité quant au fond de déclarations antérieures incompatibles de trois amis de B, dans lesquelles ceux-ci avaient dit à la police que B avait poignardé à mort la victime au cours d'une bagarre. Les trois sont revenus sur leurs déclarations au procès. (Ils ont, par la suite, plaidé coupable à des accusations de parjure.) Le ministère public sollicitait l'admission des déclarations antérieures faites à la police pour établir la véracité de leur contenu. Bien qu'il n'ait aucunement douté de la fausseté des rétractations, le juge du procès a suivi la règle de common law traditionnelle (« orthodoxe ») selon laquelle les déclarations ne pouvaient servir qu'à attaquer la crédibilité des témoins. Vu le caractère douteux des autres éléments de preuve d'identification, le juge du procès a acquitté B.

75 La question soumise à notre Cour était de savoir s'il y avait lieu de maintenir l'application de la règle orthodoxe à l'égard des déclarations antérieures incompatibles. En faisant l'historique, le juge en chef Lamer a constaté que, bien que l'interdiction du ouï-dire n'ait pas toujours été reconnue comme étant le fondement de la règle, des « dangers » semblables avaient été évoqués pour interdire l'admission d'une déclaration, à savoir l'absence de serment ou d'affirmation solennelle, l'incapacité du juge des faits d'apprécier le comportement et l'absence de contre-interrogatoire au moment précis où la déclaration avait été faite (p. 763-764). Après avoir examiné les critiques d'auteurs de doctrine, les opinions de membres de commissions de réforme du droit, les changements apportés par le législateur au Canada et ailleurs, ainsi que l'évolution de la règle du ouï-dire, le juge en chef Lamer a conclu qu'il était du ressort et du devoir de la Cour de formuler une nouvelle règle (p. 777). Il a estimé que « la preuve des déclarations antérieures incompatibles

particular context, given the particular problems raised by the nature of such statements" (p. 783).

76 The most important contextual factor in *B. (K.G.)* is the availability of the declarant. Unlike the situation in *Khan* or *Smith*, the trier of fact is in a much better position to assess the reliability of the evidence because the declarant is available to be cross-examined on his or her prior inconsistent statement. The admissibility inquiry into threshold reliability, therefore, is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence. The search is for adequate substitutes for the process that would have been available had the evidence been presented in the usual way, namely through the witness, under oath or affirmation, and subject to the scrutiny of contemporaneous cross-examination.

77 Since the declarant testifies in court, under oath or affirmation, and is available for cross-examination, the question becomes why there is any remaining concern over the reliability of the prior statement. As I have indicated earlier, necessity and reliability should not be considered in isolation. One criterion may have an impact on the other. The situation in *B. (K.G.)* is one example. As noted by Lamer C.J., "[p]rior inconsistent statements present vexing problems for the necessity criterion" (p. 796). Indeed, the declarant is available as a witness. Why should not the usual rule apply and the recanting witness's sworn testimony alone go to the truth of the matter? After all, is that not the optimal test on reliability — that the witness come forth to be seen and heard, swear or affirm to tell the truth in the formal context of court proceedings, and be subjected to

d'un témoin, autre que l'accusé, doit être admissible quant au fond, d'après l'analyse fondée sur les principes élaborée dans les arrêts de notre Cour, *Khan* et *Smith* », et que les exigences de fiabilité et de nécessité « doivent être adapté[e]s et raffiné[e]s dans le contexte présent, vu les problèmes particuliers soulevés par la nature de ces déclarations » (p. 783).

Le facteur contextuel le plus important dans l'arrêt *B. (K.G.)* est la disponibilité du déclarant. Contrairement à la situation dans l'affaire *Khan* ou l'affaire *Smith*, le juge des faits est beaucoup mieux en mesure d'apprécier la fiabilité de la preuve parce que le déclarant est disponible pour être contre-interrogé au sujet de sa déclaration antérieure incompatible. Par conséquent, l'examen du seuil de fiabilité applicable en matière d'admissibilité ne porte pas tant sur la question de savoir s'il y a un motif de croire que la déclaration est véridique que sur celle de savoir si le juge des faits sera en mesure d'apprécier rationnellement la preuve. Il faut chercher des substituts adéquats au processus qui aurait été disponible si la preuve avait été présentée de la façon habituelle, à savoir par l'entremise du témoin qui vient déposer sous la foi du serment ou d'une affirmation solennelle et qui subit un contre-interrogatoire au moment précis où la déclaration est faite.

Étant donné que le déclarant témoigne en cour sous la foi du serment ou d'une affirmation solennelle et qu'il est possible de le contre-interroger, la question est alors de savoir pourquoi se préoccupe-t-on encore de la fiabilité de la déclaration antérieure. Comme je l'ai indiqué précédemment, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. La situation dans l'affaire *B. (K.G.)* en est un exemple. Comme l'a fait remarquer le juge en chef Lamer, « [l]es déclarations antérieures incompatibles posent des problèmes embarrassants par rapport au critère de la nécessité » (p. 796). En fait, le déclarant est disponible pour témoigner. Pourquoi la règle habituelle ne devrait-elle pas s'appliquer, et pourquoi le témoignage sous serment du témoin qui se rétracte ne devrait-il pas seul permettre de découvrir la vérité? Après

cross-examination? If a witness recants a prior statement and denies its truth, the default position is to conclude that the trial process has worked as intended — untruthful or inaccurate information will have been weeded out. There must be good reason to present the prior inconsistent statement as substantive proof over the sworn testimony given in court.

tout, n'est-ce pas là le critère optimal en matière de fiabilité — à savoir que le témoin se présente pour être vu et entendu, pour promettre, sous la foi du serment ou d'une affirmation solennelle, de dire la vérité dans le cadre formel de procédures judiciaires, et pour faire l'objet d'un contre-interrogatoire? Si un témoin revient sur une déclaration antérieure et en nie la véracité, la solution par défaut consiste à conclure que le procès a eu les résultats escomptés : les renseignements faux ou inexacts ont été éliminés. Il doit y avoir une bonne raison de présenter la déclaration antérieure incompatible comme preuve quant au fond de préférence au témoignage sous serment devant le tribunal.

78

As we know, the Court ultimately ruled in *B. (K.G.)*, and the principle is now well established, that necessity is not to be equated with the unavailability of the witness. The necessity criterion is given a flexible definition. In some cases, such as in *B. (K.G.)* where a witness recants an earlier statement, necessity is based on the unavailability of the *testimony*, not the witness. Notwithstanding the fact that the necessity criterion can be met on varied bases, the context giving rise to the need for the evidence in its hearsay form may well impact on the *degree* of reliability required to justify its admission. As stated by Lamer C.J. in *B. (K.G.)*, where the hearsay evidence is a prior inconsistent statement, reliability is a "key concern" (at pp. 786-87):

Comme nous le savons, dans l'arrêt *B. (K.G.)*, la Cour a statué en fin de compte — et ce principe est maintenant bien établi — que la nécessité ne saurait être assimilée à la non-disponibilité du témoin. Le critère de la nécessité reçoit une définition souple. Dans certains cas, comme dans l'affaire *B. (K.G.)* où un témoin revient sur une déclaration antérieure, la nécessité tient à la non-disponibilité du *témoignage* et non du témoin. Malgré le fait qu'il peut être satisfait de diverses manières au critère de la nécessité, le contexte qui engendre la nécessité de la preuve par ouï-dire peut bien avoir une incidence sur le *degré* de fiabilité exigé pour en justifier l'admission. Comme l'a dit le juge en chef Lamer dans l'arrêt *B. (K.G.)*, lorsque la preuve par ouï-dire est une déclaration antérieure incompatible, la fiabilité est une « préoccupation fondamentale » (p. 787) :

> The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.

> Cette préoccupation s'accentue dans le cas des déclarations antérieures incompatibles parce que le juge des faits doit choisir entre deux déclarations faites par le même témoin, par opposition aux autres formes de ouï-dire dans lesquelles une seule version des faits est présentée. Autrement dit, dans le cas des déclarations antérieures incompatibles, l'examen est axé sur la fiabilité relative de la déclaration antérieure et du témoignage entendu au procès, de sorte que des indices et garanties de fiabilité autres que ceux énoncés dans les arrêts *Khan* et *Smith* doivent être prévus afin que la déclaration antérieure soit soumise à une norme de fiabilité comparable avant que les déclarations de ce genre soient admises quant au fond.

79 Lamer C.J. went on to describe the general attributes of in-court testimony that provide the usual safeguards for reliability. He reviewed at some length the compelling reasons to prefer statements made under oath or affirmation, the value of seeing and hearing the witness in assessing credibility, the importance of having an accurate record of what was actually said, and the value of contemporaneous cross-examination. In considering what would constitute an adequate substitute in respect of the prior inconsistent statement, he concluded (at pp. 795-96) that there will be "sufficient circumstantial guarantees of reliability" to render such statements substantively admissible where

> (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party . . . has a full opportunity to cross-examine the witness respecting the statement . . . . Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

80 To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer. A lot of courtroom testimony proves to be totally unreliable. However, therein lies the safeguard — in the *process* that has uncovered its untrustworthiness. Hence, the presence of adequate substitutes for that process establishes a threshold of reliability and makes it safe to admit the evidence.

81 Lamer C.J. also added an important proviso, to which I will return later, on the trial judge's discretion to refuse to allow the jury to make substantive use of the statement, even where the criteria outlined above are satisfied when there is any concern that the statement may be the product of some form of investigatory misconduct (pp. 801-2). Here, although the statements were videotaped, and the

Le juge en chef Lamer a ensuite décrit les caractéristiques générales d'un témoignage en cour qui offre les garanties habituelles de fiabilité. Il a examiné longuement les raisons impérieuses de préférer les déclarations faites sous la foi du serment ou d'une affirmation solennelle, l'utilité de voir et d'entendre le témoin pour apprécier la crédibilité, l'importance d'avoir un compte rendu exact de ce qui a réellement été dit, et l'avantage du contre-interrogatoire effectué au moment précis où la déclaration est faite. En étudiant ce qui constituerait un substitut adéquat à l'égard de la déclaration antérieure incompatible, il a conclu, aux p. 795-796, qu'il y aura des « garanties circonstancielles de fiabilité suffisantes » pour rendre de telles déclarations admissibles quant au fond

> (i) si la déclaration est faite sous serment ou affirmation solennelle après une mise en garde quant à l'existence de sanctions et à l'importance du serment ou de l'affirmation solennelle, (ii) si elle est enregistrée intégralement sur bande vidéo, et (iii) si la partie adverse [. . .] a la possibilité voulue de contre-interroger le témoin au sujet de la déclaration [. . .] Subsidiairement, il se peut que d'autres garanties circonstancielles de fiabilité suffisent à rendre une telle déclaration admissible quant au fond, à la condition que le juge soit convaincu que les circonstances offrent des garanties suffisantes de fiabilité qui se substituent à celles que la règle du ouï-dire exige habituellement.

Il n'est pas tout à fait juste d'affirmer qu'une déclaration est suffisamment fiable parce qu'elle est faite en personne et sous serment, et que le déclarant est contre-interrogé. Maints témoignages en cour s'avèrent tout à fait indignes de foi. Toutefois, c'est là que se situe la garantie — dans le *processus* qui en a révélé le manque de fiabilité. L'existence de substituts adéquats à ce processus établit donc un seuil de fiabilité et permet d'admettre sans risque la preuve.

Le juge en chef Lamer a également assujetti à une réserve importante — sur laquelle je reviendrai plus loin — le pouvoir discrétionnaire du juge du procès de refuser que la déclaration soit soumise au jury comme preuve de fond même dans le cas où les critères susmentionnés sont respectés, s'il y a quelque crainte que la déclaration soit le produit d'une forme d'inconduite de la part des enquêteurs

witnesses were cross-examined, the statements were not made under oath. Whether there was a sufficient substitute to warrant substantive admission was sent back to be determined by the trial judge (p. 805). The appeal was allowed and a new trial ordered. Cory J. (L'Heureux-Dubé J. concurring) agreed with the result but for different reasons that, for the purpose of our analysis, need not be reviewed here.

(p. 801-802). En l'espèce, bien que les déclarations aient été enregistrées sur bande vidéo et que les témoins aient été contre-interrogés, ces déclarations n'ont pas été faites sous serment. La question de savoir s'il y avait un substitut suffisant pour justifier l'admission quant au fond a été renvoyée au juge du procès pour qu'il la tranche (p. 805). Le pourvoi a été accueilli et un nouveau procès a été ordonné. Le juge Cory (avec l'appui de la juge L'Heureux-Dubé) était d'accord avec le résultat, mais pour des motifs différents qui, pour les besoins de notre analyse, n'ont pas à être examinés ici.

6.2.4.4 *R. v. U. (F.J.), [1995] 3 S.C.R. 764*

U. (F.J.) brought back to the Court the issue of admissibility of prior inconsistent statements. In an interview with police, the complainant, J.U., told the interviewing officer that the accused, her father, was having sex with her "almost every day" (para. 4). She gave considerable details about the sexual activity and also described two physical assaults. The interviewing police officer later testified that he had attempted to tape the interview, but that the tape recorder had malfunctioned. He subsequently prepared a summary, based partly on notes and partly on his memory.

6.2.4.4 *R. c. U. (F.J.), [1995] 3 R.C.S. 764*

82 Dans l'affaire *U. (F.J.)*, la question de l'admissibilité des déclarations antérieures incompatibles a de nouveau été soumise à la Cour. Au cours d'un entretien avec la police, la plaignante, J.U., a déclaré au policier qui l'interrogeait que l'accusé, son père, avait eu des rapports sexuels avec elle [TRADUCTION] « presque chaque jour » (par. 4). Elle a donné de nombreux détails concernant ces activités sexuelles et a également fait état de deux agressions physiques. Le policier qui l'a interrogée a témoigné plus tard qu'il avait tenté d'enregistrer l'entretien, mais que le magnétoscope avait mal fonctionné. Il a, par la suite, préparé un résumé en se fondant en partie sur les notes qu'il avait prises et en partie sur ce qu'il avait retenu.

Immediately after interviewing J.U., the same officer interviewed the accused. Again, the interview was not taped. The accused admitted to having sex with J.U. "many times", describing similar sexual acts and the two physical assaults that J.U. had described (para. 5). At trial, J.U. recanted the allegations of sexual abuse. She claimed to have lied at the behest of her grandmother. The accused denied having told police that he had engaged in sexual activity with J.U.

83 Immédiatement après avoir interrogé J.U., le même policier a interrogé l'accusé. Là encore, l'entretien n'a pas été enregistré. L'accusé a reconnu avoir eu des rapports sexuels avec J.U. [TRADUCTION] « bien des fois », décrivant des actes sexuels similaires et les deux agressions physiques dont elle avait fait état (par. 5). Au procès, J.U. est revenue sur ses allégations d'abus sexuel. Elle a soutenu avoir menti à la demande de sa grand-mère. L'accusé a nié avoir dit à la police qu'il avait eu des rapports sexuels avec J.U.

The focus of the discussion before this Court was whether the "rule" in *B. (K.G.)* applied to this case. Although the criteria in *B. (K.G.)* were based on the principled approach in *Khan* and *Smith*, it was not clear whether *B. (K.G.)* established a distinct "rule"

84 Le débat devant la Cour portait sur la question de savoir si la « règle » de l'arrêt *B. (K.G.)* s'appliquait à l'affaire. Bien que les critères de l'arrêt *B. (K.G.)* aient été fondés sur la méthode d'analyse raisonnée adoptée dans les arrêts *Khan* et *Smith*, il

for admitting prior inconsistent statements. Lamer C.J. sought to clarify the relationship between these cases, stating as follows (at para. 35):

> *Khan* and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases also state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis. My decision in *B. (K.G.)* is an application of those principles to a particular branch of the hearsay rule, the rule against the substantive admission of prior inconsistent statements. The primary distinction between *B. (K.G.)*, on the one hand, and *Khan* and *Smith*, on the other, is that in *B. (K.G.)* the declarant is available for cross-examination. This fact alone goes part of the way to ensuring that the reliability criterion for admissibility is met. The case at bar differs from *B. (K.G.)* only in terms of available indicia of reliability. Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary because evidence of the same quality cannot be obtained at trial. For that reason, assessing the reliability of the prior inconsistent statement at issue here is determinative.

85 Lamer C.J. went on to determine how the indicia of reliability could be founded on different criteria than those set out in *B. (K.G.)*. The complainant's statement to the police was not made under oath. Nor was it videotaped. Most importantly, however, the declarant was available for cross-examination, thereby significantly alleviating the usual dangers arising from the introduction of hearsay evidence. Yet, the same concerns about the reliability of the prior inconsistent statement arose in this case. The complainant had recanted her earlier allegations. In the usual course of the trial process, this should be the end of the matter. Consider, for example, if the complainant had made the earlier allegations about being sexually assaulted by her father to some girlfriends in the context of playing a game of "Truth or Dare" where each player was being encouraged to outdo the previous one by saying or doing something outrageous. It would be difficult

n'était pas évident que l'arrêt *B. (K.G.)* établissait une « règle » distincte applicable à l'admission des déclarations antérieures incompatibles. Le juge en chef Lamer a cherché à clarifier en ces termes le lien entre ces affaires (par. 35) :

> Il ressort des arrêts *Khan* et *Smith* que la preuve par ouï-dire sera admissible quant au fond lorsqu'elle est nécessaire et suffisamment fiable. Il y est également dit qu'on doit interpréter de façon souple tant la nécessité que la fiabilité, tenant compte des circonstances de l'affaire et veillant à ce que notre nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories. Ma décision dans *B. (K.G.)* est une application de ces principes à une branche particulière de la règle du ouï-dire, la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles. La principale distinction entre l'arrêt *B. (K.G.)* d'une part, et les arrêts *Khan* et *Smith* d'autre part, réside dans le fait que, dans l'arrêt *B. (K.G.)*, l'auteur de la déclaration peut être contre-interrogé. Ce seul fait contribue à l'assurance du respect du critère de l'admissibilité quant à la fiabilité. L'espèce diffère de l'arrêt *B. (K.G.)* seulement quant aux indices de fiabilité disponibles. Le critère de la nécessité est rempli en l'espèce de la même façon qu'il y est satisfait dans *B. (K.G.)* : la déclaration antérieure est nécessaire parce qu'une preuve de la même qualité ne peut être obtenue au procès. C'est pour cette raison qu'il est déterminant d'évaluer la fiabilité de la déclaration antérieure incompatible en question en l'espèce.

Le juge en chef Lamer a ensuite déterminé comment les indices de fiabilité pouvaient reposer sur d'autres critères que ceux énoncés dans l'arrêt *B. (K.G.)*. La déclaration de la plaignante à la police n'avait pas été faite sous serment et n'avait pas non plus été enregistrée sur bande vidéo. Qui plus est cependant, la déclarante pouvait être contre-interrogée, ce qui atténuait considérablement les dangers habituels découlant de la présentation d'une preuve par ouï-dire. Pourtant, cette affaire suscitait les mêmes préoccupations quant à la fiabilité de la déclaration antérieure incompatible. La plaignante était revenue sur ses allégations antérieures. Dans le cours normal du processus judiciaire, cela devrait mettre un terme à l'affaire. Supposons, par exemple, qu'en jouant avec certaines de ses amies au jeu de la vérité « Truth or Dare », dans lequel chaque joueur est encouragé à surpasser le joueur précédent en disant ou faisant quelque chose qui

to find justification for introducing her casual statement as substantive proof over her sworn testimony that the events never happened. Hence, the focus must turn on the reliability of the prior inconsistent statement.

choque, la plaignante aurait allégué avoir été agressée sexuellement par son père. L'utilisation, à titre de preuve quant au fond, de la déclaration qu'elle a faite à brûle-pourpoint — de préférence à son témoignage sous serment voulant que ces faits ne se soient jamais produits — serait difficilement justifiable. L'accent doit donc être mis sur la fiabilité de la déclaration antérieure incompatible.

In *B. (K.G.)*, the Court held that a prior inconsistent statement is sufficiently reliable for substantive admission if it is made in circumstances comparable to the giving of in-court testimony. In *U. (F.J.)*, the reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth. Again here, the criteria of necessity and reliability intersect. In the interest of seeking the truth, the very high reliability of the statement rendered its substantive admission necessary.

86 Dans l'arrêt *B. (K.G.)*, la Cour a conclu qu'une déclaration antérieure incompatible est suffisamment fiable pour être admise quant au fond si elle est faite dans des circonstances comparables à celles d'un témoignage devant le tribunal. Dans l'affaire *U. (F.J.)*, on a satisfait à l'exigence de fiabilité en démontrant plutôt que la question de savoir si la plaignante avait dit la vérité dans sa déclaration à la police n'était pas vraiment un sujet de préoccupation. Les similitudes frappantes entre sa déclaration et celle faite de façon indépendante par son père étaient si convaincantes que la seule explication vraisemblable était qu'ils disaient tous les deux la vérité. Là encore, les critères de la nécessité et de la fiabilité se recoupent. Par souci de recherche de la vérité, il était nécessaire d'admettre quant au fond la déclaration en raison de sa très grande fiabilité.

Again here, Lamer C.J. added the following proviso (at para. 49):

87 Là encore, le juge en chef Lamer a ajouté la condition suivante (par. 49) :

> I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

> Je soulignerais également les conditions que j'ai précisées dans *B. (K.G.)*, à savoir que le juge du procès doit être convaincu, selon la prépondérance des probabilités, que la déclaration n'est pas le produit de la coercition, que ce soit menaces, promesses, questions trop suggestives de l'enquêteur ou d'une autre personne en situation d'autorité, ou autres manquements des enquêteurs.

6.2.4.5 *R. v. Hawkins, [1996] 3 S.C.R. 1043*

6.2.4.5 *R. c. Hawkins, [1996] 3 R.C.S. 1043*

88 This Court's decision in *Hawkins* was concerned mainly with the issue of spousal incompetency. However, it is also instructive on the application of the principled approach to the hearsay rule. My remarks here are confined to the latter aspect of the case. It exemplifies how, in some circumstances, the reliability requirement may be established solely by the presence of adequate substitutes

88 L'arrêt *Hawkins* de notre Cour portait surtout sur la question de l'inhabilité à témoigner du conjoint. Toutefois, cet arrêt est également intéressant en ce qui concerne l'application de la méthode d'analyse raisonnée à la règle du ouï-dire. Mes remarques ne visent ici que ce dernier aspect de l'arrêt. Il illustre comment, dans certaines circonstances, seule l'existence de substituts adéquats aux garanties

for the safeguards traditionally relied upon to test trial testimony. As we shall see, again here, the opportunity to cross-examine the declarant was a crucial factor. Because there were sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, the Court concluded that the trial judge erred in excluding the statement based on its perceived lack of probative value.

89 Hawkins, a police officer, was charged with obstructing justice and corruptly accepting money. His then girlfriend, G, testified at his preliminary inquiry. After testifying the first time, G brought an application to testify again and recanted much of what she had said, with explanations. By the time of the trial, Hawkins and G were married and therefore G was incompetent to testify under s. 4 of the *Canada Evidence Act*. After ruling that the common law rule of spousal incompetency applied, and that G's testimony at the preliminary inquiry could not be read in at trial under s. 715 of the *Criminal Code*, the trial judge held that the evidence was not admissible under the principled approach because it was not sufficiently reliable. Hawkins was acquitted. The verdict was overturned by majority decision of the Court of Appeal for Ontario. On further appeal to this Court, the appeal was dismissed but for different reasons. This Court refused to modify the common law rule of spousal incompetency as it was invited to do. The Court agreed with the trial judge that the common law rule applied, and the testimony could not be read in under s. 715. However, a majority of the Court held that the preliminary inquiry testimony could be read in at trial under the principled approach to the admission of hearsay. The three dissenting judges held that this violated the policy underlying s. 4 and should not be permitted.

traditionnelles invoquées pour vérifier le témoignage au procès peut permettre de satisfaire à l'exigence de fiabilité. Comme nous le verrons, là encore, la possibilité de contre-interroger la déclarante était un facteur crucial. Parce qu'il y avait suffisamment d'indices de fiabilité pour que le juge des faits dispose d'une base satisfaisante pour examiner la véracité de la déclaration, la Cour a conclu que le juge du procès avait commis une erreur en excluant la déclaration parce qu'il la croyait dépourvue de valeur probante.

M. Hawkins, un policier, a été accusé d'avoir entravé la justice et d'avoir par corruption accepté de l'argent. G, qui était sa petite amie à l'époque, a témoigné à l'enquête préliminaire. Après avoir témoigné la première fois, G a demandé à témoigner de nouveau, et elle est revenue, en s'expliquant, sur une grande partie de ce qu'elle avait dit. Au moment du procès, M. Hawkins et G étaient mariés, et G était, de ce fait, inhabile à témoigner en vertu de l'art. 4 de la *Loi sur la preuve au Canada*. Après avoir décidé que la règle de common law de l'inhabilité du conjoint à témoigner s'appliquait et que le témoignage de G recueilli à l'enquête préliminaire ne pouvait pas être lu au procès en application de l'art. 715 du *Code criminel*, le juge du procès a conclu que la preuve n'était pas admissible selon la méthode d'analyse raisonnée parce qu'elle n'était pas suffisamment fiable. M. Hawkins a été acquitté. Le verdict a été écarté par une décision majoritaire de la Cour d'appel de l'Ontario. Le pourvoi formé par la suite devant notre Cour a été rejeté, mais pour des motifs différents. La Cour a refusé de se rendre à l'invitation de modifier la règle de common law de l'inhabilité du conjoint à témoigner. Elle a convenu avec le juge du procès que la règle de common law s'appliquait et que le témoignage ne pouvait pas être lu en application de l'art. 715. Toutefois, les juges majoritaires de la Cour ont décidé que le témoignage recueilli à l'enquête préliminaire pouvait être lu au procès suivant la méthode d'analyse raisonnée applicable à l'admission du ouï-dire. Les trois juges dissidents ont estimé que cela dérogeait à la politique sous-jacente de l'art. 4 et ne devait pas être permis.

After determining that the necessity criterion was met, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring) addressed reliability. In the circumstances of this case, it could hardly be said that the complainant's testimony was inherently trustworthy. She had given contradictory versions, all under oath. Rather, the Court looked for the presence of a satisfactory basis for evaluating the truth of the statement, stating as follows, at para. 75:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact. [Emphasis added.]

The Court held that, generally, a witness's testimony before a preliminary inquiry will satisfy the test for threshold reliability, since the fact that it was given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues will provide sufficient guarantees of its trustworthiness (para. 76). In addition, the accuracy of the statement is certified by a written transcript which is signed by the judge, and the party against whom the hearsay evidence is tendered has the power to call the declarant as a witness. The inability of the trier of fact to observe demeanour was found to be "more than compensated by the circumstantial guarantees of trustworthiness inherent in the adversarial, adjudicative process of a preliminary inquiry" (para. 77). The fact that the early common law was prepared to admit former testimony under certain circumstances indicated an implicit acceptance of its reliability notwithstanding the lack of the declarant's presence (para. 78). Therefore, Lamer C.J. and Iacobucci J. concluded (at para. 79):

90 Après avoir déterminé que le critère de la nécessité était rempli, le juge en chef Lamer et le juge Iacobucci (avec l'appui des juges Gonthier et Cory) ont abordé la question de la fiabilité. Dans les circonstances de cette affaire, on ne pouvait guère affirmer que le témoignage de la plaignante était en soi digne de foi. Les versions qu'elle avait toutes présentées sous serment étaient contradictoires. La Cour a plutôt vérifié s'il existait une base satisfaisante pour examiner la véracité de la déclaration, affirmant ceci (par. 75) :

> Le critère de la fiabilité vise un seuil de fiabilité et non une fiabilité absolue. La tâche du juge du procès se limite à déterminer si la déclaration relatée en question renferme suffisamment d'indices de fiabilité pour fournir au juge des faits une base satisfaisante pour examiner la véracité de la déclaration. Plus particulièrement, le juge doit cerner les dangers spécifiques du ouï-dire auxquels donne lieu la déclaration et déterminer ensuite si les faits entourant cette déclaration offrent suffisamment de garanties circonstancielles de fiabilité pour contrebalancer ces dangers. Il continue d'appartenir au juge des faits de se prononcer sur la fiabilité absolue de la déclaration et le poids à lui accorder. [Je souligne.]

91 La Cour a statué qu'en général un témoignage recueilli à l'enquête préliminaire satisfait au critère du seuil de fiabilité puisque le fait qu'il a été présenté sous serment et que le témoin a alors été contre-interrogé dans le cadre d'une audience mettant en cause les mêmes parties et essentiellement les mêmes questions en litige fournit suffisamment de garanties de fiabilité de ce témoignage (par. 76). De plus, l'exactitude de la déclaration est certifiée par une transcription signée par le juge, et la partie contre laquelle la preuve par ouï-dire est présentée a le pouvoir d'assigner le déclarant à témoigner. L'impossibilité pour le juge des faits d'observer le comportement a été qualifiée de « plus que contrebalancé[e] par les garanties circonstancielles de fiabilité propres à la procédure décisionnelle de nature accusatoire que constitue l'enquête préliminaire » (par. 77). Le fait qu'à l'origine on était disposé en common law à admettre en preuve un témoignage antérieur dans certaines circonstances indiquait qu'on en reconnaissait implicitement la fiabilité malgré l'absence du déclarant (par. 78). Le juge en chef Lamer et le juge Iacobucci ont donc conclu ceci (par. 79) :

For these reasons, we find that a witness's recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial. The surrounding circumstances of such testimony, particularly the presence of an oath or affirmation and the opportunity for contemporaneous cross-examination, more than adequately compensate for the trier of fact's inability to observe the demeanour of the witness in court. The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

Applying this reasoning to the statement at issue, it was found to be reliable (para. 80).

92 Lamer C.J. and Iacobucci J. added that the trial judge had erred in considering the internal contradictions contained in the testimony because these considerations properly related to the ultimate assessment of the actual probative value of the testimony, a matter for the trier of fact. Although some of the analysis on this last point is couched in terms of categorizing factors as relevant to either threshold or ultimate reliability, an approach which should no longer be adopted, the Court's conclusion on this point exemplifies where the line should be drawn on an inquiry into threshold reliability. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not — recall *U. (F.J.)*.

6.3 *Revisiting Paragraphes 215 and 217 in Starr*

93 As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the

Pour ces motifs, nous sommes d'avis qu'un témoignage enregistré lors d'une enquête préliminaire comporte suffisamment de garanties de fiabilité pour permettre au juge des faits d'en faire une utilisation quant au fond au cours du procès. Les circonstances entourant ce témoignage, tout particulièrement l'existence d'un serment ou d'une affirmation et la possibilité de contre-interrogatoire au moment de la déclaration font plus que contrebalancer l'impossibilité pour le juge des faits d'observer le comportement du témoin en cour. L'absence du témoin au procès influe sur le poids et non sur l'admissibilité du témoignage.

Appliquant ce raisonnement à la déclaration en cause, la Cour a estimé qu'elle était fiable (par. 80).

Le juge en chef Lamer et le juge Iacobucci ont ajouté que le juge du procès avait commis une erreur en tenant compte des contradictions internes du témoignage parce que ces considérations se rapportaient, à juste titre, à l'appréciation en dernière analyse de la valeur probante même du témoignage, qui doit être faite par le juge des faits. Bien qu'une partie de l'analyse relative à ce dernier point consiste à classer des facteurs comme se rapportant soit au seuil de fiabilité soit à la fiabilité en dernière analyse — méthode qui ne devrait plus être suivie —, la conclusion de la Cour à cet égard illustre où doit être tracée la ligne de démarcation en matière d'examen du seuil de fiabilité. Lorsque l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire de vérifier davantage si la déclaration est susceptible d'être véridique. Cette question relève alors entièrement, en dernière analyse, du juge des faits et le juge du procès outrepasse son rôle en vérifiant si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non — qu'on se rappelle l'arrêt *U. (F.J.)*.

6.3 *Réexamen des par. 215 et 217 de l'arrêt Starr*

Comme le révèle, je l'espère, l'analyse qui précède, la question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse

context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be predetermined on the admissibility *voir dire*.

dépendra du contexte. Partant, certains des commentaires formulés aux par. 215 et 217 de l'arrêt *Starr* ne devraient plus être suivis. Les facteurs pertinents ne doivent plus être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Le tribunal devrait plutôt adopter une approche plus fonctionnelle, comme nous l'avons vu précédemment, et se concentrer sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. De plus, le juge du procès doit demeurer conscient du rôle limité qu'il joue lorsqu'il se prononce sur l'admissibilité — il est essentiel pour assurer l'intégrité du processus de constatation des faits que la question de la fiabilité en dernière analyse ne soit pas préjugée lors du voir-dire portant sur l'admissibilité.

I want to say a few words on one factor identified in *Starr*, namely "the presence of corroborating or conflicting evidence" since it is that comment that appears to have raised the most controversy. I repeat it here for convenience:

94 Je tiens à dire quelques mots sur un facteur décrit dans l'arrêt *Starr*, à savoir « la présence d'une preuve corroborante ou contradictoire », puisqu'il semble que ce soit ce commentaire qui a soulevé le plus de controverse. Pour des raisons de commodité, je reproduis le commentaire en question :

> Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). [para. 217]

> De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). [par. 217]

I will briefly review the two cases relied upon in support of this statement. The first does not really provide assistance on this question and the second, in my respectful view, should not be followed.

95 J'examinerai brièvement les deux décisions invoquées à l'appui de cet énoncé. La première n'est pas vraiment utile à cet égard et la seconde, selon moi, ne devrait pas être suivie.

In *R. v. C. (B.)* (1993), 12 O.R. (3d) 608 (C.A.), the trial judge, in convicting the accused, had used a co-accused's statement as evidence in support of the complainant's testimony. The Court of Appeal held that this constituted an error. While a statement made by a co-accused was admissible for its truth against the co-accused, it remained hearsay as against the accused. The co-accused had recanted his statement at trial. His statement was not shown to be reliable so as to be admitted as an exception to the hearsay rule against the accused.

96 Dans l'affaire *R. c. C. (B.)* (1993), 12 O.R. (3d) 608 (C.A.), en déclarant l'accusé coupable, le juge du procès avait utilisé la déclaration d'un coaccusé comme preuve étayant le témoignage de la plaignante. La Cour d'appel a conclu que cela constituait une erreur. Alors que la déclaration d'un coaccusé était admissible contre lui comme preuve de sa véracité, elle restait du ouï-dire à l'égard de l'accusé. Le coaccusé était revenu sur sa déclaration au procès. Il n'a pas été démontré que sa déclaration était suffisamment fiable pour être admise

Therefore, this case is of no assistance on the question of whether supporting evidence should be considered or not in determining hearsay admissibility. It simply reaffirms the well-established rule that an accused's statement is only admissible against its maker, not the co-accused.

97 *Idaho v. Wright*, 497 U.S. 805 (1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.

98 In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in *Starr*. He said the following:

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable.

contre l'accusé à titre d'exception à la règle du ouï-dire. Cette affaire n'est donc d'aucun secours pour ce qui est de savoir s'il y a lieu de considérer une preuve à l'appui pour décider de l'admissibilité d'un ouï-dire. On y réaffirme simplement la règle bien établie selon laquelle la déclaration d'un accusé n'est admissible que contre lui et non contre un coaccusé.

L'arrêt *Idaho c. Wright*, 497 U.S. 805 (1990), est plus à propos. Dans cette affaire, cinq des neuf juges de la Cour suprême des États-Unis n'étaient pas convaincus que [TRADUCTION] « la preuve corroborant la véracité d'une déclaration relatée puisse étayer, à juste titre, la conclusion que la déclaration comporte "des garanties particulières de fiabilité" » (p. 822). Selon les juges majoritaires, l'utilisation d'une preuve corroborante à cette fin « permettrait d'admettre une déclaration présumée peu fiable en se fondant sur la fiabilité d'un autre élément de preuve au procès, résultat que nous croyons contraire à l'exigence que la preuve par ouï-dire admise en vertu de la clause de confrontation des témoins soit à ce point digne de foi qu'il serait peu utile de contre-interroger le déclarant » (p. 823). Par exemple, les juges majoritaires ont fait observer qu'une déclaration faite sous la contrainte peut se révéler véridique, mais qu'une preuve tendant à corroborer la véracité de cette déclaration ne saurait être substituée au contre-interrogatoire du déclarant au procès. Les juges majoritaires ont aussi exprimé la crainte, surtout dans les affaires d'abus sexuels d'enfants, qu'un jury s'appuie sur la corroboration partielle fournie par la preuve médicale pour inférer à tort la fiabilité de toute l'allégation.

Dans ses motifs dissidents, le juge Kennedy, avec l'appui des trois autres juges, s'est dit en profond désaccord avec le point de vue des juges majoritaires concernant l'utilisation potentielle d'un élément de preuve à l'appui ou contradictoire. À mon avis, ses motifs reprennent une bonne partie des critiques formulées au sujet de la position de notre Cour dans l'arrêt *Starr*. Il a affirmé ceci :

> [TRADUCTION] Je ne vois rien qui justifie constitutionnellement cette décision de dissocier la preuve corroborante de l'examen de la question de savoir si les

It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]

Kennedy J. also strongly disagreed with the majority's view that only circumstances surrounding the making of the statement should be considered:

The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] . . . terminology unexpected of a child of similar age." But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's

déclarations d'un enfant sont fiables. Il va de soi pour la plupart des gens que l'un des meilleurs moyens de savoir si quelqu'un est digne de foi consiste à vérifier si ses propos sont corroborés par une autre preuve. Par exemple, dans un cas de violence envers une enfant, si une partie de la déclaration relatée de l'enfant veut que l'assaillant lui ait lié les poignets ou qu'il ait eu une cicatrice au bas de l'abdomen, et qu'une preuve matérielle ou un témoignage corrobore cette déclaration — preuve que l'enfant n'aurait pas pu fabriquer —, nous serons probablement plus enclins à croire que l'enfant dit la vérité. À l'inverse, on peut penser à la déclaration qu'un enfant fait de manière spontanée ou, par ailleurs dans des circonstances indiquant qu'elle est fiable, mais qui contient aussi des inexactitudes factuelles incontestées si énormes que la crédibilité de ses déclarations s'en trouve considérablement minée. Selon l'analyse de la Cour, la déclaration satisferait aux exigences de la clause de confrontation des témoins malgré un doute ineconsidérable quant à sa fiabilité. [p. 828-829]

Le juge Kennedy était aussi en profond désaccord avec le point de vue des juges majoritaires selon lequel seules les circonstances entourant la déclaration doivent être considérées :

[TRADUCTION] L[es juges majoritaires] n'offre[nt] aucune justification pour écarter l'examen de la preuve corroborante, si ce n'est qu'[ils] indique[nt] que celle-ci ne renforce pas la « fiabilité inhérente » des déclarations. Mais pour déterminer la fiabilité des déclarations, je ne vois aucune différence entre les facteurs qui, selon la Cour, indiquent l'existence de « fiabilité inhérente » et ceux qui, comme la preuve corroborante, ne paraissent pas le faire. Même les facteurs retenus par la Cour obligeront à examiner la preuve même que celle-ci entend soustraire à l'analyse de la fiabilité. La Cour note que l'un des critères de fiabilité est de savoir si l'enfant a « utilis[é] [. . .] un vocabulaire inattendu de la part d'un enfant de son âge ». Mais pour se prononcer sur ce point, il faut examiner les connaissances de l'enfant sur le plan du vocabulaire et la possibilité qu'il a eu ou non d'apprendre le vocabulaire en cause. Et lorsque toutes les circonstances extrinsèques d'une affaire sont prises en compte, il peut se révéler que l'usage d'un mot ou d'un vocabulaire particulier étaye en fait l'inférence d'un contact prolongé avec le défendeur, qui était connu pour son utilisation du vocabulaire en question. Comme autre exemple, la Cour note qu'un motif d'inventer une histoire est significatif en ce qui concerne la question de la fiabilité. Mais si le suspect accuse un tiers d'avoir inventé une fausse preuve contre lui et d'avoir préparé l'enfant, il est sûrement utile de démontrer que ce tiers n'a eu aucun contact avec l'enfant ni aucune possibilité

99

test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.

The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way. [References omitted; pp. 833-34.]

100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in *Idaho v. Wright* as follows (at p. 36):

The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement [*Ratten v. R.*, [1972] A.C. 378 (P.C.)]. Or, a party claims it can rely on the truth of the contents of a statement because it

de proposer un faux témoignage. Vu les contradictions inhérentes du critère de la Cour qui se dégagent de ses propres exemples, je pense que sa conclusion se révélera rapidement aussi inapplicable qu'illogique.

Bref, tant les circonstances entourant les déclarations de l'enfant que l'existence d'une preuve corroborante indiquent plus ou moins si les déclarations sont fiables. Si la Cour veut donner à entendre que les circonstances entourant une déclaration sont les meilleurs indices de fiabilité, je doute qu'il en soit ainsi dans tous les cas. Et, si cela était vrai dans une affaire donnée, cela ne justifie pas de passer sous silence d'autres indices de fiabilité comme la preuve corroborante, s'il n'y a aucune autre raison de les écarter. D'ailleurs, je crois que la preuve corroborante sous forme de témoignage ou de preuve matérielle, outre les circonstances bien précises entourant la déclaration, serait un moyen privilégié de déterminer la fiabilité d'une déclaration pour les besoins de la clause de confrontation, pour la simple raison que, contrairement aux autres indices de fiabilité, la preuve corroborante peut être étudiée par le défendeur et appréciée de façon objective et critique par le tribunal de première instance. [Renvois omis; p. 833-834.]

À mon avis, l'opinion du juge Kennedy reflète mieux l'expérience canadienne sur cette question. Il s'est révélé difficile et parfois paradoxal de limiter l'enquête aux circonstances entourant la déclaration. Notre Cour elle-même n'a pas toujours adopté cette approche restrictive. De plus, je ne juge pas convaincante la préoccupation des juges majoritaires quant au caractère « autocorroborant » de la preuve corroborante. À cet égard, je suis d'accord avec les commentaires suivants du professeur Paciocco concernant le raisonnement majoritaire de l'arrêt *Idaho c. Wright* (p. 36) :

[TRADUCTION] Le raisonnement final proposé veut qu'admettre une preuve simplement parce qu'une autre preuve établit qu'elle est fiable en ferait une preuve « autocorroborante ». En fait, on réserve généralement cette étiquette aux arguments circulaires selon lesquels un élément de preuve douteux « s'appuie sur lui-même » pour s'ériger en exception. Par exemple, une partie soutient qu'elle peut s'appuyer sur une déclaration relatée parce qu'elle a été faite sous une pression ou contrainte telle que la possibilité d'invention peut être écartée à juste titre, mais s'appuie ensuite sur le contenu de cette même déclaration pour prouver l'existence de cette pression ou contrainte [*Ratten c. R.*, [1972] A.C. 378 (P.C.)]. Ou encore, une partie affirme

was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see *R. v. Evans*, [1991] 1 S.C.R. 869. Looking to *other* evidence to confirm the reliability of evidence, the thing *Idaho v. Wright* purports to prevent, is the very antithesis of "bootstrapping".

qu'elle peut compter sur la véracité d'une déclaration parce qu'elle a été faite par une partie opposée, mais s'appuie ensuite sur le contenu de la déclaration pour prouver qu'elle a été faite par une partie opposée : voir *R. c. Evans*, [1991] 1 R.C.S. 869. S'en remettre à un *autre* élément de preuve pour confirmer la fiabilité d'une preuve, ce que l'arrêt *Idaho c. Wright* vise à prévenir, est l'antithèse même de la preuve « autocorroborante ».

7. Application to This Case

Mr. Skupien's statements to the cook, Ms. Stangrat, to the doctor and to the police constituted hearsay. The Crown sought to introduce the statements for the truth of their contents. In the context of this trial, the evidence was very important — indeed the two charges against Mr. Khelawon in respect of this complainant were entirely based on the truthfulness of the allegations contained in his statements.

Mr. Skupien's hearsay statements were presumptively inadmissible. None of the traditional hearsay exceptions could assist the Crown in proving its case. The evidence could only be admitted under the principled exception to the hearsay rule.

Mr. Skupien's death before the trial made it necessary for the Crown to resort to Mr. Skupien's evidence in its hearsay form. It was conceded throughout that the necessity requirement had been met. The case therefore turned on whether the evidence was sufficiently reliable to warrant admission.

Since Mr. Skupien had died before the trial, he was no longer available to be seen, heard and cross-examined in court. There was no opportunity for contemporaneous cross-examination. Nor had there been an opportunity for cross-examination at any other hearing. Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I

7. Application à la présente affaire

101 Les déclarations que M. Skupien a faites à la cuisinière, M^me^ Stangrat, au médecin et à la police constituaient du ouï-dire. Le ministère public cherchait à présenter ces déclarations pour établir la véracité de leur contenu. Dans le contexte du présent procès, cette preuve était très importante — en fait, les deux accusations portées contre M. Khelawon relativement à ce plaignant reposaient entièrement sur la véracité des allégations contenues dans les déclarations de ce dernier.

102 Les déclarations relatées de M. Skupien étaient présumées inadmissibles. Aucune des exceptions traditionnelles à la règle du ouï-dire ne pouvait aider le ministère public à établir sa preuve. La preuve ne pouvait être admise qu'en application de l'exception raisonnée à la règle du ouï-dire.

103 Le décès de M. Skupien avant le procès a forcé le ministère public à recourir à son témoignage sous sa forme relatée. Il a été concédé dans toutes les cours que l'on avait satisfait à l'exigence de nécessité. Il s'agissait donc de savoir si le témoignage était suffisamment fiable pour être admis en preuve.

104 Comme M. Skupien était décédé avant le procès, il ne pouvait plus être vu, entendu et contre-interrogé en cour. Il ne pouvait pas être contre-interrogé au moment précis de sa déclaration. Il n'y avait pas eu non plus d'autre possibilité de le contre-interroger à aucune autre audience. Même si M. Skupien était âgé et frêle au moment de ses allégations, rien ne prouve que le ministère public a tenté de préserver son témoignage en application des art. 709 à 714 du *Code criminel*. M. Skupien n'a pas témoigné à l'enquête préliminaire. Le dossier n'indique pas s'il était décédé à cette époque. En

do not question the fact that it was necessary for the Crown to resort to Mr. Skupien's evidence in hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here.

105 The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

106 Obviously, there was no case to be made here on the presence of adequate substitutes for testing the evidence. This is not a *Hawkins* situation where the difficulties presented by the unavailability of the declarant were easily overcome by the availability of the preliminary hearing transcript where there had been an opportunity to cross-examine the complainant in a hearing that dealt with essentially the same issues. Nor is this a *B. (K.G.)* situation where the presence of an oath and a video were coupled with the availability of the declarant at trial. There are no adequate substitutes here for testing the evidence. There is the police video — nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement.

107 In my respectful view, there was no case to be made on that basis either. This was not a situation

faisant ces commentaires, je ne remets pas en question la nécessité pour le ministère public de recourir au témoignage sous forme relatée de M. Skupien. Je reconnais que c'était nécessaire. Toutefois, dans une instance appropriée, il se peut bien que, pour trancher la question de la nécessité, le tribunal se demande si la partie qui veut présenter la preuve a déployé tous les efforts raisonnables pour préserver la preuve du déclarant de manière à préserver également les droits de l'autre partie. Cette question ne se pose pas en l'espèce.

Il reste toutefois que l'absence de possibilité de contre-interroger M. Skupien a une incidence sur la question de la fiabilité. La préoccupation majeure que suscite le caractère relaté de la preuve est l'incapacité de vérifier de la manière habituelle les allégations que cette preuve comporte. La preuve est inadmissible à moins qu'il y ait un autre motif suffisant de la vérifier ou que le contenu de la déclaration soit suffisamment fiable.

De toute évidence, il n'y avait aucune preuve à faire en l'espèce au sujet de l'existence d'autres moyens adéquats de vérifier la preuve. Il ne s'agit pas d'une situation comme celle dans l'affaire *Hawkins* où les difficultés présentées par la non-disponibilité de la déclarante pouvaient facilement être surmontées par le fait que l'on disposait de la transcription de l'audience préliminaire où on avait eu l'occasion de contre-interroger la plaignante dans le cadre d'une audience portant essentiellement sur les mêmes questions en litige. Il ne s'agit pas non plus d'une situation comme celle dans l'affaire *B. (K.G.)* où un serment et une bande vidéo s'ajoutaient à la disponibilité du déclarant au procès. Il n'y a en l'espèce aucun autre moyen adéquat de vérifier la preuve. Il y a la bande vidéo de la police — rien d'autre. L'exception raisonnée à la règle du ouï-dire ne constitue pas un moyen de fonder une déclaration de culpabilité sur une déclaration faite à la police sur bande vidéo ou autrement, sans plus. Pour satisfaire à l'exigence de fiabilité en l'espèce, le ministère public ne pouvait se fonder que sur la fiabilité inhérente de la déclaration.

À mon avis, il n'y avait aucune preuve à faire sur ce fondement non plus. Il ne s'agissait pas d'une

as in *Khan* where the cogency of the evidence was such that, in the words of Wigmore, it would be "pedantic to insist on a test whose chief object is already secured" (§ 1420, at p. 154). To the contrary, much as in the case of the third statement ruled inadmissible in *Smith*, the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross-examination. Mr. Skupien was elderly and frail. His mental capacity was at issue — the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault — the medical records revealed a number of complaints of fatigue, weakness and dizziness and the examining physician, Dr. Pietraszek, testified that the injuries could have resulted from a fall (A.R., vol. II, at p. 259). The evidence of the garbage bags filled with Mr. Skupien's possessions provided little assistance in assessing the likely truth of his statement — he could have filled those bags himself. Ms. Stangrat's obvious motive to discredit Mr. Khelawon presented further difficulties. The initial allegations were made to her — Dr. Pietraszek acknowledged in his evidence that when he saw Mr. Skupien, Ms. Stangrat was present and may have helped him by giving some indication of what happened. The extent to which Mr. Skupien may have been influenced in making his statement by this disgruntled employee was a live issue. Mr. Skupien had issues of his own with the way the retirement home was managed. This is apparent from his rambling complaints on the police video itself. The absence of an oath and the simple "yes" in answer to the police officer's question as to whether he understood that it was important to tell the truth do not give much insight on whether he truly understood the consequences for Mr. Khelawon of making his statement. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth.

situation comme celle dans l'arrêt *Khan* où la force probante de la preuve était telle que, comme l'a affirmé Wigmore, il serait [TRADUCTION] « trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint » (§ 1420, p. 154). Au contraire, tout comme dans le cas de la troisième déclaration jugée inadmissible dans l'arrêt *Smith*, les circonstances soulevaient un certain nombre de questions sérieuses de sorte qu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire. M. Skupien était âgé et frêle. Sa capacité mentale était en cause — les dossiers médicaux faisaient état de diagnostics répétés de paranoïa et de démence. Il y avait également la possibilité que ses blessures aient résulté d'une chute plutôt que d'une agression — les dossiers médicaux révélaient un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements et le médecin traitant, le D^r^ Pietraszek, a témoigné que les blessures pouvaient être dues à une chute (d.a., vol. II, p. 259). Les sacs à ordures remplis d'effets personnels de M. Skupien étaient peu utiles pour déterminer si la déclaration était susceptible d'être véridique — il pouvait avoir rempli ces sacs lui-même. D'autres difficultés résultaient du motif évident que M^me^ Stangrat avait de discréditer M. Khelawon. Les premières allégations ont été formulées devant elle — dans son témoignage, le D^r^ Pietraszek a reconnu que M^me^ Stangrat était présente lorsqu'il a rencontré M. Skupien et qu'elle pouvait avoir aidé ce dernier en fournissant des indices sur ce qui s'était produit. Il fallait déterminer dans quelle mesure cette employée mécontente pouvait avoir influencé M. Skupien lorsqu'il a fait sa déclaration. M. Skupien avait lui-même certaines récriminations au sujet de la façon dont la maison de retraite était gérée. Cela ressort de ses plaintes incohérentes contenues dans l'enregistrement vidéo de la police. L'absence de serment et le simple « oui » répondu lorsque le policier lui a demandé s'il comprenait qu'il était important de dire la vérité n'aident pas beaucoup à déterminer s'il saisissait vraiment les conséquences de sa déclaration pour M. Khelawon. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait considérablement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur.

108 As indicated earlier, the crux of the trial judge's finding that the evidence was sufficiently trustworthy was based on the "striking similarities" between the statements of the five complainants. As Rosenberg J.A., I too would not reject the possibility that the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case. However, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. For example, the videotaped interview with Mr. Dinino which formed the basis of the second conviction against Mr. Khelawon was nine minutes in length. It was preceded by a 30-minute interview with the police. The police officer had no notes of the initial interview. Constable Pietroniro acknowledged that it "was very difficult" to get Mr. Dinino to answer questions and that much of the videotape is inaudible. Constable Pietroniro would generally put to Mr. Dinino what he thought Mr. Dinino was saying and Mr. Dinino would respond "yes" or "yeah". Constable Pietroniro agreed that he was making an educated guess as to what Mr. Dinino was saying and that there were some things said by Mr. Dinino that he did not understand. Quite apart from these difficulties, it is also far from clear on the record on precisely what features the trial judge based his finding that there was a "striking similarity" between the various statements. However, I do not find it necessary to elaborate on this point. The admissibility of the other statements is no longer in issue. The Court of Appeal unanimously ruled them inadmissible.

109 I conclude that the evidence did not meet the reliability requirement. The majority of the Court of Appeal was correct to rule it inadmissible.

8. Conclusion

110 For these reasons, I would dismiss the appeal.

Comme nous l'avons vu, la conclusion du juge du procès que la preuve était suffisamment fiable reposait essentiellement sur les « similitudes frappantes » entre les déclarations des cinq plaignants. À l'instar du juge Rosenberg, je suis moi aussi d'avis de ne pas écarter le fait que l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié. Toutefois, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et ne pouvaient être admises quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Par exemple, l'entretien enregistré sur bande vidéo de M. Dinino, sur lequel reposait la deuxième déclaration de culpabilité de M. Khelawon, durait neuf minutes et avait été précédé d'un entretien de 30 minutes avec la police. Le policier ne possédait aucune note de l'entretien initial. L'agent Pietroniro a reconnu qu'il était [TRADUCTION] « très difficile » d'obtenir des réponses de M. Dinino et qu'une grande partie de l'enregistrement était inaudible. Il répétait généralement à M. Dinino ce qu'il croyait que celui-ci avait dit, et M. Dinino répondait par « oui » ou « ouais ». L'agent Pietroniro a reconnu qu'il faisait des suppositions éclairées au sujet de ce que M. Dinino disait et qu'il n'avait pas saisi certains propos de ce dernier. Outre ces difficultés, le dossier est loin d'indiquer clairement sur quelles caractéristiques précises le juge du procès s'est fondé pour conclure à l'existence d'une « similitude frappante » entre les diverses déclarations. Toutefois, je ne juge pas nécessaire de m'étendre sur cette question. L'admissibilité des autres déclarations n'est plus en cause. La Cour d'appel a décidé, à l'unanimité, qu'elles étaient inadmissibles.

Je conclus que la preuve ne satisfait pas à l'exigence de fiabilité. Les juges majoritaires de la Cour d'appel ont eu raison de la déclarer inadmissible.

8. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi.

Appeal dismissed.

Solicitor for the appellant: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondent: Fleming, Breen, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Louis P. Strezos and Associate, and Di Luca Barristers, Toronto.

Pourvoi rejeté.

Procureur de l'appelante : Ministère du Procureur général de l'Ontario, Toronto.

Procureurs de l'intimé : Fleming, Breen, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Louis P. Strezos and Associate, et Di Luca Barristers, Toronto.

Tab 5

F.H. *Appellant*

v.

Ian Hugh McDougall *Respondent*

- and -

F.H. *Appellant*

v.

The Order of the Oblates of Mary Immaculate in the Province of British Columbia *Respondent*

- and -

F.H. *Appellant*

v.

Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development *Respondent*

F.H. *Appelant*

c.

Ian Hugh McDougall *Intimé*

- et -

F.H. *Appelant*

c.

The Order of the Oblates of Mary Immaculate in the Province of British Columbia *Intimé*

- et -

F.H. *Appelant*

c.

Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord canadien *Intimée*

Indexed as: F.H. *v.* McDougall

Neutral citation: 2008 SCC 53.

File No.: 32085.

2008: May 15; 2008: October 2.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Evidence — Standard of proof — Allegations of sexual assault in a civil case — Inconsistencies in complainant's testimony — Whether Court of Appeal erred in holding trial judge to standard of proof higher than balance of probabilities.

Répertorié : F.H. *c.* McDougall

Référence neutre : 2008 CSC 53.

N^{o} du greffe : 32085.

2008 : 15 mai; 2008 : 2 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Preuve — Norme de preuve — Allégations d'agression sexuelle formulées dans une instance civile — Contradictions dans le témoignage du demandeur — La Cour d'appel a-t-elle eu tort de conclure que la juge du procès aurait dû appliquer une norme de preuve plus stricte que celle de la prépondérance des probabilités?

Evidence — Corroborative evidence — Allegations of sexual assault in a civil case — Whether victim must provide independent corroborating evidence.

Appeals — Standard of review — Applicable standard of appellate review on questions of fact and credibility.

From 1966 to 1974, H was a resident of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. M was an Oblate Brother at the school and also the junior and intermediate boys' supervisor from 1965 to 1969. H claimed to have been sexually assaulted by M in the supervisors' washroom when he was approximately 10 years of age. These assaults were alleged to have occurred when the children were lined up and brought, one by one, into the washroom to be inspected by the supervisors for cleanliness. H told no one about the assaults until 2000, when he confided in his wife. He then commenced this action against the respondents. Despite inconsistencies in his testimony as to the frequency and gravity of the sexual assaults, the trial judge found that H was a credible witness and concluded that he had been anally raped by M on four occasions during the 1968-69 school year. In addition, she found that M had physically assaulted H by strapping him on numerous occasions. A majority of the Court of Appeal overturned the decision with respect to the sexual assaults on the grounds that the trial judge had failed to consider the serious inconsistencies in H's testimony in determining whether the alleged sexual assaults had been proven to the standard of proof that was "commensurate with the allegation", and had failed to scrutinize the evidence in the manner required.

Held: The appeal should be allowed and the trial judge's decision restored.

There is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. If a trial judge expressly states the correct standard of proof, or does not express one at all, it will be presumed that the correct standard was applied unless it can be demonstrated that an incorrect standard was applied. Further, the appellate court must ensure that it does not substitute its own view of the facts with that of the trial judge in determining whether the correct standard was

Preuve — Corroboration — Allégations d'agression sexuelle formulées dans une instance civile — Le témoignage de la victime doit-il faire l'objet d'une corroboration indépendante?

Appels — Norme de contrôle — Norme de contrôle applicable en appel aux questions de fait et de crédibilité.

De 1966 à 1974, H a été pensionnaire au Pensionnat indien de Sechelt, en Colombie-Britannique, un établissement dirigé par les Oblats de Marie Immaculée et financé par l'État canadien. Frère oblat au pensionnat, M a été surveillant des garçons les plus jeunes et de ceux d'âge intermédiaire de 1965 à 1969. H a prétendu qu'à l'âge d'environ 10 ans, M l'avait agressé sexuellement dans les toilettes des surveillants. Selon son témoignage, les enfants formaient des rangs et étaient emmenés à tour de rôle dans les toilettes pour que le surveillant s'assure de leur propreté : c'est alors qu'ils étaient agressés sexuellement. H n'a révélé les agressions subies qu'en 2000, se confiant alors à son épouse. Il a ensuite intenté son action contre les intimés. Malgré les contradictions de son témoignage quant à la fréquence et à la gravité des agressions sexuelles, la juge du procès a conclu à sa crédibilité en tant que témoin et déterminé que M l'avait sodomisé quatre fois pendant l'année scolaire 1968-1969. Elle a par ailleurs conclu que M avait agressé H physiquement en le frappant avec une lanière en cuir à de nombreuses occasions. Les juges majoritaires de la Cour d'appel ont infirmé sa décision quant aux agressions sexuelles au motif qu'elle avait omis de prendre en compte les contradictions importantes du témoignage de H pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve « proportionnée à l'allégation » et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû.

Arrêt : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Dans une instance civile, une seule norme de preuve s'applique, celle de la prépondérance des probabilités. Bien que la jurisprudence ait donné à penser que la norme pénale ou une norme variable s'applique lorsque, comme en l'espèce, un comportement criminel ou moralement répréhensible est allégué, au Canada, la norme de preuve civile ne comporte pas de degrés de probabilité. Lorsque le juge du procès énonce expressément la bonne norme de preuve ou qu'il ne renvoie à aucune, il est présumé avoir appliqué la bonne, sauf preuve du contraire. Aussi, lorsqu'elle détermine si la bonne norme a été appliquée, la cour d'appel doit veiller à ne pas substituer sa propre interprétation des faits à celle du juge du procès. Dans toute instance civile, le

applied. In every civil case, a judge should be mindful of, and, depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof. One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. In serious cases such as this one, where there is little other evidence than that of the plaintiff and the defendant, and the alleged events took place long ago, the judge is required to make a decision, even though this may be difficult. Appellate courts must accept that if a responsible trial judge finds for the plaintiff, the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. This is sufficient to decide the appeal. [30] [40] [44-46] [49] [53-54]

In finding that the trial judge failed to scrutinize H's evidence in the manner required by law, in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances, the Court of Appeal also incorrectly substituted its credibility assessment for that of the trial judge. Assessing credibility is clearly in the bailiwick of the trial judge for which he or she must be accorded a heightened degree of deference. Where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge must not consider the plaintiff's evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It is apparent from her reasons that the trial judge recognized this obligation upon her, and while she did not deal with every inconsistency, she did address in a general way the arguments put forward by the defence. Despite significant inconsistencies in his testimony concerning the frequency and severity of the sexual assaults, and the differences between his trial evidence and answers on previous occasions, the trial judge found that H was nevertheless a credible witness. Where a trial judge demonstrates that he or she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. Here, the Court of Appeal

juge doit avoir présentes à l'esprit — et, selon les circonstances, il peut les prendre en compte — la gravité des allégations ou de leurs conséquences, ou encore, l'improbabilité intrinsèque, mais ces considérations ne modifient pas la norme de preuve. Une seule règle de droit vaut dans tous les cas : le juge du procès doit examiner attentivement la preuve pour décider si, selon toute vraisemblance, l'événement allégué a eu lieu. En outre, la preuve doit toujours être claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. Dans le cas d'une allégation grave comme celle considérée en l'espèce, lorsque la preuve consiste essentiellement dans les témoignages du demandeur et du défendeur, et que les faits allégués se sont produits longtemps auparavant, aussi difficile que puisse être sa tâche, le juge doit trancher. Lorsqu'un juge consciencieux ajoute foi à la thèse du demandeur, la cour d'appel doit tenir pour acquis que la preuve était suffisamment claire et convaincante pour qu'il conclue au respect du critère de la prépondérance des probabilités. En l'espèce, la Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffit pour statuer sur le présent pourvoi. [30] [40] [44-46] [49] [53-54]

En concluant que la juge du procès avait omis d'examiner le témoignage de H aussi attentivement qu'elle l'aurait dû légalement, à la lumière des contradictions du témoignage et de l'absence d'élément circonstanciel le corroborant, la Cour d'appel a également substitué à tort son appréciation de la crédibilité à celle de la juge du procès. Il incombe clairement au juge du procès d'apprécier la crédibilité d'un témoin, de sorte que sa décision à cet égard justifie une grande déférence. Lorsque la norme de preuve applicable est celle de la prépondérance des probabilités, il n'y a pas de règle quant aux circonstances dans lesquelles les contradictions relevées dans le témoignage du demandeur amèneront le juge du procès à conclure que le témoignage n'est pas crédible ou digne de foi. En première instance, le juge ne doit pas considérer le témoignage du demandeur en vase clos. Il doit plutôt examiner l'ensemble de la preuve et déterminer l'incidence des contradictions sur les questions de crédibilité touchant au cœur du litige. Il appert de ses motifs que la juge du procès a reconnu cette obligation, et bien qu'elle n'ait pas considéré chacune des contradictions, elle a examiné de façon générale les arguments de la défense. Malgré les contradictions importantes du témoignage de H sur la fréquence et la gravité des agressions sexuelles, ainsi que les divergences entre son témoignage au procès et les réponses données précédemment, la juge du procès a estimé que H était un témoin digne de foi. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand même à la conclusion que le témoin

identified no such error. [52] [58-59] [70] [72-73] [75-76]

In addition, while it is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim must provide independent corroborating evidence. Such evidence may not be available, especially where the alleged incidents took place decades earlier. Also, incidents of sexual assault normally occur in private. Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration. In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant, as in this case. Here, the Court of Appeal was correct in finding that the trial judge did not ignore M's evidence or marginalize him, but simply believed H on essential matters rather than M. [77] [80-81] [86] [96]

Finally, an unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at, but that does not make the reasons inadequate. Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been. The Court of Appeal found that the trial judge's reasons showed why she arrived at her conclusion that H had been sexually assaulted by M. Its conclusion that the trial judge's reasons were adequate should not be disturbed. [100-101]

Cases Cited

Applied: *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *R. v. Lifchus*, [1997] 3 S.C.R. 320;

était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel. En l'espèce, la Cour d'appel n'a pas relevé pareille erreur. [52] [58-59] [70] [72-73] [75-76]

Par ailleurs, même si la corroboration indépendante est utile et étoffe la preuve offerte, elle ne s'impose pas légalement lorsque, dans une affaire d'agression sexuelle, c'est la parole de la victime contre celle du défendeur. Il est possible qu'il ne puisse y avoir de corroboration, surtout lorsque les faits allégués se sont produits quelques décennies auparavant. Sans compter que les agressions sexuelles ont généralement lieu en privé. Exiger la corroboration rendrait la norme de preuve en matière civile plus stricte que celle appliquée en matière pénale. Dans une affaire d'agression sexuelle, la décision du juge du procès peut dépendre du fait qu'il ajoute foi au témoignage du demandeur ou à celui du défendeur, mais malgré ce dilemme, le juge doit apprécier la preuve et se prononcer sans exiger de corroboration. Au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. S'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive, ce témoignage étant incompatible avec celui de l'autre partie. Croire une partie suppose alors explicitement ou non que l'on ne croit pas l'autre sur le point important en litige. C'est particulièrement le cas lorsque, comme en l'espèce, le demandeur formule des allégations que le défendeur nie en bloc. La Cour d'appel a eu raison de conclure que la juge du procès n'avait pas ignoré le témoignage de M ni marginalisé ce dernier, mais qu'elle avait simplement cru H plutôt que M sur des points importants. [77] [80-81] [86] [96]

Enfin, la partie qui n'a pas gain de cause peut juger insuffisants les motifs du juge du procès, surtout s'il ne l'a pas crue. Il faut reconnaître qu'il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision, mais ses motifs ne sont pas insuffisants pour autant. Les motifs ne sont pas non plus insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être. La Cour d'appel a conclu que les motifs de la juge du procès expliquaient les raisons pour lesquelles elle avait conclu que H avait été agressé sexuellement par M. Les motifs de la juge du procès étaient suffisants et ils ne doivent pas être modifiés. [100-101]

Jurisprudence

Arrêts appliqués : *Hanes c. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154; *R. c. Lifchus*, [1997]

H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51; **referred to:** *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *Bater v. Bater*, [1950] 2 All E.R. 458; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. v. Burns*, [1994] 1 S.C.R. 656; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. R.W.B.* (1993), 24 B.C.A.C. 1; *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30; *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

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3 R.C.S. 320; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17; *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26; *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34; *R. c. R.E.M.*, [2008] 3 R.C.S. 3, 2008 CSC 51; **arrêts mentionnés :** *H.F. c. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. c. W. (D.)*, [1991] 1 R.C.S. 742; *Bater c. Bater*, [1950] 2 All E.R. 458; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Continental Insurance Co. c. Dalton Cartage Co.*, [1982] 1 R.C.S. 164; *Heath c. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) c. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse : Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. c. Burns*, [1994] 1 R.C.S. 656; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *R. c. R.W.B.* (1993), 24 B.C.A.C. 1; *R. c. J.H.S.*, [2008] 2 R.C.S. 152, 2008 CSC 30; *Faryna c. Chorny*, [1952] 2 D.L.R. 354.

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Code criminel, S.R.C. 1970, ch. C-34, art. 139(1).
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Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives à d'autres lois, S.C. 1980-81-82-83, ch. 125.

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Southin, Rowles et Ryan) (2007), 68 B.C.L.R. (4th) 203 (*sub nom. C. (R.) c. McDougall*), [2007] 9 W.W.R. 256, 41 C.P.C. (6th) 213, 239 B.C.A.C. 222, 396 W.A.C. 222, [2007] B.C.J. No. 721 (QL), 2007 CarswellBC 723, 2007 BCCA 212, accueillant l'appel contre la décision de la juge Gill quant à l'allégation d'agression sexuelle, mais le rejetant quant à l'allégation d'agression physique, [2005] B.C.J. No. 2358 (QL) (*sub nom. R.C. c. McDougall*), 2005 CarswellBC 2578, 2005 BCSC 1518. Pourvoi accueilli.

Allan Donovan, *Karim Ramji* and *Niki Sharma*, for the appellant.

Bronson Toy, for the respondent Ian Hugh McDougall.

F. Mark Rowan, for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey and *Christine Mohr*, for the respondent Her Majesty the Queen in Right of Canada.

The judgment of the Court was delivered by

[1] ROTHSTEIN J. — The Supreme Court of British Columbia found in a civil action that the respondent, Ian Hugh McDougall, a supervisor at the Sechelt Indian Residential School, had sexually assaulted the appellant, F.H., while he was a student during the 1968-69 school year. A majority of the British Columbia Court of Appeal allowed the respondent's appeal in part, and reversed the decision of the trial judge. I would allow the appeal to this Court and restore the judgment of the trial judge.

I. Facts

[2] The Sechelt Indian Residential School was established in 1904 in British Columbia. It was funded by the Canadian government and operated by the Oblates of Mary Immaculate. F.H. was a resident student at the school from September 1966 to March 1967 and again from September 1968 to June 1974. Ian Hugh McDougall was an Oblate Brother until 1970 and was the junior and intermediate boys' supervisor at the school from 1965 to 1969.

[3] The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

Allan Donovan, *Karim Ramji* et *Niki Sharma*, pour l'appelant.

Bronson Toy, pour l'intimé Ian Hugh McDougall.

F. Mark Rowan, pour l'intimé The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey et *Christine Mohr*, pour l'intimée Sa Majesté la Reine du chef du Canada.

Version française du jugement de la Cour rendu par

[1] LE JUGE ROTHSTEIN — Dans le cadre d'une poursuite au civil, la Cour suprême de la Colombie-Britannique a conclu que pendant l'année scolaire 1968-1969, l'intimé Ian Hugh McDougall, surveillant au Pensionnat indien de Sechelt, avait agressé sexuellement l'appelant, F.H., un ancien élève de l'établissement. Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont accueilli en partie l'appel de l'intimé et infirmé la décision de la juge du procès. Je suis d'avis d'accueillir le pourvoi et de rétablir le jugement de première instance.

I. Faits

[2] Le Pensionnat indien de Sechelt a vu le jour en Colombie-Britannique en 1904. Son financement était assuré par l'État canadien, et sa direction, par les Oblats de Marie Immaculée. F.H. y a séjourné de septembre 1966 à mars 1967, ainsi que de septembre 1968 à juin 1974. Frère Oblat jusqu'en 1970, Ian Hugh McDougall y a été surveillant des garçons les plus jeunes et de ceux d'âge intermédiaire de 1965 à 1969.

[3] L'établissement comptait trois étages. Les dortoirs des garçons les plus jeunes et des plus âgés étaient situés à l'étage supérieur. Les toilettes des surveillants se trouvaient également à l'étage supérieur et on pouvait y avoir accès par les toilettes des pensionnaires. Le dortoir des garçons d'âge intermédiaire était situé au deuxième étage, et la chambre de M. McDougall s'y trouvait dans un angle.

[4] F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately 10 years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.

F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.

The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.

The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.

The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took

[4] F.H. prétend qu'à l'âge d'environ 10 ans, M. McDougall l'a agressé sexuellement dans les toilettes des surveillants. Au procès, il a dit avoir subi quatre agressions. La juge du procès relate son témoignage aux par. 34-38 de ses motifs :

[TRADUCTION] La première fois, F.H. se trouvait dans le dortoir avec d'autres garçons. Le défendeur a demandé à quatre d'entre eux de se rendre aux toilettes principales à l'étage supérieur et d'attendre avant d'aller dans les toilettes des surveillants pour un examen. F.H. a été le dernier à s'y présenter. Le défendeur lui a demandé de retirer son pyjama et, alors que F.H. était de face, il l'a examiné des pieds à la tête. Il a caressé son pénis. Le défendeur l'a ensuite retourné, lui a demandé de se pencher et a inséré son doigt dans son anus. Le défendeur a enlevé ses vêtements, a empoigné F.H. par la taille, l'a mis sur ses genoux et l'a violé. Il avait rabattu le couvercle de la toilette, sur lequel il s'était assis. Après avoir éjaculé, il a dit au demandeur de remettre son pyjama et de quitter la pièce.

F.H. était sous le choc. Il n'a ni pleuré ni crié; il est demeuré silencieux. Lorsqu'il s'est rendu aux toilettes communes principales, il a constaté qu'il saignait. Le lendemain matin, il a remarqué la présence de sang dans son pyjama. Il est descendu aux toilettes des garçons et il s'est changé. Il a rincé son pyjama et l'a rangé dans son casier.

La deuxième agression s'est produite environ deux semaines plus tard. F.H. se trouvait dans le dortoir et se préparait à aller au lit lorsque le défendeur lui a dit de se rendre aux toilettes des surveillants pour un examen. Aucun autre garçon n'était présent. Il a demandé à F.H. d'enlever son pyjama, puis il l'a encore une fois violé. F.H. s'est rendu aux toilettes communes pour se laver. Le lendemain matin, il a constaté que son pyjama était taché de sang. Comme c'était jour de lessive, il a déposé son pyjama dans le panier à linge avec les draps.

La troisième agression a eu lieu environ un mois plus tard. Dans son témoignage, F.H. a dit qu'on lui avait une fois de plus demandé d'aller dans les toilettes des surveillants, d'enlever son pyjama et de se retourner. Encore une fois, le défendeur l'avait empoigné par la taille et l'avait violé. Il avait saigné, mais il ne se souvient pas s'il y avait des taches de sang sur son pyjama.

La quatrième agression est survenue environ un mois après la troisième. Alors que F.H. se préparait à aller au lit, le défendeur l'a saisi par les épaules et l'a emmené à

him upstairs to the supervisors' washroom. Another rape occurred.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

[6] F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l)).

II. Judgments Below

A. *British Columbia Supreme Court*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact:

(1) Was either plaintiff physically or sexually abused while he attended the school?

(2) If the plaintiff was abused

(a) by whom was he abused?

(b) when did the abuse occur? and

(c) what are the particulars of the abuse?

[8] The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325, in

l'étage supérieur dans les toilettes des surveillants. Un autre viol a été commis.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. n'a révélé les agressions subies que vers l'année 2000. Il vivait à ce moment des difficultés conjugales après que son épouse eut appris son infidélité. Il a témoigné qu'il avait alors ressenti le besoin de confier ce qu'il avait vécu enfant. Sur les conseils de son épouse, il a consulté une thérapeute.

[6] F.H. a intenté son action contre les intimés le 7 décembre 2000, soit environ 31 ans après les agressions sexuelles alléguées. En Colombie-Britannique, aucun délai de prescription ne s'applique à la poursuite pour agression sexuelle, et celle-ci peut être intentée à tout moment (voir la *Limitation Act*, R.S.B.C. 1996, ch. 266, al. 3(4)(l)).

II. Les décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] L'action de F.H. et celle de R.C., un autre ancien pensionnaire ayant formulé des allégations apparentées contre les mêmes parties, ont été réunies. Les parties ont convenu que l'instruction porterait sur les questions de fait suivantes :

[TRADUCTION]

(1) L'un ou l'autre des demandeurs a-t-il été agressé physiquement ou sexuellement alors qu'il était pensionnaire?

(2) Dans l'affirmative,

a) qui l'a agressé,

b) à quel moment et

c) dans quelles circonstances?

[8] Après avoir présidé le procès, la juge Gill a d'abord fait remarquer dans ses motifs que la réponse à ces questions dépendait de la crédibilité attribuée aux témoignages. Peu de questions de droit étaient en cause. Elle a cité la décision *H.F. c. Canada (Attorney General)*, [2002] B.C.J.

which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

[9] The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

[10] In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defence that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defence's position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defence counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

[11] The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H. was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults

No. 436 (QL), 2002 BCSC 325, établissant que dans un cas d'allégations graves aux conséquences sérieuses, il y avait lieu d'appliquer la norme de preuve civile qui est [TRADUCTION] « proportionnée aux circonstances » (par. 4).

[9] La juge du procès a ensuite considéré le témoignage de chacun des demandeurs, celui de M. McDougall et ceux d'autres personnes ayant travaillé au pensionnat ou y ayant séjourné. M. McDougall a nié les allégations d'agression sexuelle et dit ne pas se rappeler avoir même frappé F.H. une seule fois avec une lanière en cuir. Il a aussi nié avoir jamais procédé à des examens corporels et il a déclaré que les garçons n'étaient pas emmenés dans les toilettes des surveillants.

[10] Pour déterminer si F.H. avait été agressé sexuellement, la juge Gill a soupesé la prétention de la défense selon laquelle le témoignage de F.H. n'était ni fiable ni crédible. Elle a rejeté la thèse voulant que le tribunal doive conclure à la non-fiabilité du témoignage de F.H. en raison de l'incapacité de ce dernier de répondre à certaines questions. Elle a tenu le témoignage de F.H. pour digne de foi tout en reconnaissant que la perpétration des agressions de la manière décrite par F.H. était susceptible de détection. Elle a par ailleurs rejeté la prétention de la défense selon laquelle l'intérêt de F.H. à mentir minait grandement sa crédibilité. Elle a plutôt convenu avec le demandeur que les circonstances de la révélation des agressions ne suggéraient pas la fabrication.

[11] La juge a relevé les éléments de concordance et de divergence entre les témoignages de F.H. et ceux des autres pensionnaires. Elle a aussi noté des contradictions importantes dans le témoignage de F.H. sur la fréquence des agressions. Au procès, F.H. avait fait état de quatre agressions, alors qu'il avait dit auparavant qu'elles avaient eu lieu toutes les deux semaines ou tous les dix jours. La juge a néanmoins conclu à sa crédibilité en tant que témoin et à la constance de son témoignage concernant [TRADUCTION] « la nature des agressions ainsi que le lieu et les moments où elles se sont produites » (par. 112). À son avis, il y avait eu agressions sexuelles, M. McDougall ayant sodomisé F.H.

being four incidents of anal intercourse committed during the 1968-69 school year.

[12] In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

[13] With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. *British Columbia Court of Appeal* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

[15] Rowles J.A. concluded that McDougall's appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

[16] Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did

à quatre reprises pendant l'année scolaire 1968-1969.

[12] Pour ce qui est des sévices physiques, la juge du procès s'est seulement demandé si les demandeurs avaient prouvé les coups infligés avec une lanière en cuir pendant leur séjour au pensionnat. Elle a considéré le témoignage de M. McDougall, celui d'un autre frère employé au pensionnat, ainsi que ceux d'autres anciens pensionnaires. Elle a conclu qu'il s'agissait d'un châtiment courant au pensionnat, qu'il n'était pas réservé aux auteurs de manquements graves et que M. McDougall l'avait infligé à F.H. un nombre indéterminé de fois.

[13] En ce qui concerne R.C., la juge du procès a conclu qu'il n'avait pas prouvé les agressions sexuelles alléguées et qu'une autre personne que M. McDougall l'avait frappé avec une lanière en cuir.

B. *Cour d'appel de la Colombie-Britannique* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] La décision de la Cour d'appel a été rendue par la juge Rowles, avec l'appui de la juge Southin, la juge Ryan inscrivant sa dissidence.

(1) Motifs de la juge Rowles

[15] La juge Rowles a conclu qu'il y avait lieu d'accueillir l'appel interjeté par M. McDougall quant à la conclusion qu'il avait agressé sexuellement F.H., mais non quant à celle qu'il l'avait frappé avec une lanière en cuir.

[16] Selon elle, la juge du procès connaissait manifestement la jurisprudence sur la norme de preuve applicable dans une affaire d'allégations d'actes moralement répréhensibles, à savoir une norme « proportionnée aux circonstances ». Toutefois, à son avis, elle aurait dû prendre en compte les contradictions importantes du témoignage de F.H. pour déterminer si les agressions sexuelles alléguées avaient été prouvées suivant la norme de preuve « proportionnée à l'allégation ». Elle a conclu que la juge du procès n'avait pas examiné la

not scrutinize the evidence in the manner required and thereby erred in law.

[17] In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

[18] In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case — "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

[19] Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other . . . requires . . . an articulated reason founded in evidence other than that of the plaintiff" (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

[20] In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

[21] While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

preuve aussi attentivement qu'elle l'aurait dû, d'où l'erreur de droit.

[17] En accueillant l'appel quant aux agressions sexuelles alléguées, la juge Rowles a estimé qu'il n'était pas utile d'ordonner la tenue d'un nouveau procès étant donné la teneur de la preuve offerte à cet égard.

(2) Motifs concordants de la juge Southin

[18] Dans ses motifs concordants, la juge Southin se penche sur l'[TRADUCTION] « aspect préoccupant » de l'affaire : « dans une instance civile, comment doit-on apprécier la preuve constituée de témoignages opposés et quelle relation doit s'établir entre l'appréciation de la preuve et le fardeau de la preuve? » (par. 84).

[19] Selon la juge Southin, il importait au plus haut point que le juge appelé à apprécier la preuve demeure conscient de la gravité des allégations. Il ne suffisait pas de préférer le témoignage du demandeur à celui du défendeur, car [TRADUCTION] « préférer [ce] témoignage à [l']autre [. . .] exige [. . .] qu'un motif convaincant fondé sur un autre élément de preuve que le témoignage du demandeur le justifie » (par. 106). De plus, elle a statué que dans l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742, la conclusion du juge Cory selon laquelle il n'y avait pas d'obligation de choisir entre la preuve de la poursuite et celle de l'accusé s'appliquait également en matière civile.

[20] Finalement, elle n'a pas relevé dans les motifs de la juge du procès [TRADUCTION] « de motif convaincant et valable en droit d'ajouter foi au témoignage du demandeur et d'écarter ceux des défendeurs » (par. 112).

(3) Motifs dissidents de la juge Ryan

[21] Même si elle partage les préoccupations des juges majoritaires concernant [TRADUCTION] « le risque d'imputer une responsabilité pour des faits survenus il y a aussi longtemps », la juge Ryan se refuse à conclure que la juge du procès n'a pas appliqué la bonne norme de preuve (par. 115).

[22] Ryan J.A. noted that the trial judge set out the test — a standard of proof commensurate with the occasion — early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

[23] In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

[24] Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony — that it was not consistent with earlier descriptions of the abuse — and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

[25] Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. *The Standard of Proof*

(1) Canadian Jurisprudence

[26] Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard

[22] Elle signale qu'au début de ses motifs, la juge du procès énonce le critère applicable, celui de la norme de preuve proportionnée aux circonstances : [TRADUCTION] « une fois le bon critère établi, il faut supposer qu'elle l'a correctement appliqué, à moins que ses motifs n'indiquent le contraire » (par. 116).

[23] Selon elle, prétendre que la juge du procès a mal appliqué la norme aux faits mis en preuve revient à dire qu'elle a tiré des conclusions de fait erronées. Or, pour infirmer des conclusions de fait, une cour d'appel doit constater qu'une erreur manifeste a été commise, qu'un élément de preuve déterminant ou pertinent n'a pas été pris en compte ou que des conclusions déraisonnables ont été tirées de la preuve.

[24] La juge Ryan estime que la juge du procès n'a pas commis de telles erreurs. Cette dernière a reconnu l'aspect le plus préoccupant du témoignage de F.H. — sa divergence avec les descriptions antérieures des agressions — et elle a conclu que, pour l'essentiel, le témoignage était constant et digne de foi. Elle n'a donc pas fait abstraction des contradictions.

[25] À défaut d'erreur entachant les motifs de la décision contestée, la juge Ryan a conclu que la Cour d'appel aurait dû respecter les conclusions de la juge du procès. Elle était donc d'avis de rejeter l'appel.

III. Analyse

A. *La norme de preuve*

(1) La jurisprudence canadienne

[26] Les efforts des tribunaux pour résoudre les difficultés que pose l'application de la norme de preuve civile de la prépondérance des probabilités dans une affaire où les faits reprochés au défendeur sont particulièrement graves — comme la fraude, la faute professionnelle ou le comportement criminel, en particulier l'agression sexuelle d'un mineur — ont suscité de nombreux commentaires. Comme l'expliquent L. R. Rothstein, R. A. Centa et E. Adams dans leur article intitulé « Balancing

of Proof" in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 455, at p. 456:

These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the case.

[27] Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated:

It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. [p. 459]

[28] In the present case the trial judge referred to *H.F. v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

The court is justified in imposing a higher degree of probability which is "commensurate with the occasion": . . . .

[29] In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

Probabilities : The Overlooked Complexity of the Civil Standard of Proof », dans *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence* (2004), 455, p. 456 :

[TRADUCTION] Les allégations de cette nature sont jugées uniques parce qu'elles continuent de frapper l'intéressé d'un opprobre moral même après le dénouement de l'instance.

[27] Les tribunaux de la Colombie-Britannique se sont généralement rangés à l'avis exprimé par lord Denning dans l'arrêt *Bater c. Bater*, [1950] 2 All E.R. 458 (C.A.), à savoir que la norme civile de la prépondérance des probabilités [TRADUCTION] « peut comporter des degrés de probabilité » (p. 459), selon l'objet du litige. Voici ce qu'il a dit :

[TRADUCTION] [Une cour civile] n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances. [p. 459]

[28] En l'espèce, la juge du procès a cité les propos suivants de la juge Neilson dans la décision *H.F. c. Canada (Attorney General)*, par. 154 :

[TRADUCTION] La cour est justifiée d'exiger un degré de probabilité plus élevé qui soit « proportionné aux circonstances » : . . .

[29] Dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, portant sur une question d'ordre constitutionnel, le juge en chef Dickson s'est rallié à l'approche formulée dans l'arrêt *Bater*. À son avis, un « degré très élevé de probabilité » exigeait que la preuve soit forte et persuasive et qu'elle fasse ressortir nettement les conséquences de la décision quelle qu'elle soit (p. 138) :

Compte tenu du fait que l'article premier est invoqué afin de justifier une violation des droits et libertés constitutionnels que la *Charte* vise à protéger, un degré très élevé de probabilité sera, pour reprendre l'expression de lord Denning, « proportionné aux circonstances ». Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction.

[30] However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. . . .
>
> . . . There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

[31] In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).

(2) Recent United Kingdom Jurisprudence

[32] In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, Lord Steyn said at para. 37:

> . . . I agree that, given the seriousness of matters involved, at least some reference to the heightened civil

[30] Une « norme variable » de probabilité n'a toutefois pas fait l'unanimité. Dans l'arrêt *Continental Insurance Co. c. Dalton Cartage Co.*, [1982] 1 R.C.S. 164, le juge en chef Laskin l'a en effet écartée. À son avis, pour tenir compte de la gravité de l'allégation, le juge du procès devait plutôt examiner la preuve « plus attentivement » (p. 169-171) :

> Chaque fois qu'il y a une allégation de conduite moralement blâmable ou qui peut revêtir un aspect criminel ou pénal et que l'allégation se présente dans le cadre d'un litige civil, le fardeau de la preuve qui s'applique est toujours celui de la preuve suivant la prépondérance des probabilités. . .
>
> . . . L'appréciation des éléments de preuve se rapportant au fardeau de la preuve implique nécessairement une question de jugement, et un juge de première instance est fondé à examiner la preuve plus attentivement si la preuve offerte doit établir des allégations sérieuses. . .
>
> Je n'estime pas que ce point de vue [celui de l'arrêt *Bater*] s'écarte du principe d'une norme de preuve fondée sur la prépondérance des probabilités ni qu'il appuie une norme variable. La question dans toutes les affaires civiles est de savoir quelle preuve il faut apporter et quel poids lui accorder pour que la cour conclue qu'on a fait la preuve suivant la prépondérance des probabilités.

[31] Suivant les décisions ontariennes rendues en matière de discipline professionnelle, la norme de la prépondérance des probabilités exige que la preuve soit [TRADUCTION] « claire et persuasive et qu'elle se fonde sur des éléments solides » (voir *Heath c. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (C. Ont. (Div. gén.)), par. 53).

(2) La jurisprudence britannique récente

[32] Au Royaume-Uni, il appert de certaines décisions que, selon la gravité des questions en jeu, la norme de preuve pénale s'applique même dans une affaire civile. Dans l'arrêt *R (McCann) c. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, lord Steyn s'exprime comme suit au par. 37 :

> [TRADUCTION] . . . je conviens qu'en raison de la gravité des questions en jeu, il serait normalement nécessaire

standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

[33] Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 586:

> . . . the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

[34] Most recently in *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

[35] Lord Hoffmann addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the

de faire appel, dans une certaine mesure, à la norme de preuve civile plus stricte : *In re H (Minors) (Sexual Abuse : Standard of Proof)* [1996] AC 563, 586 D-H, lord Nicholls of Birkenhead. Essentiellement pour des raisons d'ordre pratique, le recorder de Manchester a décidé d'appliquer la norme pénale. La Cour d'appel a indiqué que ce choix est opportun dans la plupart des cas. Lord Bingham of Cornhill a fait remarquer que la norme civile plus stricte est presque identique à la norme appliquée au pénal. Je ne rejette aucun de ces points de vue. Mais à mon avis, le pragmatisme commande de faciliter la tâche des tribunaux en leur enjoignant d'appliquer la norme pénale dans toute affaire relative à l'article premier.

[33] Dans l'arrêt *In re H. (Minors) (Sexual Abuse : Standard of Proof)*, [1996] A.C. 563 (H.L.), lord Nicholls aborde un autre aspect, celui de [TRADUCTION] « la probabilité ou [de] l'improbabilité intrinsèque d'un événement » (p. 586) :

> [TRADUCTION] . . . la probabilité ou l'improbabilité intrinsèque d'un événement est un élément à prendre en compte pour soupeser les probabilités et décider si, tout bien considéré, l'événement a eu lieu. Plus l'événement est improbable, plus la preuve offerte doit être forte pour l'établir suivant la prépondérance des probabilités.

[34] Plus récemment, dans l'arrêt *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, rendu le 11 juin 2008, la Chambre des lords s'est de nouveau penchée sur la question de la norme de preuve. Après l'audition du présent pourvoi, l'avocat du procureur général du Canada, M^e^ Southey, a porté cet arrêt à l'attention de notre Cour sans que les avocats des autres parties ne s'y opposent.

[35] Lord Hoffmann y fait état de la « confusion » qui règne au sein des tribunaux britanniques sur le sujet (par. 5) :

> [TRADUCTION] Une certaine confusion a toutefois été créée par des décisions donnant à penser que la norme de preuve peut varier selon la gravité de la faute alléguée, voire celle des conséquences pour l'intéressé. Ces décisions appartiennent à trois catégories. Dans la première, le tribunal qualifie l'affaire de civile à une fin donnée (p. ex., pour l'application de l'article 6 de la Convention européenne des droits de l'homme et des libertés fondamentales), mais il estime néanmoins, vu la gravité des conséquences de l'instance, que la norme de preuve pénale ou l'équivalent devrait s'appliquer. Dans

proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

[36] The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffmann states:

I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffmann did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[37] Lord Hoffmann went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

[38] *In re B* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the

la deuxième catégorie, le tribunal opine que lorsqu'un événement est intrinsèquement improbable, de solides éléments de preuve peuvent être nécessaires pour le convaincre qu'il est plus probable que l'événement se soit produit que le contraire. Dans la troisième catégorie, le juge confond simplement la norme de preuve et le rôle de la probabilité intrinsèque pour décider si une partie s'est acquittée ou non du fardeau de la preuve au regard de la norme applicable.

[36] La Chambre des lords a conclu à l'unanimité à l'existence d'une seule norme de preuve en matière civile. Lord Hoffmann dit au par. 13 :

[TRADUCTION] Je pense que le temps est venu d'affirmer une fois pour toutes qu'il n'y a en matière civile qu'une seule norme de preuve : il doit être plus probable que le fait allégué s'est produit que le contraire.

Or, lord Hoffmann n'a pas désapprouvé l'application de la norme pénale selon la question en jeu. Après avoir très clairement énoncé qu'une seule norme de preuve s'appliquait en matière civile, il poursuit au par. 13 en tenant des propos plutôt énigmatiques :

[TRADUCTION] Je n'entends pas désapprouver l'une ou l'autre des décisions comprises dans la première catégorie, mais je conviens avec lord Steyn dans *McCann's*, p. 812 que ce serait beaucoup plus clair si les tribunaux disaient simplement que, même s'il s'agit d'une instance civile, vu la nature de la question en jeu, il est indiqué d'appliquer la norme pénale.

[37] Lord Hoffmann ajoute que la prise en compte de la probabilité intrinsèque ne constitue pas une règle de droit (par. 15) :

[TRADUCTION] J'insiste sur les mots que j'ai mis en italiques [« dans la mesure où cela est indiqué dans les circonstances »]. Lord Nicholls [dans *In re H*] n'a pas énoncé une règle de droit. Il n'existe qu'une seule règle de droit : il faut prouver qu'il est plus probable que le fait a eu lieu que le contraire. Le sens commun — et non le droit — exige, pour trancher à cet égard, qu'on tienne compte, dans la mesure où cela est indiqué, de la probabilité intrinsèque.

[38] L'arrêt *In re B* a été rendu sous le régime de la *Children Act 1989* du Royaume-Uni. Bien que ses observations sur la norme de preuve applicable ne valent que pour cette loi, la baronne Hale explique que ni la gravité de l'allégation ni celle

consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section I of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

[39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;

(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

des conséquences possibles ne devraient modifier la norme de preuve appliquée pour établir les faits. Voici ce qu'elle dit aux par. 70-72 :

[TRADUCTION] Vos seigneuries, pour cette raison, j'irais plus loin et je clamerais haut et fort que la norme de preuve applicable pour établir les faits nécessaires au respect du critère du par. 31(2) ou à l'application des considérations liées au bien-être de l'article premier de la loi de 1989 est simplement la prépondérance des probabilités, ni plus ni moins. Ni la gravité de l'allégation, ni celle des conséquences ne devraient modifier la norme de preuve appliquée pour établir les faits. La probabilité intrinsèque ne doit être prise en compte, s'il y a lieu, que pour découvrir la vérité.

Pour ce qui est des conséquences, elles sont toujours sérieuses quelle que soit l'issue de l'instance. L'enfant peut voir sa relation avec sa famille sérieusement compromise ou s'exposer encore à un préjudice important. À l'inverse, le père ou la mère peut voir sa relation avec l'enfant sérieusement compromise ou avoir encore la possibilité de maltraiter cet enfant ou un autre.

Pour ce qui est de la gravité de l'allégation, il n'y a pas de lien logique ou nécessaire entre gravité et probabilité. Le comportement gravement préjudiciable — comme le meurtre — est suffisamment rare pour être la plupart du temps intrinsèquement improbable. Malgré cela, lorsque, par exemple, on découvre un corps à la gorge tranchée, mais aucune arme à proximité, le meurtre est loin d'être improbable. D'autres comportements gravement préjudiciables, comme l'alcoolisme ou la toxicomanie, sont malheureusement trop répandus et loin d'être improbables.

(3) Résumé des différentes approches

[39] Voici en résumé quelles sont selon moi les différentes approches possibles dans une affaire civile où un comportement criminel ou moralement répréhensible est allégué :

(1) La norme de preuve pénale s'applique selon la gravité de l'allégation.

(2) Une norme de preuve intermédiaire se situant entre la civile et la pénale, proportionnée aux circonstances, s'applique.

(3) Lorsque l'allégation est grave, la norme de preuve n'est pas plus stricte, mais la preuve doit faire l'objet d'un examen plus attentif.

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and

(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

[41] Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt

(4) La norme de preuve n'est pas plus stricte, mais la preuve doit être claire et convaincante.

(5) La norme de preuve n'est pas plus stricte, mais plus l'événement est improbable, plus la preuve doit être solide pour satisfaire au critère de la prépondérance des probabilités.

(4) L'approche qui devrait désormais être celle des cours de justice canadiennes

[40] Comme l'a fait la Chambre des lords, notre Cour devrait selon moi affirmer une fois pour toutes qu'il n'existe au Canada, en common law, qu'une seule norme de preuve en matière civile, celle de la prépondérance des probabilités. Le contexte constitue évidemment un élément important et le juge ne doit pas faire abstraction, lorsque les circonstances s'y prêtent, de la probabilité ou de l'improbabilité intrinsèque des faits allégués non plus que de la gravité des allégations ou de leurs conséquences. Toutefois, ces considérations ne modifient en rien la norme de preuve. À mon humble avis, pour les motifs qui suivent, il faut écarter les approches énumérées précédemment.

[41] L'arrêt *Hanes c. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154, p. 158-164, a clairement établi que la norme pénale ne s'applique pas en matière civile au Canada. La preuve hors de tout doute raisonnable exigée en matière criminelle est liée à la présomption d'innocence dont bénéficie l'accusé dans un procès pénal. Le fardeau de la preuve incombe toujours à la poursuite. Comme l'a expliqué le juge Cory dans l'arrêt *R. c. Lifchus*, [1997] 3 R.C.S. 320, par. 27 :

> Premièrement, il faut indiquer clairement au jury que la norme de la preuve hors de tout doute raisonnable a une importance vitale puisqu'elle est inextricablement liée au principe fondamental de tous les procès pénaux : la présomption d'innocence. Ces deux concepts sont pour toujours intimement liés l'un à l'autre, comme Roméo et Juliette ou Oberon et Titania, et ils doivent être présentés comme formant un tout. Si la présomption d'innocence est le fil d'or de la justice pénale, alors la preuve hors de tout doute raisonnable en est le fil d'argent, et ces deux fils sont pour toujours entrelacés pour former la trame du droit pénal. Il faut

that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[42] By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:

Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

[43] An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:

As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.

[44] Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other

rappeler aux jurés que le fardeau de prouver hors de tout doute raisonnable que l'accusé a commis le crime incombe à la poursuite tout au long du procès, et qu'il ne se déplace jamais sur les épaules de l'accusé.

[42] À l'opposé, dans une affaire civile, nulle présomption d'innocence ne s'applique. L'explication en est donnée dans J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 154 :

[TRADUCTION] Comme il importe peu à la société que le demandeur ou le défendeur ait gain de cause dans une instance civile, il n'y a pas lieu de prévenir un jugement erroné en appliquant une norme de preuve plus stricte que celle de la prépondérance des probabilités.

Il est vrai qu'une conclusion de responsabilité tirée dans une affaire civile peut avoir des conséquences sérieuses qui continuent de se faire sentir après l'instance. Mais il demeure qu'une affaire civile ne fait pas intervenir le pouvoir de l'État de punir une personne ou de la priver de sa liberté.

[43] Le recours à une norme de preuve intermédiaire présente des difficultés d'ordre pratique. Comme le disent Rothstein, Centa et Adams (p. 466-467) :

[TRADUCTION] De même, laisser entendre que la norme de preuve applicable est « plus stricte » que la « simple prépondérance des probabilités » soulève nécessairement la question du pourcentage de probabilité à établir? Ce qui n'est d'aucune utilité, car le décideur pourra se représenter une probabilité de « 51 p. 100 » ou une « probabilité plus grande », mais non une probabilité de 60 p. 100 ou de 70 p. 100.

[44] Autrement dit, il semblerait incongru qu'un juge conclue qu'il est probable, mais pas assez probable suivant une norme non précisée, qu'un événement ait eu lieu et, par conséquent, que cet événement ne s'est pas produit. Comme l'explique lord Hoffmann dans l'arrêt *In re B*, par. 2 :

[TRADUCTION] Lorsqu'une règle de droit exige la preuve d'un fait (le « fait en litige »), le juge ou le jury doit déterminer si le fait s'est ou non produit. Il ne saurait conclure qu'il a pu se produire. Le droit est un système binaire, les seules valeurs possibles étant zéro et un. Ou bien le fait s'est produit, ou bien il ne s'est pas produit. Lorsqu'un doute subsiste, la règle selon laquelle

carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[47] Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:

Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is

le fardeau de la preuve incombe à l'une ou l'autre des parties permet de trancher. Lorsque la partie à laquelle incombe la preuve ne s'acquitte pas de son obligation, la valeur est de zéro et le fait est réputé ne pas avoir eu lieu. Lorsqu'elle s'en acquitte, la valeur est de un, et le fait est réputé s'être produit.

À mon avis, la seule façon possible d'arriver à une conclusion de fait dans une instance civile consiste à déterminer si, selon toute vraisemblance, l'événement a eu lieu.

[45] Laisser entendre que lorsqu'une allégation formulée dans une affaire civile est grave, la preuve offerte doit être examinée plus attentivement suppose que l'examen peut être moins rigoureux dans le cas d'une allégation moins grave. Je crois qu'il est erroné de dire que notre régime juridique admet différents degrés d'examen de la preuve selon la gravité de l'affaire. Il n'existe qu'une seule règle de droit : le juge du procès doit examiner la preuve attentivement.

[46] De même, la preuve doit toujours être claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. Mais, je le répète, aucune norme objective ne permet de déterminer qu'elle l'est suffisamment. Dans le cas d'une allégation grave comme celle considérée en l'espèce, le juge peut être appelé à apprécier la preuve de faits qui se seraient produits de nombreuses années auparavant, une preuve constituée essentiellement des témoignages du demandeur et du défendeur. Aussi difficile que puisse être sa tâche, le juge doit trancher. Lorsqu'un juge consciencieux ajoute foi à la thèse du demandeur, il faut tenir pour acquis que la preuve était à ses yeux suffisamment claire et convaincante pour conclure au respect du critère de la prépondérance des probabilités.

[47] Enfin, il peut arriver que le fait soit intrinsèquement improbable. L'improbabilité intrinsèque dépend toujours des circonstances. Comme le dit la baronne Hale dans l'arrêt *In re B*, par. 72 :

[TRADUCTION] Prenons l'exemple bien connu de l'animal aperçu dans Regent's Park. S'il est vu à l'extérieur du zoo, dans un lieu où l'on promène habituellement son chien, alors il est plus vraisemblable qu'il s'agisse d'un

seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

[48] Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[50] I turn now to the issues particular to this case.

B. *The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.*

[51] The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider

chien que d'un lion. S'il est vu à l'intérieur du zoo, près de l'enclos des lions, dont la porte est ouverte, il se peut fort bien qu'il soit plus vraisemblable qu'il s'agisse d'un lion que d'un chien.

[48] Un fait allégué peut être très improbable, un autre moins. Il ne saurait y avoir de règle permettant de déterminer dans quelles circonstances et jusqu'à quel point le juge du procès doit tenir compte de l'improbabilité intrinsèque. Dans l'arrêt *In re B*, lord Hoffmann fait remarquer ce qui suit (par. 15) :

[TRADUCTION] Le sens commun — et non le droit — exige, pour trancher à cet égard, qu'on tienne compte, dans la mesure où cela est indiqué, de la probabilité intrinsèque.

Il revient au juge du procès de décider dans quelle mesure, le cas échéant, les circonstances donnent à penser que le fait allégué est intrinsèquement improbable et, s'il l'estime indiqué, il peut en tenir compte pour déterminer si la preuve établit que, selon toute vraisemblance, l'événement s'est produit. Or, aucune règle de droit ne saurait le lui imposer.

(5) Conclusion sur la norme de preuve

[49] En conséquence, je suis d'avis de confirmer que dans une instance civile, une seule norme de preuve s'applique, celle de la prépondérance des probabilités. Dans toute affaire civile, le juge du procès doit examiner la preuve pertinente attentivement pour déterminer si, selon toute vraisemblance, le fait allégué a eu lieu.

[50] Je passe maintenant aux questions particulières que soulève le présent pourvoi.

B. *Les préoccupations de la Cour d'appel concernant les contradictions relevées dans le témoignage de F.H.*

[51] La rigueur de l'examen qui s'impose dans une affaire d'agression sexuelle est au cœur de l'analyse de la Cour d'appel. Selon la juge Rowles, celle-ci devait notamment déterminer [TRADUCTION] « si la juge du procès, compte tenu de la norme de preuve applicable dans une affaire de cette nature,

the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

[52] In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "scrutinize the evidence in the manner required and thereby erred in law" (para. 79).

[53] As I have explained, there is only one civil standard of proof — proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

[54] Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was))

a omis de prendre en compte les lacunes du témoignage de [F.H.] ou ses aspects préoccupants » (par. 72). Ces « aspects préoccupants » englobaient les déclarations contradictoires de F.H. à l'interrogatoire préalable et au procès concernant la fréquence des agressions sexuelles alléguées, de même que la divergence entre l'allégation initiale de tentative de relation anale et l'affirmation au procès qu'il y avait eu pénétration.

[52] Vu l'absence d'un élément circonstanciel étayant le témoignage de F.H., les juges majoritaires de la Cour d'appel ont conclu que la juge du procès avait omis de se demander si les faits avaient été prouvés [TRADUCTION] « selon la norme proportionnée à l'allégation » et qu'elle n'avait pas « examiné la preuve aussi attentivement qu'elle l'aurait dû, d'où l'erreur de droit » (par. 79).

[53] Je le répète, une seule norme de preuve s'applique en matière civile, celle de la prépondérance des probabilités. Bien que la jurisprudence du moment puisse expliquer sa décision, la Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffit pour statuer sur le présent pourvoi, mais j'estime important pour l'avenir de faire quelques observations supplémentaires sur le raisonnement des juges majoritaires de la Cour d'appel.

[54] La juge Rowles a eu raison de conclure que l'omission d'un juge de première instance d'appliquer la bonne norme de preuve constitue une erreur de droit. La question est de savoir dans quelle mesure une telle omission peut ressortir des motifs du juge. Évidemment, dans le cas improbable où le juge du procès formule expressément une norme de preuve incorrecte, il est présumé l'avoir appliquée. Lorsqu'il énonce expressément la bonne norme de preuve, il est présumé l'avoir appliquée. Dans le cas où le juge ne renvoie à aucune norme de preuve particulière, on présume également qu'il a appliqué la bonne :

> Les juges du procès sont censés connaître le droit qu'ils appliquent tous les jours.
>
> (*R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, la juge McLachlin (maintenant Juge en chef))

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

[55] An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

[56] Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. *The Inconsistency in the Evidence of F.H.*

[57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of

Que la norme applicable ait été précisée ou non, on présume qu'elle a été appliquée, sauf lorsque l'analyse révèle le contraire. Toutefois, lorsqu'elle détermine si la bonne norme a effectivement été appliquée, la cour d'appel doit prendre garde de ne pas substituer son interprétation des faits à celle du juge du procès.

[55] La cour d'appel ne peut infirmer une conclusion de fait que « lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve » (*H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 4 (soulignement omis), le juge Fish). La juge Rowles le reconnaît à juste titre (par. 27). Elle ajoute que lorsque le juge du procès s'appuie sur quelque élément de preuve pour tirer une conclusion, la cour d'appel peut difficilement conclure à l'existence d'une erreur manifeste et dominante. D'ailleurs, toujours au par. 27, elle renvoie à l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, par. 22, et aux propos maintes fois cités depuis qu'y tiennent à ce sujet les juges Iacobucci et Major.

[56] La juge Rowles était convaincue que la juge du procès savait quelle norme de preuve avait été appliquée jusqu'alors aux allégations d'actes moralement répréhensibles. Elle dit au par. 35 :

> [TRADUCTION] Il appert de ses motifs que la juge était au fait de la jurisprudence sur la norme de preuve applicable à des allégations d'actes moralement répréhensibles.

Cela aurait dû convaincre la Cour d'appel que la juge du procès avait compris et appliqué la norme de preuve qu'elles tenaient pour applicable en l'espèce.

C. *Les contradictions du témoignage de F.H.*

[57] Au paragraphe 5 de ses motifs, la juge du procès tient compte du jugement de la juge Rowles dans l'affaire *R. c. R.W.B.* (1993), 24 B.C.A.C. 1, par. 28-29, portant sur la crédibilité d'un témoignage qui est entaché de contradictions et que la

supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[59] It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

[60] The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77 that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

preuve n'étaye pas par ailleurs. Même si la juge Rowles se prononçait dans le contexte pénal, à l'instar de la juge du procès, j'estime que ses remarques sont pertinentes dans le cas présent :

> [TRADUCTION] En l'espèce, il existait un certain nombre de contradictions dans le témoignage de la plaignante de même qu'entre son témoignage et celui d'autres témoins. Bien que de légères contradictions n'entachent pas indûment la crédibilité d'un témoin, une suite de contradictions peut constituer un facteur non négligeable et semer un doute raisonnable dans l'esprit du juge des faits quant à la crédibilité du témoignage. Aucune règle ne permet de déterminer dans quels cas des contradictions susciteront un tel doute, mais le juge des faits doit à tout le moins les examiner dans leur ensemble pour déterminer si le témoignage en question est digne de foi. C'est particulièrement vrai en l'absence de corroboration sur la principale question en litige, comme c'était le cas en l'espèce. [par. 29]

[58] Comme l'a estimé la juge Rowles à l'égard de la norme de preuve pénale, lorsque la norme applicable est la prépondérance des probabilités, il n'y a pas non plus de règle quant aux circonstances dans lesquelles les contradictions relevées dans le témoignage du demandeur amèneront le juge du procès à conclure que le témoignage n'est pas crédible ou digne de foi. En première instance, le juge ne doit pas considérer le témoignage du demandeur en vase clos. Il doit plutôt examiner l'ensemble de la preuve pour déterminer l'incidence des contradictions sur les questions de crédibilité touchant au cœur du litige.

[59] Il appert de ses motifs que la juge du procès a reconnu son obligation de tenir compte des contradictions du témoignage de F.H. et de les confronter avec l'ensemble de la preuve dans la mesure du possible. Bien qu'elle n'ait pas considéré chacune des contradictions, elle a examiné de façon générale les arguments de la défense, ce qu'elle explique au par. 100.

[60] La juge du procès se penche expressément sur certains aspects du témoignage de F.H. tenus pour préoccupants par la Cour d'appel. À titre d'exemple, la juge Rowles dit au par. 77 que le témoignage de F.H. concernant les inspections effectuées dans les toilettes des surveillants contredisait celui d'autres témoins :

There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to the respondent's recollection of events. In fact, the defence evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

[61] However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

[62] In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

[63] The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall,

[TRADUCTION] Nul témoin ayant fréquenté le pensionnat n'a confirmé que d'autres garçons avaient formé des rangs puis avaient été examinés par M. McDougall dans les toilettes des surveillants de manière à étayer la version des faits de l'intimé. En fait, la preuve offerte par la défense établissait le contraire, c'est-à-dire que les garçons n'avaient jamais fait la file à l'extérieur des toilettes des surveillants pour quelque raison que ce soit.

[61] Or, la juge Gill traite des inspections dans les toilettes et du fait que les souvenirs des témoins à leur sujet sont contradictoires. Elle tire aussi la conclusion de fait que des inspections avaient lieu périodiquement au pensionnat. Voici ce qu'elle dit au par. 106 :

> [TRADUCTION] On a soutenu que le témoignage de F.H. ne concordait pas avec celui d'autres témoins. Aucune inspection n'avait lieu dans les toilettes des surveillants ou de la façon indiquée par F.H. Je conviens qu'aucun autre témoin n'a fait état d'inspections effectuées dans les toilettes des surveillants; toutefois, des témoins de la défense ont confirmé l'existence d'inspections. J'ai déjà fait référence au témoignage de M. Paul. Je conclus que des inspections ont été effectuées de la manière qu'il a décrite. Les garçons subissaient parfois un examen le jour de la douche et les surveillants s'assuraient régulièrement que les garçons s'étaient bien lavés. Certes, M. Paul n'a pas affirmé que le défendeur avait effectué de tels examens, mais il a dit que ceux-ci étaient courants. En fait, le témoignage de M. Paul ne corrobore pas celui du défendeur selon lequel les inspections visaient seulement la détection de poux et relevaient de l'infirmière.

[62] Dans ce passage de ses motifs, la juge du procès relève la divergence entre le témoignage de F.H. et ceux des autres témoins. Elle examine aussi le témoignage de M. McDougall à la lumière de ceux des autres témoins de la défense. Elle conclut du témoignage de M. Paul que des inspections avaient lieu couramment. Elle constate que son témoignage n'est pas compatible avec celui de M. McDougall selon lequel les inspections visaient seulement la détection de poux et relevaient de l'infirmière. Il s'ensuit nécessairement qu'à son avis, le témoignage de M. McDougall n'était pas digne de foi sur ce point.

[63] Les juges majoritaires de la Cour d'appel se disent également préoccupées par le témoignage de F.H. selon lequel chaque fois qu'il avait été agressé

he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

[64] It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

sexuellement par M. McDougall, il s'était rendu aux toilettes des surveillants situées à l'étage supérieur de son dortoir. La juge Rowles dit ce qui suit au par. 77 :

> [TRADUCTION] Or, [F.H.] faisait alors partie des plus jeunes garçons et non de ceux d'âge intermédiaire, de sorte que son dortoir aurait dû se situer à l'étage supérieur. Vu la preuve relative au lieu où dormaient les garçons, [M. McDougall] ne pouvait pas « faire monter » [F.H.].

L'avocat de l'appelant fait observer qu'au procès, F.H. a déclaré qu'il faisait partie des garçons d'âge intermédiaire lors des agressions sexuelles et que, par conséquent, il devait monter pour se rendre aux toilettes des surveillants. Malgré les contradictions, des éléments de preuve permettaient d'ajouter foi au témoignage de F.H.

[64] Il est vrai que la juge Gill ne traite pas de l'incohérence du témoignage de F.H. concernant la fréquence des inspections dans les toilettes des surveillants, contrairement à la juge Rowles qui la relève au par. 75 :

> [TRADUCTION] L'intimé a aussi dit à M^me^ Stone que, toutes les deux semaines, les jeunes garçons se plaçaient à l'extérieur des toilettes des surveillants, qu'ils appelaient la « salle d'examen », pour y être examinés. Au procès, il a témoigné que la mise en rang n'avait eu lieu que lors de la première agression sexuelle. Encore une fois, il s'agit d'une modification importante de sa relation des événements.

La juge Gill ne mentionne pas expressément le fait que les allégations de tentative de relation anale et d'attouchement des organes génitaux figurant dans la déclaration initiale différaient du témoignage de F.H. au procès selon lequel il y avait eu pénétration. La juge Rowles dit au par. 76 :

> [TRADUCTION] Dans sa déclaration initiale, l'intimé alléguait seulement la tentative de relation anale et l'attouchement des organes génitaux, nullement que l'appelant avait inséré son doigt dans son anus ou qu'il l'avait contraint à une relation anale. Au procès, il a affirmé qu'il y avait eu pénétration. Comme l'a dit la juge du procès, l'intimé a reconnu avoir lu la déclaration, y compris les paragraphes détaillant les agressions alléguées, et qu'il était conscient de la différence entre faire quelque chose et tenter de faire quelque chose.

[65] However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

[66] As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months. [Emphasis added.]

[67] Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

[68] The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

[69] As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not

[65] Or, aux paragraphes 46 et 48 de ses motifs, la juge Gill a fait état de ces contradictions soulevées en contre-interrogatoire. Il s'ensuit donc qu'elle en était consciente.

[66] En ce qui concerne les divergences relatives à la fréquence des agressions sexuelles, la juge Rowles dit ce qui suit au par. 73 :

> [TRADUCTION] À l'interrogatoire préalable, l'intimé a déclaré que les agressions sexuelles s'étaient produites « chaque semaine », « fréquemment » et « environ tous les dix jours » pendant toute la durée de son séjour au pensionnat. Au procès, il a reconnu avoir déclaré à l'interrogatoire préalable qu'il avait dit à sa thérapeute, M^me^ Nellie Stone, que les agressions sexuelles perpétrées par l'appelant avaient eu lieu pendant toute la durée de son séjour au pensionnat, de l'âge de huit à quatorze ans. Or, au procès, il a précisé que les agressions sexuelles ne s'étaient produites qu'à quatre occasions sur une période de deux mois et demi. [Je souligne.]

[67] L'avocat de F.H. fait remarquer que son client a témoigné que plus d'une personne l'avaient agressé physiquement et sexuellement pendant son séjour au pensionnat, que la question à laquelle il a répondu portait à la fois sur les agressions sexuelles et les sévices physiques et que les juges majoritaires de la Cour d'appel ont considéré à tort que sa déclaration ne visait que les agressions perpétrées par M. McDougall. Il fait valoir que les propos de F.H. s'appliquaient à toutes les agressions physiques et sexuelles subies au cours des six années de son séjour au pensionnat, et pas seulement à celles commises par M. McDougall.

[68] La Cour d'appel semble conclure que F.H. a témoigné à l'interrogatoire préalable que M. McDougall l'avait agressé sexuellement pendant toute la période qu'il avait été pensionnaire, alors qu'il a dit au procès qu'il y avait eu quatre agressions sur une période de deux mois et demi. Bien que le témoignage ne soit pas sans soulever de doute, il est possible de l'interpréter de la manière prônée par l'avocat de F.H. et de conclure à l'absence de contradiction entre le témoignage à l'interrogatoire préalable et celui offert au procès.

[69] En ce qui concerne la fréquence des agressions sexuelles qu'aurait perpétrées M. McDougall,

ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

[70] The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

[71] All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

[72] With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility

la juge du procès tient compte des contradictions dans le témoignage de F.H, mais elle ajoute tout de même foi à celui-ci (par. 112) :

> [TRADUCTION] Des contradictions entachent toutefois le témoignage de F.H. Comme l'a aussi fait valoir la défense, son témoignage sur la fréquence des agressions n'a pas été invariable et il y a des différences entre ce qu'il a reconnu avoir dit à M^me^ Stone, son témoignage en interrogatoire préalable et ce qu'il a affirmé au procès. Pendant le procès, il a déclaré qu'il y avait eu quatre agressions. Auparavant, il avait affirmé que les agressions se produisaient toutes les deux semaines ou tous les dix jours. C'est là une différence importante. Toutefois, son témoignage concernant la nature des agressions, ainsi que le lieu et les moments où elles se sont produites n'a pas varié. Malgré les divergences quant à la fréquence des agressions, je suis d'avis que F.H. était un témoin digne de foi.

[70] La juge du procès n'avait pas à conclure à la non-crédibilité de F.H. ou à la non-fiabilité de son témoignage au procès parce que celui-ci contredisait ses déclarations antérieures. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand même à la conclusion que le témoin était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel.

[71] Il ne s'ensuit pas que les préoccupations de la juge Rowles n'étaient pas fondées. Certains éléments du témoignage de F.H. soulèvent des questions. Or, la juge du procès était consciente des contradictions du témoignage. Les événements sont survenus plus de 30 ans auparavant. Comme la juge du procès renvoie aux contradictions et considère expressément certaines d'entre elles, il faut présumer qu'elle en a tenu compte pour établir la prépondérance des probabilités. Malgré ses réserves, il n'appartenait pas à la Cour d'appel de revenir sur la décision de première instance en l'absence d'une erreur manifeste et dominante.

[72] En toute déférence, je ne peux voir dans les motifs des juges majoritaires de la Cour d'appel qu'un désaccord avec l'appréciation de la crédibilité de F.H. par la juge du procès à la lumière des contradictions et de l'absence d'élément circonstanciel corroborant le témoignage. Il incombe

is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

clairement au juge du procès d'apprécier la crédibilité, de sorte que sa décision à cet égard justifie une grande déférence. Comme l'ont expliqué les juges Bastarache et Abella dans l'arrêt *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17, par. 20 :

> Apprécier la crédibilité ne relève pas de la science exacte. Il est très difficile pour le juge de première instance de décrire avec précision l'enchevêtrement complexe des impressions qui se dégagent de l'observation et de l'audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits. C'est pourquoi notre Cour a statué — la dernière fois dans l'arrêt *H.L.* — qu'il fallait respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante.

[73] As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L.*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

[73] Je le répète, une cour d'appel ne peut intervenir que « lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve » (*H.L.*, par. 4 (soulignement omis)). La Cour d'appel n'a pas opiné en ce sens. En toute déférence, en concluant que la juge du procès avait omis d'examiner le témoignage de F.H. aussi attentivement qu'elle l'aurait dû légalement, la Cour d'appel a substitué à tort son appréciation de la crédibilité à celle de la juge du procès.

D. *Palpable and Overriding Error*

[74] Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

D. *Erreur manifeste et dominante*

[74] Bien que la Cour d'appel n'ait pas relevé d'erreur manifeste et dominante, le procureur général du Canada soutient que la juge du procès en a de fait commis une. Sa prétention s'appuie entièrement sur les contradictions du témoignage de F.H. Selon lui, au vu de ces contradictions, la juge du procès aurait clairement eu tort de conclure que F.H. était digne de foi.

[75] I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole.

[75] Je ne veux pas minimiser les contradictions du témoignage de F.H. Elles sont certainement pertinentes pour l'appréciation de sa crédibilité. Or, malgré ces contradictions, la juge du procès était convaincue de la fiabilité du témoignage de F.H. et de la perpétration des quatre agressions sexuelles par M. McDougall. Il appert de ses motifs que la conclusion sur la crédibilité des témoins a été tirée au regard de l'ensemble de la preuve. La juge a tenu

She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

[76] In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over 30 years earlier when F.H. was approximately 10 years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. *Corroboration*

[77] The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent

compte de l'aménagement du pensionnat et du fait que la perpétration des agressions de la manière décrite par F.H. était susceptible de détection. Elle s'est également demandé si le témoignage de F.H. concernant les inspections effectuées dans les toilettes des surveillants et l'accès aux draps et aux pyjamas concordait avec celui d'autres témoins. Elle a reconnu que F.H. avait intérêt à mentir pour préserver son mariage, mais elle a statué que les circonstances de la révélation ne suggéraient pas la fabrication. Dans son analyse, la juge du procès a aussi pris en considération l'attitude de F.H., à savoir qu'[TRADUCTION] « [il] ne s'agissait pas d'un témoin offrant des réponses détaillées, qu'il répondait souvent par un simple oui ou non, sans devancer les questions » (par. 110) et que « [p]endant son témoignage, il n'a manifesté aucune émotion, mais il était clair qu'il avait peu de bons souvenirs du pensionnat, voire aucun » (par. 113).

[76] En fin de compte, ajouter foi à un témoignage et non à un autre est affaire de jugement. Vu les contradictions du témoignage de F.H. au sujet de la fréquence des agressions sexuelles, on conçoit aisément qu'un autre juge n'aurait peut-être pas conclu que F.H. était un témoin digne de foi. Cependant, la juge Gill l'a trouvé crédible. Il importe de se rappeler que le témoignage portait sur des événements survenus plus de 30 ans auparavant et qu'à l'époque F.H. avait environ 10 ans. Pour des raisons de principe, le législateur de la Colombie-Britannique a cessé d'assujettir à un délai de prescription la poursuite pour agression sexuelle. Il lui était loisible de le faire. Néanmoins, il faut reconnaître que la tâche du juge du procès appelé à apprécier la preuve dans une affaire de cette nature est particulièrement ardue. Mais une cour d'appel qui n'a pas entendu les témoignages ni observé les témoins n'a pas pour autant le droit de réévaluer la fiabilité de ceux-ci.

E. *Corroboration*

[77] Les motifs des juges majoritaires de la Cour d'appel peuvent être interprétés comme établissant qu'une corroboration indépendante s'impose légalement lorsque, dans une affaire où une agression sexuelle est alléguée, c'est la parole de la victime

corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

[78] In her concurring reasons at para. 106, Southin J.A. stated:

To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

[79] The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

[81] Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125),

contre celle du défendeur. La juge Rowles fait observer au par. 77 :

[TRADUCTION] Nul témoin ayant fréquenté le pensionnat n'a confirmé que d'autres garçons avaient formé des rangs puis avaient été examinés par M. McDougall dans les toilettes des surveillants de manière à étayer la version des faits de [F.H.].

Elle ajoute (par. 79) :

[TRADUCTION] Aucun élément circonstanciel ne corrobore le témoignage de [F.H.].

[78] La juge Southin affirme pour sa part (par. 106, motifs concordants) :

[TRADUCTION] Préférer un témoignage à un autre exige, à mon avis, qu'un motif convaincant fondé sur un autre élément de preuve que le témoignage du demandeur le justifie.

[79] Ces extraits peuvent donner à penser qu'il existe en matière civile une exigence juridique de corroboration dès lorsqu'une agression sexuelle est alléguée. Par surcroît de prudence et afin d'offrir des repères pour l'avenir, j'ajoute les remarques suivantes.

[80] Un élément de corroboration est toujours utile et étoffe la preuve offerte. C'est à mon avis ce que voulait dire la juge Rowles. Or, il ne s'agit pas d'une exigence juridique, car il est possible qu'un tel élément n'existe pas, surtout lorsque les faits se sont produits quelques décennies auparavant. Sans compter que les agressions sexuelles ont généralement lieu en privé.

[81] Exiger la corroboration rendrait la norme de preuve en matière civile plus stricte que celle appliquée en matière pénale. Le droit criminel moderne a écarté l'exigence, d'abord établie par la common law puis par la loi, qu'une allégation d'agression sexuelle soit corroborée pour qu'il puisse y avoir déclaration de culpabilité (voir *Code criminel*, S.R.C. 1970, ch. C-34, par. 139(1), prévoyant la nécessité d'une corroboration et ses modifications subséquentes supprimant cette exigence (*Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives*

as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. *Is W. (D.) Applicable in Civil Cases in Which Credibility Is in Issue?*

[82] At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.).
>
> . . .
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on a balance of probabilities.

[83] *W. (D.)* was a decision by this Court in which Cory J., at p. 758, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are

à d'autres lois, S.C. 1980-81-82-83, ch. 125), ainsi que la version actuelle du *Code criminel*, L.R.C. 1985, ch. C-46, art. 274, portant que la corroboration n'est pas nécessaire pour déclarer une personne coupable d'agression sexuelle). Dans une affaire d'agression sexuelle, la décision du juge du procès peut dépendre du fait qu'il ajoute foi au témoignage du demandeur ou à celui du défendeur, mais malgré ce dilemme, il doit apprécier la preuve et se prononcer sans exiger de corroboration.

F. *L'arrêt W. (D.) s'applique-t-il au civil en matière de crédibilité?*

[82] La juge Southin dit ce qui suit aux par. 107, 108 et 110 :

> [TRADUCTION] Le juge ne peut se contenter de dire qu'il trouve le demandeur crédible et, de ce fait, que le défendeur ment nécessairement.
>
> Jusqu'ici mes motifs ne font qu'appliquer l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742 (C.S.C.), au contexte civil.
>
> . . .
>
> Je ne vois aucun motif rationnel de ne pas rejeter l'alternative en matière civile, tout comme en matière pénale, lorsque l'acte reproché constitue un acte criminel, même si la norme de preuve applicable est celle de la prépondérance des probabilités, et non celle de l'absence de tout doute raisonnable.

[83] Dans l'arrêt *W. (D.)*, par la voix du juge Cory, notre Cour a établi un exposé à trois volets afin d'aider le jury à évaluer les témoignages contradictoires de la victime et de l'accusé dans le cadre d'une poursuite criminelle pour agression sexuelle (p. 758) :

> Premièrement, si vous croyez la déposition de l'accusé, manifestement vous devez prononcer l'acquittement.
>
> Deuxièmement, si vous ne croyez pas le témoignage de l'accusé, mais si vous avez un doute raisonnable, vous devez prononcer l'acquittement.
>
> Troisièmement, même si vous n'avez pas de doute à la suite de la déposition de l'accusé, vous devez vous demander si, en vertu de la preuve que vous acceptez,

convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[84] These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:

Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.

. . .

. . . In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[85] The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

[86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that

vous êtes convaincus hors de tout doute raisonnable par la preuve de la culpabilité de l'accusé.

[84] Cet exposé au jury n'est pas sacré. Il offre simplement des repères pour l'application du doute raisonnable, comme l'a récemment expliqué le juge Binnie dans l'arrêt *R. c. J.H.S.*, [2008] 2 R.C.S. 152, 2008 CSC 30, par. 9 et 13 :

Essentiellement, l'arrêt *W. (D.)* explique tout simplement au bénéfice des jurés profanes en quoi consiste un doute raisonnable dans le contexte de l'évaluation de témoignages contradictoires. Il attire l'attention des jurés sur l'erreur consistant à procéder à un « concours de crédibilité ». Il explique que les juges de première instance sont tenus de bien faire comprendre aux jurés que le ministère public n'est jamais dispensé du fardeau de prouver tous les éléments de l'infraction hors de tout doute raisonnable.

. . .

. . . Dans *R. c. Avetysan*, [2000] 2 R.C.S. 745, 2000 CSC 56, le juge Major qui s'exprimait au nom des juges de la majorité a souligné que, dans toutes les causes où la question de la crédibilité revêt de l'importance, « [c]e qu'il importe vraiment de déterminer, c'est essentiellement si les directives du juge du procès ont donné au jury l'impression qu'il devait choisir entre les deux versions des événements » (par. 19). L'essentiel c'est que le manque de crédibilité de l'accusé n'équivaut pas à une preuve de sa culpabilité hors de tout doute raisonnable.

[85] La démarche proposée dans l'arrêt *W. (D.)* a été conçue pour aider le jury aux prises avec des témoignages contradictoires dans une affaire criminelle à déterminer s'il existe un doute raisonnable. La non-crédibilité de l'accusé ne prouve pas sa culpabilité hors de tout doute raisonnable.

[86] Toutefois, au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. S'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive, ce témoignage étant incompatible avec celui de l'autre partie. Aussi, croire une partie suppose explicitement ou non que l'on ne croit pas l'autre sur le point important en litige. C'est particulièrement le cas lorsque, comme en l'espèce, le

are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. *Did the Trial Judge Ignore the Evidence of McDougall?*

[87] In an argument related to *W. (D.)*, the Attorney General of Canada says, at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

[88] The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), which concludes at p. 357:

> . . . a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

[89] Thus, the Attorney General contends, at para. 47 of its factum, that:

> In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

[90] I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

[91] The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H. She also dealt with the defence arguments

demandeur formule des allégations que le défendeur nie en bloc. La démarche préconisée dans l'arrêt *W. (D.)* ne convient pas pour évaluer la preuve au regard de la prépondérance des probabilités dans une instance civile.

G. *La juge du procès a-t-elle ignoré le témoignage de M. McDougall?*

[87] Dans sa plaidoirie relative à l'arrêt *W. (D.)*, le procureur général du Canada indique au par. 44 de son mémoire que [TRADUCTION] « [l]e simple fait de croire un témoin, sans apprécier le témoignage de l'autre témoin, a pour effet de marginaliser cet autre témoin » puisqu'il n'a aucun moyen de savoir si le juge ne l'a pas cru ou s'il a simplement ignoré son témoignage.

[88] La thèse du procureur général repose sur un extrait souvent cité de l'arrêt *Faryna c. Chorny*, [1952] 2 D.L.R. 354 (C.A.C.-B.), p. 357. La Cour d'appel y conclut :

> [TRADUCTION] . . . une cour d'appel doit être convaincue que la conclusion sur la crédibilité tirée en première instance repose non pas sur un seul élément de preuve, à l'exclusion de tout autre, mais bien sur l'ensemble des éléments permettant d'apprécier la crédibilité dans le cas considéré.

[89] Le procureur général soutient donc au par. 47 de son mémoire :

> [TRADUCTION] Dans une instance civile où une agression sexuelle est alléguée, le juge des faits qui ajoute foi au témoignage du demandeur et ignore simplement celui du défendeur ne satisfait pas à l'exigence, établie dans l'arrêt *Faryna*, que chacun des éléments de la preuve soit examiné.

[90] Je conviens que le juge du procès qui considère le seul témoignage du demandeur, à l'exclusion de celui du défendeur, commet une erreur. Or, ce n'est pas ce qui s'est passé en l'espèce.

[91] La juge du procès a relaté le témoignage de M. McDougall concernant sa foi et sa vocation, son mariage subséquent, sa fonction au pensionnat, la vie quotidienne dans l'établissement, l'entretien des vêtements et de la literie et sa dénégation des allégations d'agression sexuelle formulées par

with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

[92] In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behaviour such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

[93] She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself" to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

[94] And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

[95] At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

R.C. et F.H. Elle s'est également penchée sur les prétentions de la défense au sujet de la crédibilité des témoignages de R.C. et de F.H. concernant les agressions sexuelles. Elle a d'ailleurs conclu que R.C. n'avait pas prouvé que M. McDougall l'avait agressé sexuellement.

[92] Pour déterminer si M. McDougall avait jamais frappé R.C. ou F.H. avec une lanière en cuir, elle a résumé son témoignage comme suit (par. 131) :

> [TRADUCTION] Ainsi, selon le témoignage du défendeur, pendant les années qu'il a passées au pensionnat, il n'aurait frappé avec une lanière en cuir que cinq ou six garçons d'âge intermédiaire. Il l'aurait fait parce qu'ils s'étaient battus ou qu'ils avaient blasphémé. Il visait toujours les mains et la correction était toujours administrée dans le dortoir. Il a rejeté le témoignage de M. Jeffries selon lequel il l'avait fréquemment puni pour les motifs précisés par M. Jeffries. Il a nié être allé chez la grand-mère de M. Jeffries ou s'être moqué de lui parce qu'il voulait rendre visite à sa grand-mère. Il a nié les allégations de F.H.

[93] Elle a par ailleurs relevé une contradiction dans le témoignage de M. McDougall (par. 135) :

> [TRADUCTION] Je suis aussi d'avis que le défendeur a minimisé son recours à la lanière en cuir pour corriger les pensionnaires. Par ailleurs, bien qu'il ait déclaré n'avoir jamais infligé ce châtiment dans sa chambre, lorsqu'il a témoigné sur un incident en particulier, il a dit avoir « fait monté le garçon dans [sa] chambre et l'avoir frappé à la main droite trois fois avec une lanière en cuir ».

M. McDougall avait ensuite rectifié les faits : il avait dit avoir frappé le garçon dans le dortoir, et non dans sa chambre. Or, il était loisible à la juge du procès d'ajouter foi à la première version plutôt qu'à la seconde.

[94] Et, je le rappelle, la juge du procès relève au par. 106 la divergence entre les propos de M. McDougall et ceux d'un témoin de la défense, M. Paul, au sujet des inspections corporelles périodiques des garçons.

[95] Au nom des juges majoritaires de la Cour d'appel, la juge Rowles indique ce qui suit (par. 66) :

From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

[96] I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. *Were the Reasons of the Trial Judge Adequate?*

[97] The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that led to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this Court that the reasons are nonetheless inadequate.

[98] The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

[TRADUCTION] On peut inférer des motifs qu'elle invoque pour conclure que l'appelant a frappé l'intimé avec une lanière en cuir que la juge du procès n'a pas ajouté foi au témoignage de l'appelant sur ce point. Le fait de ne pas croire un témoin sur un point peut bien ternir son témoignage sur un autre sujet, mais une conclusion sur la crédibilité qui est défavorable à un témoin ne saurait à elle seule établir un fait en litige.

[96] Je suis d'accord avec la juge Rowles. Toutefois, les conclusions défavorables tirées par la juge du procès sur la crédibilité du témoignage de M. McDougall au sujet du recours à la lanière en cuir et le fait qu'elle a ajouté foi au témoignage de M. Paul plutôt qu'à celui de M. McDougall au sujet des inspections corporelles périodiques montrent qu'elle n'a pas ignoré le témoignage de M. McDougall et qu'elle ne l'a pas marginalisé. Elle a simplement cru F.H. plutôt que M. McDougall sur des points importants.

H. *Les motifs de la juge du procès étaient-ils suffisants?*

[97] Le procureur général soutient que les motifs de la juge du procès ne sont pas suffisants. La Cour d'appel a rejeté cette prétention (par. 61, la juge Rowles) :

[TRADUCTION] De façon générale, lorsque le juge précise le raisonnement à l'issue duquel il a tiré sa conclusion sur la question en litige, ses motifs sont suffisants aux fins d'un examen en appel. Pour qu'ils soient jugés insuffisants, point n'est besoin d'établir qu'un vice entache le raisonnement ayant mené à la conclusion. En l'espèce, les motifs de la juge permettent de comprendre comment elle est arrivée à la conclusion que l'intimé avait été agressé sexuellement.

Dans la mesure où la Cour d'appel dit pouvoir discerner les raisons pour lesquelles la juge du procès a tiré sa conclusion, la partie qui souhaite convaincre notre Cour que les motifs sont néanmoins insuffisants doit surmonter un obstacle de taille.

[98] Dans l'arrêt *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26, notre Cour explique la notion de suffisance des motifs. Dans l'arrêt *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34, le juge Binnie résume comme suit la teneur de l'obligation de motiver une décision :

(1) To justify and explain the result;

(2) To tell the losing party why he or she lost;

(3) To provide for informed consideration of the grounds of appeal; and

(4) To satisfy the public that justice has been done.

[99] However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. . . . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

[100] An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying

(1) justifier et expliquer le résultat;

(2) indiquer à la partie qui n'a pas gain de cause pourquoi elle a perdu;

(3) permettre un examen éclairé des moyens d'appel;

(4) convaincre le public que justice a été rendue.

[99] Cependant, une cour d'appel n'est pas admise à intervenir au seul motif que le juge du procès s'est mal exprimé. L'omission de fournir des motifs suffisants ne constitue pas non plus un motif d'appel distinct. Au par. 20 de l'arrêt *Walker*, le juge Binnie dit ce qui suit :

> L'arrêt *Sheppard* établit toutefois que « [l]a cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé » (par. 26). Les motifs sont suffisants s'ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l'abstrait, mais d'après la réponse qu'ils apportent aux éléments essentiels du litige. [. . .] L'obligation de fournir des motifs « devrait recevoir une interprétation fonctionnelle et fondée sur l'objet » et l'inobservation de cette obligation n'a pas pour effet de créer « un droit d'appel distinct » ou de conférer « en soi le droit à l'intervention d'une cour d'appel » (par. 53).

[100] La partie qui n'a pas gain de cause peut juger insuffisants les motifs du juge du procès, surtout s'il ne l'a pas crue. Il faut reconnaître qu'il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision (voir l'arrêt *Gagnon*). Ses motifs ne sont pas insuffisants pour autant. Dans l'arrêt *R. c. R.E.M.*, [2008] 3 R.C.S. 3, 2008 CSC 51, rendu concurremment avec la présente décision, la juge en chef McLachlin explique que les conclusions relatives à la crédibilité peuvent faire intervenir des éléments difficiles à exprimer :

> Bien qu'il soit utile que le juge tente d'exposer clairement les motifs qui l'ont amené à croire un témoin plutôt qu'un autre, en général ou sur un point en particulier, il demeure que cet exercice n'est pas nécessairement purement intellectuel et peut impliquer des facteurs difficiles à énoncer. De plus, pour expliquer en détail pourquoi un témoignage a été écarté, il se peut

unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

[101] Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

[102] I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: Donovan & Company, Vancouver.

Solicitors for the respondent Ian Hugh McDougall: Forstrom Jackson, Vancouver.

Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Solicitor for the respondent Her Majesty the Queen in Right of Canada: Attorney General of Canada, Toronto.

que le juge doive tenir des propos peu flatteurs sur le témoin. Or, le juge voudra peut-être épargner à l'accusé, qui a témoigné pour nier le crime, la honte de subir des commentaires négatifs sur son comportement, en plus de celle de voir son témoignage écarté et d'être déclaré coupable. Bref, l'appréciation de la crédibilité est un exercice difficile et délicat qui ne se prête pas toujours à une énonciation complète et précise. [par. 49]

De même, les motifs ne sont pas insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être.

[101] La juge Rowles a conclu que les motifs de la juge du procès expliquaient les raisons pour lesquelles elle avait conclu que F.H. avait été agressé sexuellement par M. McDougall. Je conviens avec elle que les motifs de la juge du procès étaient suffisants.

IV. Conclusion

[102] En toute déférence, je suis d'avis que les juges majoritaires de la Cour d'appel ont eu tort d'annuler la décision de la juge du procès. Le pourvoi est accueilli avec dépens. La décision de la Cour d'appel de la Colombie-Britannique est annulée, et celle de la juge du procès rétablie.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant : Donovan & Company, Vancouver.

Procureurs de l'intimé Ian Hugh McDougall : Forstrom Jackson, Vancouver.

Procureurs de l'intimé The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Procureur de l'intimée Sa Majesté la Reine du chef du Canada : Procureur général du Canada, Toronto.

Tab 6

Case Name:

Professional Institute of the Public Service of Canada
v.
Canada (Attorney General)

Between
Professional Institute of the Public Service of Canada, Canadian Merchant Service Guild, Federal Government Dockyard Trades and Labour Council (EAST), International Brotherhood of Electrical Workers, Federal Government Dockyard Chargehands Association, Research Council Employees' Association, Association of Public Service Financial Administrators, Professional Association of Foreign Service Officers, Federal Government Dockyard Trades and Labour Council (WEST), The Canadian Association of Professional Radio Operators, Canadian Air Traffic Control Association, Canadian Military Colleges Faculty Associatiion, and Federal Superannuates National Association, plaintiffs, and
Attorney General of Canada, defendant
And between
Public Service Alliance of Canada, plaintiffs, and
Attorney General of Canada, defendant
And between
Edward Halayko, Helen Rapp and Charles McCabe in their personal capacities as members of the executive of the Armed Forces Pensioners'/Annuitants' Association of Canada, L'Association des Membres de la Police Montee du Quebec, The B.C. Mounted Police Professional Association, the Mounted Police Association of Ontario, and the Canadian Association of Professional Employees, plaintiffs, and
The Attorney General of Canada, defendant

[2005] O.J. No. 5775

[2005] O.T.C. 1144

51 C.C.P.B. 307

22 E.T.R. (3d) 238

145 A.C.W.S. (3d) 396

2005 CarswellOnt 7981

Court File Nos. 99-CV-11878, 99-CV-11888 and 99-CV-12257

Ontario Superior Court of Justice

A. Panet J.

Heard: November 15-18, 2005.
Judgment: December 23, 2005.

(87 paras.)

Civil evidence -- Hearsay rule -- Application of rule -- Exceptions -- Necessary and reliable evidence -- Government documents related to financing and administration of superannuation pension plans admitted into evidence based on necessity and reliability.

Civil evidence -- Documentary evidence -- Public documents -- Government documents -- Government documents related to financing and administration of superannuation pension plans admitted into evidence based on necessity and reliability.

Pensions and benefits law -- Pensions -- Government plans -- Government documents related to financing and administration of superannuation pension plans admitted into evidence based on necessity and reliability.

Motion by the plaintiffs for an order declaring that certain documents produced by the defendant, the Attorney General of Canada, are admissible as evidence -- Plaintiffs sought various declarations regarding three superannuation plans established by the Crown for certain of its employees -- Responsibility for financing policies and administration of the plans lay with certain cabinet ministers and government departments -- Plaintiffs contended that the government borrowed from the plans' contributions and surpluses to finance its budgetary requirements -- Plaintiffs alleged a fiduciary obligation existed and claimed a legal and equitable interest in plan accounts, including surpluses -- Plaintiffs sought admission of discussion papers, internal memoranda, letters and releases that dealt with policies or practices of government with respect to structure, financing, ownership, operation and accounting for pension surpluses and pension reform -- Defendant argued that relevance of documents was not established and that they should be excluded on basis of rule

against hearsay evidence -- HELD: Motion allowed -- Narrow approach to issue of relevance was inappropriate given nature of plaintiffs' claims -- Consideration of the plaintiffs' claims required review of all surrounding circumstances related to structure and operation of the plans including documents that otherwise had no legal effect -- Statements in documents were relevant and related to facts in issue -- Notwithstanding hearsay, documents were admissible in evidence based on their necessity and reliability -- No other exclusionary rules operated to render documents inadmissible.

Statutes, Regulations and Rules Cited:

Canadian Bill of Rights,

Canadian Charter of Rights and Freedoms, 1982, s. 15

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17,

Ontario Rules of Civil Procedure, Rule 30.05

Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd supp.),

Public Pensions Reporting Act, S.C. 1986, c. 16,

Public Service Superannuation Act, R.S.C. 1985, c. P-36,

Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11,

Counsel:

Dougal Brown, for the Plaintiffs

James Cameron, for the Plaintiffs

Fiona Campbell, for the Plaintiffs

Donald J. Rennie and Yvonne E. Milosevic, for the Defendant

DECISION ON MOTION

A. PANET J.:--

Introduction

1 In these actions, the Plaintiffs seek certain declarations with respect to the superannuation plans of the Defendant established for the employees of the federal government and for the members of the Canadian Forces and the R.C.M.P.

2 By Order dated September 25, 2001, these three actions are to be tried together.

3 This motion by the Plaintiffs is brought at the commencement of the trial. The motion is for an Order declaring that the documents listed in Schedule A to the Notice of Motion, which lists 128 documents, are admissible as evidence and may be filed as exhibits at the trial or, in the alternative, that certain of the listed documents are admissible at the trial upon formal proof of their authenticity. .

Background

4 By way of background, the parties have agreed to an Agreed Statement of Facts which, for context, is now summarized.

5 The federal government has established by legislation three separate pension plans, sometimes referred to as the Superannuation Plans, for its own employees, for members of the Canadian Forces and for members of the R.C.M.P. The relevant statutes, respectively, are the Public Service Superannuation Act, R.S.C. 1985, c. P-36, as amended ("PSSA"), the Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, as amended ("CFSA"), and the Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11, as amended ("RCMPSA"). These Plans are excepted from the application of the Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd supp.)

6 The President of the Treasury Board has overall responsibility for the financing policies of the Plans. The President of the Treasury Board is the responsible Minister under the PSSA; the Minister of National Defence is the responsible Minister under the CFSA; and the Solicitor General of Canada is the responsible Minister under the RCMPSA. Responsibility for the day-to-day administration of the PSSA Plan rests with the Department of Public Works and Government Services.

7 The PSSA provided for an Advisory Committee to advise the Minister (originally the Minister of Finance, later the President of the Treasury Board) on matters in connection with the PSSA. Although authorized under the RCMPSA, no pension board was ever established for that Plan. There was no similar provision for a pension board under the CFSA until 1992. After legislative amendment, a CFSA Pension Advisory Committee was established in 1994 and an RCMP Pension Advisory Committee was established in 1995.

8 The Plans are very similar in nature, fundamental objective and structure. Plan Members contribute to the relevant plans, as do Government and public service corporations (in the case of the PSSA Plan). The benefit to be paid to or in respect of an eligible Plan Member is an amount determined on the basis of a legislated formula related to the member's length of service and

earnings (except where the only entitlement is to a return of contributions).

9 The Plans share common financial features. Until April 1, 2000, the Plans did not provide for external investment of pension "amounts". Their design and structure provided for the crediting of interest to the Superannuation Accounts. The vehicle under the Superannuation Acts for recording transactions in respect of pre-April 2000 service has been the Superannuation Account. The prescribed contribution rates for Plan Members have varied over time.

10 Contributions to the Plans by members are generally made by way of reservation from salary. Prior to April 1, 2000, the reserved salary portion was credited to the Superannuation Account for each of the Plans.

11 The contribution amounts credited by the Government to the Superannuation Accounts prior to April 1, 2000 were determined pursuant to the legislation. The contribution amounts were charged to government expenditures and reported as expenditures in the Public Accounts. The Government contribution formula for the PSSA Plan differed from that for the CFSA and RCMPSA Plans.

12 In addition to the contribution credits, the Government was legislatively required to make additional credits to the Superannuation Accounts, as necessary, in respect of liabilities arising from general salary increases and adverse experience. These additional credits were called "actuarial liability credits". From the time of their enactment, the Superannuation Acts and their predecessor statutes have required the Government to credit interest on the balance of the Superannuation Accounts (or their predecessor accounts) at rates prescribed by regulation.

13 Prior to April 1, 2000, all benefits and other amounts payable under the Plans were paid out of the Consolidated Revenue Fund and charged to the appropriate Superannuation Accounts, with certain exceptions. The legislative amendments in 1999 provided, inter alia, for the market investment of pension "amounts" after April 1, 2000.

14 The Government remains obliged under the Superannuation Acts to cover any estimated actuarial deficits in the Pension Funds. Periodic actuarial evaluations of the Plans are legislatively required pursuant to the Superannuation Acts and the Public Pensions Reporting Act, SC 1986, c. 16.

15 The transactions and balances of the Superannuation Accounts are reported annually in the Public Accounts of Canada.

16 I note that this brief summary is for the purpose of providing context to the motion. The full details are contained in the Agreed Statement of Facts and in the referenced Statements of Claim and Statements of Defence.

The Claims By The Plaintiffs

17 In their Statements of Claim, the Plaintiffs contend that the Government of Canada adopted the practice of borrowing the contributions to these Plans and the interest thereon in order to finance a significant part of its financial requirements. They claim that in 1993 the Treasury Board became aware that there was a substantial surplus in the Public Service Superannuation Account. They claim that the Government amortized the surplus in the Public Service Superannuation Accounts commencing in the 1993-94 fiscal year and that the effect of the amortization of this surplus was to effectively reduce the cost of the Government's contributions to the Plans to zero. They also claim that in 1996 the Government began to recapture the interest payable on the surplus which was amortized and credited as revenue to the Government. The Plaintiffs also claim that in 1999 the Government passed amending legislation that unilaterally amended the terms of the Pension Plans. The Plaintiffs contend that the Government has complete discretion and control over the property and the interests of its employees with respect to the Superannuation Accounts and accordingly has a fiduciary obligation to contributors.

18 The Plaintiffs claim that the employees have a legal interest or an equitable interest in the commingled amounts credited to the Superannuation Account and in any surplus and that they are entitled to any surplus or, in the alternative, they have a pro rata interest in any surplus, in accordance with their share of total contributions to the Superannuation Account.

19 The remedy sought by the Plaintiffs is a series of declarations that would reflect the position of the Plaintiffs that they have a legal or equitable interest in the Superannuation Accounts, including any surplus in those accounts.

20 The Defendant takes the position that no trust, actual or implied, is created or exists with respect to any amounts in the Public Service Superannuation Account and that there is no property in the Superannuation Account capable of being trust property. Further, the Defendant denies that there is any fiduciary obligation owed by the Crown or that the Crown stands in a fiduciary relationship to Plan Members by reason of the inherent character and particular circumstances of the relationship created by the Plans. In the alternative, the Defendant maintains that if there is a fiduciary or similar obligation, it is only in its limited capacity as administrator of the Plans.

The Issue On This Motion

21 The issue on this motion is whether the documents listed in Schedule A to the Notice of Motion of the Plaintiffs dated October 25, 2005 are admissible in evidence at the trial of this action.

22 The documents in issue include those that deal with the policies or practices of the government with respect to government pensions. These include an extract from the 1991 Budget, policy circulars of Treasury Board, news releases and an extract from a report of the Auditor General.

23 They also include a broad range of documents prepared within the government dealing with the structure, financing, ownership, operation and accounting for pensions and surpluses and

pension reform. In this category there can be found:

- Background papers, briefing papers, notes, minutes, agendas and records of meetings.
- Reports of Advisory Committees.
- Internal memoranda to the President of Treasury Board and to and between senior government officials.
- Correspondence between departments and agencies.

24 On the hearing of this motion, the Plaintiffs have proposed three categories into which the documents may be grouped:

a) Documents containing statements that record events, decisions, discussions and deliberations relating to the issues. Examples of these documents would include discussion papers and internal memoranda.
b) Documents containing statements that deal with the structure, operation and administration of the Superannuation Accounts or deal with the financing, contributions, funding and accounting arrangements for the Pension Plans. Examples would include letters, releases and internal memoranda.
c) Documents containing statements that express the opinions of government officials or Ministers about the government's legal obligations or Plan Members' legal rights. Examples would include letters and internal memoranda.

25 It appears that a document in issue may contain statements with respect to more than one of the above groups.

26 The Plaintiffs submit that the documents in categories (a) and (b) contain statements that are relevant and are admissible as exceptions to the hearsay rule. They submit that the documents in category (c) are also admissible as they contain statements which are relevant and are tendered as evidence that those opinions or views were honestly held and communicated and are also admissible as they are admissions by the Defendant.

27 The Defendant opposes the admission of the documents in Schedule A on the grounds that their relevance has not been established and, further, that they should be excluded on the basis of the rule against hearsay evidence.

Analysis

28 In order to be admissible at trial, the party seeking to have a document admitted in evidence must first establish its authenticity.

29 Once the authenticity has been established, the court will only admit the document in evidence if its relevance is demonstrated to the issues in the trial.

30 If relevance is established, then the court will consider whether the document is subject to any exclusionary rules, such as the rule against hearsay evidence.

31 Finally, the court will consider whether it should exercise its discretion to exclude the evidence - on the ground that its prejudicial effect outweighs its probative value.

32 The principles for receiving evidence have been succinctly stated as follows:

> To be received, evidence must meet two basic requirements. First, it must be admissible. Second, the trier of law must not have exercised his or her judicial discretion to exclude the evidence.
>
> Two further concepts make up the principle of admissibility. Evidence is not admissible unless it is: (1) relevant; and (2) not subject to exclusion under any other clear rule of law or policy.
>
> (Sopinka, Lederman & Bryant "The Law of Evidence in Canada", 2d ed. (Canada, Butterworths 1999) at 23)

33 I turn now to a consideration of each of the conditions for the admissibility of evidence.

1. Authenticity

34 In response to a Request to Admit, the Defendant admitted the authenticity of all but 23 of the documents listed in Schedule A. In its factum, and at the hearing of the motion, the Defendant waived formal proof of the authenticity of all documents. The motion was heard on the basis that the Defendant has admitted the authenticity of all of the documents in Exhibit A.

2. Relevance

35 The position of the Plaintiffs is that all of the 128 documents are relevant to the issues in this case.

36 I note that all of the documents were produced by the Defendant as being relevant to the matters in issue in these proceedings. However, the Defendant submits that the test for relevance for documentary disclosure on discovery is broader than the test of relevance for admissibility: (see Bensuro Holdings Inc. v. Avenor Inc. (2000) 186 D.L.R. (4th) 182. The Defendant submits that, pursuant to Rule 30.05 of the Rules of Civil Procedure, production of a document on discovery is not an admission of its relevance or admissibility.

37 The Defendant contends that the subject documents do not meet the test of relevance on three grounds:

1. It is unclear on the face of the majority, if not most of the documents what assertions of fact the Plaintiffs seek to draw from their contents.
2. It is not clear whether the purpose of the Plaintiffs in offering some of these documents is as proof of the facts in issue or as extrinsic aids to assist the court in interpreting legislation.
3. Some of the documents contain what amounts to statements of legal opinion or argument on the ultimate issues of law to be determined by this court.

38 In general terms, evidence is relevant if it has the tendency to make the proposition for which it is tendered more probable than that proposition would be without the evidence.

39 The question of relevance and whether a fact bears the required relationship to another fact is not usually determined by the application of a legal test but rather it is an exercise in the application of experience and common sense (see Sopinka, supra, at 24).

40 As stated by Cory J. in R. v. Arp, [1998] 3 S.C.R. 339 at para. 38:

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue".

41 The first step in determining the issue of relevance is the identification of the facts that are in issue in the case. It is the substantive law relating to the particular charge or cause of action that forms the basis for this identification exercise: (see Sopinka, supra, at 25).

42 The present actions relate to the Superannuation Plans for employees of the federal government, members of the R.C.M.P. and members of the Canadian Forces and claims with respect to surpluses in those Plans. The actions also relate to the legislation passed in 1999 by the federal government to change the structure of the Pension Plans and to remove amounts from the Superannuation Accounts for each of the three Pension Plans. More specifically, the actions involve claims that the employees have a legal or equitable interest in the commingled amounts in the Superannuation Plans and that the employees are entitled to the surpluses in those plans. The actions involve claims on the basis of trust, constructive trust and breaches thereof as well as claims that the government has fiduciary obligations to the members of the those plans which were breached. The actions also involve claims under s. 15 of the Charter of Rights and Freedoms and claims under the Canadian Bill of Rights.

43 In order to determine those factual issues that are relevant to a determination of those issues, it is necessary to consider more specifically the causes of action asserted by the Plaintiffs.

44 The claim for a legal or equitable interest in the Superannuation Accounts is based on the assertion that the Superannuation Accounts are impressed with a trust or, in the alternative, that the government has a fiduciary obligation with respect to the Superannuation Accounts.

45 In considering competing claims to a pension surplus, the Supreme Court of Canada stated that the court will analyze the pension plan and the funding structures created under it. In considering whether the pension fund is impressed with a trust, the court stated that:

> This is a determination which must be made according to ordinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for a specified beneficiary.
>
> (see Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611 at 655.

46 In considering the issue of fiduciary obligations, Dickson J. stated in Guerin v. Canada, [1984] 2 S.C.R. 335 at 384:

> I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

47 The question to be considered by the Court was phrased by La Forest J. in Hodgkinson v. Simms, [1994] 3 S.C.R. 377 at 409:

> The question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interest with respect to the subject matter at hand.

48 The indicia of a fiduciary relationship was described by the Court in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 at 599 as being: 1) the fiduciary has scope for the exercise of some discretion or power; 2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's interest; and 3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

49 In dealing with a claim by professional hockey players with respect to pensions and a surplus, the court indicated that it was guided foremost by the language of the formal documents and by the parties' conduct, statements and representations to each other: (see Bathgate v. National Hockey League Pension Society, 1992 (1993) 11 O.R. (3d) 449 at 498, aff'd (1994) 16 O.R. (3d) 761).

50 In its decision in Schmidt, supra, the Supreme Court of Canada stated at para. 133:

> Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined.

51 With respect to understanding the legislation and its operation, external facts are relevant. (see Ruth Sullivan, ed., Dreidger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994) at 418).

52 A consideration of the claims by the Plaintiffs will involve a review of these pension plans in all their aspects over a significant number of years. In considering issues with respect to those plans it appears that the courts have taken care to review all the surrounding circumstances relating to the structure and operation of the plans. As stated by the Court in Schmidt, supra, even documents not normally considered to have legal effect may be relevant to determining the rights of employers and employees in a pension plan.

53 I conclude that a narrow, highly technical approach to the issue of relevance would not be appropriate in these circumstances. The rights and obligations of the parties should be determined having regard to all the surrounding circumstances in which the pension plans operated.

54 The Defendant has proposed that the Court would treat the documents as conditionally relevant, subject to their relevance being established in the course of the trial. With respect, I disagree. Such an approach might well result in the trial itself being characterized by a series of motions or objections to the introduction of documentary evidence which would be disruptive and might deflect attention from the real issues before the court.

55 Further, it would unfairly prejudice the Plaintiffs in the presentation of its case and the evidence to be led if it did not know in advance the admissibility of the subject documents. Indeed, the purpose of the present motion is to avoid both of these problems.

56 It is apparent from a review of the Statements of Claim and the Statements of Defence that there is a broad range of factual assertions by the Plaintiffs which have been put in issue by the Defendant. Quite simply, those factual assertions, which underlie the causes of action, relate to the establishment, structure, operation financing and accounting of the pension plans.

57 The statements in the documents relate to those factual assertions or facts in issue. This is, in my view, an example of where, as stated by Sopinka, supra, the application of experience and common sense is appropriate. The determination of the rights and obligations of the parties in these actions should be made with all available evidence that is relevant to the issues. In my view, all of the documents contain statements that are relevant to the issues in this action. I conclude that all of the documents are relevant to the issues and are therefore admissible, subject to a consideration of any exclusionary rule and the possible exercise of judicial discretion to exclude, which I will now

consider.

3. Exclusionary Rules - Hearsay

58 In the present context, it is necessary to distinguish between those statements in the documents that are proposed to be admitted for a non-hearsay use and those statements in the documents that involve hearsay evidence.

59 Whether the statement in the document involves the use of hearsay evidence will depend on the purpose for which the statement is proposed to be used. If the statement in the document is tendered as evidence of the truth of the assertion or the statement itself, then it is hearsay evidence. On the other hand, if the statement in the document is tendered as evidence that the statement was made rather than as evidence as to the truth of the statement, it is not hearsay evidence.

60 This distinction was explained succinctly by MacDonald J.A. in R. v. Baltzer (1974), 27 C.C.C. (2d) 118 at 143 (N.S.S.C. (A.D.)):

> Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristics but the use to which it is put. Whenever a witness testifies that someone said something, immediately one should ask, "what is the relevance of the fact that someone said something?" If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence - the truth or falsity of the statement is of no consequence: if the relevance of the statement lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is.

61 The statements in category (c) do not involve the use of hearsay evidence. The statements in category (c) contain statements as to the opinions of Government officials or Ministers about the Government's legal obligations or Plan Members' legal rights. They are tendered as evidence that such opinions or views were honestly held and communicated.

62 As proposed by the Plaintiffs, the documents in category (a) contain statements as to events, decisions, discussions and deliberations. These statements are tendered as evidence that the events, decisions, discussions and deliberations occurred as stated in the documents. The documents in category (b) contain statements that deal with the structure, operation and administration of the Superannuation Accounts or deal with the financing, contributions, funding and accounting arrangements for the pension plans. These statements are tendered as evidence that the structure, operation, administration, financing, contributions, funding and accounting arrangements were as stated in the documents.

63 The statements in the documents in categories (a) and (b) are tendered as evidence that the events, decisions, discussions and deliberations occurred as stated or that the structure, operation,

administration, financing, contributions, funding and accounting arrangements were as stated in the documents. To the extent proposed, these statements involve assertions of fact - and it is the truth or falsity of the fact that is in issue rather than the fact that the assertion was made. To be more specific, many of these assertions of fact are referred to in the Statements of Claim of the Plaintiffs and are denied by the Defendant. Therefore, the very assertions of fact are in issue to that extent.

64 As a result, the admissibility of those statements involves a consideration of the rule against hearsay evidence.

65 In Ares v. Venner [1970] S.C.R. 608, the Supreme Court of Canada indicated a new approach to the rule against hearsay evidence. In that decision, it allowed the reception in evidence, as prima facie proof of the facts stated therein, of hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record. However, the court went on to state that this in no way precluded a party wishing to challenge the accuracy of the records or entries from doing so.

66 In R. v. Smith, [1992] 2 S.C.R. 915, the Supreme Court confirmed that its decision in R. v. Khan [1990] 2 S.C.R. 531, signalled an end to the old categorical approach to the admission of hearsay evidence. At p. 933, Lamer C.J. stated:

> Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.

67 The court stated that the criterion of "reliability" is a function of the circumstances under which the statement in question was made. It stated that the criterion of "necessity" refers to the necessity of the hearsay evidence to prove a fact in issue and should be given a flexible definition encompassing diverse situations.

68 Of application to the present issue before me is the statement by Lamer C.J. in R. v. Smith, supra, at p. 935 referring to the admissibility of several telephone conversations:

> In my view it would be neither sensible nor just to deprive the jury of the highly relevant evidence on the basis of an arcane rule against hearsay evidence, founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement, made under circumstances which do not give rise to apprehensions about its reliability, simply because the declarant is unavailable for cross-examination. Where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate evidence on that basis.

69 Threshold reliability is not concerned with whether the statement is true or not; rather it is concerned with whether the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness: (see R. v. Khelawon, [2005] O.J. No. 723 (C.A.)).

70 As to the criterion of reliability, it is evident that these documents were prepared by senior or knowledgeable officials within departments or agencies of the federal government. They describe or explain the operation of the Superannuation Plans and these accounts. In many cases, they were for the purpose of conveying information to Ministers and senior government officials or other departments of government. In my view, it is reasonable to expect that a high premium would be placed on their accuracy. There is also the expectation of candor, given the circumstances and the fact that there was no litigation existing at the time. This evidence has the "circumstantial guarantee of trustworthiness". I therefore conclude that the statements which I have considered in categories (a) and (b) meet the test of reliability.

71 I turn now to a consideration of the requirement as to necessity.

72 Necessity for these purposes must be interpreted as "reasonably necessary": (see R. v. Khan, at 546).

73 In the present circumstances, given the range of the documents and the lengthy period over which they were created it may be difficult, or indeed impossible, for the Plaintiffs to locate all of the authors of the documents. In such event, those documents or some of them might never be made available at the trial of these actions. In some cases, even if the author was available, the attendance in court would be needless and a waste of the court's time where that person's evidence would be simply to give evidence on a matter that could reasonably be confirmed by hearsay evidence.

74 There is therefore the advantage of efficiency and expediency with respect to the proposed evidence.

75 Further, in all cases, these are Crown documents that were prepared contemporaneously and at times when the Plaintiffs were not present. It would be somewhat unfair to require the Plaintiff to call witnesses to tender in evidence these documents prepared by them, who it may be expected, might be witnesses adverse to the position of the Plaintiffs. It is open to the Defendant to call the authors of the documents or other officials to explain the statements made in these documents.

76 A functional approach, to the same effect, was taken by the Federal Court of Appeal in Ethier v. Canada (R.C.M.P. Commissioner), [1993] F.C.J. No. 183. Two categories of documents were in issue in that case, the first being file notes and memoranda relating to an investigation carried out by the Public Service Commission at the appellant's request and contemporary official documents generated by the Public Service Commission or by the R.C.M.P. The Court concluded that, in the circumstances of the case, the documents met the first criterion of reliability as, on a prima facie basis, the manner in which they were generated was such as to substantially negate the possibility that the declarant was untruthful or mistaken. Further, the Court stated that there could be no serious question as to the criterion of necessity in the circumstances. It stated that it was not realistic to expect the appellant's solicitor to approach the various declarants and seek affidavits from them, assuming that he could have done so without committing a serious breach of professional ethics.

77 I conclude that the criteria of reliability and necessity have been satisfied with respect to all of the subject documents. The documents are therefore admissible in evidence notwithstanding that they contain hearsay statements.

78 The Defendant has argued that it is not clear which of the asserted statements in the documents the Plaintiff wishes to tender in evidence.

79 However, given the categories proposed by the Plaintiffs, I conclude that there is sufficient certainty in this regard.

4. Judicial Discretion

80 There is also a judicial discretion to exclude evidence, which is otherwise admissible, on the ground that its prejudicial effect outweighs its probative value.

81 Quite simply, I see no basis to exclude the subject evidence on this ground. Indeed, none of the parties has requested that I exercise judicial discretion to exclude the evidence.

82 I conclude therefore that the documents in categories (a), (b) and (c) are admissible in evidence for the purposes as proposed by the Plaintiffs.

Admissions

83 The Plaintiffs also submit that the documents are admissible as they contain statements that are admissions or out of court assertions made by the Defendant. They contend that the statements are therefore admissible as exceptions to the hearsay rule.

84 Admissions of a party are admissible against him or her in both civil and criminal cases: (see Sopinka, supra, at p. 287). This proposition is always subject to the requirement that their probative value outweighs their prejudicial effect.

85 It is up to the court receiving the statement in evidence to consider all the circumstances surrounding the making of the statement in arriving at its decision as to the strength or probative value of the statement.

86 In the present case, I have decided already that the documents are admissible in evidence. To the extent that the documents contain statements that are admissions, such statements are admissible in evidence in this trial.

Conclusion

87 I find that the documents in Exhibit A to the Notice of Motion are admissible in evidence at this trial, in accordance with this decision.

A. PANET J.

Tab 7

Athabaska Airways, Ltd. v. Canada, [1994] F.C.J. No. 1869

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

Simpson J.

Heard: November 30, 1994

Oral judgment: December 2, 1994

Reasons dated: December 6, 1994

Action No. T-3631-78

[1994] F.C.J. No. 1869 | *[1994] A.C.F. no 1869* | *89 F.T.R. 286* | *52 A.C.W.S. (3d) 79*

Between Athabaska Airways, Ltd., plaintiff, and Her Majesty the Queen in Right of Canada, Gregory H. Leitch, Ronald W. Hart, John L. Datzkiw and Ferdinand Sebastian, defendants

(11 pp.)

Case Summary

Evidence — Relevant facts, relevance and materiality — Admissibility — Of accident reports — Confidential information, use of — Pre-trial order for exclusion of evidence, when available, grounds for — Hearsay rule — Admission of hearsay contained in expert report.

Motion for an order striking out certain evidence prior to the commencement of the trial in which the evidence was going to be adduced. The plaintiff applicant's action arose out of the crash of a small plane belonging to it some 17 years earlier. It was common ground between the parties that the immediate cause of the crash was the pilot's loss of control in a storm cloud. The plaintiff claimed against the Crown defendant alleging that the air traffic controllers were negligent. The present motion was precipitated by the plaintiff's concern that some of the evidence in the three reports filed by the defendant was so prejudicial, and so clearly inadmissible, that it should be struck out in a motion prior to trial, rather than by the trial judge. Specifically, the reports were an expert report, an investigation report and an accident report. The plaintiff sought their exclusion on the grounds, inter alia, that they contained hearsay as well as confidential information provided to the Crown by the plaintiff during its investigation into the causes of the crash.

HELD: Motion dismissed.

None of the issues raised by the plaintiff were clear enough to justify a ruling before trial that the impugned evidence was inadmissible. Regarding the alleged hearsay evidence contained in the expert report, the issue was essentially one of weight. Accordingly, that report was not, prima facie, inadmissible. The court would exclude hearsay evidence prior to trial only if it was absolutely clear that it would bear no weight which might be the case where the impugned evidence was double hearsay not alleged by the applicant. The Crown was intending to use the confidential information as a shield in an action initiated by the very party claiming the confidence. The court was not satisfied that that constituted a breach of confidence.

Timothy B. Trembley, for the plaintiff. Donald J. Rennie, for the defendants.

SIMPSON J. (Reasons for Order, orally)

1 These are my oral reasons for my decision in this matter. This motion was brought by the Plaintiff on short notice, three days before the commencement of trial. The Plaintiff's concern is that some of the evidence in the reports filed by the Defendant is so prejudicial, and so clearly inadmissable, that it should be struck out in a motion prior to trial, rather than by the trial judge.

2 The case concerns the crash of a small plane owned by the Plaintiff. The plane went down 17 years ago. The two-man crew and the four passengers all died. The accident occurred 20 minutes out of Winnipeg and the parties agree that the immediate cause of the crash was the pilot's loss of control in a storm cloud.

3 The Plaintiff has sued the Crown, alleging that the air traffic controllers were negligent, and that they failed to warn the pilot and let him fly into the cloud. The Crown defends, saying that the pilot had on-board radar, and had a duty to avoid the cloud.

4 Three reports have been tendered by the Crown. One -- and this is the only expert report -- is prepared by a Dr. Gegg. The second, which I will call the long accident report, is signed by three investigators and includes a number of appendices. Among them is Dr. Gegg's report, her interview notes and calculations of the plane's weight, which were prepared by one of the investigators. This report and it's appendices are not available to the public. The third report is what I will call the short accident report. It is a two-page document which summarizes the accident and which is available to the public.

5 These reports raise four issues. They are: hearsay, confidentiality, improper opinion evidence and the admissibility of the accident reports.

Heresay

6 In Dr. Gegg's report, and in the long accident report, mention is made of the fact that some people she interviewed felt that the pilot of the plane was cocky and un-cooperative. In Dr. Gegg's report the sources for that statement are unnamed and the parties agree that Dr. Gegg had no first-hand knowledge of the pilot.

7 The Crown concedes that Dr. Gegg's statement about the pilot's attitude is hearsay evidence and that it is based on information she obtained from those she interviewed. The Crown also admits that none of the parties she interviewed will be called at trial. However, Dr. Gegg's interview notes will be available, as will her testimony.

8 The law on this issue is well stated in the text called The Law of Evidence in Canada, by Sopinka, Lederman, and Bryant. The following passage appears at page 555 of that text:

> "Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with Abbey, have a direct effect on the weight to be given to the opinion perhaps the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight."

9 With Dr. Gegg's evidence the Crown finds itself in the rare situation where there will be no independent proof at all. However, even in this unusual case, the above quotation makes it clear that the issue is still one of weight. Accordingly, Dr. Gegg's evidence is not prima facie inadmissable.

10 The question of admissibility will be determined based on the trial judge's assessment of Dr. Gegg and her sources. I should note that her sources appear to be responsible people, in the sense that they hold responsible offices. She interviewed the personnel in the airport weather office, the owner and chief pilot of the Plaintiff company and the pilot's parents. I cannot say with certainty at this time that evidence based on these sources is wholly unreliable. I would exclude heresay evidence before trial only if it was absolutely clear to me that it could bear no weight. That might be the case, for example, if the evidence was double hearsay. However, as that is not the case in the situation before me, the evidence will not be excluded at this time.

11 The second statement of concern to the Plaintiff appears in all three reports. It is said that the pilot did not check with the weather office before take-off. The Crown also concedes that this is hearsay and depends on Dr. Gegg's interview with weather office personnel. Again it is conceded that those individuals will not be available to give evidence at trial. For the reasons just given, this evidence is at least potentially reliable and it will not be excluded at this time.

Confidentiality

12 The Plaintiff says it provided confidential information to the Crown in the course of the accident investigation and that that information is now improperly used by the Crown in its defence in this action. The two statements at issue appear in the long accident report and are attributed to Mr. Hunt, who, at the time, was the chief pilot for the Plaintiff.

13 He apparently said that the manufacturer of the plane offered a training course which was "not that good" and he also gave the accident investigator the impression that it was not uncommon for the Plaintiff's planes to take off fully fuelled. This meant that they would be overloaded on take-off. Both statements, in my view, provide general background. Neither deal directly with the facts of the accident. For this reason they are of marginal relevance.

14 The Plaintiff says the Defendant should not defend using information the Plaintiff provided in confidence. I should note that the claim for confidentiality is for the Plaintiff company. It is not made on behalf of the individuals who provided the information.

15 The first question, is whether the information was confidential. The Plaintiff's evidence asserting confidentiality was presented by way of information and belief based on evidence provided by the owner of the Plaintiff company to counsel. It was not direct evidence, although the owner's direct evidence was presumably available. The Plaintiff also provided background evidence about the likelihood of confidentiality. It was also in the form of information and belief based on information from Mr. Bruce MacDougall who is the principal lawyer on the brief for the Plaintiff. I have decided that, in the absence of first hand evidence, I am not prepared to decide issues which may result in the exclusion of evidence prior to trial.

16 If confidentiality did exist, it was offered by the Defendant to gain the co-operation of those involved so that it could conduct a productive investigation and issue a meaningful accident report. In my view, confidentiality in this situation means that admissions by the company being investigated will not be given to third parties and will not be used to attack the company. By that I mean that they will not used as a sword. The law is very clear that confidential information cannot be used to injure. For that proposition I was referred to the case of Slavutych vs. Baker et al, *[1976] 1 SCR 254*.

17 In this case, however, the Crown wants to use the information as a shield in an action initiated by the very party

who claims the confidence. It is not clear to me that this constitutes a breach of confidence. I am therefore not prepared to exclude evidence before trial on this basis.

Opinion Evidence

18 The next issue concerns improper opinion evidence. This issue arises because the long accident report, which is not an expert report, contains as an appendix a calculation of the aircraft's weight. The Plaintiff says this is opinion and should be excluded because the maker is not presented as an expert. The Defendant says this is not an expert matter, that anyone knowledgeable in the business can do these calculations and that, indeed, the owner of the Plaintiff company made the calculations in answer to an undertaking given on discovery.

19 Again it is clear that this matter cannot be resolved on a motion. There is insufficient evidence. The trial judge must hear from the investigator who prepared the calculations. However, I caution the Crown that he should be ready to convince the trial judge that this is either not an expert matter or that the witness is qualified to give opinion evidence.

Admissibility of Accident Reports

20 The last issue is the admissibility of the two accident reports. The Plaintiff suggests that they are entirely inadmissible and should not go before the trial judge. This submission is based on the Canadian Transportation Accident Investigation and Safety Board Act. This legislation, however, was not enacted at the time of the accident or at the time the reports were made. I have therefore concluded that it does not apply in this case.

21 Two cases were cited on this issue. They are Swanson and Peever vs. Canada, February 7, 1990, unreported, Federal Court Trial Division and Adams Estate vs. Decock Estate, [1987], 6WWR, 168, Manitoba Queen's Bench, aff'd *(1988), 55 Man. R. (2d) 190* (C.A.). They indicate that on their face, accident reports, are admissible under the public documents exception to the hearsay rule. It is also clear that at trial they may be rejected entirely or accepted for limited purposes, but there appears to be no basis to exclude them before trial, especially in a case where the events occurred 17 years ago and where evidence of any kind will be rather sparse.

Conclusion

22 None of the issues raised by the Plaintiff are clear enough to justify a ruling before trial that the impugned evidence is inadmissible.

23 An order will go dismissing the motion with costs to the Defendant. Leave will be given for late filing of the reports of David Murdoch, Robert Rudich, Dr. Gegg, Hugh McCallum, Michael Schewel and Adam Keller. As well, leave will be granted for the late filing of the Defendant's affidavit of Catherine Luspück on this motion.

Tab 8

Regina v. Kaipiainen., [1954] O.R. 43

Ontario Reports

ONTARIO

COURT OF APPEAL

PICKUP C.J.O. and ROACH, HOPE, HOGG and AYLESWORTH JJ.A.

24, 1953 *

* Reasons released December 11, 1953.

[1954] O.R. 43

Case Summary

Criminal Law — Trials — Motion for Adjournment to Obtain Evidence on Commission — Defence of Insanity — Evidence in Finland as to Previous Mental Illnesses of Accused and Members of his Family — Injustice of Refusing Adjournment — Attempted Introduction of Documents as "public".

Evidence — Documentary Evidence — "Public documents" — Tests to be Applied to Render Documents Admissible on Mere Production.

At the opening of a trial for murder, where the principal defence was to be insanity, counsel for the accused moved for an adjournment of the trial to enable him to obtain evidence in Finland (the country of the accused's origin) under a commission for which an order had been made, but which, owing to a combination of circumstances, had not actually been issued. The evidence sought to be obtained related to a history of previous mental illness of the accused and members of his family, and in particular to diagnoses made and treatments received while he was a member of the Finnish army. Copies of the accused's Finnish army records were produced, and the trial judge refused to grant the adjournment sought, directing that parts of the documents be admitted in evidence. The trial proceeded, and the accused was convicted.

Held, there must be a new trial. In the circumstances, the refusal of the adjournment constituted a grave injustice to the accused, and prevented a fair trial. The defence had reason to believe that evidence was available in Finland to establish that the accused had previously suffered from mental illnesses, and this evidence, if produced at the trial, would materially support the defence of insanity and materially affect, if not weaken, the evidence of the psychiatrists called for the Crown. In addition, it had apparently been assumed by counsel that the documents produced were "public documents", and admissible as such, but no attempt had been made to prove that they met any of the tests laid down as indispensable in Thrasyvoulos Ioannou et al. v. Papa Christoforos Demetriou et al., [1952] A.C. 84 at 94, and earlier decisions. This necessary foundation could be laid only by the taking of evidence under the proposed commission.

AN APPEAL from a conviction, before Spence J. and a jury, for murder.

23rd and 24th November 1953. The appeal was heard by PICKUP C.J.O. and ROACH, HOPE, HOGG and AYLESWORTH JJ.A.

A.M. Cooper (appointed by the Court), for the accused, appellant: 1. The trial judge erred in refusing an adjournment to enable the defence to obtain commission evidence in Finland. The evidence sought to be so obtained would have been relevant, (a) to indicate by itself that the accused was insane when he committed this offence, because of his previous insanity: Phipson on Evidence, 9th ed. 1952, p. 107; (b) to strengthen the opinion of Dr. Burch and weaken that of the psychiatrists called by the Crown; the whole of Dr. Burch's evidence

was based on facts as told to him by the accused, while both Dr. Tennant and Dr. Senn formed their opinions by rejecting what the accused had told them about his previous mental illnesses; (c) to make the accused's army records admissible in evidence. [ROACH J.A.: There is still another ground, that the evidence in Finland might show that what the accused first told the doctors, and then repudiated in a later interview with Dr. Tennant, was in fact true, from which the jury might infer that if he were sane he would know that the facts would be in his favour, and that his subsequent repudiation was in itself significant as to his mental condition.] In all these circumstances the refusal of an adjournment was a denial of justice, and prevented the accused from making his full answer and defence.

2. The trial judge erred in admitting only part of the Finnish army records. Portions of them were admitted as "public documents", under a recognized exception to the hearsay rule (see Phipson, op. cit., p. 347), but if any part of the records was admissible on this ground they were all admissible, since no part is more hearsay than any other part. [PICKUP C.J.O.: The documents must be proved, must they not?] Yes, but the certificate from the Finnish legation was sufficient proof of their character. [PICKUP C.J.O.: But did not counsel at the trial agree that some parts only of the documents should be admitted?] Yes, but only after the trial judge had made his ruling, and refused the adjournment. In any case, counsel could not bind the accused on a question of admissibility of evidence.

On this branch of my argument I refer to The Irish Society v. The Bishop of Derry et al. (1846), 12 Cl. & F. 641, 8 E.R. 1561; Gleen v. Gleen (1900), 17 T.L.R. 62; Casey v. Kennedy (1920), 48 N.B.R. 85, 52 D.L.R. 326; Hempton v. State (1901), 86 N.W. 596.

3. The learned trial judge failed to set out adequately, in his charge to the jury, the facts supporting the theory of the defence that the accused was incapable through drunkenness of forming the intent necessary to constitute the crime of murder. The evidence on this issue was considerable and complicated, and it was difficult for the jury to understand it without its being separated from the rest of the evidence. The charge is not only incomplete on this point, but in one respect it is incorrect: Azoulay v. The Queen, *[1952] 2 S.C.R. 495*, *104 C.C.C. 97*, *15 C.R. 181*.

P. Hart (appointed by the Court), for the accused, appellant:

4. The learned trial judge erred in not directing an issue under s. 967 of The Criminal Code, R.S.C. 1927, c. 36, as to whether the accused was fit to stand his trial. All that there need be, to require the directing of such an issue, is a doubt, and the fact that counsel for the defence does not raise the question does not deprive the accused of his statutory right to have an issue directed if there is any doubt as to his fitness to be tried: Rex v. Williams, *63 O.L.R. 191*, *50 C.C.C. 230*, *[1929] 1 D.L.R. 343*. Dr. Burch said that in his opinion the accused was insane at the time of the crime, and also said that in his opinion the accused had "deteriorated very badly" from the time of his first examination to the day before the trial. Surely this, with the history of previous insanity, and the accused's repudiation to Dr. Senn, just before the trial, of the story that constituted his only possible defence, with the entirely motiveless killing of his little son, of whom he was proved to have been very fond, was enough to raise at least a doubt in the trial judge's mind: Rex v. Gibbons, *[1946] O.R. 464*, *86 C.C.C. 20*, *1 C.R. 522*, *[1947] 1 D.L.R. 45*; Regina v. Woltucky *(1952), 6 W.W.R. (N.S.) 72*, *103 C.C.C. 43*, *15 C.R. 24*. It appears from a remark made by the trial judge during the cross-examination of Dr. Senn that he did have a doubt, and that he misdirected himself in law by holding that since an issue had not been requested by the defence he need not direct one: Rex v. Williams, supra; Rex v. Gibbons, supra.

5. The trial judge misdirected the jury as to the onus probandi in respect of the defence of insanity. He said: "The accused is entitled to the benefit of any reasonable doubt, except on the issue of insanity." These words, read with other parts of the charge, in which he had told the jury that the onus was on the accused to establish the defence of insanity, might be understood as meaning that if the jury were satisfied that there was a preponderance of evidence in favour of the defence of insanity, but still had a reasonable doubt, they must convict. Proof "to the reasonable satisfaction" of the jury does not necessarily exclude a reasonable doubt: Smythe v. The King, *[1941] S.C.R. 17*, *74 C.C.C. 273*, *[1941] 1 D.L.R. 497*; Rex v. Gibbons, supra.

In my submission the trial judge should not have used the words "reasonable doubt" at all in connection with the burden on the accused under s. 19: Clark v. The King, *61 S.C.R. 608*, *35 C.C.C. 261*, *59 D.L.R. 121*, *[1921] 2*

W.W.R. 446. I concede that at three places in his charge the trial judge directed the jury quite accurately as to the burden on the accused, but the passage I have quoted was the last direction given on this point.

W.B. Common, Q.C., for the Attorney-General, respondent [directed by the Court to argue only as to grounds 1, 2 and 4]: The case was traversed in January to enable the defence to apply for a commission, but the motion for the order was not made until July. [PICKUP C.J.O.: But the commission was eventually granted, and we must take it that the case was a proper one for the granting of a commission.] That may be so, but the formal order was not taken out until September, leading to the natural impression that counsel for the accused had abandoned the idea. The Crown was ready and willing at all times to facilitate this matter, and the question of expense has never been, and is not now, a barrier to the execution of the commission.

When one sees the course that this trial took it is clear that no injustice was done to the accused by the refusal of the adjournment. Dr. Burch was allowed to give in evidence the whole story told to him by the accused as to his life in Finland, and his whole history, with the exception of the technical medical diagnoses, was before the Court. The same thing was done in the evidence of the Crown's psychiatrists, with one exception, viz., that they added the accused's denial to them of the truth of his previous story. [ROACH J.A.: But if the commission evidence had been available the facts might have been proved to be consistent with his first story rather than with his denial.] It was open to the accused on this trial to go into the witnessbox in his own defence and give first-hand evidence of what had happened in Finland. An affidavit made by him in January 1953 shows that he had some clarity of mind.

If the psychiatrists' evidence had been based solely on the events that happened in Canada, without any reference to what had happened previously in Finland, I could not support the conviction. [PICKUP C.J.O.: Is that not exactly your position, except as to Dr. Burch's evidence?] I submit not.

The trial judge did not deal with this matter arbitrarily, but suggested an arrangement which was accepted by counsel.

2. The mere production by counsel of such documents as these, with a statement that they were public documents, could not make them admissible. They were never proved to be public documents within the rule, and they are not in fact public documents as we understand that term, which means public documents of Canada. These could not possibly be admissible without the evidence of some person who was familiar with the original documents. I know of no principle of common law under which they could be admitted. [PICKUP C.J.O.: You need not pursue your argument further on this point. We are all of the opinion that the documents were not admissible on the present record.]

4. This ground is, I submit, entirely without foundation. There was no legal evidence before the Court (assuming that the documents were not admissible) of any previous mental condition of the accused. There is no suggestion anywhere in the evidence that he was unfit to stand his trial, or that he was not capable of instructing counsel. The only thing relied upon is Dr. Burch's statement that the accused had "deteriorated", without any further explanation. Surely that was not enough, at that stage of the trial, to raise a doubt about the accused's sanity at the time of lthe trial. Dr. Burch had examined the accused on three occasions, once at great length, and he did not suggest that the accused was not fit to stand his trial. [PICKUP C.J.O.: We need not hear you further on this point.]

A.M. Cooper, in reply: It must be remembered that the trial judge expressly told the jury that Dr. Burch's evidence of what the accused told him was not evidence of the facts stated by the accused.

At the conclusion of the argument THE COURT delivered judgment orally, ordering a new trial, and stated that written reasons would be delivered later.

11th December 1953. The reasons for judgment of the Court were delivered by

A.M. Cooper and P. Hart (appointed by the Court), for the accused, appellant.

W.B. Common, Q.C., for the Attorney-General, respondent.

AYLESWORTH J.A.

Appellant appeals from his conviction on 8th October 1953 at the city of Port Arthur after trial before Mr. Justice Spence and a jury, for that he on 28th November 1952 did murder Seppo Kaipiainen. Seppo Kaipiainen was appellant's four-year-old son. At the conclusion of the hearing of the appeal the appeal was allowed, the conviction was quashed and a new trial was directed, for reasons to be given later. Those reasons are now stated. In view of the fact that a new trial has been directed, it is undesirable and unnecessary to refer to the facts, except to the limited extent required in order fully to appreciate certain grounds of appeal advanced on appellant's behalf.

Several of those grounds allege misdirection or non-direction by the learned trail judge in his charge to the jury. In ordering a new trial it was stated, as the unanimous opinion of the Court, that the charge was not only adequate but indeed clear and comprehensive in every respect and that all such grounds of appeal therefore failed. A further ground of appeal also then disposed of adversely to the appellant, for reasons made clear during the argument, was that upon the evidence it should have appeared to the learned trial judge that there was sufficient reason to doubt whether appellant, on account of insanity, was fit to stand trial within the meaning of s. 967 of The Criminal Code, R.S.C. 1927, c. 36; no further comment need now be made with respect to that ground.

Counsel, however, made two other submissions in support of the appeal, namely, that the learned trial judge erred in refusing to grant defence counsel's motion for an adjournment of the trial to enable evidence to be taken on commission in Finland and that he also erred in ruling inadmissible those portions of the appellant's records of service in the Finnish army which stated or referred to diagnoses of appellant's alleged former mental illness. It was not considered necessary for Mr. Common to complete his argument on the latter of these submissions, but it is desirable, nevertheless, to deal with both of them. For that purpose there follows a review of the proceedings leading to appellant's trial and brief reference to some of the evidence relative to the defence of insanity.

Originally appellant's case was to come on for trial at the assizes commencing in Port Arthur on 29th January 1953, at which time an adjournment of the trial was obtained on appellant's behalf to permit application to be made to take evidence in Finland on commission with respect to appellant's alleged former mental illness. Efforts previously initiated on appellant's behalf to obtain such evidence then continued, with the result that an order directing the issue of the commission was made on 22nd July 1953 by Mr. Justice Danis. Discussion ensued between the Crown and appellant's counsel concerning the probability of arrangements for the admission in evidence at the trial of copies of certain Finnish army records pertaining to the appellant so that the difficulties, delay and expense of the commission proceedings might be avoided. The actual issue of the order of Danis J. was deferred.

The records in question, or rather, the copies thereof, produced by appellant's counsel, contained statements of certain events which happened during the period of appellant's service in the Finnish army, including his confinement in various hospitals, among them a hospital entitled "The Unit of Recouperance of Nervous Disorders" at the 12th Army Personnel Reinforcement Centre of the Finnish Army in 1944, and also contained medical diagnoses purporting to have been made at such hospitals. A misunderstanding arose between representatives of the Crown and appellant's counsel as to the scope of the suggested agreement concerning admission at the trial of the contents of these documents. This is the more readily understandable since the discussions were largely oral and took place partly in Toronto between appellant's Toronto agents and the office of the Attorney-General and partly at Port Arthur between appellant's counsel and the County Crown Attorney. At least partly as a consequence

of the misunderstanding, appellant's counsel was permitted to withdraw from the defence and through the good offices of the local Legal Aid Committee another counsel was appointed to represent the appellant.

This charge of counsel occurred late in September 1953, on the eve, as it were, of the commencement of the assizes at Port Arthur to be conducted by Mr. Justice Spence in the following month. The case came on for trial on 5th October 1953, at which time appellant's new counsel moved for an adjournment to enable the defence to proceed with the taking of evidence on commission, the order for which commission had in the meantime been issued. During the argument of the motion Crown counsel objected to the adjournment and on two grounds objected as well to the admission of the copies of the Finnish army records. His first objection to the admission of these documents was that the identity of appellant with the individual mentioned in the documents had not been established; as his second ground he argued that the documents contained diagnoses of appellant's mental condition which were matters of "opinion" and therefore inadmissible. The learned trial judge concluded the motion with the following direction addressed to appellant's counsel: "Well, I think Mr. Ibbetson [the Crown Attorney] should go through these statements with you and extract sentences which show the receipt and nature of wounds and the hospitalization which this man suffered or underwent, and these should then be put on a separate sheet and admitted by both parties and that the trial should proceed."

The trial then did proceed on that basis and what may perhaps be termed the main defence which counsel endeavoured to develop was that appellant was insane at the time the offence was committed.

A substantial part of the evidence relative to this aspect of the defence was given by three psychiatrists, one called for the defence and two called in reply by the Crown. All three psychiatrists at various times had examined appellant. On such examinations appellant had given a history of mental illnesses and confinement for mental illnesses in Finland, including instances within his term of army service in Finland, and occurrences of mental illness in his family. He also had related severally to the psychiatrists accounts of occasions upon which he had attempted to commit suicide. At subsequent examinations by the psychiatrists he had admitted to some of them that his former story of attempted suicide and of mental illnesses was, in fact, an attempt, on instructions he had received, to build up his defence, and could be "forgotten". Appellant's admissions in this respect were by no means identical in nature and extent as made respectively to the three psychiatrists. In the result, the psychiatrists differed, Dr. Burch for the defence giving it as his opinion that appellant, at the time of the commission of the offence, did not, by reason of his mental illness, know that his act was wrong. Dr. Burch based his diagnosis "almost completely" on the appellant's history as recited to him by appellant. The psychiatrists called by the Crown felt that the history related to them by appellant was altogether unreliable by reason of his self-contradictions; they disregarded it and, basing their diagnoses on their observations of appellant and upon evidence adduced in their presence at the trial, gave it as their opinion that appellant was sane at the time the offence was committed. It was common ground among the psychiatrists that mental illness in the family of a person, coupled with a history of mental illness of that person himself, when established as facts, are important factors to be taken into consideration in arriving at an expert opinion as to the sanity or insanity of that person on a subsequent date.

With deference to the learned trial judge, we think the request for adjournment should have been granted. The essence of the situation so far as the defence was concerned in requesting the adjournment was this: There was reason to believe that evidence was available in Finland to establish that appellant had suffered mental illnesses, and for the purpose of making that evidence available at the trial investigations as to the facts had culminated in the issue of an order directing a commission; that evidence would support materially the defence of insanity and would materially affect, if not weaken, the evidence of psychiatrists who likely would be called for the Crown; refusal of an adjournment for the purpose of procuring the available evidence would hamper the defence seriously and constitute an injustice to the appellant. If the matter had been put forcibly and clearly to the learned trial judge on that basis, we do not doubt that he would have granted the adjournment. Appellant, however, was not represented by an experienced counsel and although subsequently in the trial appellant's counsel appears to have acquitted himself most creditably, if is not to be overlooked that he had scant time indeed within which adequately to assess and present in argument upon the motion for adjournment the serious dilemma confronting the appellant. Actually the necessity of granting the adjournment, if a fair trial was to be had, to a great extent appears to have been obscured by the tenor of the argument upon the motion, which was partly taken up with the question of the admissibility of the Finnish army records, in whole or in part, and with argument addressed to the exact nature and result of the arrangements for admission of these documents. Upon this latter question both counsel seem to have assumed,

and to have invited the learned trial judge to act upon that assumption, that these documents were "public documents" and that the documents themselves demonstrated that to be the case; the learned trial judge was not invited to consider that question and none of the relevant authorities thereon was called to his attention. For reasons which will appear later, the documents as actually then presented were wholly inadmissible and if the learned trial judge had had the benefit of argument upon that point, including the authorities, he must have so held; in so holding, the injustice to appellant of directing the trial then to proceed would have been brought into clear focus and the imperative need of an adjournment would have been recognized.

The question what are public documents has been considered in at least four decisions of the utmost importance: The Irish Society v. Bishop of Derry et al. (1846), 12 Cl. & F. 641, 8 E.R. 1561; Sturla et al. v. Freccia et al. (1880), 5 App. Cas. 623; Lilley v. Pettit, [1946] K.B. 401, [1946] 1 All E.R. 593 (sub nom. Pettit v. Lilley); Thrasyvoulos Ioannou et al. v. Papa Christoforos Demetriou et al., [1952] A.C. 84, [1952] 1 All E.R. 179. The dictum of Lord Blackburn in Sturla's case, explaining his interpretation of the judgment in The Irish Society v. Bishop of Derry et al., and the dictum of Lord Goddard C.J. in Lilley's case, delivered in his considered review of both the Sturla and The Irish Society judgments, have received the express approval of the Judicial Committee of the Privy Council in the Trasyvoulos Ioannou case wherein Lord Tucker, in delivering the judgment of their Lordships, laid down the tests which must be met if documents of the nature which fall to be dealt with in this case are to be established as public documents and if the statements therein are to be accepted as evidence. Dealing with a document of a similar nature, termed "Report and Reference of Salim Effendi", Lord Tucker at p. 94 said:

"Applying Lord Blackburn's test to the document in question, their Lordships consider that it was not shown by the plaintiffs in the action, either intrinsically from the contents of the document itself or from other evidence, (1) that a judicial or semi-judicial inquiry was ever held by Salim ... (2) that the inquiry in fact held by Salim was held with the object that his report thereon should be made public; or (3) that the report was in fact at all times open to public inspection or that an inference to this effect should be drawn from the fact that it was produced in evidence without objection by the Land Registry authorities. Furthermore, they are of opinion that, in any event, it was not established that it was any part of the duty of Salim to record the matters set out in the opening paragraphs of the 'Reference' which have been set out above, and they consider that it is implicit in the authorities (and, indeed, it was expressly so stated in Nothard v. Pepper (1864), 17 C.B.N.S. 39, 49, 52 [144 E.R. 16], and Attorney-General v. Antrobus, [1905] 2 Ch. 188, 194) that the statements in a document tendered in evidence as a public document should be statements with regard to matters which it was the duty of the public officer holding the inquiry to inquire into and report on."

Merely to state these requirements as to the admission in evidence of a document alleged to be a public document is to demonstrate, on the record before the Court, the complete absence on the motion before the learned trial judge of any attempt whatsoever to meet any one of them. Until all of those requirements were met, any and all of the statements in the Finnish army records produced before the learned trial judge remained inadmissible. Obviously the foundation for their admissibility, if they are admissible, must be ladi by the submission at trial of proof not only of their nature but of the purpose for which and the authority under which the documents were prepared-- all within the purview of the pertinent rules so ably expressed by Lord Tucker.

A consideration of the very real difficulties in appellant's way in establishing the admissibility of these documents emphasizes at once the importance of the terms of the order under which commission proceedings are desired; doubtless counsel for both Crown and accused in the interests of justice will collaborate to this end so that the order may provide proper scope for evidence to be taken in Finland relating to the question of the admissibility of the Finnish army records and to the facts concerning appellant's alleged mental illnesses.

All members of the Court desire to record their appreciation of the able manner in which counsel appointed to present the appeal discharged their onerous duties.

New trial ordered.

End of Document

Tab 9

R. v. A.P., [1996] O.J. No. 2986

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Robins, Weiler and Laskin JJ.A.

Heard: March 6, 1996.

Judgment: September 4, 1996.

No. C12534

[1996] O.J. No. 2986 | 92 O.A.C. 376 | 109 C.C.C. (3d) 385 | 1 C.R. (5th) 327 | 32 W.C.B. (2d) 58 | 1996 CanLII 871 | 1996 CarswellOnt 3150

Between Her Majesty the Queen, respondent, and A.P. (a young person), appellant

(14 pp.)

Case Summary

Criminal law — Evidence and witnesses — Documents and reports — Public documents.

This was an appeal of the setting aside of an acquittal and the ordering of a new trial. The appellant young offender was tried on a charge of breach of probation. He ran away from a home where he was directed to reside during probation. The trial judge refused to admit into evidence certified copies of the original information and probation order. They were not made under seal or certified under the signature of a judge. The trial judge granted a directed verdict of acquittal. The acquittal was overturned on appeal by the Crown. The information and probation order were found to be admissible into evidence as public documents. The appellant argued on appeal of this decision that court documents could not be admitted into evidence as public documents. The appellant argued that the Crown was restricted in the manner by which court documents could be introduced as evidence at trial.

HELD: The appeal was dismissed.

The order directing a new trial and setting aside the appellant's acquittal was upheld. The trial judge erred in refusing to admit the copies of the original information and probation order into evidence. There were other ways available for the Crown to prove the authenticity of the copies in addition to seal or certification. The Crown was not prevented from attempting to admit the copies of the information or probation order as public documents. The original information and probation order would have been admissible as public documents at common law. They were reliable and readily available.

Statutes, Regulations and Rules Cited:

Evidence Act, *R.S.C. 1985, c. C-5, ss. 23*, 24(a), 36. Young Offenders Act, R.S.C. 1985, c. Y-1, ss. 44.1, 45(3).

Counsel

Britton Bedford-Jones for the appellant. Robert Kelly for the respondent.

The judgment of the Court was delivered by

LASKIN J.A.

1 A.P., a young offender, was tried on a charge of breach of probation. The trial judge refused to admit into evidence certified copies of the original information and the probation order because they were not made under seal or certified under the signature of a judge of the court as required by s. 23 of the Canada Evidence Act, R.S.C. 1985, c. C.-5 ("CEA"). He then granted A.P.'s motion for a directed verdict of acquittal.

2 On appeal [reported at *(1992), 75 C.C.C. (3d) 178*] Hayes J. concluded that the two court documents were admissible as public documents under s. 24(a) of the CEA. He therefore allowed the Crown's appeal, set aside the acquittal and ordered a new trial.

3 A.P. now appeals to this court. The issue raised by his appeal - whether court documents may be admitted in evidence under s. 24(a) of the CEA - though narrow, appears to be of considerable practical significance in provincial court proceedings.

The Facts and the Proceedings Below

4 A.P. was placed on probation in November 1990. As a condition of his probation A.P. was required to reside in a place specified by the provincial director or his delegate. A.P.'s probation officer directed him to reside in a group home in Pickering. A.P. twice ran away from the group home, resulting in the breach of probation charge.

5 The Crown gave A.P. written notice under the CEA of its intention to adduce in evidence at trial certified true copies of the original information and the probation order. The copies of the information and the probation order tendered by the Crown at trial were certified with a pre-printed stamp and the signature of the deputy clerk of the court. Defence counsel objected to the admissibility of these documents because they did not comply with s. 23 of the CEA, which states:

> 23.(1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, Federal Court or Tax Court of Canada, any court in any province, any court in any British colony or possession or any court of record of the United States, of any state of the United States or of any other foreign country, or before any justice of the peace or coroner in any province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice or coroner, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice or coroner or other proof whatever.
>
> (2) Where any such court, justice or coroner referred to in subsection (1) has no seal, or so certifies, the evidence may be made by a copy purporting to be certified under the signature of a judge or presiding provincial court judge of the court or of the justice or coroner, without any proof of the authenticity of the signature or other proof whatever.

6 Crown counsel acknowledged that the documents could not be admitted under s. 23 and he stated that he did not know whether the court even had a seal. Instead he submitted that the two documents should be admitted under s. 24(a) of the CEA because the originals were public documents and the tendered copies had been certified

by the person in whose custody they had been placed. Section 24(a) of the CEA provides:

> 24. In every case in which the original record could be admitted in evidence,
>
> (a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or
>
> ...
>
> is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

7 The trial judge, His Honour Judge Ball, ruled that the certified copies were inadmissible. He also refused the Crown's request for an adjournment to obtain the originals. He said the following:

> Well, Section 23 deals specifically with evidence of judicial proceedings. We are dealing with judicial proceedings, we must comply with Section 23. Section 24, certified copies. Well, Section 23 says, yes, you can provide certified copies. Copy of any official or public documents purporting to be certified under the hand of a proper officer. Well, Section 23 tells us who the proper officer is, if there is no seal, it's the judge. So they both work together.

8 In reversing the trial judge, Hayes J. concluded first that s. 23 "... is not restrictive and that other methods of proof may be available at common law and by statute depending on the form of the document tendered"; and second, that the information and probation order were public documents and therefore the tendered documents were admissible under s. 24(a) of the CEA. I agree with both of his conclusions and would dismiss the appeal.

Discussion

9 Section 23 of the CEA specifically addresses the admissibility in evidence of court documents from previous judicial proceedings. But s. 23 is not the only possible basis for their admissibility. Court documents may be proved at common law or by resorting to an applicable provision of another statute. These two possibilities are expressly provided for in s. 36 of the CEA, and are confirmed by the case law. Section 36 (which is headed "Construction") provides:

> Construction.
>
> 36. This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act or existing at law.
>
> (This Part is Part 1 which covers ss. 2 to 42 and applies to federal proceedings.)

10 In R. v. Blackstock *(1950), 97 C.C.C. 201* (Ont. C.A.), in which this court addressed the method for proving a previous conviction, Aylesworth J.A. wrote at p. 207:

> Neither s. 23 of the Canada Evidence Act nor s. 982 of the Code provide in effect that proof of a previous conviction, or even strict proof, may only be made as provided therein. Section 23 merely says that evidence of a proceeding or record "may be made" as therein provided, while s. 982 says merely that a certain certificate of a previous indictment and conviction, or a certain copy of a summary conviction shall, upon proof of the identity of the person of the offender, be sufficient evidence of the conviction.
>
> I think it quite clear, therefore, that even with respect to proof of the three necessary previous convictions, in order to found the charge, any method by which these three may be proved strictly is open to the prosecution.

This proposition is also generally supported in the Supreme Court decision in R. v. Albright *(1987), 37 C.C.C. (3d) 105* (S.C.C.).

11 In the present case the Crown could not rely on the common law because it did not have the original of either the information or the probation order. And it did not suggest that the documents could be proved by using the provisions of another statute. Instead the Crown sought to prove the information and the probation order by using a different provision of the same statute, s. 24(a) of the CEA.

12 Section 36 of the CEA may not directly assist the Crown because by its terms it seems to suggest that the provisions of the CEA are in addition to whatever methods of proof exist in other statutes. Nonetheless, s. 36 confirms that s. 23 is not the exclusive method for proving court documents. In other words, I see nothing in s. 23 that would prevent the Crown from relying on s. 24(a) provided, of course, the requirements of that section are satisfied.

13 Thus, the central issue on this appeal is whether the information and the probation order were admissible under s. 24(a) of the CEA as certified copies of an "official or public document." Section 24(a) allows for the admission of copies of official or public documents provided that the "original record could be admitted in evidence." Therefore, if the original information and probation order would have been admissible as public documents at common law, the Crown could properly rely on s. 24(a) to prove the certified copies.

14 At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly." Sopinka et al. The Law of Evidence in Canada (1992), p. 231. Public documents are admissible without proof because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them. Rand J. commented on the rationale for the public documents exception to the hearsay rule in Finestone v. The Queen *(1953), 107 C.C.C. 93* at 95 (S.C.C.):

> The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy.

15 A "public document" means "... a document that is made for the purpose of the public making use of it, and being able to refer to it." Sturla v. Freccia (1880), 5 App. Cas. 623 (H.L.) at 643. English and Canadian cases have generally prescribed four criteria for the admissibility of a public document without proof.

(i) the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;

(ii) the public official must have made the document in the discharge of a public duty or function;

(iii) the document must have been made with the intention that it serve as a permanent record, and

(iv) the document must be available for public inspection.

16 See Finestone v. The Queen, supra; R. v. Kaipiainen *(1953), 107 C.C.C. 377* (Ont. C.A.); R. v. Northern Electric Co. et al. *(1955), 21 C.R. 45* at 75-82 (Ont. H.C.); J.D. Ewart, Documentary Evidence in Canada, 1984, pp. 148-75.

17 The fourth criterion is controversial. It is not a requirement in the United States, and in my opinion there is much to be said for the following observation by McCormick:

> This limitation has been criticized, and the American courts reasonably have not adopted it. Although public inspection might provide a modest additional assurance of reliability, strictly limiting admissibility to records

> that are open to public inspection would be unwise because many documents with sufficient reliability to justify admission would be excluded.

McCormick on Evidence 4th ed. (1992), V.2 at pp. 288-289.

18 Nonetheless, I am satisfied that the two documents in question on this appeal meet all four criteria for admissibility.

(i) Each document was made by a public official.

19 The information was prepared by a probation officer employed by the Ministry of Community and Social Services, sworn by a Justice of the Peace and endorsed by a Youth Court judge. The probation order was made by the Youth Court judge (though undoubtedly drawn up by a member of the court staff) and was signed by the Youth Court judge or the clerk of the court.

(ii) The public officials who made these documents obviously did so in the discharge of a public duty or public function.

(iii) The documents were made with the intention that they serve as permanent records.

20 Informations and probation orders are court records. Generally speaking court records have the necessary degree of permanency. They are preserved for a long period of time because they are intended to serve as a future record of what happened in a public courtroom. Under s. 45(3) of the Young Offenders Act, *R.S.C. 1985, c. Y-1* ("YOA") the Youth Court has discretion to destroy records of cases heard in that court. The existence of this statutory discretion, however, does not undermine the quality of permanency attaching to the information and the probation order. Youth Court records are no less permanent than records of any other court.

(iv) The two documents are reasonably available for public inspection.

21 Although the YOA imposes certain controls on the disclosure of Youth Court records, it does not prevent public access to the documents. Indeed, under s. 44.1 of the YOA, the two documents must, on request, be made available to a person with an interest in the record (the young person, defence counsel, the Crown, a parent, a police officer, etc.). I agree with counsel for the Crown that the statutorily controlled access provided for in s. 44.1 satisfies the availability for public inspection requirement of the public documents exception to the hearsay rule. Anyone with a real interest in these documents and in their accuracy has a right of access under the YOA.

22 Moreover, inherent reliability underlies the public documents exception to the hearsay rule and I do not think that there can be any doubt about the reliability of the certified copies of the information and the probation order. The copies are photocopies (that is reproduced mechanically, rather than by hand) and the certification was made by an official of the court - the deputy clerk - who has custody of the documents and no interest in the outcome of the proceedings. I agree entirely with the following submission in the Crown's factum:

> In this day and age, there is no meaningful difference between a photocopy of a judicial record tendered under court seal (C.E.A., s. 23(1)) or under the signature of a judicial officer (C.E.A., s. 23(2)), and a photocopy that has been certified with the pre-printed stamp and signature of the Clerk or Deputy Clerk of the court. There is simply no appreciable difference in the reliability of these different methods of hearsay authentication.

23 Accordingly, in my view the certified copies of the information and probation order tendered by the Crown were admissible under s. 24(a) of the CEA.

24 I would therefore dismiss the appeal.

LASKIN J.A.
ROBINS J.A. - I agree.
WEILER J.A. - I agree.

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Tab 10

Ares v. Venner, [1970] S.C.R. 608

Supreme Court Reports

Supreme Court of Canada

Present: Abbott, Martland, Ritchie, Hall and Spence JJ.

1970: February 18, 19 / 1970: April 28.

[1970] S.C.R. 608 | *[1970] R.C.S. 608* | *1970 CanLII 5*

Georges Armand Ares (Plaintiff), Appellant; and Albert Venner (Defendant), Respondent; and Seton Hospital, Jasper, and Sisters of Charity of St. Vincent de Paul (Defendants).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Case Summary

Evidence — Admissibility of notes made by nurses attending patient while in hospital — Exception to hearsay rule.

In an action for negligence brought by the appellant against a doctor (respondent) and a hospital and the operators of the hospital, the trial judge found the doctor negligent and gave judgment against him for $29,407.13. The action against the hospital and its operators was dismissed. An appeal was taken to the Appellate Division of the Supreme Court of Alberta by the respondent. The appellant cross-appealed against the hospital. The Appellate Division allowed the appeal and set aside the trial judgment and directed a new trial as to the respondent. The cross-appeal against the hospital was dismissed. The appellant appealed to this Court against the order for the new trial. The respondent cross-appealed, claiming dismissal of the action rather than a new trial as ordered by the Appellate Division.

The main issue in the Appellate Division was as to the admissibility of notes made by the nurses who attended the appellant while he was in the hospital. These notes were tendered in evidence as part of the respondent's discovery evidence which was being read into the record on behalf of the appellant at the trial. Counsel for the respondent objected to the notes being received in evidence, but they were admitted by the trial judge as being an exception to the hearsay rule. The Appellate Division held that the notes had been improperly admitted.

Held: The appeal should be allowed and the judgment at trial restored; the cross-appeal should be dismissed.

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

Cases Cited

Minority view in Myers v. Director of Public Prosecutions, [1965] A.C. 1001, adopted and followed; Omand v. Alberta Milling Co. (1922), 18 A.L.R. 383; Ashdown Hardware Co. v. Singer *(1951), 3 W.W.R. (N.S.) 145*; Canada Atlantic Railway Co. v. Moxley (1889), 15 S.C.R. 145, referred to.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division [(1969), 70 W.W.R. 96.], allowing an appeal from a judgment of O'Byrne J. and directing a new trial. Appeal allowed and judgment at trial restored; cross-appeal dismissed.

H.W. Veale and H.M. Liknaitzky, for the plaintiff, appellant. G.F. Henderson, Q.C., and J.C. Major, for the defendant, respondent.

Solicitors for the plaintiff, appellant: Brower, Johnson, Liknaitzky, Robertson, Shamchuk & Veale, Edmonton. Solicitors for the defendant, respondent: Saucier, Jones, Peacock, Black, Gain, Stratton & Laycraft, Calgary.

The judgment of the Court was delivered by

HALL J.

HALL J.:— The appellant who was 21 years of age at the time and a student in Arts at St. John's College, Edmonton, was skiing in Jasper Park on the afternoon of February 21, 1965. At about 4:00 p.m. that afternoon he fell and sustained a severe comminuted fracture of both the tibia and fibula of his right leg some five or six inches below the knee. The Ski Patrol came to his assistance, and after applying a pneumatic splint took him to the Seton Hospital in Jasper. This hospital was being operated by the Sisters of Charity of St. Vincent de Paul.

On being admitted to the hospital, he came under the care of the respondent, Dr. Albert Venner, a specialist in internal medicine who was in general medical practice in Jasper at that time. The appellant was taken to an operating room and while under a general anesthetic the fracture was reduced by Dr. Venner and a plaster cast applied by him which extended from the toes to the upper thigh. This procedure was completed by about 6:00 p.m.

The learned trial judge summarized the events of the next four days as follows:

> On Monday morning, the plaintiff was visited by Dr. Venner. The nurse's record indicates that at 8:00 p.m. the cast was split approximately eight inches and that the plaintiff's toes were numb, swollen and blue and that there was no movement in the toes. The plaintiff experienced the usual pain attributable to a fracture. He advised both the doctor and nurses on Monday evening that he had no feeling in his foot, he could not move his toes nor could he feel pinpricks or pinching. He said his leg was in pain and his toes were swollen and blue.
>
> Dr. Venner in splitting the cast at eight o'clock did so for the purpose of examining the plaintiff's foot. The plaintiff's condition continued the same on Tuesday except that in addition to the other symptoms I have mentioned, his toes were cool.
>
> On Wednesday, Dr. Venner split the cast to the knee and examined the plaintiff's leg. The plaintiff's condition was somewhat the same as previously, at best. On Wednesday evening, the cast was split its entire length. During the night, Dr. Venner visited the plaintiff on two occasions. He decided to send the plaintiff to Edmonton and this was done on Thursday, February 25th.
>
> During the plaintiff's time in hospital his condition, to say the least, had not improved from Monday.

After being taken to Edmonton, the appellant was examined by Dr. John C. Callaghan, a cardiovascular specialist, who had the leg X-rayed and arteriograms taken. He found evidence of spasm in the deep branches of the blood vessels in what is known as the fascial compartments. In his judgment the situation called for an orthopaedic specialist and he immediately turned the patient over to Dr. Donald C. Johnston. Dr. Johnston testified that he was called in consultation by Dr. Callaghan and his evidence as to what he found was as follows:

A. He arrived at the University Hospital and he was in a, wearing a cast, from toes to mid-thigh which had been split up the front. Actually he had been sent down to Dr. John Callaghan and I had been asked to see him in consultation. At that time the toes were pale, they were insensitive. We immediately removed the cast, and one of Dr. Callaghan's residents did an arteriogram. Following the arteriogram we took him immediately to the operating room and opened up the anterior department of his leg, so-called fasciotomy. This was left open and a padded plaster of paris cast was re-applied which was immediately bivalved.

B. What do you mean by bivalved?

C. Split on both sides and the top removed, or removable.

D. Why did you do that?

E. To make sure that there was no further obstruction, that there could be no possible obstruction or pressure on the wound.

F. Now, the cast that you removed, doctor, did you have an opportunity to see it, to examine it at all?

G. Yes.

H. Was it a complete cast, what is known as a complete cast, did it go all the way around the leg?

I. It did.

J. And from the toes to the groin. And what condition was the cast in? I believe you said it had been split, is that right?

K. Yes, split throughout its length down the front.

L. Were there any encircling straps attached to the cast at that point?

M. I don't think so.

N. Now, what did the arteriogram that had been done by Dr. Callaghan show?

O. As I recall it showed a block at the fracture site.

P. A block of the circulation?

Q. Of the circulation, yes.

Dr. Johnston continued in charge of the appellant but the condition of the leg continued to deteriorate. Further arteriograms were taken and following consultations with a Dr. Rostrup the decision was made to amputate the leg below the knee. This was done on April 5, 1965.

Dr. Johnston's evidence as to this crucial decision was as follows:

Q. Did you see Georges Ares on subsequent occasions?

R. Yes.

S. Would that be on the 4th, 16th and 31st of March?

T. Well, he was seen every day, but these were the days I think we took him back to the operating room.

U. And for what purpose?

V. It was obvious that he had muscle necrosis.

W. What is that?

X. Well, the muscle was dead from lack of blood supply, so then this muscle liquefies and then has to be removed, and it was on these occasions that we were removing parts of dead muscle.

Y. Were there any further casts applied?

Z. A cast each time.

AA. And what was done to the cast each time it was applied?

BB. It was bivalved.

CC. Would that be for the same reason that you gave earlier?

DD. Yes.

EE. Now, as a result of your observations over this period, did you come to any conclusion?

FF. Yes. Although circulation in the skin of the toes and the foot was quite encouraging it was felt that he had so much muscle damage in the leg and damage to the nerves, through again lack of blood supply or as we call it ischemia. He also had a comminuted fracture, that although it would be, it was probably, it would probably have been possible to save this leg with several more operations over a period of maybe two or three years that the decision was made in consultation with Dr. Rostrup in the operating room that in view of his age and what he would end up with, with the loss of muscle he'd end up in effect with a sort of a living insensitive peg, that we would be better advised that the correct course for him would be to amputate the leg below the knee and this was carried out. This was done, I think it was, was it the 5th of June when the amputation was carried out?

GG. No, 5th of April.

HH. 5th of April rather.

II. Yes. Now, I believe this decision was reached on March 31st, 1965 was it?

JJ. Yes.

* * *

Q. And did the patient remain in hospital?

R. Yes.

S. Until what time?

T. I don't recall exactly. I recall about a week later he had a secondary haemorrhage from his stump and we had to take him back to the operating room and open the stump up and tie off the bleeder and following this his course in hospital was normal and he was discharged on crutches.

The appellant took action against Dr. Venner, Seton Hospital and the Sisters of Charity of St. Vincent de Paul claiming negligence on the part of Dr. Venner, the hospital and the Sisters of Charity as operators of the hospital. The action was tried by O'Byrne J. who found Dr. Venner negligent and gave judgment against him for $29,407.13. The action against the hospital and the Sisters of Charity was dismissed. An appeal was taken to the Appellate Division of the Supreme Court of Alberta [(1969), 70 W.W.R. 96.] by Dr. Venner. The appellant cross-appealed against the hospital. The Appellate Division allowed the appeal and set aside the judgment of O'Byrne J. and directed a new trial as to Dr. Venner. The cross-appeal against the hospital was dismissed. The appellant has appealed to this Court against the order for the new trial. The respondent Venner has cross-appealed, claiming

dismissal of the action rather than a new trial as ordered by the Appellate Division. Neither the hospital nor the Sisters of Charity are now parties to this appeal.

There was a considerable volume of expert medical testimony tendered on behalf of appellant and Dr. Venner. Having heard the evidence, the learned trial judge found as follows:

> We have here a broken leg at a ski resort--albeit a severe break. These circumstances are not the unusual circumstances found in the Challand and Ostash cases which involved very difficult diagnosis of complications resulting from gas gangrene and carbon monoxide respectively. The complication found in this case was one of circulatory impairment.
>
> The classic signs or symptoms of circulatory impairment manifested themselves clearly and early.
>
> There has been established, to my satisfaction, that in such cases there is a usual and normal practice in the profession, regardless of specialty, namely to split or bivalve the cast. If no relief is then obtained, one should refer to a specialist or, if equipped, explore further to ascertain the cause of the problem.
>
> The defendant did not follow such practice. He was, in my judgment, concerned more with maintaining the good fracture reduction he had obtained than with the maintenance of good circulation. This led to the irreparable damage. To use a legal expression, in these cases time becomes of the essence.
>
> I am satisfied that the defendant's decision was not the result of exercising the average standard and he is therefore liable for the resulting damage.

This was a finding made on contradictory evidence and upon evidence which the learned trial judge was entitled to rely. He also had the testimony of the appellant which of itself indicated a deteriorating condition through the decisive Monday to Wednesday period and which was corroborated by the findings of Dr. Johnston. The finding of negligence, supported as it is by the evidence, should not be disturbed.

The main issue in the Appellate Division was as to the admissibility of notes made by the nurses who attended the appellant while he was in Seton Hospital. These notes were tendered in evidence as part of Dr. Venner's discovery evidence which was being read into the record on behalf of the appellant at the trial. Counsel for Dr. Venner objected to the notes being received in evidence, but they were admitted by O'Byrne J. as being an exception to the hearsay rule. In receiving the evidence, O'Byrne J. said:

> Well, I understand now your (defendant's counsel) objection but it strikes me at this time without having read the authorities that if you are not satisfied with the contents of this hospital record that it's up to you to call such evidence as you may wish to call to correct, amplify or amplify as you determine. It seems to me that what Mr. Veale was seeking to do is clearly within the authorities that he has quoted to me and I admit the records as Exhibit 6.

and in his judgment he said:

> I note that the nurses from the Seton Hospital were here during the three days of trial. No one called them. They were available to all. They were brought here at the plaintiff's expense. This impresses me, and strengthens my reception of the notes as being "generally trustworthy" to use the term from Wigmore on Evidence, cited by plaintiff's counsel on the first day of trial.

Johnson J.A., with whom McDermid and Allen JJ.A. concurred, in dealing with these records said:

> In the present action where the crucial finding of the trial judge was
>
> > "The classic signs or symptoms of circulatory impairment manifested themselves clearly and early"
>
> the accuracy of these records were of supreme importance.
>
> These records, far from being a simple record of instrument readings or medical dosages, are the nurses' assessment of phenomena. They involve the nurses' ability to observe, and equally important, to record their observations accurately. Having inscribed their findings, there would still remain the degree to which

> an observed condition was present when such words as "blue", "bluish pink", "cool" and "cold" were used. All of these could be fruitful areas for cross-examination. Untested by cross-examination, it cannot be said that the evidence meets the test of "Circumstantial Probability of Trustworthiness" and should not have been admitted without the nurses being called to verify it and be available for cross-examination. There is no question of the unavailability of these nurses. As the learned judge said in the passage from his judgment which I have quoted earlier, these nurses were subpoenaed by the plaintiff, were present throughout the trial and were not called.

and concluded:

> Because of the improper admission of the nurses' notes, the appeal will be allowed with costs and a new trial directed.

O'Byrne J., in receiving the notes as evidence, relied on a passage from Wigmore, 3rd ed., vol. 6, para. 1707, which reads:

> 1707. Hospital Records. The medical records of patients at a hospital, organized on the usual modern plan, deserve to be placed under the present principle. They should be admissible, either on identification of the original by the keeper, or on offer of a certified or sworn copy. There is a Necessity (ante, 1421); the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness (ante, 1422); for the records are made and relied upon in affairs of life and death. Moreover amidst the day-to-day details of scores of hospitals cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring on the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the Court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists.

and on two Alberta cases Omand v. Alberta Milling Company [(1922), 18 A.L.R. 383.] and Ashdown Hardware Co. v. Singer et al. [*(1951), 3 W.W.R. (N.S.) 145*.], as well as on a case in this Court Canada Atlantic Railway Company v. Moxley [(1889), 15 S.C.R. 145.].

In Omand the claim was for damages alleged to have been caused by a shipment of inferior flour resulting from an excess of moisture and being short in weight. A witness, Flavelle, was called who had been superintendant of the Flour Inspection Department for the Wheat Board and the Wheat Export Company and originally for the Canadian Government acting for the British Government having to do with the export of wheat to England. He proposed to refresh his memory of the events relevant to the litigation by the inspection reports which had been made for the express purpose of ascertaining and determining the quantity and quality of all flour purchased by the Government and requiring in its operation a large body of officials, among whom diverse particular duties were distributed and it was part of the system that the particular results should be regularly recorded. The learned trial judge refused to permit the witness to do this. The Appellate Division allowed an appeal from the judgment dismissing the action. Stuart J.A. dealt with the question of the admission of the reports as follows:

> In my opinion the records were, under a proper exception to the heresay rule, admissible in evidence as proof of the facts stated therein.
>
> There is first the necessity principle. No one but the officials at Montreal who were testing flour regularly for the Canadian or British government could possibly give any evidence on the points involved. Those officials did such an enormous amount of testing that they could not possibly remember the result of the test in each individual case. It is really absurd even to talk about their memory being refreshed. Everyone knows perfectly well that it could not be. So that the necessity arises not merely from death (as it did in Reid's

> case) or from absence (as in Grant's case) but from the sheer impossibility of memory even in the case of the witnesses produced, viz., Shutt and Flavelle.
>
> Then there is the circumstantial guarantee of trustworthiness arising from (1) complete disinterestedness, (2) duty to test, (3) duty to record the test at the time, this duty being to superior authorities who would be liable to punish or reprimand for failure to perform it.
>
> The whole subject is fully discussed in Wigmore on Evidence, pars. 1420 and 1521 to 1532, and I think the principles, there suggested as sound, should be so treated and adopted by the Court.

In Ashdown which was an action for the price of goods sold and delivered, the defendant contended that the plaintiff had failed to prove that goods were delivered to the amount claimed. The plaintiff relief on its ledger accounts and the evidence of the credit manager of the plaintiff who had charge of and supervision of accounts with his customers. He was familiar with the system and method adopted by the company in the ordering and supplying of goods, the invoicing of such goods and the posting and entering in the ledger. The defendant contended that there was no proof of sale or delivery and that the plaintiff could not establish his case by production of the records. Clinton J. Ford J.A., delivering the judgment of the Court said:

> It is true that there was no direct proof of actual delivery to or receipt by the firm of the goods in question, nor evidence by any clerk or servant of the plaintiff who personally sent out the goods, in fulfilment of any specific order; but, in my opinion, proof in this way cannot be reasonably required in present-day business in a large commercial concern where clerks and servants are changed from time to time, whose evidence may be difficult and often impossible to obtain, and who, even if brought before the court, would have forgotten most of the particular transactions. Of course, the court must, as always, having in mind the circumstances, decide what is the best evidence available, and the kind or degree of proof required. This view is, I think, in accord with that outlined fully in Wigmore on Evidence, 3rd ed., vol. 5, sec. 1530. To emphasize the difficulty of proving each specific item of the account. I point out that we have here an example of goods sold and delivered over a period from April 26, 1948, to November 30, 1949, composed of items covering about 40 pages of the appeal book.
>
> I think that this view of the kind of proof required to establish a prima-facie case here is supported by the reasoning in Omand v. Alta. Milling Co. *[1922] 3 WWR 412*, *18 Alta LR 383*, where Beck J.A. refers to proof of a carefully devised and a carefully conducted system, although in that case it was a governmental system of inspection followed by the making of records, as leading to a high probability of the correctness of the ultimate results and, the system having been proved by the supervisor, who verified the copies or duplicates of the reports used in pursuance of the system, the contents of the reports were proved and held to be prima facie correct. Clark J.A. concurred with Beck, J.A. Stuart, J.A., at p. 412, says that such records were, under a proper exception to the hearsay rule admissible in evidence as proof of the facts stated therein. He refers to Wigmore on Evidence, secs. 1521 to 1532, and expresses the opinion that the principles there suggested as sound should be so treated and adopted by the court. Having read the sections, I respectfully agree with the opinion expressed by Stuart, J.A. and add that, in my opinion, the principles outlined there apply to the proof required in this case.

In Moxley the plaintiff brought action against the Canada Atlantic Railway Company claiming that owing to the defective condition of the railway's locomotive sparks were thrown which ignited timber and wood on plaintiff's land which fires spread rapidly and destroyed a quantity of wood timber on the land. To establish his case, the plaintiff put in evidence certain books of the railway company containing statements of repairs required on the engine which had passed the plaintiff's farm at about the time the fires started. These records were objected to, and in dealing with the issue Gwynne J. said at p. 163:

> Then, as to the entries in the defendant's books as to the condition of engine No. 4, these entries, having been made in a book kept for the express purpose of calling the attention of the mechanical department to something required to be done and having been caused to be made in the book by the driver of the engine whose duty it was to make the entries or have them made, were admissible in evidence.

The issue as to the admissibility of the nurses' notes in this appeal is not as decisive as it might be by virtue of the objection taken by counsel for Dr. Venner at the trial. The position taken was as follows:

> Mr. Major: My Lord, our position briefly taken is that it's difficult for Your Lordship, I think, not having the record in front of him, the nurse's records understand perhaps what I'm trying to say. We don't object to the records going in insofar as they show that nurses attended the patient, insofar as they show anything that is objective in its nature, insofar as being evidence in this case is concerned. But you will note in reading the record and in just picking something at random they say:
>
> > "Quiet evening, complained of discomfort, relieved by sedation, numbness in all toes, toes now swollen and blue."
>
> Insofar as that type of description is used it's an expression of opinion by the nurse on what she observed the time that she was there and I think it would be unfair to accept it as prima facie proof of that which is purported to have happened without the nurse who made those notes being present today to say that when she says blue she means what all of us understand by blue. Insofar as her expressions of opinion, the doctor, I don't think, should be put in a position of having these admitted. He is prejudiced insofar as the authorities quoted by my learned friend, seems that the very exception stated in Wigmore, the bona fide dispute that Wigmore refers to is precisely the position that I think we are in in this particular matter insofar as the expressions of opinion may be concerned.
>
> The Court: I don't understand what you mean by that. What exception?
>
> Mr. Major: If you will look at the last sentence, I suppose the second last is a better place to start:
>
> > "The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the Court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists."
>
> And I simply say that insofar as expressions of opinion are contained in the record a bona fide dispute may exist, not perhaps a dispute as much as a need for clarification, amplification of what the nurses meant at the time they made the record.
>
> The Court: Which, of course, you can do, notwithstanding the entry of that as an exhibit in this trial at this point.
>
> Mr. Major: My Lord, if it's Your Lordship's ruling that--
>
> The Court: I haven't yet ruled. I have to find out what your problem is.
>
> Mr. Major: My problem is this, that I'm quite prepared to have these go in subject to that exception that I have made, that they are not taken as prima facie proof by the Court of what they purport to be insofar as they relate to opinion.
>
> The Court: What you're saying is that you want to reserve the right to call any evidence to vary or dispute or amplify the contents of the nurse's record or chart or whatever it's called?
>
> Mr. Major: No, I go a little further than that, My Lord. I say that it is the obligation of the plaintiff in discharging his burden of proof, that he calls evidence to clarify the matter which I would put in dispute insofar as these records purport to deal with them. I don't think that he discharges his burden by entering these records which indicate that the leg may be blue or there may be numbness or there may be other generic terms used. I say that that burden of proof is not discharged against me by the entry of these records and I take objection to them being accepted as that. Otherwise, I have no objection to them going in.

Also during the examination in chief and cross-examination of Dr. Venner, the nurses' notes were referred to and he admitted having had access to these notes and of being aware of them in determining his course of action on each occasion that he visited the appellant in the hospital in Jasper.

However, despite this, I think it desirable that the Court should deal with the issue as a matter of law and settle the practice in respect of hospital records and nurses' notes as being either admissible and prima facie evidence of the truth of the statements made therein or not admissible as being excluded by the hearsay rule.

The question has not been free from doubt. The need for a restatement of the hearsay rule has long been acknowledged, but differences of opinion exist as to how the change should come about. There are two schools of thought and these are well illustrated in the recent decision in the House of Lords in Myers v. Director of Public Prosecutions [[1965] A.C. 1001, [1964] 3 W.L.R. 145, [1964] 2 All E.R. 881.]. In Myers, Lord Reid, with whom Lords Morris and Hodson agreed, presented the case for a legislative solution as follows:

> I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted.

Lord Donovan presented the case for extension of the rule by judicial decision in these words:

> I am aware that your Lordships view these consequences with uneasiness. Nevertheless it was urged on behalf of the appellant that this House is powerless to prevent them. The argument is that the records themselves are hearsay; that legislation would be required to make them admissible evidence; that the admission of this evidence would have to be hedged around with safeguards lest untrustworthy evidence comes in by the same door: and that all this is the province of Parliament.
>
> My Lords, I feel the force of the argument but I remain unconvinced. The common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds. Particularly is this so in the field of procedural law. Here the question posed is--"Shall the courts admit as evidence of a particular fact authentic and reliable records by which alone the fact may be satisfactorily proved?" I think the courts themselves are able to give an affirmative answer to that question.

He was supported by Lord Pearce who said:

> I find it impossible to accept that there is any "dangerous uncertainty" caused by obvious and sensible improvements in the means by which the court arrives at the truth. One is entitled to choose between the individual conflicting obiter dicta of two great judges and I prefer that of Jessel M.R. His dictum was as follows, 1 P.D. 154, 241: "Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases." On that expression of principle he admitted the extension which has been acted on ever since in the Probate Division.

> That, I respectfully think, is the correct method of approach, particularly to a problem that deals with the court's method of ascertaining truth. As new situations arise it adapts its practice to deal with the situation in accordance with the basic and established principles which lie beneath the practice. To exalt the practice above the principle would be a surrender to formalism. Since this branch of the law is so untidy, there is but little appeal in "the demon of formalism which tempts the intellect with the lure of scientific order."
>
> While I give weight to the general explicit or implicit disapproval of further extension, expressed obiter in Woodward v. Goulstone, *11 App. Cas. 469*, I cannot accept that from 1886 no further evolution was possible in particular circumstances or sets of circumstances on the general principles expressed by Jessel M.R. Since that date life has greatly changed in various respects. With the necessity created by death the courts were familiar and they had evolved exceptions which dealt reasonably adequately with that phenomenon. With the necessity created by insanity Lord Aldon and Lord Cottenham had dealt and I cannot find that they have been overruled. The necessity created by mass production and modern business they could not then foresee. They did not provide for the anonymity of modern industrial records and the difficulty of tracing those who made them. The individuality of persons in a large factory or business may be difficult or impossible to discover. They do many repetitive and almost automatic tasks concerning which no memory exists. Yet their composite efforts make machines and records whose complexity, efficiency, and accuracy are beyond anything imaginable in 1886. In my view the anonymity of the recorder or the impossibility of tracing him create as valid a necessity as does his death for allowing his business records to be admitted. The principles on which the court sets out to discover the truth about these things remain unchanged, but the way in which those principles are applied must change if the principles are to be honoured and observed.

Although the views of Lords Donovan and Pearce are those of the minority in Myers, I am of opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: "This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job."

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

I would, accordingly, allow the appeal and restore the judgment of O'Byrne J. with costs here and in the Appellate Division. The cross-appeal should be dismissed with costs.

Appeal allowed with costs; cross-appeal dismissed with costs.

Tab 11

COURT FILE NO.: 04-CV-026378A; 04-CV-026588A;
04-CV-026986A; 04-CV-028197A; 05-CV-031616A;
05-CV-031747A; 06-CV-34480A; 07-CV-37376A; 07-CV-37377A

DATE: 2007/11/23

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN:

**MARGARET AULT/ROBERT COLLIER/ROBERT TEMPLE/
ROD SHEPHERD/RICHARD FINDLAY/DAVID LUCK/
LUCIE NOBERT/MARIE-FRANCE DUFOUR/BRYAN C. ARMSTRONG**

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

and

**SYLVAIN PARENT, LAURA BURNSIDE, WELTON PARENT INC.
LOBA LIMITED and RAYMOND JEMUS**

Third Parties

RULING RE SCOPE OF DEFENDANT'S CROSS-EXAMINATION OF PLAINTIFFS' EXPERT WITNESS

Background

[1] John Christie is an actuary whom the Plaintiffs retained to prepare calculations relating to their claim for damages based on pension loss. Mr. Christie prepared a report for each of the Plaintiffs. The report for each Plaintiff, other than David Luck, was served on the Defendant and Third Parties. Each report provides a comparison of (1) the value of the pension benefits under the *Public Service Superannuation Act* that the Plaintiff will receive assuming the Plaintiff terminated employment in October 2000 and started to receive his or her pension on the actual date that the pension was or will be payable, and (2) the value of the pension benefits under the same plan that the Plaintiff would have received had he or she continued to work with the Public Service until a hypothetical retirement date chosen by the Plaintiff.

[2] Mr. Christie was called to testify on behalf of each Plaintiff for whom a report was served. The Plaintiffs' counsel asked that Mr. Christie be qualified to give expert opinion evidence in regard to the valuation of pension benefits and the estimation of losses from reduced

pension service. He was qualified as requested, with no objections being raised by opposing counsel. During his examination-in-chief, Mr. Christie's evidence was restricted to these topics.

[3] During her cross-examination of Mr. Christie, the Defendant's counsel sought to adduce expert opinion evidence from Mr. Christie relating to the standard of care owed by actuaries to their clients. The Defendant's counsel proposed to ask Mr. Christie hypothetical questions in this regard with the goal of establishing that Sylvain Parent and Welton Parent Inc. owed a duty of care to the Plaintiffs and breached the standard of care applicable to Canadian actuaries. Counsel for the Plaintiffs and counsel for Sylvain Parent and Welton Parent Inc. objected to this line of questioning.

Argument of Defendant

[4] The Defendant argues that the liability of Sylvain Parent and the other Third Parties is squarely in issue in the main party action, as well as in the Third Party action. Mr. Christie is eminently qualified as an expert in the field of the professional ethics and standards that apply to actuaries in Canada. The Court needs the assistance of an expert to understand the professional standards applicable to actuaries. There is no exclusionary rule which would prevent this evidence being adduced through Mr. Christie. The scope for cross-examination of an expert is wide and is not restricted to the four corners of the expert's report. Mr. Christie was called to testify on behalf of the Plaintiffs, not the Defendant, and therefore the Defendant was under no obligation to provide the Plaintiffs or the Third Parties with any notice of areas outside of the scope of Mr. Christie's report on which the Defendant would seek his expert opinion during cross-examination.

Basic Requirements for the Admissibility of Expert Evidence

[5] Expert evidence is admissible if (1) it is relevant, (2) it provides information which is likely to be outside the experience and knowledge of the fact finder (in this case the judge), (3) it is not subject to any exclusionary rule, and (4) the evidence is given by a properly qualified expert. (*R. v. Mohan*, [1994] 2 S.C.R. 9)

Relevance

[6] In each Statement of Defence, the Defendant pleads: "…if any damages were suffered by the Plaintiff, which is not admitted but is expressly denied, those damages were caused in whole or in part by the actions of Sylvain Parent, Laura Burnside, Loba, Welton Parent Inc. and Raymond Jemus". In their Third Party Claims, the Defendant pleads that, if it is held liable for any loss or damages suffered by the Plaintiffs, those damages and losses were caused or contributed to by the conduct of the Third Parties, which included the failure of one or more of the Third Parties to advise the Plaintiffs of various facts or circumstances. The Defendant goes on to plead that (1) at all material times Sylvain Parent, Welton Parent Inc. and Raymond Jemus held themselves out to the Plaintiffs as independent professional advisors, (2) the Plaintiffs sought professional advice from them, (3) these three Third Parties knew that the Plaintiffs would be relying on their advice, (4) the Plaintiffs did in fact rely on their advice in making their

decisions regarding a transfer of pension funds to the Loba pension plan, (5) as professional advisors these three Third Parties owed a duty of care to the Plaintiffs, and (6) these Third Parties breached that duty.

[7] Sylvain Parent is an actuary and Welton Parent Inc. is an actuarial firm. Evidence has been adduced that one or more Plaintiffs knew this and that one or more Plaintiffs sought advice from Mr. Parent in regard to pension issues.

[8] I conclude that evidence relating to the standard of care expected of actuaries and how certain actions or inactions fit with that standard of care is relevant to a fact in issue in the trial and may tend to prove that fact. At the stage of relevance, I find that its probative value outweighs its potential prejudicial effect, leading to the conclusion that the value of the evidence would make it worth receiving.[1]

Necessity in Assisting the Trier of Fact

[9] Expert opinion evidence would be of assistance to the Court in understanding the rules of professional conduct and the rules of professional ethics applicable to actuaries, matters outside the Court's experience. This evidence would assist the Court in determining the standard of care to be met by Sylvain Parent or Welton Parent Inc. as actuaries when dealing with the Plaintiffs, assuming the Court determined that in the circumstances of this case, as actuaries, they owed a duty of care to the Plaintiffs. Again, at this stage, the need for expert opinion evidence regarding the professional standards expected of actuaries outweighs any concerns about potential prejudice.[2]

Absence of an Exclusionary Rule

[10] The Plaintiffs and Third Parties have not referred me to any exclusionary rule of evidence that specifically deals with the admissibility of the proposed evidence. Nevertheless, they rely on the underlying policy objectives inherent in r. 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 in arguing that the proposed evidence should be inadmissible in the circumstances of this case. More will be said of this shortly.

Properly Qualified Expert

[11] John Christie has ample professional qualifications that would have supported a finding that he is an expert in the area of professional standards and ethics for actuaries. As a Fellow of the Canadian Institute of Actuaries since 1969, Mr. Christie was a member of the Discipline Committee from 1990 to 1997 and was its Chair from 1992 to 1997. He has been a member of the Institute's Committee on Rules of Professional Conduct from 2004 to the present.

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[1] See *R v. K.(A.)* (1999), 45 O.R. (3d) 641 (C.A.) at paras 77 – 89.
[2] Ibid, at paras 90 – 101.

[12] That being said, Mr. Christie was not qualified by the Court to give expert opinion evidence in regard to professional standards and ethics for actuaries, as the Plaintiffs did not seek to have him qualified in this area. The Defendant argues that this is irrelevant and that, regardless of the qualification given by the Court, the Defendant should be able to elicit expert opinion evidence from Mr. Christie regarding other areas in which the Court would have qualified Mr. Christie if the Court had been asked to do so. The Defendant relies on the following cases.

[13] In *R. v. Marquand*, [1993] 4 S.C.R. 223, a number of medical experts provided evidence beyond the areas of expertise in which they had been qualified. Defence counsel did not object to the witnesses' giving evidence in the expanded areas, but did object to the judge charging the jurors that they could rely on that evidence. The trial judge instructed the jury that the opinions outside the expertise of the witnesses were to be weighed along with all the other evidence.

[14] On appeal in part on this basis, McLachlin, J. at para. 37 stated:

> Important as the initial qualification of an expert witness may be, it would be overly technical to reject expert evidence simply because the witness ventures an opinion beyond the area of expertise in which he or she has been qualified. As a practical matter, it is for opposing counsel to object if the witness goes beyond the proper limits of his or her expertise. The objection to the witness's expertise may be made at the stage of initial qualification, or during the witness's evidence if it becomes apparent the witness is going beyond the area in which he or she was qualified to give expert opinion. In the absence of objection, a technical failure to qualify a witness who clearly has expertise in the area will not mean that the witness's evidence should be struck. However, if the witness is not shown to have possessed expertise to testify in the area, his or her evidence must be disregarded and the jury so instructed.

[15] Although McLachlin J. disapproved of the procedure adopted at the trial regarding the expert opinion evidence, the fact that the witnesses all clearly possessed expertise sufficient to permit them to testify as they did led her to conclude that it was not an error in law to allow the jury to consider their evidence in its entirety.

[16] In the case at hand, the Plaintiffs and the Third Parties did object when the Defendant sought to elicit expert opinion evidence from Mr. Christie beyond the area in which he was qualified to provide expert opinion evidence. That differentiates this case from *Marquand*.

[17] In *R. v. D.R.*, [1996] 2 S.C.R. 291 a children's therapist was qualified as an expert in the behavioural, social and emotional characteristics of sexually abused children. She had been present during the videotaped interviews of the children conducted by the police. Defence counsel sought to cross-examine the expert on the interview techniques employed during those interviews. The trial judge did not allow this line of questioning. The Supreme Court held that, given the importance of the right to cross-examine witnesses, and the fact that the issue of the

children's credibility was central to the allegations against the accused, the trial judge had erred in restricting the cross-examination. The Court considered it immaterial whether the therapist was an expert in interview techniques as the scope of cross-examination of an expert is not restricted to his or her area of expertise. (See paras. 44-45)

[18] The case of *R. v. D.R.* can be distinguished from the case at hand. First, the priorities in a criminal case are different from those in a civil case. In the former, enabling the accused to make full answer and defence is the overarching concern. In a civil case, the primary consideration is to secure a just, expeditious and cost-effective determination of the action on its merits. Secondly, the excluded evidence in *R. v. D.R.* related to observations which the therapist had been in a position to make during the interviews with the children and did not necessarily involve any opinion evidence based on expertise. For these reasons, this case is not of particular relevance to the issue before me.

[19] In *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Sup.Ct.Master), Master MacLeod stated at para. 25:

> Experts are only entitled to give opinion evidence in areas within their accepted expertise and wandering from that expertise will render the extraneous opinion inadmissible. … There seems no reason this principle should not operate in reverse. If the expert is qualified to answer additional opinion questions, they may be admissible. At trial, questions could be asked in cross examination to widen the scope of the expert's expertise and then to elicit a relevant opinion on a point other than that provided in chief. If this is appropriate on a motion then the expert may be asked questions about experience in other related areas and then could be asked an opinion. That opinion would be admissible only if the judge accepts it after finding this new area of expertise meets the criteria in *R. v. Mohan, supra.*

[20] In *Caputo,* the Plaintiffs in a contemplated class action brought a motion to compel answers to questions refused on cross-examinations on experts' affidavits filed by the Defendants on the certification motion. Master MacLeod noted that any proper questions on a cross-examination that have a semblance of relevance to the determination of the motion must be answered. A deponent may be cross-examined on any fact in his or her knowledge which is relevant to the determination of the motion, even if it is not in his or her affidavit. Master MacLeod went on to draw a distinction between the role of a judge or master hearing a refusals motion and the role of the judge hearing the actual motion or trial. The latter determines whether or not expert evidence will be admitted and the weight to attach to it. A master hearing a refusals motion is providing a screening function to determine what evidence will be before the motions judge or trial judge when he or she is deciding on the admissibility of evidence. As such, relevance on the refusals motion should be determined broadly so as not to usurp the function of the motions judge or trial judge. It is in this context that Master MacLeod made the comment above regarding the scope of cross-examination of experts. As he acknowledged, this is a very different context than a ruling on admissibility of evidence at trial.

[21] The Plaintiffs pointed me to the case of *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.). The Court of Appeal held that one reason why the trial judge in that case had not been in error in ruling that a medical expert could not be examined in chief on an area of expertise reasonably assumed to be within his area of special skill and knowledge was that the trial judge had not been asked to and had not in fact qualified the expert to give expert evidence in regard to that topic.

[22] I have not been referred to any case law or other authority which has specifically dealt with the question of whether in a civil trial an expert *on cross-examination* can be asked for *expert opinion evidence* in regard to a subject falling outside the areas in which the expert has been formally qualified by the Court. In any event, I do not find it necessary to decide whether the limited qualification I granted at the commencement of Mr. Christie's evidence, and at the request of the Plaintiffs, precludes his being cross-examined regarding his expert opinion relating to other possible areas of his expertise. For policy reasons relating to the issue of notice and the avoidance of trial by ambush, I find that the proposed evidence regarding the standard of care owed by actuaries to persons such as the Plaintiffs, in the circumstances of this case, is inadmissible.

Analysis

[23] Rule 53.03 reads as follows:

> *Experts' Reports*
> 53.03(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony.
> *Sanction for Failure to Address Issue in Report or Supplementary Report*
> (3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,
> (a) a report served under this rule; or
> (b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.
> …

[24] This rule sets out the protocol to be followed in civil trials before this court when a party wishes to rely on expert opinion evidence to advance an issue in the case. The rule complements rules 30 to 33 dealing with productions, discovery of documents, examinations for discovery of

parties, discovery of non-parties and medical examinations. All of these rules have as their underlying purpose the early identification of evidence relevant to all issues in the litigation. It is through this early identification of evidence that issues can be resolved at the earliest possible time. This in turn helps to minimize the costs associated with litigation and reduces the demand on limited judicial resources through shortening required trial times. Of equal importance, the early and full disclosure of evidence enables all parties to properly prepare for trial so that the trial unfolds in an orderly, efficient and fair fashion. There is no room for "trial by ambush" in our civil justice system.

[25] It must be remembered that r. 1.04 of the *Rules of Civil Procedure* states that the rules must be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Rule 53.03 must be interpreted with these overarching priorities in mind.

[26] The Defendant argues that the Plaintiffs cannot claim prejudice when their expert is cross-examined to elicit expert opinion evidence on an issue not dealt with in his report but within his area of expertise, even if that area is not included in the area of expertise for which he was formally qualified at trial. The Defendant argues that presumably the Plaintiffs accept the expertise of Mr. Christie as stated in his *curriculum vitae*, since they retained him and his *curriculum vitae* makes it clear his area of expertise is broader than the limited issues dealt with in the report he prepared for the Plaintiffs. Further, the Defendant argues that the Plaintiffs were aware of the pleadings in the Statement of Defence and the Third Party claims; therefore they knew that the standard of care owed by actuaries was a live issue and that Mr. Christie might have some useful insight in that regard. Implied in this line of reasoning is the argument that, if the Plaintiffs were reckless enough to put on the stand an expert who has expertise in an area of interest to the Defendant, and whose opinion in regard to that issue might bolster the Defendant's position, too bad for them. They should have foreseen this possibility and should have prepared for it, possibly by not calling Mr. Christie to provide his expert opinion in regard to the calculation of pension loss (even though such evidence is necessary to pursue their case), possibly by broadening Mr. Christie's retainer to cover the issue of standard of care (even if this evidence would not be something which the Plaintiffs would initially seek), or possibly by retaining another professional who could quantify pension loss but would not be able to opine on the standard of care applicable to actuaries (an unlikely scenario). I reject these arguments. They in no way respect the goals of early resolution of issues and the just, most expeditious and least expensive determination of civil proceedings.

[27] In any event, this line of argument has no application to the Third Party claim, which is a separate proceeding from the main action. The Third Parties did not retain Mr. Christie and did not serve any report prepared by Mr. Christie. Their knowledge of Mr. Christie's expertise and his expert opinion, as it relates to the main action and the Third Party claim, comes from Mr. Christie's report and *curriculum vitae*. If the Defendant retained another expert to opine on the issue of the standard of care owed to the Plaintiffs by Sylvain Parent and Welton Parent Inc. – one of the central issues in the Third Party claim – the Third Parties would have received notice of that expert's opinion in this regard at least 90 days prior to trial, and would have had the

opportunity of retaining their own expert or experts to advise them in this regard and to prepare a responding opinion, if necessary. Why should the Third Parties be denied this opportunity because the Defendant wants to adduce expert opinion evidence through Mr. Christie, the Plaintiffs' expert, rather than through another expert? The same policy considerations that lead to the requirement of a party providing appropriate notice regarding expert opinion evidence it seeks to adduce through its own expert witness, applies to expert opinion evidence it seeks to adduce against one party through cross-examination of another party's expert witness. Rule 1.04(2) states that, where matters are not provided for in the Rules, the practice shall be determined by analogy to them.

[28] Notice must also be taken of r. 53.03(3), which provides that an expert witness may not testify with respect to *an issue*, except with leave of the trial judge, unless *the substance* of his or her testimony *with respect to that issue* is set out in a report or supplementary report served within certain time limits prior to trial. In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, supra* at para. 38, the Ontario Court of Appeal stated:

> In our view, these cases indicate that the "substance" requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

[29] In *Marchand*, a medical malpractice case, the Court determined that causation was a separate issue from standard of care, and before a party could adduce evidence from his or her expert in regard to causation, the substance of the expert's opinion in that regard had to be included in a medical report served on the other party; a medical report dealing with the issue of standard of care did not suffice to meet that requirement. As well, the trial judge's qualification of the expert in the area of standard of care was not broad enough to also render the expert qualified in the area of causation. For both of these reasons, the Court of Appeal concluded that the trial judge had not erred in refusing to allow the expert to opine on issues of causation.

[30] The most relevant case in regard to the issue before me is that of *Stribbell v. Bhalla* (1988), 32 C.P.C. (2d) 272 (Ont. H.C.). In that case, a medical practitioner who was called to testify at trial had undertaken an independent medical examination of the plaintiff on behalf of the defendant. The plaintiff served the medical report and the expert's *curriculum vitae* and then read portions of the report into evidence. The defendant's counsel sought to cross-examine the expert on a variety of issues of relevance in the case. Osborne J. observed that the clear policy

underlying the rules relating to discovery and to the production of experts' reports is one of disclosure. He would not let the defendant's counsel ask the medical practitioner for an expert opinion that was not the product of his report. In making this ruling, Osborne J. stated at paras. 10, 15:

> I recognize that in so ruling I am in some respects limiting the extent to which, in these unusual circumstances this medical witness may be cross-examined. I do not take the view that cross-examination must be contained within the four corners of the report. My judgment is that cross-examination cannot indirectly elicit from the witness expert opinions which should have been the subject matter of earlier disclosure. There was no such disclosure in this case, as required by r. 53.03(1).
> …
> I am of the opinion that to do so indirectly under the guise of the so-called right to full cross-examination, defeats the very purpose of the disclosure provisions of the rules. The rules have statutory effect. It seems to me that had it been intended that the disclosure provisions of the rules be virtually obliterated by this process, that some specific provision would have been found in the rules that would suggest that the course of action [the defendant's counsel] wishes to embark upon is to be permitted. …

[31] The *Stribbell* case can be distinguished from this case in one respect, which I consider a very minor factor. In *Stribbell*, the defendant had initially retained the medical practitioner to conduct an independent medical examination, but then, seeing the report, had decided not to rely on it. The plaintiff served the report on the defendant as if the practitioner had been retained by the plaintiff and had prepared a report at the plaintiff's request. At trial, the practitioner was presented as the plaintiff's witness, with the defendant having the right of cross-examination. The only difference in the case at hand is that Mr. Christie was retained by the Plaintiffs. I fail to see why the reasoning used by Osborne J. should not apply equally to the circumstances of this case.

[32] The Defendant picks up on the comments made in *Stribbell* and in other cases, such as *R. v. D.R.*, [1996] 2 S.C.R. 291 at paras. 44-45 reinforcing the importance of the right to cross-examine witnesses. I accept that the Defendant may cross-examine Mr. Christie in a rigorous and thorough fashion in regard to the evidence he provided to the Court. That includes an exploration of the nature of his retainer, the information on which he relied and the assumptions he made in formulating his opinion, the source of that information or those assumptions, the investigations he undertook, the calculations he made, the methodology he used, any authorities on which he relied, and any factors which impact on his credibility and his status as an independent expert. The right of cross-examination cannot be relied upon, however, to enable the Defendant to elicit expert opinion evidence from Mr. Christie in a manner that would render the trial process unfair.

[33] The Defendant chose not to serve an expert's report in regard to the issue of the standard of care owed to the Plaintiffs by Sylvain Parent and Welton Parent Inc. Service of such a report would have put the Plaintiffs and Third Parties on notice of the nature of the evidence that the Defendant could and likely would adduce relating to this issue. This would have amounted to the disclosure expected under the *Rules of Civil Procedure*, the purpose of which is to enable all parties to understand the strength of the opposing parties' case, to facilitate the early resolution of as many issues as possible, and to enable all parties to prepare for trial in an efficient and cost-effective manner. Had the Plaintiffs and Third Parties been put on notice that the Defendant had an expert opinion dealing with the issue of the standard of care owed by actuaries, they would have had the choice of seeking their own expert opinion evidence in response. They would have been in the position of determining whether there was a difference of opinion amongst experts as to the rules of professional conduct applicable to actuaries, whether a professional duty of care applied in the circumstances of this case and, if so, what standard of care applied. They would have been able to choose the expert to retain in regard to this type of evidence. They would have been in a position to elicit evidence from the Plaintiffs, and possibly other witnesses, to provide the appropriate factual foundation for the opinion to be offered by their chosen expert.

[34] The scheme of r. 53.03 makes it clear that a party is not expected to guess about whether an opposing party will be able to adduce expert opinion evidence favourable to its case in regard to one or more issues in the litigation. All parties are to receive adequate notice of such possible evidence so that they have the opportunity of deciding how best to respond. Allowing the Defendant to elicit expert opinion evidence from Mr. Christie regarding the standard of care would deny both the Plaintiffs, but even more importantly, the Third Parties, this opportunity.

[35] In those situations specifically covered by r. 53.03(1)(2) and (3), even if an expert's report dealing with the substance of his testimony with respect to an issue has not been served as provided under the rule, the expert may still be able to testify with leave of the trial judge. Rule 53.08(1) provides that, if evidence is admissible only with leave of the trial judge under r. 53.03(3), leave *shall* be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. The Plaintiffs and Third Parties argue that I should not rely on this provision by way of analogy in the circumstances of this case to grant the Defendant leave to elicit from Mr. Christie expert opinion evidence regarding the standard of care. I accept this argument.

[36] For all of the reasons already stated, the Plaintiffs, and again, most importantly, the Third Parties, would be prejudiced by allowing the Defendant to introduce expert opinion evidence without advance notice. Neither an adjournment, nor an award of costs, would be of assistance. Mr. Christie has already testified on behalf of the Plaintiffs. The Plaintiffs have not had an opportunity of informing themselves of Mr. Christie's opinion in regard to the standard of care applicable in the circumstances of this case, and to make tactical decisions regarding the use of Mr. Christie as their expert, the scope of his report, the method of adducing his evidence, and the need to consult and obtain a report from any other expert. All of these decisions needed to be taken before the commencement of the trial. Of significance is that the Plaintiffs in the Findlay, Shepherd and Temple actions had already testified prior to Mr. Christie testifying. There may

have been areas which the Plaintiffs' counsel would have explored with these Plaintiffs had he had notice of the expert opinion evidence to be adduced through Mr. Christie.

[37] In regard to the Third Parties, what the Defendant's counsel seeks to do is an end run around the normal rules of disclosure regarding expert opinion evidence. The Third Parties would be completely blind-sided through the introduction of critical expert evidence concerning the standard of care applicable to actuaries. They have now missed the opportunity of cross-examining the Plaintiffs who have already testified. In order to be able to adequately deal with the potential evidence to be adduced through Mr. Christie, they would require adequate notice of what that evidence would entail. They could require a lengthy adjournment in order to consult their own expert or experts and serve their responding reports on the other parties.

[38] This trial has been scheduled for eight weeks, and counsel have advised that it likely will take one to two weeks longer than anticipated. There are seven counsel representing the parties. The trial date was scheduled months ago. Adjourning the trial to a later date would be a serious scheduling challenge, to put it mildly.

Disposition

[39] The Defendant cannot adduce expert opinion evidence from Mr. Christie that goes beyond the areas in which he has been qualified as an expert or that goes beyond the substance of Mr. Christie's report that was served under r. 53.03. The substance of the report includes what is reasonably required to explain or amplify aspects of the report.

[40] Mr. Christie was qualified to give expert opinion evidence relating to the valuation of pension benefits and the estimation of losses from reduced pension service. Mr. Christie's reports served by the Plaintiffs under r. 53.03 deal with these topics. The topics in regard to which the Defendant seeks to cross-examine Mr. Christie and adduce his expert opinion evidence relate to the issue of liability, namely whether the Third Parties owed the Plaintiffs a duty of care and, if a duty of care existed, the appropriate standard of care and whether the Third Parties failed to meet that standard of care in their dealings with the Plaintiffs. This is an entirely different area from that in which Mr. Christie was qualified to provide expert opinion evidence. It is an entirely different area from those topics covered in Mr. Christie's report. Undue prejudice would be caused – to the Third Parties in particular – if this line of questioning were allowed.

[41] The Defendant may question Mr. Christie regarding the existence of rules or standards of professional conduct within the actuarial profession as this provides a backdrop to assist in my assessment of Mr. Christie's evidence. His evidence in regard to the existence of such rules and standards is simply factual and does not require his giving expert opinion evidence beyond the scope of what I have ruled as being admissible.

Aitken J.

DATE: November 23, 2007

COURT FILE NO.: 04-CV-026378A; 04-CV-026588A; 04-CV-026986A; 04-CV-028197A; 05-CV-031616A; 05-CV-031747A; 06-CV-34480A; 07-CV-37376A; 07-CV-37377A

DATE: 2007/11/23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Margaret Ault v. Attorney General of Canada 04-CV-026378A; Robert Collier v. Attorney General of Canada 04-CV-026588; Robert C. Temple v. Attorney General of Canada 04-CV-026986A; Rod Shepherd v. Attorney General of Canada 04-CV-028197A; Richard Findlay v. Attorney General of Canada 05-CV-031616A; David Luck v. Attorney General of Canada 05-CV-031747A; Lucie Nobert v. Attorney General of Canada 06-CV-34480A; Marie-France Dufour v. Attorney General of Canada 07-CV-37376A; Bryan C. Armstrong v. Attorney General of Canada 07-CV-37377A

BEFORE: Aitken J.

RULING RE SCOPE OF DEFENDANT'S CROSS-EXAMINATION OF PLAINTIFFS' EXPERT WITNESS

Aitken J.

DATE: November 23, 2007

Tab 12

Case Name:

R. v. Kayaitok

Between
Her Majesty the Queen, Crown, and
Bruce Kayaitok, Accused

[2013] Nu.J. No. 2

2013 NUCJ 2

2013 CarswellNun 3

104 W.C.B. (2d) 1114

Docket: 24-08-08

Registry: Iqaluit

Nunavut Court of Justice
Iqaluit, Nunavut

E.D. Johnson J.

Heard: January 19, September 10 and October 19, 2012.
Judgment: January 16, 2013.

(101 paras.)

Matters: Rulings on voir dires (admissibility of statements and propensity evidence).

Counsel:

Counsel (Crown): Paul Bychok and Amy Porteous.

Counsel (Accused): Malcolm Kemp and Clare Henderson.

REASONS FOR JUDGMENT

E.D. JOHNSON J.:--

I. INTRODUCTION

1 The accused is charged with the second-degree murder of his common-law spouse Belinda Tootiak [Tootiak] on June 13, 2008, in the community of Kugaaruk.

2 The Crown expects to prove at the accused's trial next year that at 07:15 hrs on the morning of June 13, 2008, the accused brought the body of his deceased spouse to the Health Centre and banged on the front door. A nurse went downstairs to see what was happening and saw the accused inside the Centre with blood on his hands and arms. She noticed the body of the deceased on a stretcher in the emergency room and had a conversation with the accused. The nurse determined that the deceased had a weak pulse but no cardiac rhythm.

3 The Crown expects that the autopsy evidence will prove that Tootiak died in the Health Centre that morning of exsanguination caused by two penetrating injuries to her right lower abdomen, which lacerated her left femoral artery.

4 The R.C.M.P. arrived shortly afterwards and arrested the accused for murder. Moments later at the Health Centre the accused made an utterance in the presence of two police officers. He made another utterance as the officers walked him to the police detachment. He made two further utterances while in the police detachment. The accused also gave a warned recorded statement to another officer after he was arrested and placed in police cells.

5 The Crown seeks to introduce into evidence these verbal utterances and the recorded statement as being voluntary statements made by the accused. During the voir dires, I heard evidence from three R.C.M.P. officers and listened to several audio recordings.

6 The Crown's case is based on circumstantial evidence. It is centered on the utterances of the accused that place him with the deceased at the time of the fatal wounds. As a result, the Crown also seeks to introduce into evidence three types of contextual evidence on the history of the relationship between the accused and his deceased spouse. The Crown asserts that this evidence is probative and relevant for the jury to hear in order to understand the circumstantial evidence that will be presented at the trial. The Crown also asserts that the evidence will be crucial in assisting the jury to understand the accused's animus toward the deceased, his motive to kill her and that he was the assailant.

7 The contextual evidence consists of written materials explaining the nine previous prosecutions of the accused for assaulting the deceased. It also includes medical records contemporaneous with many of the prosecutions and the viva voce evidence of seven witnesses who knew both parties and

interacted with them as they dealt with many violent incidents in their relationship.

8 The Crown also reserved the right to make a further application to introduce evidence from social workers that has not yet been compiled by the police.

9 After hearing the oral and written arguments of counsel, I reserved judgment.

II. ISSUES

A. Admissibility of Utterances and Recorded Statement B. Admissibility of Contextual Evidence

A. Admissibility of utterances and recorded statement

(i). Evidence

10 The Crown called three R.C.M.P. officers at the voir dires. Corporal Ryan Snodgrass [Snodgrass] testified that he received a phone call from nurse Charmaine Saunders at 07:40 hrs on the morning of June 13, 2008, requesting police assistance at the Health Centre. He called Sergeant Maurice Poisson [Poisson] and they both attended at the Health Centre.

11 Snodgrass testified about an oral utterance made by the accused after they arrived at the Health Centre at 07:50 hrs (Voir Dire # 1). After hearing the utterance, Snodgrass arrested the accused and then both officers escorted him to the police detachment.

12 On arrival at the detachment, Snodgrass called his District Advisory NCO in Iqaluit. Poisson told Snodgrass to re-arrest the accused, read him his rights, take photographs, and to obtain a blood swab and finger nail scrapings.

13 Poisson testified about an utterance he heard from the accused between 07:50 and 07:55 hrs as they were walking over to the detachment (Voir Dire # 2).

14 Poisson testified about another utterance he heard from the accused shortly after they arrived at the detachment when Poisson placed the accused in an interview room (Voir Dire # 3)

15 Poisson also testified about an utterance he heard from the accused at 14:35 hrs when he was in his cell (Voir Dire # 4).

16 Constable Joe Baines [Baines] testified about a recorded statement he took from the accused at 16:11 hrs on the afternoon of June 13 (Voir Dire # 5).

17 Snodgrass testified that when he and Poisson arrived at the Health Centre he observed three nurses and the accused standing around the emergency room and the deceased lying on a bed. One of the nurses had mentioned something about knife wounds and that Tootiak was dead. In response, the accused said that the deceased "fell on a broom." Snodgrass then told the accused he was a

suspect and arrested him. Poisson confirmed Snodgrass's evidence about the utterance at the Health Centre adding that he heard the accused say it was a broom handle rather than a broom.

18 Both officers then walked with the accused back to the detachment. Snodgrass consciously avoided speaking with the accused because of information he had learned at a course a year earlier. Poisson was aware that utterances could be admissible in court and did not want to say anything to the accused because he knew he could be questioned about it later. He did not want to write it down at that time and as a result he did not ask the accused any questions.

19 Poisson testified that as they were walking to the detachment the accused stated "they had been in the shower together, that she fell on a broken broom handle and there was lots of blood from the bathroom to the living room."

20 On arrival at the detachment at 07:55 hrs, Poisson placed the accused in an interview room. Poisson asked the accused if he had been drinking and he replied in the negative. He then asked the accused, "Did Belinda fall on the knife - a knife"? The accused responded, "She fell and landed on a broken mop handle." The accused then said that he grabbed it and pulled it out and there was lots of blood. He carried her to the couch and started to dress her. The accused stated that she was getting pale so he put her on his shoulder and he carried her outside and put her on a bike and took her to the Health Centre. He waited five to ten minutes trying to get the attention of a nurse.

21 At 08:42 hrs Snodgrass re-arrested the accused and read him the standard police caution with Poisson in attendance. Snodgrass' complete interaction with the accused was recorded by a cassette tape recorder. Snodgrass asked the accused if he wanted to speak to a lawyer. The accused responded, "For what? I didn't do nothing." Snodgrass then took photographs and scrapings from under the accused's fingernails.

22 At 09:03 hrs the accused was placed in a cell. Poisson left the detachment to make arrangements for a guard and he and Snodgrass took turns checking on the accused during the day. The accused was lying down on the bed covered by a blanket and appeared to be sleeping most of the day. At 14:20 hrs Poisson was checking on the accused and noticed the accused was sitting up on his bed. The accused asked him what was going on and he responded that some R.C.M.P. officers from Iqaluit wanted to talk to him. At 14:30 hrs the accused said his finger was bleeding. Poisson told him not to pick it and to wrap it in a Kleenex and put pressure on it.

23 At 14:35 hrs Poisson noticed the accused sitting by the door of his cell. The accused asked him why he was there. Poisson responded, "You are under arrest for the murder of Belinda." The accused responded, "I didn't do anything. We were doing good." Poisson asked him if he had been drinking last night and the accused responded that he had a few shots. Poisson asked him when he had his last drink and the accused responded last night. Poisson asked him where he got the alcohol and he said he bought it. A short time later, as Poisson was leaving the cell area, the accused stated, "There were two holes in her."

24 At 16:11 hrs Baines started a recorded statement with the accused. A short time later, at 16:13 hrs, Baines and Snodgrass seized some clothing that the accused was wearing. The accused was given replacement clothes and offered something to eat and a cigarette. He declined the offer and asked why he was being kept in jail. Baines replied that the accused was in jail because he was arrested for murder and the accused responded, "I didn't even touch her." The following questions and answers then took place after the accused refused the offer of refreshments:

> A. Look I never touched her at all.
>
> Q. You never touched her at all?
>
> A. I never, she slipped.
>
> Q. She's what?
>
> A. Broken mop.
>
> Q. Oh, she slipped?
>
> A. Yeah. She was taking a shower and then she was walking around and that fucking mop was there. It cut her stomach. I was, I brought her to the health centre ...

25 All three officers testified that the accused was not under the influence of alcohol and appeared to understand and comprehend everything that was going on. Poisson testified that he asked the accused twice whether he had been drinking because during his past encounters with the accused he had been drinking and Poisson was suspicious the accused might have been drinking even though he could not smell the odour of alcohol. The accused responded that he had a couple of shots the night before. The officers knew from past experience that the accused understood English.

(ii). Crown argument

26 The Crown argues that the statements were voluntary and are admissible at the trial except for the statements covered in Voir Dire # 3. The Crown concedes that because the accused was under arrest when he made that statement he should have been cautioned and Chartered. Furthermore, unlike the other utterances, the statement was elicited by posing a question to the accused.

(iii). Defence argument

27 The accused did not challenge the admissibility of the other statements.

(iv). Analysis

28 Although the accused had been drinking the night before, I am satisfied that he was sober when he was arrested and fully comprehended what was going on. His physical co-ordination and balance was good and his speech was not slurred. He was able to communicate with the police and he was responsive to the questions from the police. He had an operating mind.

A.iv.1 Voir Dire # 1

29 As noted by Kilpatrick J. in R. v. VanEindhoven, 2006 NUCJ 12, [2006] Nu.J. No. 13 [VanEindhoven], the absence of a police caution does not determine whether an accused's statement was voluntary. The presence or absence of a caution is just one of many circumstances to be considered by the Court in the larger issue of whether the statement was voluntary. As Kilpatrick J. stated at paragraph 28 of VanEindhoven,

> Where a caution is given to a citizen before he or she is called upon to speak, the mind is more likely to be focused. The caution tells the citizen that there is a choice to be made. It tells the citizen that there are serious legal implications involved in speaking out. It warns the speaker not to be influenced, in making their decision, by any threats or promises made by a person in authority. An admission against interest made after caution, under such solemn circumstances, is more likely to be reliable and trustworthy.

30 As I noted at paragraph 125-128 of R. v. Jeffrey, 2007 NUCJ 6, [2007] Nu.J. No. 10, a caution should be given when police are about to question a person who has become a suspect. If a person is detained the police are required to advise of the right to counsel under section 10(b) of the Charter and there is a strong argument that the person is also a suspect who should be cautioned.

31 When the accused made his first utterance he was not in custody. Poisson and Snodgrass had no reason to suspect the accused of any involvement in the commission of an offence. The utterance occurred shortly after the police arrived at the Health Centre and was not prompted by any questioning by the police. It was a voluntary statement and reliable.

A.iv.2 Voir Dire # 2

32 The second statement occurred when the accused was under arrest but before he was cautioned.

33 Neither officer sought information from the accused after he was arrested and was walking to the police detachment. The utterance was spontaneous. The police were in the early stages of an investigation and, although the accused was an arrested suspect, the police were not yet prepared to

question him and consciously avoided doing so until later. Although the accused should have been cautioned, I am satisfied that his utterance was voluntary and reliable.

A.iv.3 Voir Dire # 3

34 The third statement took place after Poisson had placed the accused in an interview room. Poisson admitted that the usual procedure was to place a person who was under arrest in the cellblock and then attend to booking him. However, he was bothered about why one of the nurses had mentioned a knife and so he put him in an interview room and asked him about it. At this point the accused was an arrested suspect and Poisson knew he had not been cautioned or Chartered. He was seeking information that he knew could be used against the accused and that the accused might feel obligated to answer. I have a reasonable doubt about whether this statement was voluntary and exclude it.

A.iv.4 Voir Dire # 4

35 The fourth statement occurred after the accused had been cautioned and given his Charter rights to legal counsel. He had spent most of the day sleeping and was in no discomfort except for the small cut on his finger. He made no complaints to the police and did not make any requests to speak to a lawyer nor for any refreshments. Poisson responded to a question the accused asked him and was not trying to question the accused as he had done in the interview room. The accused appeared to comprehend what was going on. I am satisfied that these utterances were voluntary.

A.iv.5 Voir Dire # 5

36 The fifth statement was recorded by Baines and I am satisfied it was also voluntary.

B. Admissibility of contextual evidence

(i). Crown argument

37 The Crown argues that the current state of the law is accurately expressed in R. v. Misir, 2001 BCCA 202, 153 CCC (3d) 70 [Misir], which followed R. v. Peterffy, 2000 BCCA 132, [2000] B.C.J. No. 338 [Peterffy]. In that case, the British Columbia Court of Appeal upheld the trial judge's ruling that both non-hearsay and hearsay evidence of the accused's prior physical and verbal abuse of the deceased was relevant and material in determining whether the accused was guilty of second-degree murder. In applying Peterffy and R. v. F (DS) (1999), 132 CCC (3d) 97, [1999] O.J. No. 688, the court held that the evidence of past disreputable conduct was relevant because it indicated the accused had a threatening and violent attitude toward the deceased. It was material because it provided motive evidence that the accused was angry at the deceased's taunting and disobedience. It was also material to the accused's intent and to ensure the jury had an accurate picture of the appellant's relationship with the deceased. Finally, the Court held that the evidence of prior abuse was not only relevant to prove intent and motive but also to prove the "identity" of the

assailant.

38 In Misir, the court also upheld the trial judge's ruling that hearsay evidence of comments made by the victim to family members and co-workers was also admissible if the evidence satisfied the requirements set out in R. v. Kahn [1990] 2 SCR 531, [1990] S.C.J. No. 81 [Kahn].

39 The Ontario Court of Appeal applied Misir in R. v. Cudjoe, 2009 ONCA 543, [2009] O.J. No. 2761 [Cudjoe], in which the accused was also charged with the second-degree murder of his wife. The court upheld the trial judge's ruling that evidence of two prior assaults on the deceased was admissible as an exception to the general rule prohibiting the admission of evidence of prior bad acts by the accused. The British Columbia Court of Appeal also applied Misir in R. v. McCotter, 2012 BCCA 54, [2012] B.C.J. No. 213 [McCotter].

40 In R. v. Van Osselaer, 2002 BCCA 464, 167 CCC (3d) 225 [Van Osselaer], the British Columbia Court of Appeal held that this type of evidence is admissible, even if it is hearsay, if it meets the hearsay tests set out in Kahn, R. v. Smith, [1992] 2 SCR 915, [1992] S.C.J. No. 74, and R. v. B (KG) [1993] 1 SCR 740, [1993] S.C.J. No. 22. Leave to appeal to the Supreme Court of Canada was denied in R. v. Kahn, [2002] SCCA No. 444.

41 The same analysis and approach to this type of evidence was adopted in Nunavut in VanEindhoven. In that case, Kilpatrick J. admitted documents and records related to a court-mandated spousal abuse program. Although the Nunavut Court of Appeal allowed the appellant's appeal and ordered a new trial in R. v. VanEindhoven, 2012 NUCA 5, [2012] Nu.J. No. 15, the Crown argues that the law summarized by Kilpatrick J. has not changed in Nunavut. The ruling of the Court of Appeal merely impugned the weighing process used by the learned trial judge in his balancing of probative value versus possible prejudice on the contested evidence in that case. At paragraph 18, the Court of Appeal noted that the Crown must establish that the tendered propensity evidence is relevant to a specific issue before the Court and that the probative value of the evidence exceeds its anticipated prejudicial effect. This is merely a restatement of the law in effect at the time of the original trial.

42 The Crown argues that the Court of Appeal did not specify that a new approach was merited but rather that the trial judge never engaged in the weighing process mandated by R. v. Handy, 2002 SCC 56, [2002] 2 SCR 908. The Court of Appeal overturned the conviction because the trial judge failed to consider and apply the correct legal test in R. v. Villeda, 2010 ABCA 351, [2010] A.J. No. 1330.

43 The impugned evidence admitted by Kilpatrick J. was derived from an 'Intake Questionaire' produced during the accused's participation in the Rankin Inlet Spousal Abuse Program. The Court of Appeal specifically noted that the accused had received the assurance of confidentiality about the Questionaire. The Court concluded that much of the information about the accused was gleaned during that process and amounted to additional evidence of bad character that was inadmissible.

44 The Crown distinguishes the impugned evidence in VanEindhoven from the prospective evidence in the case at bar. Unlike VanEindhoven, the prospective evidence in this case pertains only to aspects of the relationship between the accused and the deceased spouse, Tootiak. It does not contain information concerning his experiences growing up, his employment history, or his prior history of aggression or violence with other men or partners. Rather, the evidence tendered by the Crown is probative of and relevant to three issues before the Court. First, that it demonstrates the animus held by the accused toward Tootiak. Second, it shows the deliberate nature of the acts that directly caused her death and logically that the accused was her assailant.

45 However, prior to the commencement of oral argument, Defence counsel informed the Crown that the accused was prepared to enter a guilty plea to manslaughter and to admit that he intended to injure Tootiak but not to kill her. In other words, the sole issue at trial will be whether the accused had the intent necessary to be convicted guilty of second-degree murder.

46 The Crown argues the admissions made by the accused do not guarantee he will testify at the trial in his own defence. As a result, the Crown cannot rely on the facts contained in the admissions about the intentions of the accused when he assaulted Tootiak. As demonstrated in the voir dire hearings, the accused made exculpatory statements claiming the death was an accident. As a result, the accused's credibility will be a key issue and the Crown argues that the contextual evidence is necessary because ultimately it is relevant to the motive of the accused and his intentions when he assaulted Tootiak. As noted, this type of evidence has been admitted in a number of appellate cases.

47 The Crown argues that the events on the day Tootiak died did not happen in a vacuum and out of the blue. There was a 14-year violent and dysfunctional relationship. The baggage of the relationship helps to explain what happened on the morning of June 13, 2008. The fact finder cannot exercise a truth finding function if the only evidence heard is the circumstantial evidence presented by the Crown. The comments of Kilpatrick J. at paragraph 136 in VanEindhoven are very clear about the importance to the trier of fact of hearing this type of evidence.

48 The Crown expects the admissible evidence will reveal that the deceased died on June 13, 2008, at the Health Centre in Kugaaruk. She had been brought there by the accused and died of exsanguination from a laceration of the left femoral artery caused by two penetrating injuries of the right lower abdomen.

49 The witness Christopher Amautinuar will testify that he was at a poker game the night before with the accused and the deceased. At some point during the evening the accused told him that he wanted to kill Roland Heisinger because "he was fucking around with Belinda." The accused and deceased were last seen together after midnight on June 13 as they left the community gym where Belinda wanted to buy soft drinks.

50 The witness nurse Erin Ferguson will testify that she awoke to the sound of banging at the front door of the Health Centre. She went downstairs and saw the accused with blood on his hands and arms. She noticed that the deceased had been placed on a stretcher in the emergency room and

she assumed the accused had placed her there. Ferguson asked the accused what happened and he replied that she slipped in the shower. Ferguson checked Belinda and determined that she had a weak pulse, warm skin but no cardiac rhythm. The Crown expects its evidence will prove that Belinda died an extremely short time after suffering the two fatal blows to her abdomen.

51 Two other nurses, Erin Byrne and Charmaine Saunders, assisted Ferguson. The Crown expects all three witnesses to testify that they did not observe any indicia of impairment on the part of the accused. Byrne recalls the accused saying that "she fell in the shower and I found her ... she fell on a broom and I pulled it out of her stomach." Saunders asked the accused how he got the cut on his hand and he replied that it happened when he was taking it out of her stomach. She also heard him say that they were in the shower together and she fell.

52 The Crown will tender forensic evidence that proves that the murder weapon was not a broom but a mop handle. Forensic evidence will also establish that dynamic bloodletting incidents did not occur in the shower but in the hallway, bathroom and the entrance to the bathroom. There was also evidence of an attempted clean up in the residence.

53 The police arrived at the Health Centre shortly afterwards and arrested the accused for murder. Pursuant to my ruling on the voluntariness voir dire, the Crown will tender evidence that during the walk back to the detachment the accused uttered to Poisson that he and the deceased had been in the shower together and that she had fallen on a broken broom handle. He later told Baines that "... she was taking a shower ... and that fucking broken mop was there. It cut her stomach ..."

54 In summary, the Crown's case is entirely based on this circumstantial evidence. Consequently, the proposed background and context evidence will be crucial to assisting the jury in deciding upon the accused's attitude to the deceased and his motive to kill her.

55 The Crown argues that the binders of contextual evidence submitted contain numerous instances demonstrating the accused's jealousies about Tootiak. For example, at a poker game on the evening before the murder there is evidence that the accused stated he was angry at Roland Heissinger and wanted to kill him because he was screwing around with Tootiak. This evidence goes directly to the accused's mindset and his motivations and intentions with Tootiak in the hours following these comments. Similarly, the proposed medical evidence demonstrates the controlling behaviour of the accused toward Tootiak. In one instance, the accused did not want her to take her medication.

56 The Crown seeks to introduce into evidence three types of contextual evidence on the history of the relationship between the accused and Tootiak. (1) the criminal record of the accused and accompanying documentation including some hearsay statements from the deceased; (2) the medical records of the deceased; (3) viva voce hearsay and non-hearsay evidence about the parties' relationship.

57 The Crown argues that the criminal record of the accused showing nine prior assaults by the

accused on the deceased and accompanying documentation including some hearsay statements from the deceased is admissible under the Misir principles. This evidence demonstrates that the accused had a threatening and violent attitude toward the deceased.

58 The Crown argues that the medical records of the deceased are also admissible under the Misir principles because they contain both hearsay and non-hearsay evidence that will help the jury understand the long standing volatile and violent relationship between the accused and the deceased.

59 Finally, the Crown wishes to call viva voce non-hearsay and hearsay evidence from seven witnesses to provide the jury with further background and context on the volatile and violent relationship between the parties.

60 The Crown argues that this contextual evidence is particularly relevant in a domestic homicide prosecution based on circumstantial evidence because it may prove the accused had an attitude of animosity toward the deceased, had the intent to kill her, and that he was the assailant.

61 The Crown argues that the hearsay components of the proposed contextual evidence are admissible because they satisfy the requirements of Kahn.

62 The Crown argues that statements given by the deceased to the police that led to the criminal convictions of the accused for assaulting the deceased are trustworthy in accordance with the Kahn test for the following reasons:

* because the violence was reported by the complainant;
* her reports to nurses, police, and social workers were spontaneous and not the result of coercion or influence of third parties;
* the statements were not tainted by leading questions;
* the accused pleaded guilty to the offences;
* the allegations were supported by the observations made by the police of her demeanour;
* the photographs taken by the police corroborate her statement;
* she sought medical assistance;
* because the deceased had no expectations of material gain;
* because the deceased wanted the physical and mental abuse to stop as attested to by her family, friends, and health care providers;
* she was reluctant at times to even report the abuse;
* she refused to testify on two occasions.

63 The Crown submits that the hearsay evidence found in the medical records is admissible under the Kahn principles. The hearsay comments must be weighed against the circumstances surrounding each visit to the local Health Centre where the comments were made. Evidence of the deceased's state of mind at these times is not subject to exclusion because it is relevant and probative to

establish a possible animus on the part of the accused towards the deceased.

64 The proposed evidence from the seven witnesses includes a substantial amount of non-hearsay evidence. The Crown argues that this evidence provides indicia of reliability and circumstantial trustworthiness for the hearsay evidence that accompanies the non-hearsay evidence because of the following:

* the abuse reported by the deceased to the police was consistent with the nature and extent of the injuries and distress they recorded and photographed;
* the abuse reported by the deceased to health care professionals was consistent with the nature and extent of the injuries and distress observed and recorded by them including extensive and repeated bruisings, lacerations, swelling, bite marks and a broken nose;
* the abuse reported by the deceased to family members and friends was consistent with the injuries that they observed themselves;
* the fact of her reported appearances at the Health Centre at night with suicidal ideation, and the lack of women's shelters, was consistent with her reports that the accused had thrown her out of the home and that she had nowhere to go;
* the fact of the deceased's frequent visits to her sister's residence, at all hours of the day and night and in various states of dress was consistent with the reported physical and mental abuse she said she was suffering;
* the repeated and consistent refusals by the deceased to heed the advice of family, friends and professionals to leave the relationship is consistent with the repeated explanations she is said to have given for remaining in the relationship: that she loved the accused and wanted the relationship to work for her children to have a father.

65 Furthermore, there is no evidence of any coercion by third parties on the deceased for her to report the abuse to family, friends, health care practioners, police, or social workers. Nor is there any evidence that she had any expectation of material gain or recompense for having made these reports. As the deceased emphasized time and again, she wanted the abuse to end because she loved her spouse and wanted her children to have a father.

(ii). Defence argument

66 The accused argues that it is important to remember that the Crown has the burden of proving that the contextual evidence is relevant to an issue at trial. The accused admits that he was the assailant and will plead guilty to manslaughter. He also admits that his actions were deliberate and intentional in the sense that he intended to injure Tootiak but not to cause her death.

67 The Crown's initial and supplemental written submissions fail to specify how the contextual

evidence will prove motive. The accused is not claiming the assault was accidental. Because of the admissions made by the accused, the only issue at trial will be whether the accused had the specific intent for second-degree murder and any evidence directed to prove animus is not relevant.

68 The issue of specific intent relates to evidence at the exact moment of the act. Evidence of animus at prior times in the relationship years before is not probative and is highly prejudicial to the accused. In addition, none of the evidence that the Crown seeks to tender is contemporaneous with the offence before the Court. In R. v. Dupras, 2000 BCSC 1128, [2000] B.C.J. No. 1513 [Dupras], Satanove J. held that evidence of expressions of malice, animosity or murderous intent are relevant to a charge of second-degree murder. However, she noted that such evidence must be placed in context. She noted the prior incident relied on in that case was nearly seven months before the commission of the offence and in the meantime there were a number of intervening events, particularly an attempt at reconciliation. As a result, the nexus between the past incident and the actions of the accused on the date of the murder were tenuous and the Crown could not show a continuing animus. She noted that since identity was not an issue, the evidence of threats and statements made closer to the date of the murder had much more probative relevance to the single issue in that case that concerned the accused's intention at the time he killed his victims. Similarly, in the case at bar, the relationship went through its ups and downs over its 14 years. The animus was intermittent and not contemporaneous with the murder. While there were many violent incidents they were broken by periods of reconciliation.

69 Defence counsel distinguished all the cases relied on by the Crown because in those cases specific intent was not the probative issue. In all of those cases, except McCotter, the accused did not admit the actus reas of the offence charged. In McCotter, a key issue was whether the accused was criminally responsible because of a mental disorder and it is distinguishable on that ground.

70 Animus is a relevant issue if the identity of the accused is an issue or if the accused raises a defence of accident. The accused admits he assaulted Tootiak and is not claiming her injuries were the result of an accident. In any event, the animus evidence tendered by the Crown relates to the years before Tootiak's death and there is no evidence of animus on the date she died. The Crown will have a difficult time proving a continuing animus. There is no evidence that the accused contemporaneously or historically threatened Tootiak. There are no similar convictions of assault with a weapon such as a knife that resulted in a stabbing and no charges for attempted murder. There is no history of murderous behaviour. Rather, the history shows a violent spousal relationship similar to what occurred in Dupras and the comments of Satanove J. are also applicable to this case.

71 If this Court accepts the logic advanced by the Crown, then any person accused of murder with prior related convictions or a history of unreported violence would be unable to plead guilty to manslaughter.

72 The accused acknowledges that motive is relevant to proving specific intent. However, there is no evidence in the five volumes of evidence prepared by the Crown or in the written submissions

that point to a motive to kill Tootiak. The Crown submissions mention some evidence of jealousy and the threat to kill Roland Heissinger. They boil down to a theory that because the accused assaulted Tootiak in the past he had a motive to kill her on the night of the murder. This reasoning leads to the slippery slope of concluding that anyone with a prior history of convictions for violence or even unreported violence could have a motive for murder. This would make Nunavut a very dangerous place to live, given the level of domestic violence in the territory. In applying this reasoning this Court should consider how many assaults equal a motive for murder.

73 Applying this logic comes dangerously close to effectively reversing the presumption of innocence for those persons with criminal convictions for violence against the person murdered.

74 The accused argues that the context evidence is nothing more than volumes of distraction for the fact finder. It is just bad character evidence wrapped up to look like background and context. The Crown has tendered the volumes of evidence and is asking the fact finder to muddle through it and hopefully find a motive. It is similar to firing a shotgun against a target hoping that one of the pellets will find it.

75 The prejudice to the accused of admitting this evidence far outweighs the low probative value of the evidence. The past history of the accused certainly sheds light on his character but does not shed any light on his motive on the night of the murder.

76 The accused also argues that the hearsay component of the proposed evidence does not meet the Kahn requirements.

(iii). Crown reply

77 The Crown pointed out in reply that there is a significant amount of recent evidence of the violence in the relationship. Going back two years from the date of the murder the Crown identified 20 incidents where Tootiak reported to the Health Center complaining about injuries caused by the accused. As a result, it is not difficult to understand that the Crown can easily prove a violent, controlling, abusive, and continuingly dysfunctional horror show for 14 years ending with the threat to kill Roland Heissinger the night before the murder. The evidence tendered is immensely probative to what was going on in the mind of the accused when he stabbed Tootiak twice with a broken mop.

III. ANALYSIS

78 The Crown described the evidence it wants to have admitted at the trial of the accused as background and context evidence. A better description derived from the purpose of this type of evidence in a criminal prosecution is to call it propensity evidence. At paragraphs 105 and 106 of VanEindhoven, Kilpatrick J. described it as follows:

> Detailed evidence of other acts of misconduct by a citizen accused of a crime is

> generally not admissible in a criminal trial. This type of evidence, called propensity, or similar fact evidence, has long been recognized to have great potential to prejudice a citizen's right to a fair trial. It has great potential to distract and confuse the trier of fact with a multiplicity of issues unrelated to the matter at hand. It has great potential to consume significant amounts of court time on peripheral issues.
>
> Propensity reasoning involves the inference that a citizen who has a propensity or disposition to do a particular crime must have done the actual crime that is alleged. If used improperly, this type of reasoning can seriously erode any presumption of innocence. If used indiscriminately, it can poison the mind of a trier of fact and make adjudicative objectivity much more difficult to achieve.

79 As outlined in R. v. Batte, [2000] O.J. No. 2184, 49 OR (3d) 321 [Batte], propensity reasoning involves two inferences. First, a judge or jury can infer from conduct on occasions other than the occasion in issue that a person has a certain disposition or state of mind. Second, the trier can infer from the existence of that disposition that a person acted in a certain way on the occasion in issue. If the evidence supports both inferences it is a form of circumstantial evidence and is relevant.

80 However, despite its relevance, evidence that depends on propensity reasoning for its admissibility is usually excluded because its potential prejudicial effect outweighs its probative value. In some cases the evidence has little probative value because either or both of the necessary inferences needed to give the evidence probative force are tenuous. An example of one such situation would be where an inference that the accused has a certain disposition is drawn from a single previous discreditable act.

81 Where the discreditable conduct is such as to permit the inferences to be drawn it must be carefully weighed because of the much greater potential to improperly prejudice the fact finder against the accused. As Doherty J.A. observed in Batte:

> A jury may assume from the evidence of discreditable conduct that the accused is a bad person and convict on that basis, or they may convict in order to punish the accused for the discreditable conduct, or they may become embroiled in a determination of whether the accused committed the alleged discreditable acts and lose sight of the real question -- did he commit the acts alleged in the indictment?

82 As noted in Batte, there are situations where the probative force of propensity reasoning is so strong that it overcomes the potential prejudice and cannot be ignored if the truth of the allegation is to be determined. This level is reached where the evidence suggests a strong disposition to do the very act alleged in the indictment. For example, where an accused is charged with assaulting his wife, evidence that the accused beat his wife on a regular basis throughout their long marriage

would be admissible. Evidence of the prior beatings does much more than suggest that the accused is a bad person or that the accused has a general disposition to act violently and commit assaults. The evidence suggests a strong disposition to do the very act in issue of assaulting his wife. In such cases, the fact finder is permitted to reason that the accused was disposed to act violently towards his wife and that he had that disposition on the occasion in issue. The existence of the disposition is a piece of circumstantial evidence that may be considered in deciding whether the accused committed the alleged assault.

83 The admissibility of prior assaults as evidence that the accused assaulted the same person on the occasion in issue is well established in the authorities, e.g., R. v. F (DS), (1999), 43 OR (3d) 609, 132 CCC (3d) 97 (CA).

84 These principles were applied in Misir, Peterffy, Cudjoe, McCotter, and Van Osselaer.

85 In Misir, the accused was convicted by a jury of second-degree murder for stabbing his deceased wife to death. The trial judge admitted evidence from various members of the deceased's family as well as some of her co-workers. The evidence indicated that the accused had physically and verbally abused the deceased and that the deceased had talked to family and her co-workers about her dissatisfaction. In holding that the trial judge had not erred in admitting this evidence, Proudfoot J. approved of the following statements made by Cumming J. at paragraphs 25 and 29 of Peterffy:

> There was but one central issue in this trial, namely, had the prosecution proved beyond a reasonable doubt that the appellant murdered Jaclynn Patterson. The ultimate aim of the trial was to ascertain the truth of that allegation. The relevance of evidence must in part be determined by the context within which the principal events took place. The context in this case was the domestic relationship of the appellant and the deceased.
>
> ...
>
> The evidence of discreditable conduct objected to by the appellant was both relevant and material. It was relevant in that it pointed to the threatening and violent attitude of the appellant, at times, towards the deceased. It was material in that it provided evidence of motive, namely, anger at the deceased's taunting and disobedience. It was also relevant and material to the appellant's intent and to ensure that the jury had an accurate picture of the appellant's relationship with the deceased. See: R. v. F.(D.S.) (1999), 132 C.C.C. (3d) 97 at p. 105.

86 In Misir, the identity of the person who committed the murder was an issue and Proudfoot J. noted that there was other evidence to support the jury's verdict. It came from the younger brothers

of the deceased who testified that the accused had a key to the deceased's apartment and used it to enter the apartment twice in the month before the murder. As a result, the history of the relationship evidence was relevant in supporting the other evidence that pointed to the accused as being the murderer.

87 In this voir dire, the Crown has the burden of establishing on a balance of probabilities that the tendered propensity evidence is relevant to a specific issue before the Court, and that the probative value of the evidence exceeds its prejudicial effect. As noted at a paragraph 111 of VanEinhoven, the probative value of the propensity evidence cannot be assessed in a factual vacuum. The evidence must assist with the determination of a live issue that must be decided by the trier of fact. The legal issues in this trial turn on the factual allegations found in the indictment and on any defences reasonably anticipated to arise on the evidence heard to date.

88 When the Crown prepared its written submissions it assumed that the identity of the accused was in issue. It also assumed from the statements made by the accused that he was going to raise a defence of accident. The Defence conceded in oral argument that the accused admits that he was the person who killed the deceased and that it was not an accident. It was an intentional action that satisfied the test for manslaughter. In other words, the accused set in motion the chain of causation that led to Tootiak's death.

89 I am satisfied that these admissions remove much of the relevance of the evidence tendered by the Crown based on the Misir reasoning. Misir, Peterffy, Cudjoe, McCotter, and Van Osselaer are distinguishable because in those cases the identity of the accused was a live issue. What is left is whether there is anything in the voluminous evidence tendered by the Crown that is relevant to the specific intent of the accused to commit second-degree murder.

90 I agree with Defence counsel that there is nothing in the Crown materials that is relevant to a motive. The Crown theory amounts to an argument that because the accused assaulted the deceased in the past he had a motive to kill her. This reasoning leads to the slippery slope of concluding that anyone with a prior history of convictions for violence or even unreported violence could have a motive for murder. It raises the concerns expressed in Batte that the prejudice to the accused outweighs the probative value of the evidence.

91 However, the issue of animus is in a different category. The accused acknowledges that Dupras establishes the principle that evidence of animus can be relevant to the issue of the intent required for second-degree murder. The accused argues that the Crown must prove a continuing animus that was contemporaneous with the offence. The Crown evidence covers a long period from 1994 to 2008 and does not prove a continuing animus up to the date of the killing because there were many violent incidents that were broken by periods of reconciliation.

92 In Dupras, the accused killed his estranged wife and her boyfriend by running them down with his pick-up truck as they walked alongside a road in Tumbler Ridge, British Columbia on May 20, 1999. He was charged with two counts of second-degree murder. A jury at Dawson Creek convicted

him of the second-degree murder of his wife and the manslaughter of her boyfriend. His defence was that he lacked the intent required for second-degree murder.

93 Mr. and Mrs. Dupras had been married for 17 years and had a son, Ryan, aged 12 at the time of the offence. They separated in the summer of 1998 at the instance of Mrs. Dupras. The marriage breakdown caused the appellant to go into a serious depression. He sought medical help and received prescriptions for anti-depressants. In the late summer and early fall of 1998, he attempted suicide on three occasions, each time consuming alcohol with an overdose of his prescription medication resulting in hospitalization as a psychiatric patient. The couple attempted reconciliation by taking a holiday together in Mexico in February 1999 but Mrs. Dupras broke it off shortly after their return. The Crown, in that case, argued that the jury should hear evidence that the accused had been convicted of assaulting Mrs. Dupras on May 9, 1998, and that on May 4, 1999, the appellant became angry with his wife for leaving their son with him without prior arrangement while she went away for a weekend. He telephoned his wife's sister, who testified that he was angry and said he would kill his wife.

94 Satanove J. refused to admit the evidence of the prior assault but admitted the evidence of the threat. She noted that the assault took place seven months before the commission of the offence and that there had been an intervening reconciliation. As a result, the connection between the assault and the May 20 killings was tenuous because the Crown could not show a continuing animus. On the other hand, the evidence of the threat was made closer to the date of the killings and had much more probative value. At paragraph 12 she stated:

> Keeping in mind that there was no issue of identity here, the evidence of threats and statements made closer to the time of the homicides had much more probative relevance to the single issue in this case, which was the accused's intention at the time he killed his victims.

95 Satanove J.'s rationale is equally applicable to this case where the only issue is the intention of the accused at the time he killed his spouse. The accused and the deceased had a long dysfunctional relationship with many assaults and numerous reconciliations. As noted at paragraph 102 in Batte, if the accused was charged with assault, then the prior convictions and other contextual evidence would be relevant because:

> Evidence of the prior beatings does much more than suggest that the accused is a bad person or that the accused has a general disposition to act violently and commit assaults. The evidence suggests a strong disposition to do the very act in issue -- assault his wife.

96 However, the marital history and prior assaults are irrelevant to a charge of second-degree murder unless they shed some light on the intention of the accused on the night of the murder. In Dupras, Satanove J. found Dupras's threat to kill his wife two weeks prior to the murder was relevant to the accused's intent on the night he killed her and her boyfriend. In the case at bar, the

medical records tendered by the Crown demonstrate an acceleration in the violence of the relationship starting in 2006 and including one threat to kill, which occurred on September 15, 2007. The medical record states as follows:

> A fight started between Belinda & her partner Bruce. She states he began to punch her to the head, her arms and her legs. Also hitting her arms. She defended herself by fighting back. She states that she did not black out but after crying she think she did. States he threatened her w [sic] a gun that he was going to kill her and the two boys. She says he brought the gun to the living room where I was put on the floor. At that point she ran out of the house and went to a neighbour's home. They called the RCMP who then brought her to the Health Centre.

IV. CONCLUSION

97 I am satisfied that this evidence is relevant and could indicate a new and elevated animus by the accused to the deceased. The record is admissible under section 26(1) of the Canada Evidence Act, RSC 1985, c C-5, because health care professionals made the entry in the usual and ordinary course of business with the expectation that the notations would be accurate, and the Crown provided notice to the Defence. It contains both hearsay and non-hearsay statements. The non-hearsay statements on the observations of the injuries and the demeanour of the deceased are admissible under section 26. Although the statements quoted above are hearsay, I am satisfied that they are reliable and necessary under the Kahn principles because they accompany the non-hearsay evidence and there is no evidence of any coercion by third parties on the deceased to report the abuse. There is also no evidence that the deceased had any expectation of material gain in making the report.

98 From September 15 to May 10, 2008, there were 15 additional entries by the health care professionals that contain relevant hearsay and non-hearsay statements. While they were not threats to kill, they constitute evidence that is relevant to the determination of whether the accused had the intent required under section 229(b) of the Criminal Code. That section contains a recklessness component and this evidence sheds some light on that issue and whether the accused had a continuing animus toward the deceased. It states:

> where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being.

99 These records contain a mixture of observations on the injuries noticed by the nurses, discussions about alcohol treatment, strategies to leave the accused and the emotional state of the deceased including thoughts about suicide because of the abuse she suffered. I am satisfied that

there is enough evidence to satisfy the continuing animus argument advanced by the Crown. Although the evidence about the accused's discreditable conduct is prejudicial to him, its significant probative value and the close nexus to the date of the death of the deceased outweighs the prejudice. All of the entries are admissible at the trial.

100 The criminal information on September 15, 2007, and accompanying documentation is also admissible because it has a close nexus to the date of the death of the deceased. The time, date, and charge associated with the other convictions are admissible to give a complete picture, but all of the other information is not admissible.

101 It is difficult to pin down some of the timelines in the statements of the witnesses that the Crown wishes to call to give context evidence. I am satisfied that some of the evidence is relevant to the issue of the continuing animus of the accused because it gives context to the relationship and both parties' attitudes about the relationship and the other partner. It also provides evidence of dysfunctional and controlling behaviour, jealousies, substance abuse and attempts at separation. However, the relevance of the evidence decreases as it moves away from the September 15, 2007 date. When calling the evidence, the Crown should restrict it to the period from September 15, 2007, to the date of the death of the deceased. If the Crown wishes to call evidence before that date it will be necessary to conduct an additional voir dire at trial and for the trial judge to make a further ruling at trial. While the evidence from after September 15, 2007, is prejudicial to the accused, that prejudice is outweighed by the evidence's probative value.

E.D. JOHNSON J.

Tab 13

In the Court of Appeal of Alberta

Citation: R. v. Smith, 2011 ABCA 136

Date: 20110511
Docket: 1001-0132-A
Registry: Calgary

Between:

Her Majesty the Queen

Appellant

- and -

Kaitlyn Ruth Smith

Respondent

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Myra Bielby

Reasons for Judgment Reserved of the Honourable Madam Justice Bielby
Concurred in by the Honourable Chief Justice Fraser
Concurred in by the Honourable Mr. Justice Martin

Appeal from Acquittals by
The Honourable Judge G.R. DeBow
Dated the 10th day of April, 2010
(Docket: 090234493P101001;
090234493P101002; 090234493P101003)

Reasons for Judgment Reserved
of the Honourable Madam Justice Bielby

[1] Reports of blood alcohol level testing done in hospital are admissible as evidence in a criminal trial for all purposes under s. 30(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("CEA"). Unless the reliability of that evidence is successfully challenged through other evidence, as permitted under s. 30(6) or otherwise, the contents of the reports are thus proven, without the need to call *viva voce* evidence to establish their reliability.

I. FACTS

[2] The Crown appeals Kaitlyn Smith's acquittals on counts of impaired driving causing death, dangerous driving causing death and driving with more than 80 mg of alcohol to 100 ml of blood in her system ("the over .08 charge"). She was driving an automobile that was involved in a single vehicle accident in which she was seriously injured and one of her four passengers was killed. She was taken, unconscious, by ambulance to hospital where blood and other samples were taken from her for medical treatment purposes and analysed.

[3] Under a production order, the police obtained the records containing the results of that analysis ("the toxicology report"). The toxicology report was entered as a full exhibit at trial without objection from Ms. Smith's counsel. An affidavit from Connie Firth was similarly entered. In it, Ms. Firth deposed that she was a Health Record Release of Information Technician with the hospital in question, that she had knowledge of the ordinary books and records of the hospital, and that "these books and records are made in the ordinary course of business". She attached the toxicology report, which she deposed was made in the usual and ordinary course of business by the hospital. That report recorded a level of alcohol in Ms. Smith's blood of 180 milligrams percent, a vitreous sample at 220 milligrams percent and a urine sample at 230 milligrams percent.

[4] At trial, the Crown called Gertrud Patricia Lehmann as a forensic alcohol expert, who addressed the absorption, distribution and elimination of alcohol from the body as well as the effect of alcohol on one's ability to operate a motor vehicle.

[5] Ms. Lehmann testified that when a person reaches levels of 100 milligrams percent of alcohol, that person is impaired, regardless of individual tolerance. Vision is affected at this level. At 150 milligrams percent, outward signs of intoxication become apparent. She opined, relying on information which included the toxicology report, that at the time of driving, Ms. Smith's blood alcohol level would have been between 126 and 175 milligrams of alcohol per 100 ml of blood, depending on whether Ms. Smith had finished drinking sometime before the collision or had been drinking in the vehicle right up to the time of the collision. Bottles of alcohol and cans of beer were found in the vehicle after the collision.

[6] Ms. Lehmann testified in cross-examination that when she had re-analysed specimens from the hospital in question in other cases, her results were in very good agreement with those of the hospital. She had no reason to question the reliability of hospital analysis, assuming the hospital had a quality assurance system in place.

[7] The trial judge held that because the Crown had failed to call evidence establishing the reliability of the hospital's analysis of Ms. Smith's alcohol level, it had not proven that fact beyond a reasonable doubt. This was so notwithstanding the trial judge's having admitted the evidence contained in the toxicology report under s. 30 of the CEA. He described the analysis contained in the toxicology report as follows:

> The substance is processed and altered from its original form, test results are produced under controlled circumstances. In effect, new evidence is being created. In order to rely on that evidence, a number of preconditions have to be met. In my view that goes far beyond the mere recording of time slips that are already in existence, produced by the defendant, and admitted in court as business records. Therefore the Canada Evidence Act and *Monkhouse* offer little to assist the Crown in this case.

[8] The trial judge went on to find that the toxicology report only proved the truth of its contents on a balance of probabilities. In the absence of other evidence to elevate its weight to proof beyond a reasonable doubt, he concluded the expert evidence similarly did not rise to that level. Consequently, the over .08 charge was dismissed. He then went on to dismiss the charges of dangerous driving causing death and impaired driving causing death based upon an assessment of evidence that did not include any consideration of the alcohol level in Ms. Smith's body at the time of the accident.

[9] The appeal is allowed and a new trial ordered.

II. THE STANDARD OF REVIEW

[10] The Crown has the right of appeal of an acquittal of criminal charges only on questions of law: see s. 676(1)(a), *Criminal Code*, R.S.C. 1985, c. C-46. The Crown must show that the error might reasonably have had a material bearing on the acquittal but is not required to go so far as to show the trial verdict would necessarily have been different had the error not been made: see ***R. v. Graveline***, 2006 SCC 16 at paras. 14-16, [2006] 1 S.C.R. 609.

[11] The parties agree that admissibility of evidence is a question of law subject to review on a standard of correctness: see ***R. v. Underwood***, 2008 ABCA 263 at para. 10, 433 A.R. 298.

III. THE ISSUES RAISED ON THIS APPEAL

[12] The issues raised on this appeal are:

(a) Can hospital records entered into evidence under the provisions of s. 30 of the CEA prove the facts contained therein beyond a reasonable doubt in a criminal trial in the absence of *viva voce* evidence establishing the circumstances in which the contents of the record were created?

(b) If so, what is the effect of the trial judge's failure to address his mind to whether there was other evidence which could have led him to conclude the toxicology report was not accurate or reliable notwithstanding its admission into evidence?

IV. ANALYSIS OF THE ISSUES

(a) Can hospital records entered into evidence under the provisions of s. 30 of the CEA prove the facts contained therein beyond a reasonable doubt in a criminal trial in the absence of viva voce evidence establishing the circumstances in which the contents of the record were created?

[13] Section 30 of the CEA reads in part:

> 30(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.
>
> ...
>
> (6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.
>
> ...

> (9) Subject to section 4 [dealing with records kept in a form which require explanation to be understood], any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with the leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.
>
> ...
>
> (11) The provisions of this section shall be deemed to be in addition to and not in derogation of
>
> > (a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or
> >
> > (b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.
>
> (12) "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada ...
>
> "record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced ...

[14] Generally, hearsay evidence is not admissible because the methods by which its reliability is normally tested – by cross-examination, for example – are not available in relation to it. However, because of the way it originated, a hearsay statement may be inherently reliable or permit sufficient testing such that the concerns surrounding it are eased and its admission justified. Business records can be considered inherently reliable where created in a context in which they are relied upon in the day-to-day affairs of the individual business. As noted by the Court in ***R. v. Grimba*** (1977), 38 C.C.C. (2d) 469 at 471 (Ont. Co. Ct.):

> It would appear that the rationale behind [section 30] for admitting a form of hearsay evidence is the inherent circumstantial guarantee of accuracy which one would find in a business context from records which are relied upon in the day to day affairs of individual businesses, and which are subject to frequent testing and cross-checking. Records thus systematically stored, produced and regularly relied upon should, it would appear under s. 30, not be barred from this Court's consideration simply because they contain hearsay or double hearsay.

This passage was cited in Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at 300.

[15] In effect, s. 30 creates a statutory exception to the rule against the admission of hearsay evidence. This statutory exception is very similar to the common law business records exception. The fundamental principles and intent of both exceptions are the same.

[16] Hospital records have been found to bear this imprimatur of reliability and have previously been admitted into evidence under s. 30 of the CEA: see ***R. v. Malko*** (1994), 92 Man. R. (2d) 194 (C.A.); ***R. v. L.(C.)*** (1999), 138 C.C.C. (3d) 356, 124 O.A.C. 45 (Ont. C.A.). In ***Ares v. Venner***, [1970] S.C.R. 608, 14 D.L.R. (3d) 4 [cited to S.C.R.], the Supreme Court of Canada held that under the common law business records exception "[h]ospital records ... made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein" (626).

[17] In ***R. v. Monkhouse*** (1987), 83 A.R. 62 at para. 17, [1988] 1 W.W.R. 725, this Court cited with approval the following passage from *Wigmore on Evidence*, 3d ed., vol. 6, at section 1701 on the topic of hospital records:

> There is a circumstantial guarantee of trustworthiness; for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists.

This passage was also cited with approval by the Supreme Court of Canada in ***Ares*** at 617.

[18] Therefore, to suggest that records such as the toxicology report in question here – which are used to make life and death decisions in hospitals – must nonetheless be considered unreliable until proven reliable by other evidence at a trial, in other words essentially corroborated by that evidence, runs counter not only to the realities of modern medicine but also to the goal of s. 30 of the CEA.

[19] In this context, hospital records are not only reliable, given that the makers of the records depend on them on a day-to-day basis, but they are often necessary. The modern reality of large

healthcare operations is that the volume of cases or transactions staff are involved in precludes the personal recollection of specific cases or data. In this sense, calling the record keeper or maker would add little evidentiary value to the business record. Moreover, the admission of documents made in the ordinary course of business has the added benefit of avoiding the "cost and inconvenience of calling the record keeper and the maker": ***R. v. Martin*** (1997), 152 Sask R. 164 at para. 49, [1997] 6 W.W.R. 62 (C.A.).

[20] The prerequisites for admissibility created by s. 30(1) of the CEA were met at trial in relation to the toxicology report. First, that section provides that in order to be admissible, a business record must have been made in the usual and ordinary course of business where oral evidence in respect of that matter would be admissible in a legal proceeding: see also ***Martin*** at para. 45; ***R. v. Wilcox***, 2001 NSCA 45 at paras. 53-54, 192 N.S.R. (2d) 159. There is no question here that had the person who drew the blood and tested it given oral evidence of that fact and the results, that evidence would have been admissible. Therefore, the requirement of the section "[w]here oral evidence in respect of a matter would be admissible in a legal proceeding ..." was met.

[21] Second, Ms. Firth's affidavit evidences that the toxicology report was made in the usual and ordinary course of business of the hospital. Therefore, the requirement that the record be "made in the usual and ordinary course of business" was met. Third, the hospital which made those records falls within the definition of "business" found in s. 30(12), being a "business ... or undertaking of any kind carried on in Canada". Finally, the toxicology report falls within the definition of "record" in s. 30(12), being "the whole or any part of any ... document, paper ... or other thing on or in which information is written, recorded, stored or reproduced".

[22] In arriving at his conclusion that s. 30 of the CEA and the philosophy expressed in ***Monkhouse*** did not assist the Crown in proving Ms. Smith's blood alcohol level at the time of the accident, the trial judge did not attempt to interpret the provisions of s. 30 of the CEA at all. His reason for distinguishing ***Monkhouse*** was based on a concern of the greater potential for unreliability to creep into the creation of a toxicology report than the creation of payroll records, the latter having been relied upon in ***Monkhouse*** to found a conviction for perjury.

[23] However, s. 30(1) of the CEA expressly applies to all business records, which, by definition, includes hospital records. Further, there is no provision in s. 30(1) or elsewhere which expressly or implicitly limits its applicability to proving facts only to the standard of a balance of probabilities, as the trial judge concluded.

[24] There is nothing in s. 30(1) that requires *viva voce* or other evidence to be tendered to bolster the admissibility of a business record simply because it is created as a result of scientific process. The CEA does not provide that evidence admitted under s. 30(1) can be used only in limited ways but, rather, expressly makes it admissible in the same manner as oral evidence would be admissible in the same case. Evidence admitted under s. 30(1) is *prima facie* evidence of the truth

of what is asserted. The majority of the Supreme Court of Canada in ***R. v. Proudlock***, [1979] 1 S.C.R. 525 concluded that *prima facie* evidence is sufficient to establish guilt in the absence of evidence to the contrary. The fact it is *prima facie* does not mean that it is conclusive. The trier of fact may, despite this *prima facie* evidence, find a reasonable doubt based on other evidence led at trial.

[25] The mere fact that the results of blood alcohol testing can be admitted into evidence by methods other than s. 30 of the CEA does not mean that s. 30 cannot be used, so long as the prerequisites for its application have been made out: see s. 30(11), CEA. In some cases oral evidence of the reliability of test results has been received: see ***R. v. Redmond*** (1990), 54 C.C.C. (3d) 273 (Ont. C.A.). But it does not follow that type of evidence is mandatory.

[26] Similarly, simply because the *Criminal Code* provides another route to the admission of hearsay evidence in a criminal proceeding, also an exception to the hearsay rule, does not compel the use of that option: see ***R. v. L. (D.O.)***, [1993] 4 S.C.R. 419 at para. 53. Indeed, that option expressly applies in circumstances in which s. 30(1) is not available, and *vice versa*. It arises under the provisions of s. 254 of the *Criminal Code*, which provides in part:

> 254(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
>
> (a) to provide, as soon as practicable,
>
> (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or
>
> (ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; ...

> (4) Samples of blood may be taken from a person under subsection (3) or (3.4) only by or under the direction of a qualified medical practitioner who is satisfied that taking the samples would not endanger the person's life or health.

[27] This procedure allows the harvesting of evidence for potential use in criminal proceedings: see, for example, ***R. v. Caruth***, 2009 ABCA 342. In comparison, s. 30(10) of the CEA expressly excludes from admission under s. 30(1) records created in the course of an investigation, inquiry or in relation to certain aspects of a legal proceeding. In other words, the use of s. 30(1) is limited to records created for purposes other than the legal proceeding into which their entry is eventually sought, such as hospital records created in the course of the medical treatment of a defendant, as here. It cannot be used to harvest evidence in relation to a legal proceeding, whereas s. 254 can only be used to do so.

[28] Any policy argument raised that the safeguards available to a defendant under s. 254 ,which do not exist in relation to s. 30(1), compel the use of the former procedure simply does not apply. Each procedure bears safeguards. Section 30(9) of the CEA offers an accused the safeguard of being able to apply for leave to cross-examine the maker of the contents of a record entered pursuant to s. 30(1). Section 258(1)(d) provides that the defendant can, in certain circumstances, obtain an additional sample of his or her blood taken at the same time as the analysed sample for the purpose of having an independent analysis done. However, that safeguard comes at a price. Evidence obtained pursuant to the s. 258(1)(d) route may be conclusive proof, i.e. it is much harder to refute this evidence of blood alcohol level than that tendered under s. 30(1) of the CEA. Section 258(1)(d.01) provides that the accuracy of the blood alcohol analysis so performed cannot be challenged by evidence of the defendant's alcohol consumption, the rate at which the alcohol so consumed would have been absorbed and eliminated, or a calculation based on that evidence of what the concentration of alcohol in the defendant's blood would have been at the time when the offence was alleged to have been committed. By comparison, evidence of this kind may be tendered to challenge the reliability of a blood alcohol analysis entered into evidence under s. 30(1) of the CEA.

[29] In any event, the defence did not advance a *Charter* challenge to the validity of s. 30(1) of the CEA on the basis that it arguably provides fewer safeguards to a defendant than does the s. 254 procedure. Such a challenge would be required to advance that argument.

[30] In summary, the Crown always has the option to enter evidence under s. 30(1) of the CEA although the evidence so entered is not "conclusive" and may be attacked in ways not available under the s. 254 route. The Crown will presumably choose to use s. 30(1) where evidence was not obtained under the s. 254 procedure, even though a criminal charge may have been anticipated at the time, where the taking of a blood sample during active treatment would endanger the defendant's life and health. Where, as here, the defendant required immediate medical attention throughout the three hours following the accident, no opportunity may present itself to obtain a blood sample under s. 254 of the *Criminal Code*. Distracting the medical personnel treating a seriously injured defendant

with a request to gather evidence could endanger health. Taking time and attention away from the administration of emergency medical treatment to actually harvest the evidence may do so as well. In this case, it was not the time to conduct a police investigation while Ms. Smith was being treated to save her life.

[31] The trial judge expressly relied upon the provincial court decision in ***R. v. Doerksen***, 2009 ABPC 215, where the Court found that a toxicology report, admitted under s. 30(1) of the CEA in a very similar situation, was proof on a balance of probabilities only and not proof beyond a reasonable doubt. The judge in ***Doerksen*** purported to distinguish ***Ares*** as applicable to civil actions only and did not address the effect of s. 30(1) of the CEA at all. ***Doerksen*** was wrongly decided.

[32] In conclusion, hospital records are capable of being admitted as evidence for the proof of their contents sufficient to meet the requirements of proof beyond a reasonable doubt under s. 30 of the CEA, without more, in the absence of other evidence sufficient to raise a doubt in the mind of the trier of fact. Here, the trial judge made an error of law in refusing to consider the toxicology report submitted into evidence under s. 30 of the CEA as evidence capable of proving its contents beyond a reasonable doubt.

(b) If so, what is the effect of the trial judge's failure to address his mind to whether there was other evidence which could have led him to conclude the toxicology report was not accurate or reliable notwithstanding its admission into evidence?

[33] The admission of business records, including hospital records, into evidence does not preclude other evidence or available inference raising a doubt about the reliability of their contents. However, any inference as to unreliability must arise from the evidence heard and not be based on mere speculation by the trial judge.

[34] Pigeon, J., writing for the majority in ***Proudlock***, described the effect of *prima facie* evidence at 550-551:

> The standard of evidence required for a conviction, including the standard of the evidence required to overcome a *prima facie* case against the accused, is just as basic a principle as the right of the accused to remain silent. In fact, it may be considered as a qualification of this principle. The accused may remain silent but, when there is a *prima facie* case against him and he is, as in the instant case, the only person who can give "evidence to the contrary" his choice really is to face certain conviction or to offer in testimony whatever explanation or excuse may be available to him.
>
> If the *prima facie* case is made up by the proof of facts from which guilt may be inferred by presumption of fact, the law is clear on the authorities that, because the case in the end must be proved beyond a reasonable doubt, it is not necessary for the

> accused to establish his innocence, but only to raise a reasonable doubt. This he may do by giving evidence of an explanation that may reasonably be true, and it will be sufficient unless he is disbelieved by the trier of fact, in which case his testimony is no evidence. In any case, the evidence given by himself or otherwise, has to be such as will at least raise a reasonable doubt as to his guilt; if it does not meet this test the *prima facie* case remains and conviction will ensue.

[35] Therefore, a trial judge is not compelled, in every case, to conclude that hospital records admitted into evidence under s. 30(1) are accurate, complete and reliable any more than he or she would be compelled to do so had the evidence come from the mouth of a witness during the trial. Other evidence – whether admitted as a result of the application of s. 30(6) of the CEA, or arising in cross-examination or otherwise, or permitted inferences from that evidence – may lead to the conclusion that these records do not prove the fact they are tendered to prove: see s. 30(6), CEA; ***Ares***.

[36] As also emphasized in ***Proudlock*** at 548-549, s. 30(1) does not shift the evidentiary burden to the defence. Rather, it simply requires the defence to adduce evidence raising a reasonable doubt if there is nothing which does so in the evidence adduced by the Crown. Such evidence could be found, for example, in the type of evidence that s. 258(1)(d.01) of the *Criminal Code* precludes from use to challenge the accuracy of s. 254 blood tests, including evidence of the amount of alcohol consumed by the defendant. It could include, as is argued here, evidence from eyewitnesses or challenges to the accuracy of expert opinion evidence if that is found by the trial judge to raise a reasonable doubt.

[37] Ms. Smith argues that two types of evidence were led at trial that should have raised a reasonable doubt in relation to the accuracy and reliability of the toxicology report and, therefore, as to her guilt. Neither were addressed by the trial judge.

[38] The first was the eyewitness evidence of the amount of alcohol she had to drink prior to the collision. The only witnesses who testified to seeing Ms. Smith drink alcohol during that time period testified that they saw her drink one or two shots of tequila only.

[39] In cross-examination, Ms. Lehmann testified that a person with Ms. Smith's characteristics who had only consumed two shots of tequila in the time frame in question would not have had a blood alcohol level exceeding "80 milligrams percent", a possibility which could not be "married up" with the higher percentage reading for Ms. Smith shown in the toxicology report. Therefore, either the toxicology report or the evidence that Ms. Smith had drunk only two shots of tequila prior to the accident had to be in error.

[40] The second challenge arose from the hypothetical question used by Crown counsel to obtain opinion evidence from Ms. Lehmann, which contained a factual error that could conceivably have

affected her opinion. The toxicology report showed that the blood sample analysed was collected from Ms. Smith at 3:30 a.m. on October 18, 2008. However, at trial, Crown counsel put the hypothetical question on the basis that the blood sample was collected 19 minutes later, at approximately 3:49 a.m. According to the defence, Ms. Lehmann's opinion was thus arguably inaccurate because it was based on an incorrect assumption as to the time of taking the sample. There was no evidence as to what difference, if any, the 19 minute discrepancy would have made.

[41] The trial judge did not make any findings about this evidence. Ms. Smith argues that we should assume he nonetheless analysed the contrary evidence and found that it raised a reasonable doubt as to the accuracy of the toxicology report.

[42] While trial judges are not obliged to discuss all evidence heard or give reasons for every conclusion reached in a decision, we are satisfied that the trial judge did not address the evidence which challenged the accuracy of the hospital records at all. Instead, his conclusion is directly linked to his erroneous treatment of the health records. Having concluded that the toxicology report could not be considered as evidence beyond a reasonable doubt, he did not go on to consider whether any other evidence existed which would raise a reasonable doubt as to its accuracy.

[43] It is not possible to conclude that, had the trial judge considered the contrary evidence, he inevitably would have determined it raised a reasonable doubt as to the accuracy of the toxicology report. Eyewitness evidence of companion drinkers is notoriously unreliable as to how much alcohol a defendant has consumed absent special features in the evidence. Given the blood alcohol levels provided in the toxicology report, the trial judge may have concluded that the 19 minute difference in the hypothetical question put to the expert would have not made a critical difference in her ultimate opinion. On the other hand, he might have concluded that this evidence, individually or collectively, did raise a reasonable doubt.

[44] In summary, had the trial judge not erred, he would have considered the contents of the toxicology report as evidence. Unless found unreliable, that evidence established that Ms. Smith had a significant level of alcohol in her blood at the time the tests were administered. That evidence would have been directly relevant to the over .08 charge and the impaired driving causing death charge. It would also have borne on the charge of dangerous driving causing death. It is not possible to conclude whether the contrary evidence would have led the trial judge to have a reasonable doubt about Ms. Smith's blood alcohol level.

[45] In other words, his errors might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. That is all that is required to mandate a new trial. It is not necessary for the Crown to establish that the verdict would have necessarily been different had those errors not been made: see ***Graveline*** at paras. 14-16.

V. SUMMARY OF CONCLUSIONS

[46] The trial judge made an error of law in concluding that the toxicology report, admitted into evidence under the provisions of s. 30 of the CEA, could not, without more, prove the facts contained therein beyond a reasonable doubt. Records admitted under s. 30 of the CEA are *prima facie* evidence of their contents for all purposes, criminal as well as civil, and may, depending on the circumstances, satisfy the requirement for proof beyond a reasonable doubt.

[47] This *prima facie* admission allows the probative value of that evidence to be challenged. However, in the absence of evidence or permissible inference successfully advancing such a challenge, a trial judge cannot decide that evidence admitted under s. 30 does not constitute proof beyond a reasonable doubt simply because it has not been bolstered by oral or other evidence confirming its reliability. The trial judge also erred in failing to turn his mind to whether there was other evidence or available inference upon which he could draw that would properly call into question the reliability or accuracy of the toxicology report.

[48] For those reasons, the appeal is allowed and a new trial ordered on all three counts upon which Ms. Smith was acquitted.

Appeal heard on February 8, 2011

Reasons filed at Calgary, Alberta
this 11th day of May, 2011

Bielby J.A.

I concur Fraser C.J.A.

I concur Martin J.A.

Appearances:

I. Kuklicz
for the Appellant

I.A. Hess and C.J. Nowlin
for the Respondent

Tab 14

Éthier v. Canada (RCMP Commissioner) (C.A.), [1993] 2 F.C. 659

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Hugessen, Stone and Décary JJ.A.

Heard: Ottawa, February 26, 1993.

Judgment: Ottawa, February 26, 1993.

Court File No. A-945-91

[1993] 2 F.C. 659 | *[1993] F.C.J. No. 183*

Réjean A. Éthier (Appellant) (Applicant) v. The Commissioner of the Royal Canadian Mounted Police and The Public Service Commission (Respondents) (Respondents)

Case Summary

Evidence — Appeal from Motions Judge's decision rejecting appellant's supplementary affidavit and exhibits thereto as hearsay — Law of hearsay changed by two recent SCC decisions — Hearsay evidence now admissible on basis of reliability, necessity — Reliability criterion met — Declarants most likely truthful as documents advanced by appellant to support own case — Possibility of mistake remote — Criterion of necessity met, respondents, by counsel, having blocked normal means of access to material — Production of documents by supplementary affidavit most practical and convenient way to bring them forward — Appeal allowed, new hearing ordered.

Statutes and Regulations Judicially Considered

Access to Information Act, R.S.C., 1985, c. A-1.
Federal Court Act, R.S.C., 1985, c. F-7, s. 18.
Federal Court Rules, C.R.C., c. 663, R. 332.1(6) (as enacted by SOR/90-846, s. 10).

Cases Judicially Considered

Followed:
R. v. Khan, *[1990] 2 S.C.R. 531*; *(1990), 59 C.C.C. (3d) 92*; *79 C.R. (3d) 1*; *113 N.R. 53*; *41 O.A.C. 353*.
R. v. Smith, *[1992] 2 S.C.R. 915*; *(1992), 94 D.L.R. (4th) 590*; *75 C.C.C. (3d) 257*; *15 C.R. (4th) 133*; *139 N.R. 323*; *55 O.A.C. 321*.

APPEAL from decision of Motions Judge (*[1992] 1 F.C. 109*; *(1991), 45 F.T.R. 310* (T.D.)) rejecting appellant's supplementary affidavit and exhibits thereto as hearsay. Appeal allowed.

Counsel

Charles T. Hackland and Patricia Brethour, for the appellant (applicant).

[page660]

Geoffrey S. Lester, for the respondents (respondents).

Solicitors

Gowling, Strathy & Henderson, Ottawa, for the appellant (applicant). Deputy Attorney General of Canada, for the respondents (respondents).

The following are the reasons for judgment of the Court delivered orally in English by

HUGESSEN J.A.

1 We are all of the view that the learned Motions Judge [*[1992] 1 F.C. 109*] erred when he rejected the appellant's supplementary affidavit sworn 29 April 1991 and the exhibits thereto on the grounds that they were hearsay. In the Motions Judge's favour let it be said at once that he did not have drawn to his notice the then recent decision of the Supreme Court of Canada in R. v. Khan[1]. The subsequent decision of the Supreme Court in R. v. Smith[2] had, of course, not even been delivered at the time of the judgment under appeal.

2 As we read them, those two decisions dramatically clarified and simplified the law of hearsay in this country. As Lamer C.J. said in Smith, they "signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity." (At page 933.)

3 The evidence here sought to be introduced consisted of materials which the appellant had obtained from the Public Service Commission, one of the respondents, following a request under the Access to Information Act.[3] It is not without significance that respondent's counsel had generally refused requests for production of such documents during the preliminaries leading up to the hearing in the Trial Division. The documents are in two categories, file notes and memoranda relating to an investigation carried out by the Public Service Commission at appellant's request (exhibit A), and contemporary official documents generated by the Commission or by the Royal [page661] Canadian Mounted Police (exhibit B). Both categories relate directly either to the decision to hold an open competition to fill for an indeterminate period the position then held by the appellant on a term basis, or to the competition itself. Those two matters were, of course, the very subject of the section 18 [Federal Court Act, R.S.C., 1985, c. F-7] proceedings in the Trial Division.

4 In our view, in the circumstances of this case, the documents in question meet the first criterion of reliability. We, of course, say nothing of the weight they should have at this stage, but on a prima facie basis we think that the manner in which they were generated is such as to "substantially negate the possibility that the declarant was untruthful or mistaken."[4] These are the respondents' own documents created during an internal investigation into

alleged improprieties in the appointment process. To the extent that they are advanced by the appellant to support his case, it is almost inconceivable that the various declarants would have said anything that was untrue. As to the possibility of mistake, while it is always present, we can see nothing in the circumstances which would lead us to believe that it is realistic in this case, at least in so far as the preliminary question of admissibility is concerned, to say that the declarants erred.

5 There can equally be no serious question as to the criterion of necessity in the circumstances. Respondents, by their counsel, had blocked any normal means of access to the material. Even once it was obtained through Access to Information Act proceedings it was hardly realistic to expect appellant's solicitor to approach the various declarants and seek affidavits from them, assuming that he could have done so without committing a serious breach of professional ethics. Their production, by means of the supplementary affidavit, was clearly the most practical and convenient way to bring them forward without putting in jeopardy any of the respondents' rights to reply or explain if they wished to do so.

[page662]

6 In the Trial Division the respondents also objected to the production of the supplementary affidavit on the grounds of the prohibition in Rule 332.1(6) [Federal Court Rules, C.R.C., c. 663 (as enacted by SOR/90-846, s. 10)]. The Motions Judge did not deal with this question in his reasons for judgment and respondents' counsel conceded on the hearing of the appeal that the decision on the evidentiary question could and should be determinative of the question of whether discretion should be exercised in favour of allowing the supplementary affidavit to be filed.

7 In view of the conclusion we have reached on the admissibility of the supplementary affidavit, we do not think we should deal with the other grounds advanced by the appellant. The whole evidentiary basis upon which the Motions Judge proceeded has now changed. We have carefully considered whether we should now proceed to decide the merits of the section 18 application in his place and have concluded that it is not appropriate that we should do so. The Motions Judge was clearly of the view that the inferences which he could draw from the appellant's material were not strong enough to overcome in his mind the positive assertions in the respondents' affidavits that no impropriety had taken place. The material which we have now found to have been wrongly excluded is manifestly of a nature to permit other, similar inferences to be drawn and we are simply unable to say whether their cumulative effect would have been enough to change the result in the Judge's mind. There must, therefore, be a new hearing.

8 The appeal will be allowed, the order of the Trial Division dated August 6, 1991, will be set aside and a new hearing ordered. The appellant is entitled to his costs of the appeal; the costs of both hearings in the Trial Division will be at the discretion of the Motions Judge.

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1 *[1990] 2 S.C.R. 531*.

2 *[1992] 2 S.C.R. 915*.

3 R.S.C., 1985, c. A-1.

4 Smith, supra, at p. 933.

5 Rule 332.1 ...

> (6) A party who has cross-examined the deponent of an affidavit may not subsequently file any affidavit in the motion without leave of the Court or the consent of all of the adverse parties to the motion.

Tab 15

Canada (Director of Investigation and Research) v. Southam Inc., 1991 CanLII 1 (CT)

Date: 1991-06-20
File number: CT-90/1
Other citation: 38 CPR (3d) 395
Citation: Canada (Director of Investigation and Research) v. Southam Inc., 1991 CanLII 1 (CT), <http://canlii.ca/t/1fltl>, retrieved on 2019-02-27

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

REASONS AND ORDER REGARDING

USE OF MATERIAL OBTAINED ON

DISCOVERY AND CRITERIA FOR ISSUING

CONFIDENTIALITY (PROTECTIVE) ORDERS

Date of Hearing:

May 24, 1991

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Lay Member:

Madame Marie-Hélène Sarrazin

Counsel for the Applicant:

Director of Investigation and Research

Stanley Wong

Counsel for the Respondents:

Southam Inc.

Lower Mainland Publishing Ltd.

Rim Publishing Inc.

Yellow Cedar Properties Ltd.

North Shore Free Press Ltd.

Speciality Publishers Inc.

Elty Publications Ltd.

Robert Kwinter

Mark Katz

COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING

USE OF MATERIAL OBTAINED ON

DISCOVERY AND CRITERIA FOR ISSUING

CONFIDENTIALITY (PROTECTIVE) ORDERS

Director of Investigation and Research

v.

Southam Inc. et al

This motion raises two related issues: (1) the extent to which, if at all, a party may use documents or information which have been acquired from the opposing party on discovery for purposes outside the context of the litigation for which they were acquired; (2) the criteria which will be applied by the Tribunal in deciding whether or not to issue an order pursuant to the procedures referred to in subsection 15(2) of the*Competition Tribunal Rules*, [15] restricting access to documents.

Procedural Context

On April 22, 1991, the respondents gave notice that, at the pre-hearing conference scheduled for April 26, 1991, they would seek a

confidentiality order to cover a variety of documents which they had produced to counsel for the*Director of Investigation and Research* ("Director") pursuant to section 14 of the*Competition Tribunal Rules*. The confidentiality (protective) order sought was to require that the documents be kept off the public record and that counsel for the applicant only disclose them to his client and experts as necessary for the purposes of the case and on their signing a confidentiality agreement. That agreement obligates the individual who is given access to the documents to keep them confidential and to agree not to use the information so acquired for any purpose other than the proceeding at hand. This is what might be called a "standard form" confidentiality order. The respondents' request was dealt with, in a preliminary way, together with some other pre-hearing matters, by telephone conference on April 26, 1991. Counsel for the Director, at that time, had not reviewed the documents individually for the purpose of determining whether or not any of them should, in his opinion, because of their content be kept off the public record. Counsel for the Director's position was that the Director and his officials, because of the nature of their positions and their duties under the*Competition Act*,[16] should not, in any event, be required to sign the proposed confidentiality agreement. This position was rejected by the Tribunal[17] and that decision is now under appeal.

At the hearing of the motion on April 26, 1991, counsel for the Director reserved his position on whether some or all of the documents in question, because of their content, were of a type which should be accorded protected status; he indicated that he intended to address this issue at a later date. The motion of May 21, 1991, presently before the Tribunal, is consequent upon that reservation. It is brought on behalf of the Director and seeks an order declaring that none of the documents for which the respondents sought and obtained (at least on a provisional basis) a protective order should be covered thereby. The motion also seeks an order stating that any document for which the respondents have not claimed confidentiality may be used by the Director for all purposes connected to his duties under the*Competition Act*.

While this motion puts in issue the status of each document and seems to require that counsel's arguments on the hearing of the motion address the content and nature of each document on a specific basis, that analysis is not sought at this time. An individual review of the documents is being left for another day. What counsel now seek is some general directions concerning the use of documents obtained on discovery and some indication by the Tribunal of the criteria it applies in granting orders pursuant to the procedures in sections 14 and 15 of the*Rules*.

Use of Discovery Documents - Implied Undertaking?

Counsel for the respondents argues that there is an implied undertaking which operates with respect to documents and information obtained from an opposing party on discovery, such that the documents and the information must not be used for purposes other than the conduct of the litigation for which they are required to be produced. Counsel for the Director argues that no such implied undertaking exists and that any undertaking must be imposed by an order of the Tribunal or presumably expressly consented to by the party receiving the documents or information. This conclusion is said to follow from: (1) a decision of the British Columbia Court of Appeal to that effect; (2) the operation of subsection 48(1) of the*Competition Tribunal Rules* and rule 5 of the Federal Court Rules; (3) the provisions of the*Competition Tribunal Rules* relating to discovery of documents; (4) the policy of the Tribunal that its proceedings are to be open to the public and the public interest in openness.

(a) The Implied Undertaking

I am of the view that counsel for the respondents' position that an implied undertaking covers documents and information obtained on discovery is correct. In England it has been clear since, at least,*Williams v. The Prince of Wales Life, & c., Co.*,[18] that there are restrictions on the use of discovery material. In the*Williams* case the defendants, before preparing a schedule of the documents in their possession (an affidavit of documents), undertook to give the plaintiff access to the documents for inspection. The documents were voluminous. The inspection did not go smoothly. The plaintiff applied to the Court for an order requiring production. The plaintiff alleged that the defendants would not grant access to anyone but the plaintiff personally and only for one hour per day. The defendants alleged that the plaintiff's solicitor's clerk was rude and offensive and that the plaintiff was misusing the documents by making them public. The Court indicated that both parties were at fault. It was held that the plaintiff and his agents were to be allowed access at all reasonable times and that insofar as the plaintiff's conduct was concerned:

> it is not the right of a Plaintiff, who has obtained access to the Defendants' papers, to make them public. The Court has granted injunctions to prevent it, and I myself have

done so, to prevent a Plaintiff, a merchant, from making public information obtained under the order for production.

I shall only make the order in this case, upon the Plaintiff's undertaking not to make public or communicate to any stranger to the suit the contents of such documents, and not to make them public in any way.[19]

There does not seem to be much reported jurisprudence on this subject between that decision and 1948. The existence of an implied undertaking is noted in a number of older texts: *Hare on Discovery*;[20] *Bray on Discovery*;[21]*Seton's Judgments and Orders*.[22] One can conclude that there are not many reported decisions on this subject because the principle that an implied undertaking existed was clearly established and well understood. This conclusion is substantiated by the decision in*Alterskye v. Scott*.[23]

In the*Alterskye* case, a motion was brought by the plaintiff seeking a better affidavit of documents from the defendant. The defendant admitted that the affidavit which had been filed was inadequate but he was concerned that if the plaintiff had access to a wider range of documents they would be used in a way which would cause him harm. The defendant contended that he should not be required to file a further affidavit unless the plaintiff undertook not to use the documents for any purpose ulterior to or collateral to the litigation between them. The Court refused to qualify its order that the defendant file a further and better affidavit, saying that the implied undertaking which accompanies disclosure on discovery provided sufficient protection in the circumstances:

The argument to-day included references to certain authorities in seton's judgments and orders, 7th ed. Vol. I, p. 76, which support the proposition, which is not disputed, in regard to the implied undertaking, under which a party obtaining discovery is, not to use documents for any collateral or ulterior purpose. In one or two of the cases an undertaking was required to be given to the court by a person seeking production before production was ordered against the person from whom it was sought: see*Williams*v.*Prince of Wales Life, etc., Co.*(3), and*Hopkinson*v.*Burghley*(4), where certain letters marked "private and confidential" were only ordered to be produced on an undertaking of the character which I have mentioned.

... It is to be observed that it is by no means usual to find in an order for discovery an undertaking of this character. It has never been the practice to include a general undertaking of this kind by either party, so far as I know, in the common form order. Therefore, it seems to me that in general the practice is to regard as a sufficient protection the implied obligation to make no improper use of disclosed documents under which each party is. ... Therefore, I do not propose to include any such undertaking in the order for a further and better affidavit of documents. The defendant must rely on the implied obligation not to make an improper use of the documents. If he can substantiate improper use in any particular case, he has his remedy. He can bring that instance of alleged improper use before the court either on proceedings for contempt, if he considers that it amounts to contempt of court, or on proceedings to restrain the conduct complained of. It seems to me, however, that in the further and better affidavit of documents which I now propose to order it will be open to the defendant,

if so advised, to say, with respect to particular documents or a particular class of documents, that those documents are, for this or that reason, especially confidential and that he objects to producing them except on an undertaking by the plaintiff in whatever form the defendant conceives would be adequate for his protection.[24]

The decision in*Harman v. Secretary of State for the Home Department*[25] was cited in argument before the Tribunal. While that decision refers to the existence of an implied undertaking (although the undertaking in that case was in fact express), the focus of the decision was on when an undertaking expires. The*Harman* decision is not particularly relevant to the issue before the Tribunal. Indeed, in the absence of a decision by either the Supreme Court of Canada or the Federal Court of Appeal adopting*Harman*, I would not be prepared to follow it. It stretches common sense to conclude that counsel's disclosure to a journalist of a document, after the document has been read in open court, constitutes a breach of the undertaking and is therefore contempt of court. In fact, the English rules of court were amended in 1987 (post-*Harman*) to explicitly provide that any undertaking with respect to use of a document obtained on discovery expires upon the reading of or reference to the document in open court.[26]

In Canada, the status of the implied undertaking with respect to discovery materials is not as straightforward. In the two jurisdictions in which the court of appeal has considered the issue conflicting results were reached. In British Columbia, the Court of Appeal held in 1986 that there was no general implied undertaking of confidentiality for documentary and oral discovery and that use of such material was only limited by the rules of court and any specific court orders.[27] In contrast, the Saskatchewan Court of Appeal concluded in 1987 that the practice in that province was the same as existed in England, that is, that there was an implied undertaking that discovery documents could not be used for any purpose other than the proper conduct of the particular action.[28]

In Ontario, various first instance cases reveal a strong trend to recognize the implied undertaking.[29] One of the textbooks on civil procedure in that province, written in 1970, explicitly refers to the implied undertaking.[30] In Alberta, Manitoba and New Brunswick, likewise, the courts, at least the trial divisions, have accepted the existence of an implied undertaking.[31] The Federal Court, Trial Division, has also recognized the implied undertaking in a recent decision by the Associate Senior Prothonotary.[32]

(b) *Kyuquot Logging Ltd.*Case

Since counsel for the Director emphasized the British Columbia situation so particularly, I will look more closely at the Court of Appeal decision in*Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.*[33] In that case, the plaintiff in an action against British Columbia Forest Products Limited ("BCFP") and the Crown wished to disclose documents and other information that it had obtained through its discovery of BCFP to the plaintiffs in another action arising out of the same facts. These other plaintiffs were suing only the Crown, having settled with BCFP, and therefore were not independently entitled to discovery of BCFP.

McLachlin J.A. (as she then was), writing for the majority, first examined the state of English law as of 1858 (the date of reception in British Columbia). She held that in 1858 there was in England no implied undertaking to use documents produced on discovery

only in the action in which they were produced. She also surveyed later developments in the law of that country which led to the modern position with respect to the implied undertaking, which she recognized clearly exists in England today. She concluded that:

> the idea of an implied undertaking to the court enforceable by contempt did not emerge until*Alterskye* and was not generally accepted until*Harman*. Until then, the obligation on a party in possession of discovery documents was enforced by express undertakings or injunctions.[34]

The position in British Columbia was held to resemble the pre-*Alterskye* position in England.

The second main impetus for the decision appears to have been a policy consideration: that a blanket rule against using information obtained on discovery for purposes outside the case for which it was obtained would lead to excessive litigation.

With respect to the British Columbia Court of Appeal's summary of the English law prior to*Alterskye*, it is based, at least in part, on certain early decisions contained in nominate reports.[35] The nominate reports often give rise to conflicting interpretations because they are not official reports but merely the notes taken down in court and compiled by the named reporter. The Tribunal's conclusion with respect to the import of these early cases and particularly the*Williams* case is different from that of the Court of Appeal. As has been noted, the*Williams* case indicates that an obligation exists not to use discovery documents for purposes extraneous to the action even in the absence of an express court order so requiring. The fact that the judge in that case made an express undertaking a condition of the order he finally gave would seem to have been for "added insurance" rather than as a result of an absolute need to do so. With respect to*Reynolds v. Godlee*, a case heavily relied upon in the*Kyuquot*decision,[36] it must be noted that whatever may have been said about undertakings with respect to discovery documents, it was all dicta. That decision relates to a solicitor-client privilege and it was on that basis that the plaintiff was allowed in the end to refuse to produce the document. While the plaintiff had originally resisted production, not on the basis of solicitor-client privilege, but because he had obtained the document from another defendant by a motion, that is not the basis on which a decision was finally made. Also, insofar as this dicta is concerned, I read the decision as saying no more than that one cannot refuse to produce a document because it has been obtained from another in confidence and that if the document has been obtained pursuant to an order for discovery the court is not prevented from requiring its disclosure to others.

With respect to the decision in*Tagg v. The South Devon Railway Co.*[37] it is not surprising that the Court of Chancery at that time refused to order that documents produced on discovery could not be used in an action at law. Prior to 1854, the only way discovery could be obtained in an action at law was by bringing a bill for discovery in Chancery.

With respect to the references to the position in the United States which is referred to in*Kyuquot* it should be noted that the Federal Rules of Procedure in the United States require that many of the pre-trial documents exchanged by the parties be filed with the court; they thereby become public. This is undoubtedly part of the reason that discovery is not subject to implied confidentiality undertakings in the United States.[38] Transcripts of discovery proceedings are not automatically filed as part of the Tribunal's public record. The discovery process is private.

In any event, the early law is not as relevant to the Tribunal in this matter as it was to the British Columbia Court of Appeal, which was concerned about the exact stage of development of the principles governing discovery upon reception in British Columbia. The Tribunal is more concerned with the practice in all Canadian jurisdictions and with the policy considerations involved in this question.

With respect to the argument that a general rule preventing use of documents and information obtained on discovery for purposes outside the context of the litigation will lead to excessive litigation, the opposite view is also a credible one. In fact, the general rule seems to have been operating in various jurisdictions for many years without much litigation arising therefrom.

(c) Subsection 48(1) of the*Competition Tribunal Rules*and Rule 5 of the Federal Court Rules

The argument that the British Columbia practice should be followed because the present case is most closely connected with British Columbia is not a convincing one. Subsection 48(1) of the*Competition Tribunal Rules* provides:

> Where, in the course of proceedings before the Tribunal, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Court Rules* shall be followed, with such modifications as the circumstances require.

Rule 5 of the Federal Court Rules provides:

> In a proceeding in the Court where any matter arises not otherwise provided for by any provision in any Act of the Parliament of Canada or by any general rule or order of the Court (except this Rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy
>
> (a) to the other provisions of these Rules, or
>
> (b) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates,
>
> whichever is, in the opinion of the Court, most appropriate in the circumstances.

It is not necessary, however, to apply either of these provisions in the present circumstances because there is no gap. The general common law principle respecting an implied undertaking on discovery applies. In addition, although the "double gap rule" argument is theoretically possible, it would lead to awkward results for a body such as the Tribunal if different rules

applied from province to province in a situation such as the present. Many of the cases before the Tribunal by their very nature span several provinces.

(d) An Interpretation of the *Competition Tribunal Rules*

It is argued that the text of the *Competition Tribunal Rules* indicates that there is no implied undertaking to keep discovery material confidential because sections 14 and 15 expressly provide a mechanism for obtaining Tribunal-ordered protected status for such material. This is not how the Tribunal views the operation of those provisions. Sections 14 and 15 refer to a mechanism for obtaining protection additional to that provided by operation of the implied undertaking (for example when one of the parties to the litigation is denied access to particular documents or information, although his or her counsel and an independent expert is granted access). More will be said later concerning the application of sections 14 and 15 as well as the policy of openness of the Tribunal. But, it suffices to say for now that sections 14 and 15 were not intended to supplant the normal operation of the general principle respecting an implied undertaking.

(e) Scope of Operation of the Implied Undertaking

A great variety of documents are typically produced on discovery; some of them are public. For example, in the present case some are newspaper clippings. Others may be of a nature such that it is clear they have been given public circulation. While the implied undertaking technically encompasses such documents, it, of course, has no meaningful operation in relation thereto. If the document or the information in question has been disclosed to the public (or perhaps even to certain other persons on non-confidential terms) there will be no undisclosed or confidential information which the undertaking can protect. The principle underlying the implied undertaking is analogous to the basic principle which underlies breach of confidence actions. The first element required to found an action for breach of confidence is that the information must be of a confidential nature; it must not be public property and knowledge.[39]

Similarly, if information contained in documents produced on discovery (or the documents themselves) has been obtained from another source, by, for example, the Director, the implied undertaking does not operate to retroactively curtail usage of that information. An implied undertaking cannot operate to pull under its umbrella documents and information obtained from sources outside the discovery process even when they are also the same as those obtained on discovery. The implied undertaking does not create a new status for such documents and information. Strayer J. made this clear with respect to confidentiality orders in *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*[40] It is equally true in the case of an implied undertaking.

Another question which arises is whether an implied undertaking is automatically vitiated if the documents or information disclosed reveal a possible criminal offence or some other breach of a statute. Counsel for the respondent cited *755568 Ontario Ltd. v. Linchris Homes Ltd.*,[41] in which a party sought leave to send the transcripts of examination for discovery to the police, alleging that they revealed a criminal offence. The Court refused to allow such use of the documents.

Counsel for the Director argues that documents or information obtained by the Director, insofar as they might relate to other breaches of the Act, are free from operation of an implied undertaking. Counsel argued that the procedure before the Competition Tribunal is unique, that only the Director can initiate an action, that the Director's only purpose is a public one, that the *lis* is not a private one and that the Director is acting in the public interest. Therefore, he argued that if there is an implied obligation on the Director not to use documents obtained on discovery for purposes outside the litigation, that undertaking falls short of preventing the Director using them for other purposes of the Act (perhaps, for example as a basis for commencing a criminal action against the present respondents or as the basis for commencing a civil or criminal action against a third party).

The general principle is that an implied undertaking exists unless the party it protects, or the court, consents to or orders its abrogation. There is authority that the release of confidential information when criminal activities are suspected is a good defence to a breach of confidence action.[42] At the same time, as has been noted, the court in *755568 Ontario Ltd. v. Linchris Homes Ltd.*[43] refused to relieve a party of its implied undertaking in order to allow transcripts of discovery to be sent to the police to investigate whether or not a crime had been committed. It is clear the court in that case was concerned that the plaintiff's proposed action was motivated by a desire to pressure the defendants into settlement:

> The public interest in investigating possible crimes is not *per se* a sufficient ground to relieve counsel of his or her implied undertaking to keep such information private. In this case the plaintiff has not by affidavit set out its reasons, if any, for wishing to have the police conduct an investigation. In my view a reasonable inference emerges that the plaintiff hopes the police will find additional information which will assist its action or that the police investigation will force the defendants to offer to settle this matter. Neither of these reasons support the plaintiff's request to be released from its undertaking and both are clearly improper motives.[44]

One would not pretend that the Director's desire to use documents and information obtained on discovery for purposes outside the litigation for which they were obtained was motivated by a desire to pressure the respondents into settlement or to obtain assistance in mounting the present case against the respondents. At the same time, there are significant policy considerations which are raised by the Director's position. If there are no constraints on the Director's use of the information for other purposes of the Act, could the discovery process turn into an alternative to, or at the very least an adjunct to the investigatory procedures the Director is authorized to pursue under other provisions of the Act, not only with respect to the respondents but also with respect to third parties as well? Was such a result intended by the *Competition Act* and the *Competition Tribunal Act*? The production of documents on discovery occurs as a result of the *Tribunal's* requirement that they be produced. They are not produced as a result of the exercise by the Director of his extensive investigatory powers.

The Tribunal is given no specific fact situation to assist in decision-making but is asked to make a general declaration that the Director is not bound by the implied undertaking. The competing interests raised by such considerations are difficult to assess in a vacuum. Thus, the Tribunal is not prepared to make a general declaration that the Director and his officials are not subject to the implied undertaking and may use the documents and information for all purposes of the Act in the absence of the presentation of a more detailed argument in the context of a specific fact situation. It should be stressed that the Tribunal is not

attempting to control the Director in the performance of his duties; the Tribunal only purports to control documents and information contained therein which were produced by the respondents to the Director*pursuant to the Tribunal's requirement* that they be produced.

It is open to the Director to apply to the Tribunal with respect to specific documents, in the context of a specific fact situation, for an abrogation of the implied undertaking. As has been noted, it is only in this way that a meaningful consideration can be given to the competing interests involved and a framework established for a thorough discussion of relevant and analogous precedents, if any exist. In addition, the respondents will have some assurance that they will have an opportunity to specifically address the issues and the uses the Director proposes to make of the documents in the particular context to which they relate.

Use of Sections 14 and 15 of the*Competition Tribunal Rules*

Sections 14 and 15 of the*Rules* provide:

14.(1) Each party shall, within 20 days after the expiration of the period set out in subsection 7(1) or 12(1) for the filing of a reply or such longer period as the parties may agree among themselves, file and serve on each other an affidavit of the documents that each party has knowledge of and that might be used in evidence to establish or rebut any allegation of fact relevant to the matters in issue, together with a brief description of each of the documents.

(2) A claim by a party that a document is privileged or contains information that for commercial reasons should not be made accessible to the public or to particular persons shall be made in the affidavit of documents.

(3) A party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents included in the affidavit, other than those in respect of which a claim is made pursuant to subsection (2) or that are not within the party's possession or control.

15.(1) Where a party served with an affidavit of documents opposes the claim that a document should not be made accessible to the public or to particular persons, the party making the claim shall place the document in a package, seal and identify the package and place it in the custody of the Registrar.

(2) The Tribunal may, at a pre-hearing conference or by notice of motion, on the request of the party opposing the claim, inspect the document and determine whether the claim is valid.

These should be read in conjunction with section 40:

40.(1) The proceedings of the Tribunal shall be open to the public and every person is entitled on request to access to all documents filed with the Registrar or received in evidence by the Tribunal other than those the Tribunal has determined under subsection 15(2) should not be made accessible to the public or to particular persons.

(2) On a motion by any party or by any other person interested in proceedings of the Tribunal and after hearing arguments from the Director and any party wishing to present arguments, the Tribunal may, if it is of the opinion that there are valid reasons for its proceedings not to be open to the public or for persons not be given access to any documents, make such order as it deems appropriate.

Sections 14 and 15, then, prescribe a certain course of conduct which is to be followed by the parties. Subsection 15(2) contemplates that the Tribunal may, consequent upon that conduct, issue an order, sometimes called a confidentiality order, sometimes called a protective order, pursuant to subsection 19(2) at a pre-hearing conference or pursuant to sections 30 and 31 upon notice of motion.

It is clear that sections 14 and 15 address two types of situations: those in which it is sought to keep documents out of the public domain and those in which it is sought to keep documents from particular persons. The second category is a subset of the first but is more restrictive. The second category envisages, for example, a situation in which it might be necessary to keep information out of the hands of a party or intervenor in the proceedings. In competition cases it is usual for competitors of the respondent to be involved, perhaps as intervenors, perhaps as witnesses, perhaps as suppliers of information to the Director.

For example, in the*Air Canada*[45] application, the respondents claimed confidentiality over many of their own documents as well as in a number of the Director's productions in order to keep that material off the public record; American Airlines, Inc. (later granted intervenor status) claimed confidentiality in two of the Director's documents. The Tribunal intervened on two occasions to resolve disputes between counsel as to whether certain items were or were not confidential; otherwise, counsel agreed on what should be subject to a protective order. In addition, the Director came into possession of certain information supplied to him by the various airlines (the respondents and the intervenors) in response to an information request. A different confidentiality order was issued to require the disclosure of this information to counsel for the respondents and respective intervenors and their independent experts but not to the respondents and the intervenors themselves.

In the*Chrysler*[46] application, the Director claimed confidentiality over portions of his documents which disclosed the identity of Mr. Brunet's customers and Mr. Brunet's terms of sale in their entirety.[47] The Director proposed that access to these documents be restricted to counsel for the respondent and to any independent experts since Mr. Brunet and Chrysler were, in some sense, competing for the same business. The confidentiality order which the Tribunal eventually issued permitted access by counsel for the respondent and by two named representatives of the respondent as well as by independent experts. Both the representatives and the experts were obliged to execute an agreement to keep the information they thereby obtained confidential.

Sections 14 and 15 contemplate that a claim for protected status may be made at the time a document is first listed in the affidavit of documents, even though at that stage it is not known whether the document will in fact be used in evidence. It is contemplated that orders which are granted as a result of a party's claim pursuant to the procedure referred to in sections 14 and 15 will protect the document throughout the whole proceeding, including at the hearing of the application. The test to be applied in granting a confidentiality order, then, generally is similar to that which is applied in determining whether judicial proceedings should be closed or documents or evidence kept off the public record. While the Tribunal always reserves the right to re-examine the question of confidentiality later, particularly at the stage of the introduction of evidence, this would normally only occur in exceptional circumstances if the initial order had been made consequent on a dispute as to the documents status and a decision thereon by the Tribunal. If the original order had been granted on consent and there was reason to believe that the status of the document had not been carefully considered by both counsel, the test for altering the confidentiality order would likely be less stringent.

An alternative interpretation of the procedure contemplated by sections 14 and 15, which I understand from counsel's arguments to be textually possible, is that those rules allow for orders imposing explicit restraints on the use of discovery documents comparable to the restraints arising from an implicit undertaking at common law (a procedure which would be necessary if no implicit undertaking was applicable). Such orders would clearly endure only through the pre-hearing period. The status of each document thus protected would have to be considered anew if it were tendered in evidence at the hearing. Counsel for the respondents readily admits that if sections 14 and 15 were used for such a purpose, the test to be applied at the hearing to determine whether or not documents should be kept off the public record would be much higher than that required to justify the imposition of an express undertaking to protect discovery documents during the pre-hearing process. But, as has been indicated, the procedures contemplated by these rules were not intended to operate as a replacement for the usual rule of implied undertakings. They were intended to be additional to that protection.

Counsel seek some direction as to the criteria which the Tribunal expects should be applied in granting confidential or protected status. It is always difficult to make such declarations in the abstract. One is particularly conscious that what is said should not be considered to be exhaustive on the subject. Novel situations, previously unencountered, may always arise. In the present case, for instance, the procedure contemplated by sections 14 and 15 is being used to accord documents protection in a provisional way until the dispute concerning some of the fundamental principles governing their use is settled.

Counsel for the Director argues that the applicable test for Tribunal protective or confidentiality orders should be comparable to that which exists under the*Access to Information Act*.[48] Thus, it is argued that in order to justify the issuance of a protective order, a party must demonstrate that disclosure of the information to either the public or in the more restrictive case to certain individuals (parties, intervenors) as well as to the public could reasonably be expected to result in harm to the party seeking the order (a "reasonable expectation of probable harm" test).[49] This test accords with what the Director has argued in other cases before the Tribunal and which the Tribunal has accepted.

In cases before the Tribunal, the Director seeks orders requiring the respondents to modify their commercial behaviour or to abandon or modify mergers. These orders are sought on the ground that the particular merger or business practice contravenes the provisions of the*Competition Act*. The Tribunal is conscious that a respondent in such proceedings should

not be placed in a position whereby it is precluded from presenting a case in answer to the Director's allegations because in order to do so it must disclose (either to the public or to other parties or intervenors) information which once disclosed is likely to cause it commercial or other harm.

At the same time, the Tribunal is conscious that the reason judicial or adjudicative processes, particularly those which involve a government agency, should be conducted in public is that such public exposure has a salutary effect on the process. The decision of the House of Lords in*Scott v. Scott*[50] sets out the general principle of "open justice" and discusses the limited exception for closing judicial or adjudicative proceedings: if it can be shown that the presence of the public would undermine the viability of the adjudicative process rather than safeguarding the integrity of the administration of justice, only then can the public be excluded. Scrutiny by the public ensures a fairness of procedure; it enhances the quality and safeguards the integrity of the fact-finding process. It encourages the best efforts of the parties and their counsel. It encourages adjudicators to explain their decisions. It also promotes public confidence in and an understanding by the public of what is being done on its behalf and in its name.

Applications are brought before the Tribunal by the Director on behalf of the public. The Tribunal's decisions are rendered in the public interest. Absent special circumstances, then, the proceedings before the Tribunal should be subject to public scrutiny.

These two competing interests, the public interest in the administration of justice and the private interests of and potential harm to persons involved in Tribunal processes, are the general parameters which the Tribunal keeps in mind in considering confidentiality orders. In most cases it is unlikely that there will be an irreconcilable conflict. There are usually techniques which can be adopted (the presentation of evidence in written form as opposed to orally, limited use of*in camera*proceedings) which allow a hearing to proceed with reasonable expedition and to be comprehensible to the public despite restrictions on the publication of certain information. It may be that in some circumstances the two competing interests will be irreconcilable. In such circumstances the test which is likely to be applied is whether or not disclosure of the sensitive information is essential for public understanding of the decision which the Tribunal makes. Thus, the Tribunal's practice has been to condition all confidential (protective) orders with the caveat that they will apply unless the Tribunal subsequently orders otherwise.

As noted, counsel have asked for some explicit guidance with respect to the Tribunal's practice concerning confidentiality (protective) orders. The Tribunal relies heavily on the initial identification by the Director and the respondents of what documents and information should be given protected status. The Tribunal has to date only been required to make a decision on whether a particular item is confidential in a few instances; usually the parties are able to agree on which information merits protected status. The factors the Tribunal is likely to consider in making such decisions, in the context of the general parameters which have already been set out, are: the age of the information which it is sought to protect (profit and pricing information may quickly lose its commercially sensitive nature while other information may retain the potential to cause harm, if released, for a much longer period of time); whether disclosure of the information will merely cause embarrassment as opposed to real commercial*harm*; whether the degree of harm which is likely to arise outweighs the disadvantage to the public understanding or the disruption to Tribunal proceedings which will

occur as a result of keeping the information confidential. As has already been noted, the above listing of factors is not meant to be exhaustive.

Conclusion

In light of the comments set out above, it is anticipated that the parties will now review the documents for which confidentiality has been claimed with a view to determining for which of them confidential (protected) status is the subject of a serious dispute.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

1. The applicant's motion that none of the documents for which the respondents claim protected status should be accorded such status is adjourned until the next session of the pre-hearing conference or until some earlier date if either counsel so requests;

2. The applicant's motion that an order issue declaring that the Director may use documents obtained on discovery for purposes other than for the present litigation is denied.

DATED at Ottawa, this 20th day of June, 1991.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) B. Reed

B. Reed

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[15] SOR/87-373.

[16] R.S.C., 1985, c. C-34.

[17]*Director of Investigation and Research v. Southam Inc. et al* (29 April 1991), CT-90/1, Order Regarding Confidentiality.

[18] (1857), 23 Beav. 338, 53 E.R. 133.

[19]*Ibid.* at 340.

[20] T. Hare,*A Treatise on the Discovery of Evidence*, 2d ed. by S. Hare (London: Stevens & Sons, 1877) at 268n.

[21] E. Bray,*The Principles and Practice of Discovery* (London: Reeves & Turner, 1885) at 238.

[22] Sir H.W. Seton,*Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 7th ed. by A.R. Ingpen, F.T. Bloxam and H.G. Garrett (London: Stevens & Sons, 1912) at 76.

[23] [1948] 1 All E.R. 469 (Ch. Div.).

[24]*Ibid.* at 470-71.

[25] (1982), [1983] 1 A.C. 280, [1982] 1 ALL E.R. 532 (H.L.).

[26] Order 24, rule 14:

> Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs.

[27]*Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 1986 CanLII 167 (BC CA), 5 B.C.L.R. (2d) 1, 30 D.L.R. (4th) 65 (C.A.) [hereinafter cited to B.C.L.R.].

[28]*Layton Holdings Ltd. v. Certain Non-Marine Underwriters* (1987), 1986 CanLII 1778 (AB QB), 56 Sask. R. 152, [1987] 2 W.W.R. 570 (C.A.).

[29]*Anderson v. Anderson* (1979), 1979 CanLII 1673 (ON SC), 26 O.R. (2d) 769 (H.C.);*Lac Minerals Ltd. v. New Cinch Uranium Ltd.*(1985), 1985 CanLII 2251 (ON SC), 50 O.R. (2d) 260 (H.C.);*Reichmann v. Toronto Life Publishing Co.*(1988), 28 C.P.C. (2d) 11 (H.C.);*National Gypsum Co. v. Dorrell* (1989), 1989 CanLII 4271 (ON SC), 68 O.R. (2d) 689 (H.C.).

[30] W.B. Williston & R.J. Rolls,*The Law of Civil Procedure*, vol. 2 (Toronto: Butterworths, 1970) at 941.

[31]*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1986), 1986 CanLII 1619 (AB QB), 43 Alta L.R. (2d) 299 (Q.B.);*Blake v. Governors and Co. of Adventurers of England Trading into Hudson's Bay* (1987), [1988] 1 W.W.R. 176, 22 C.P.C. (2d) 95 (Man. Q.B.);*Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224 (Q.B.).

[32]*Re Lubrizol Corp. and Imperial Ltd.* (1990), 33 C.P.R. (3d) 49 (F.C.T.D.). See also*Smith, Kline & French Lab. Ltd. v. Canada* [1989] 3 F.C. 540 at 555-6, for discussion of the issue.

[33]*Supra*, note 13.

[34] *Ibid.* at 19-20.

[35] *Ibid.* at 16-17. The cases referred to are:*Reynolds v. Godlee* (1858), 4 K. & J. 88, 70 E.R. 37;*Tagg v. The South Devon Railway Co.* (1849), 12 Beav. 151, 50 E.R. 1017;*Williams,supra*, note 4;*Richardson v. Hastings* (1844), 7 Beav. 354, 49 E.R. 1102.

[36] And in the article by I. Eagles, "Disclosure of Material Obtained on Discovery" (1984) 47 Mod. L. Rev. 284 at 286n which is referred to in the*Kyuquot*decision.

[37]*Supra*, note 21.

[38] See P.H. Love, "Constructing a Public Right of Access to Pretrial Proceedings: How Sound is the Structure?" (1988) 66 Wash. U.L.Q. 745 at 763.

[39] *Saltman Engineering Co. v. Campbell Engineering Co.*(1948), 65 R.P.C. 203 at 215 (C.A.);*Coco v. A.N. Clark (Engineers) Ltd.*(1968), [1969] R.P.C. 41 at 47 (Ch. Div.).

[40] (23 May 1991), CT-91/1, Order Regarding Confidentiality at 7.

[41] (1990), 1990 CanLII 6665 (ON SC), 1 O.R. (3d) 649 (Gen. Div.).

[42]*Initial Services Ltd. v. Putterill*, [1968] 1 Q.B. 396 (C.A.).

[43]*Supra*, note 27.

[44]*Ibid.* at 655.

[45]*Director of Investigation and Research v. Air Canada*, CT-88/1.

[46]*Director of Investigation and Research v. Chrysler Canada Ltd.*, CT-88/4.

[47] Mr. Brunet claimed that Chrysler had refused to supply him with car parts.

[48] R.S.C., 1985, c. A-1.

[49] This test was adopted in the access to information context in*Canada Packers Inc. v. Minister of Agriculture* (1988), 1988 CanLII 1421 (FCA), [1989] 1 F.C. 47 at 60 (C.A.).

[50] [1913] A.C. 417.

Tab 16

The Attorney General of Nova Scotia and Ernest Harold Grainger *Appellants*;

and

Linden MacIntyre *Respondent*;

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta *Interveners*;

and

Canadian Civil Liberties Association *Intervener.*

File No.: 16045.

1981: February 3; 1982: January 26.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Criminal law — Search warrants — Right to inspect search warrants and informations on which search warrants based — Whether access restricted to "interested parties" or open to general public — Whether right to inspect only on execution of search warrant or whether hearings dealing with search warrants open — Criminal Code, R.S.C. 1970, c. C-34, ss. 443, 446.

Respondent, an investigative journalist, was denied access to search warrants and supporting material by appellant Grainger, the Justice of the Peace who had issued them, because such material was not available for inspection by the general public. At trial, respondent was held entitled to a declaration that search warrants after their execution, and the informations related to them in the control of the justice of the peace or court official, were court records available for examination by members of the general public. In dismissing an appeal, the Appeal Court declared that the public was entitled to inspect informations upon which search warrants were issued pursuant to s. 443 of the *Criminal Code*, and that any member of the public, including individuals

Le procureur général de la Nouvelle-Écosse et Ernest Harold Grainger *Appelants*;

et

Linden MacIntyre *Intimé*;

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan et le procureur général de l'Alberta *Intervenants*;

et

Canadian Civil Liberties Association *Intervenante.*

N° du greffe: 16045.

1981: 3 février; 1982: 26 janvier.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit criminel — Mandats de perquisition — Droit d'examiner les mandats de perquisition et les dénonciations sur lesquelles ils se fondent — Les «personnes concernées» sont-elles les seules à avoir accès aux documents ou le grand public y a-t-il également accès? — Y a-t-il un droit d'examiner le mandat de perquisition seulement après son exécution ou l'audition relative aux mandats de perquisition est-elle publique? — Code criminel, S.R.C. 1970, chap. C-34, art. 443, 446.

L'intimé, qui est journaliste enquêteur, s'est vu refuser l'accès aux mandats de perquisition et aux pièces justificatives par l'appelant Grainger, le juge de paix qui avait délivré les mandats, pour le motif que le public en général ne peut avoir accès à ces documents pour les consulter. En première instance, on a statué que l'intimé avait droit à un jugement déclarant que les mandats de perquisition exécutés et les dénonciations qui s'y rapportent, qui se trouvent sous la garde du juge de paix ou d'un fonctionnaire d'une cour, sont des pièces judiciaires que le grand public peut consulter. En rejetant l'appel de cette décision, la Cour d'appel a déclaré que le public a le droit de consulter les dénonciations à l'origine des mandats de perquisition délivrés en application de l'art.

about to be the subject of a search warrant, was entitled to be present in open court when the search warrants were issued.

Held (Martland, Ritchie, Beetz and Estey JJ. dissenting): The appeal should be dismissed.

Per Laskin C.J. and Dickson, McIntyre, Chouinard and Lamer JJ.: After a search warrant has been executed, and objects found during the search are brought before a justice, members of the public are entitled to inspect the warrant, and the information upon which it was issued. Curtailment of public accessibility is justified only where the need to protect other social values is of superordinate importance. In cases where a search warrant is issued but nothing is found, protection of the innocent is such an overriding social value. Furthermore, the public interest in the effective administration of justice must override public accessibility to the extent that the proceedings at which the warrant is issued can be conducted *in camera*. Otherwise a person whose property was to be searched could remove the goods. The need for confidentiality disappears, however, once the warrant has been executed. At this point the public as well as those who are directly interested have a right to inspect the warrant and the related information.

Per Martland, Ritchie, Beetz and Estey JJ. (*dissenting*): The broad declaration of the Court of Appeal, for reasons given by Dickson J., cannot be sustained. Respondent cannot assert a right to examine the search warrants and related informations on the basis that the issuance of the search warrants was a judicial act in open court with a right for the public to be present.

Proceedings before a justice under s. 443 are part and parcel of criminal investigative procedure and are not analogous to trial proceedings which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted to persons who can show a direct and tangible interest in the documents. There is no general right to inspect search warrants and the informations relating thereto.

[*Inland Revenue Commissioners v. Rossminster Ltd.*, [1980] 2 W.L.R. 1; *R. v. Solloway Mills & Co.*, [1930] 3 D.L.R. 293; *Realty Renovations Ltd. v. Attorney-*

443 du *Code criminel* et que tous les particuliers, y compris ceux que les mandats pourraient viser, ont le droit d'être présents à l'audience publique quand les mandats ont été délivrés.

Arrêt (les juges Martland, Ritchie, Beetz et Estey sont dissidents): Le pourvoi est rejeté.

Le juge en chef Laskin et les juges Dickson, McIntyre, Chouinard et Lamer: Après qu'un mandat de perquisition a été exécuté et que les objets trouvés pendant la perquisition ont été portés devant un juge de paix, le public a le droit d'examiner le mandat et la dénonciation par suite de laquelle il a été délivré. Restreindre l'accès du public ne peut se justifier que si la nécessité de protéger d'autres valeurs sociales a préséance. Dans le cas où un mandat de perquisition est délivré, mais sans que rien ne soit trouvé, la protection de l'innocent est une des valeurs sociales qui ont préséance. De plus, le droit du public à une administration efficace de la justice doit l'emporter sur son droit d'accès de sorte que les procédures qui portent sur la délivrance du mandat peuvent se dérouler à huis clos. Autrement, l'occupant des lieux à perquisitionner pourrait faire disparaître les pièces. Toutefois, après l'exécution du mandat, il n'est plus nécessaire de préserver le caractère confidentiel. A ce stade, le public aussi bien que les personnes directement concernées ont le droit de consulter le mandat et la dénonciation qui s'y rapporte.

Les juges Martland, Ritchie, Beetz et Estey (*dissidents*): Pour les motifs exprimés par le juge Dickson, la déclaration générale faite par la Cour d'appel n'est pas défendable. L'intimé ne peut prétendre à un droit de consulter les mandats de perquisition et les dénonciations qui s'y rapportent sous prétexte que la délivrance des mandats de perquisition est un acte judiciaire accompli au cours d'une audience publique à laquelle le public a le droit d'être présent.

Les procédures qui ont lieu devant un juge de paix en application de l'art. 443, et qui font partie de la procédure d'enquête criminelle, ne sont pas assimilables aux procédures du procès qui doivent généralement se dérouler en audience publique. Autoriser le public à consulter les documents que détient le juge de paix n'équivaut pas au droit du public d'assister à l'audience et de suivre les procédures. Il y a lieu de restreindre l'accès à ces documents aux personnes qui peuvent démontrer qu'elles sont concernées de façon directe et réelle. Il n'y a aucun droit général d'examiner les mandats de perquisition et les dénonciations qui s'y rapportent.

[Jurisprudence: *Inland Revenue Commissioners v. Rossminster Ltd.*, [1980] 2 W.L.R. 1; *R. v. Solloway Mills & Co.*, [1930] 3 D.L.R. 293; *Realty Renovations*

General for Alberta et al. (1978), 44 C.C.C. (2d) 249; *Southam Publishing Company v. Mack* (1959-60), 2 Crim. L.Q. 119; *Nixon v. Warner Communications, Inc.* (1978), 98 S. Ct. 1306; *R. v. Wright*, 8 T.R. 293; *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339; *Scott v. Scott*, [1913] A.C. 417; *McPherson v. McPherson*, [1936] A.C. 177, referred to.]

APPEAL from a judgment of the Nova Scotia Court of Appeal (1980), 110 D.L.R. (3d) 289, 52 C.C.C. (2d) 161, 38 N.S.R. (2d) 633, 69 A.P.R. 633, dismissing an appeal from a judgment of Richard J. Appeal dismissed, Martland, Ritchie, Beetz and Estey JJ. dissenting.

Reinhold M. Endres and *Mollie Gallagher*, for the appellants.

Robert Murrant and *Gordon Proudfoot*, for the respondent.

J. A. Scollin, Q.C., and *S. R. Fainstein*, for the intervener the Attorney General of Canada.

S. Casey Hill, for the intervener the Attorney General for Ontario.

Ronald Schacter, for the intervener the Attorney General of Quebec.

Eugene D. Westhaver, for the intervener the Attorney General for New Brunswick.

E. Robert A. Edwards, for the intervener the Attorney General of British Columbia.

Kenneth W. MacKay, for the intervener the Attorney General for Saskatchewan.

Y. Roslak, Q.C., and *Lloyd Nelson*, for the intervener the Attorney General for Alberta.

Alan D. Gold, for the intervener the Canadian Civil Liberties Association.

The judgment of Laskin C.J. and Dickson, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.—The appellant, Ernest Harold Grainger, is Chief Clerk of the Provincial Magistrate's Court at Halifax and also a Justice of the Peace. In the latter capacity he had occasion to issue certain search warrants. The respondent, Linden MacIntyre, is a television journalist

Ltd. v. Attorney-General for Alberta et al. (1978), 44 C.C.C. (2d) 249; *Southam Publishing Company v. Mack* (1959-60), 2 Crim. L.Q. 119; *Nixon v. Warner Communications, Inc.* (1978), 98 S. Ct. 1306; *R. v. Wright*, 8 T.R. 293; *Gazette Printing Co. c. Shallow* (1909), 41 R.C.S. 339; *Scott v. Scott*, [1913] A.C. 417; *McPherson v. McPherson*, [1936] A.C. 177.]

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (1980), 110 D.L.R. (3d) 289, 52 C.C.C. (2d) 161, 38 N.S.R. (2d) 633, 69 A.P.R. 633, qui a rejeté l'appel formé contre le jugement du juge Richard. Pourvoi rejeté, les juges Martland, Ritchie, Beetz et Estey sont dissidents.

Reinhold M. Endres et *Mollie Gallagher*, pour les appelants.

Robert Murrant et *Gordon Proudfoot*, pour l'intimé.

J. A. Scollin, c.r., et *S. R. Fainstein*, pour l'intervenant le procureur général du Canada.

S. Casey Hill, pour l'intervenant le procureur général de l'Ontario.

Ronald Schacter, pour l'intervenant le procureur général du Québec.

Eugene D. Westhaver, pour l'intervenant le procureur général du Nouveau-Brunswick.

E. Robert A. Edwards, pour l'intervenant le procureur général de la Colombie-Britannique.

Kenneth W. MacKay, pour l'intervenant le procureur général de la Saskatchewan.

Y. Roslak, c.r., et *Lloyd Nelson*, pour l'intervenant le procureur général de l'Alberta.

Alan D. Gold, pour l'intervenante la Canadian Civil Liberties Association.

Version française du jugement du juge en chef Laskin et des juges Dickson, McIntyre, Chouinard et Lamer rendu par

LE JUGE DICKSON—L'appelant Ernest Harold Grainger est le greffier principal de la Cour de magistrat provinciale à Halifax et il est aussi juge de paix. A ce dernier titre, il a décerné des mandats de perquisition. L'intimé, Linden MacIntyre, est journaliste de la télévision au service de la

employed by the Canadian Broadcasting Corporation. At the material time Mr. MacIntyre was researching a story on political patronage and fund raising. Mr. MacIntyre asked Mr. Grainger to show him the search warrants and supporting material. Mr. Grainger refused, on the ground that such material was not available for inspection by the general public. Mr. MacIntyre commenced proceedings in the Supreme Court of Nova Scotia, Trial Division, for an order that search warrants and informations relating thereto, issued pursuant to s. 443 of the *Criminal Code*, R.S.C. 1970, c. C-34, or other related or similar statutes, are a matter of public record and may be inspected by a member of the public upon reasonable request.

I

Mr. Justice Richard of the Trial Division of the Supreme Court of Nova Scotia delivered reasons approving Mr. MacIntyre's application. He held that Mr. MacIntyre was entitled to a declaration to the effect that search warrants "which have been executed", and informations relating thereto, which are in the control of the justice of the peace or a court official are court records available for examination by members of the general public.

An appeal brought by the Attorney General of Nova Scotia and by Mr. Grainger to the Appeal Division of the Supreme Court of Nova Scotia was dismissed. The Appeal Division proceeded on much broader grounds than Richard J. The order dismissing the appeal contained a declaration "that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the *Criminal Code* of Canada". The Court also declared that Mr. MacIntyre was entitled to be present in open court when the search warrants were issued. This right, the Appeal Division said, extended to any member of the public, including individuals who would be the subjects of the search warrants.

Société Radio-Canada. A l'époque en cause, M. MacIntyre faisait des recherches sur une affaire de favoritisme politique et de souscription de fonds. M. MacIntyre a demandé à M. Grainger de lui laisser voir les mandats de perquisition et les documents justificatifs. M. Grainger a refusé pour le motif que le public en général ne peut avoir accès à ces documents pour les consulter. M. MacIntyre a alors entamé des procédures devant la Division de première instance de la Cour suprême de la Nouvelle-Écosse pour obtenir une ordonnance portant que les mandats de perquisition, et les dénonciations qui s'y rapportent, décernés en application de l'art. 443 du *Code criminel*, S.R.C. 1970, c. C-34, ou de toute autre loi semblable ou connexe sont du domaine public et accessibles à un particulier sur demande raisonnable.

I

Le juge Richard, de la Division de première instance de la Cour suprême de la Nouvelle-Écosse, a rendu un jugement faisant droit à la requête de M. MacIntyre. Il a conclu que M. MacIntyre avait droit à un jugement déclarant que les mandats de perquisition [TRADUCTION] «qui ont été exécutés», et les dénonciations qui s'y rapportent, qui se trouvent sous la garde du juge de paix ou d'un fonctionnaire d'une cour, sont des pièces judiciaires que le grand public peut consulter.

L'appel interjeté par le procureur général de la Nouvelle-Écosse et M. Grainger à la Division d'appel de la Cour suprême de la Nouvelle-Écosse a été rejeté. La Division d'appel s'est fondée sur des motifs beaucoup plus larges que ceux du juge Richard. L'ordonnance qui rejette l'appel comporte une déclaration selon laquelle [TRADUCTION] «un particulier a le droit de consulter les dénonciations à l'origine des mandats de perquisition délivrés en application de l'art. 443 du *Code criminel* du Canada». La cour a également déclaré que M. MacIntyre avait le droit d'être présent à l'audience publique quand les mandats ont été délivrés. Ce droit, selon la Division d'appel, s'étend à tout particulier, et même aux personnes que les mandats de perquisition pourraient viser.

This Court granted leave to appeal the judgment and order of the Appeal Division. The Attorney General of Canada and the Attorneys General of the Provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta intervened to support the appellant Attorney General of Nova Scotia. The Canadian Civil Liberties Association intervened in support of Mr. MacIntyre.

Although Mr. MacIntyre happens to be a journalist employed by the C.B.C. he has throughout taken the position that his standing is no higher than that of any member of the general public. He claims no special status as a journalist.

II

A search warrant may be broadly defined as an order issued by a justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the justice who issued the warrant to be dealt with by him according to law.

Search warrants are part of the investigative pretrial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the *Code*, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act on the part of the justice, usually performed *ex parte* and *in camera*, by the very nature of the proceedings.

Cette Cour a accordé l'autorisation d'appeler du jugement et de la déclaration de la Division d'appel. Le procureur général du Canada et les procureurs généraux des provinces de l'Ontario, du Québec, du Nouveau-Brunswick, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta sont intervenus pour appuyer l'appelant, le procureur général de la Nouvelle-Écosse. La Canadian Civil Liberties Association est intervenue en faveur de M. MacIntyre.

Bien que M. MacIntyre se trouve être journaliste au service de la Société Radio-Canada, il a soutenu, au cours de toutes les procédures, que sa situation n'était pas meilleure que celle des simples particuliers. Il ne prétend à aucun statut spécial en tant que journaliste.

II

On peut définir de façon générale un mandat de perquisition comme un ordre délivré par un juge de paix, en vertu de pouvoirs accordés par la loi, autorisant une personne désignée à pénétrer dans un lieu déterminé, pour y chercher et saisir des objets déterminés qui fournissent la preuve de la perpétration réelle d'une infraction ou de l'intention d'en perpétrer une. Un mandat peut être décerné par suite d'une dénonciation faite sous serment accompagnée de la preuve qu'il y a des motifs raisonnables de le décerner. Les objets saisis doivent être transportés devant le juge de paix qui a décerné le mandat pour qu'il en dispose conformément à la loi.

Les mandats de perquisition se situent dans la phase d'enquête antérieure au procès en droit criminel; ils servent souvent au début de l'enquête et avant que l'identité de tous les suspects soit connue. Pour protéger l'intérêt public par la recherche et la répression efficaces du crime, le Parlement a, en adoptant l'art. 443 du *Code*, légalisé ce qui serait autrement une introduction illégale dans un endroit et une saisie illégale de biens. La délivrance d'un mandat de perquisition est un acte judiciaire fait par le juge de paix, habituellement *ex parte* et à huis clos, à cause de la nature même des procédures.

The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.

As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the *Criminal Code*.

III

The *Criminal Code* gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations. And there is little authority on the point. The appellant Attorney General of Nova Scotia relied upon Taylor's *Treatise on the Law of Evidence* (11th ed. 1920), upon a footnote to Order 63, Rule 4 of the English Rules of Court, and upon *Inland Revenue Commissioners v. Rossminster Ltd.*, [1980] 2 W.L.R. 1. These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exerciseable when some direct

Le mandat de perquisition a acquis, depuis quelques années, une importance croissante comme moyen d'enquête parce que le crime et les criminels deviennent de plus en plus astucieux et que la fréquence des crimes économiques s'accroît. L'efficacité d'une perquisition faite à la suite de la délivrance d'un mandat dépend beaucoup du moment de l'exécution, du degré de confidentialité qui entoure la délivrance du mandat et de l'élément de surprise qui accompagne la perquisition.

Comme il arrive souvent dans une société libre, il y a ici deux aspects de l'intérêt public qui s'affrontent. Le premier ressortit aux libertés fondamentales et à la protection de la personne contre toute atteinte à la jouissance de ses biens. Il y a un avantage public manifeste et important à éviter les perquisitions arbitraires et les saisies illégales. L'autre aspect concurrent de l'intérêt public tient à la détection et à la preuve efficaces du crime ainsi qu'à l'arrestation et à la condamnation rapides des délinquants. L'utilisation à bon escient de mandats de perquisition renforce la protection qu'assure au public l'application efficace de la loi.

En soupesant ces aspects de l'intérêt public, le législateur a fait un choix de principe clair. Il a fait prédominer les éléments de l'intérêt public que sont la détection, l'investigation et la répression des crimes sur l'intérêt particulier. Dans toute la mesure de sa portée, l'art. 443 a été adopté pour faciliter l'administration de la justice et l'application des dispositions du *Code criminel*.

III

Le *Code criminel* fournit peu d'indications sur la question de l'accès du grand public aux mandats de perquisition et aux dénonciations qui les justifient. Peu de choses ont été écrites sur le sujet. Le procureur général de la Nouvelle-Écosse appelant a invoqué l'ouvrage de Taylor, intitulé *Treatise on the Law of Evidence* (11e éd. 1920), une annotation à l'Ordonnance 63, règle 4, des Règles de cours anglaises et l'arrêt *Inland Revenue Commissionners v. Rossminster Ltd.*, [1980] 2 W.L.R. 1. Ces sources indiquent que, d'après la pratique anglaise, il n'y a pas de droit absolu d'examiner et de copier les dossiers et pièces judiciaires. Le droit

and tangible interest or proprietary right in the documents can be demonstrated.

It does seem clear that an individual who is 'directly interested' in the warrant can inspect the information and the warrant after the warrant has been executed. The reasoning here is that an interested party has a right to apply to set aside or quash a search warrant based on a defective information (*R. v. Solloway Mills & Co.*, [1930] 3 D.L.R. 293 (Alta. S.C.)). This right can only be exercised if the applicant is entitled to inspect the warrant and the information immediately after it has been executed. The point is discussed by Mr. Justice MacDonald of the Alberta Supreme Court in *Realty Renovations Ltd. v. Attorney-General for Alberta et al.* (1978), 44 C.C.C. (2d) 249 at pp. 253-54:

> Since the issue of a search warrant is a judicial act and not an administrative act, it appears to me to be fundamental that in order to exercise the right to question the validity of a search warrant, the interested party or his counsel must be able to inspect the search warrant and the information on which it is based. Although there is no appeal from the issue of a search warrant, a superior Court has the right by prerogative writ to review the act of the Justice of the Peace in issuing the warrant. In order to launch a proper application, the applicant should know the reasons or grounds for his application, which reasons or grounds are most likely to be found in the form of the information or warrant. I am unable to conceive anything but a denial of Justice if the contents of the information and warrant, after the warrant is executed, are hidden until the police have completed the investigation or until the Crown prosecutor decides that access to the file containing the warrant is to be allowed. Such a restriction could effectively delay, if not prevent review of the judicial act of the Justice in the issue of the warrant. If a warrant is void then it should be set aside as soon as possible and the earlier the application to set it aside can be heard, the more the right of the individual is protected.

The appellant, the Attorney General of Nova Scotia, does not contest the right of an 'interested party' to inspect search warrants and informations after execution. His contention is that Mr. MacIntyre, a member of the general public, not directly affected by issuance of the warrant, has no right of inspection. The question, therefore, is whether, in

n'existe que si la personne peut faire la preuve d'un intérêt certain et immédiat ou d'un droit de propriété sur les pièces.

Il semble clair qu'une personne qui est directement concernée par le mandat peut examiner la dénonciation et le mandat après que ce dernier a été exécuté. La raison en est, dans ce cas, que la partie concernée a le droit de demander l'annulation ou la cassation du mandat de perquisition qui se fonde sur une dénonciation viciée. (*R. v. Solloway Mills & Co.*, [1930] 3 D.L.R. 293 (C.S. Alta.)). Ce droit ne peut s'exercer que si le requérant peut examiner le mandat et la dénonciation immédiatement après que celui-ci a été exécuté. Le juge MacDonald, de la Cour suprême de l'Alberta, traite ce point dans l'affaire *Realty Renovations Ltd. v. Attorney-General for Alberta et al.* (1978), 44 C.C.C. (2d) 249, aux pp. 253 et 254:

> [TRADUCTION] Puisque la délivrance d'un mandat de perquisition est un acte judiciaire et non un acte administratif, il me paraît fondamental que, pour pouvoir exercer le droit de contester la validité d'un mandat de perquisition, la partie concernée ou son avocat puisse examiner le mandat de perquisition et la dénonciation sur laquelle il se fonde. Bien qu'il n'existe pas d'appel de la délivrance d'un mandat de perquisition, une cour supérieure a le droit, par bref de prérogative, de réviser l'acte du juge de paix qui délivre le mandat. Pour bien présenter sa requête, le requérant doit en connaître les raisons ou motifs qui tiennent fort probablement à la formulation de la dénonciation ou du mandat. Je ne puis rien voir d'autre qu'un déni de justice si l'on cache la teneur de la dénonciation et du mandat, après l'exécution de celui-ci, jusqu'à ce que la police ait terminé l'enquête ou jusqu'à ce que le substitut du procureur général décide de permettre la consultation du dossier où se trouve le mandat. Une telle restriction pourrait de fait retarder, sinon empêcher, la révision de l'acte judiciaire du juge de paix qui a délivré le mandat. Si un mandat est nul, il faut le déclarer nul dès que possible; le plus tôt on peut présenter la requête en annulation, le mieux on protège les droits de la personne.

Le procureur général de la Nouvelle-Écosse appelant ne conteste pas le droit d'une «partie concernée» d'examiner les mandats et les dénonciations après exécution. Il soutient que M. MacIntyre, un simple citoyen, qui n'est pas directement touché par la délivrance du mandat, n'a pas de droit d'examen. La question est donc de savoir si

law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed 'interested parties' and those members of the public who are unable to show any special interest in the proceedings.

There would seem to be only two Canadian cases which have addressed the point. In (1959-60), 2 Crim. L.Q., 119, reference is made to an unreported decision of Greschuk J. in *Southam Publishing Company v. Mack* in Supreme Court Chambers in Calgary, Alberta. Mandamus was granted requiring a magistrate to permit a reporter of the *Calgary Herald* to inspect the information and complaints which were in his possession relating to cases the magistrate had dealt with on a particular date.

In *Realty Renovations Ltd. v. Attorney-General for Alberta, supra,* MacDonald J. concluded his judgment with these words:

> I further declare that upon execution of the search warrant, the information in support and the warrant are matters of Court Record and are available for inspection on demand.

It is only fair to observe, however, that in that case the person seeking access was an "interested party" and therefore the broad declaration, quoted above, strictly speaking went beyond what was required for the decision.

American courts have recognized a general right to inspect and copy public records and documents, including judicial records and documents. Such common law right has been recognized, for example, in courts of the District of Columbia (*Nixon v. Warner Communications, Inc.* (1978), 98 S. Ct. 1306). In that case Mr. Justice Powell, delivering the opinion of the Supreme Court of the United States, observed at p. 1311:

> Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records, but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject of litigation, its contours have not been delineated with any precision.

on peut faire une distinction, en droit, quant à l'accessibilité, entre les personnes qu'on peut qualifier de «parties concernées» et les particuliers qui ne peuvent faire la preuve d'aucun intérêt spécial dans les procédures.

Il semble n'y avoir que deux arrêts canadiens qui ont examiné la question. Dans (1959-60), 2 Crim. L.Q. 119, on fait état de l'affaire *Southam Publishing Company v. Mack*, une décision non publiée rendue en chambre par le juge Greschuk de la Cour suprême à Calgary (Alberta). Il a accordé un *mandamus* qui enjoignait à un magistrat de laisser un journaliste du *Calgary Herald* consulter la dénonciation et les plaintes que le magistrat avait en sa possession relativement à des affaires dont il s'était occupé à une date donnée.

Dans *Realty Renovations Ltd. v. Attorney-General for Alberta*, précité, le juge MacDonald termine son jugement en ces termes:

> [TRADUCTION] Je déclare de plus qu'après l'exécution du mandat de perquisition, la dénonciation qui l'appuie et le mandat deviennent des pièces du dossier judiciaire qui peuvent être consultées sur demande.

Il n'est que juste cependant de souligner que dans cette affaire-là, la personne qui demandait à voir les pièces était une «partie concernée», et, en conséquence, la déclaration générale précitée va, à proprement parler, au-delà de ce qui était requis pour trancher l'affaire.

Les tribunaux américains reconnaissent un droit général de consulter et de copier les dossiers et documents publics, y compris les dossiers et documents judiciaires. Ce droit de *common law* a été admis, par exemple, par les tribunaux du district de Columbia (*Nixon v. Warner Communications, Inc.* (1978), 98 S. Ct. 1306). Dans cet arrêt, le juge Powell, qui expose l'opinion de la Cour suprême des États-Unis, fait remarquer, à la p. 1311:

> [TRADUCTION] Aussi bien le requérant que les intimées reconnaissent l'existence d'un droit, en *common law*, d'accès aux dossiers judiciaires, mais ils sont en complet désaccord sur son étendue et sur les circonstances qui en justifient la limitation. Etant peu souvent débattus en cour, les paramètres de ce droit n'ont pas été fixés avec précision.

Later, at p. 1312, Mr. Justice Powell said:

The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, *e.g., State ex rel. Colscott v. King*, 154 Ind. 621, 621-627, 57 N.E. 535, 536-538 (1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, *e.g., State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 677, 137 N.W.2d 470, 472 (1965), modified on other grounds, 28 Wis.2d 685a, 139 N.W.2d 241 (1966). But see *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896).

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'

The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice *in camera*. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity

Plus loin, à la p. 1312, le juge Powell dit:

[TRADUCTION] On a jugé que l'intérêt nécessaire pour justifier la délivrance d'une ordonnance qui oblige à laisser consulter peut être, par exemple, la volonté des simples citoyens de surveiller de près le fonctionnement des corps publics, voir par ex. *State ex rel. Colscott v. King*, 154 Ind. 621, 621-627, 57 N.E. 535, 536-538 (1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-339 (1879), et l'intention de l'éditeur d'un journal de faire paraître des renseignements sur le fonctionnement du gouvernement, voir par ex. *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 677, 137 N.W.2d 470, 472 (1965), modifié pour d'autres motifs, 28 Wis.2d 685a, 139 N.W.2d 241 (1966). Mais voir: *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896).

En raison du petit nombre de décisions judiciaires, il est difficile, et probablement peu sage, de vouloir donner une définition exhaustive du droit de consulter les dossiers judiciaires ou une délimitation précise des facteurs dont il faut tenir compte pour déterminer s'il faut en permettre la consultation. La question qui nous est soumise est limitée aux mandats de perquisition et aux dénonciations. La solution de cette question me paraît dépendre de plusieurs grands principes généraux, notamment le respect de la vie privée des particuliers, la protection de l'administration de la justice, la réalisation de la volonté du législateur de faire du mandat de perquisition un outil efficace dans la détection du crime et, enfin, d'un principe cardinal d'intérêt public qui consiste à favoriser la «transparence» des procédures judiciaires. Bentham a énoncé de façon éloquente la justification de ce dernier principe dans les termes suivants:

[TRADUCTION] «Dans l'ombre du secret, de sombres visées et des maux de toutes formes ont libre cours. Les freins à l'injustice judiciaire sont intimement liés à la publicité. Là où il n'y a pas de publicité, il n'y a pas de justice.» «La publicité est le souffle même de la justice. Elle est l'aiguillon acéré de l'effort et la meilleure sauvegarde contre la malhonnêteté. Elle fait en sorte que celui qui juge est lui-même un jugement.»

Le fait que les mandats de perquisition peuvent être délivrés par un juge de paix à huis clos n'entame pas cette préoccupation de responsabilité. Au contraire, il donne du poids à la thèse en faveur de la politique d'accessibilité. Le secret qui préside d'abord à la délivrance de mandats peut

is a strong deterrent to potential malversation.

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

IV

The appellant, the Attorney General of Nova Scotia, says in effect that the search warrants are none of Mr. MacIntyre's business. MacIntyre is not directly interested in the sense that his premises have been the object of a search. Why then should he be entitled to see them?

There are two principal arguments advanced in support of the position of the appellant. The first might be termed the 'privacy' argument. It is submitted that the privacy rights of the individuals who have been the object of searches would be violated if persons like Mr. MacIntyre were permitted to inspect the warrants. It is argued that the warrants are issued merely on proof of 'reasonable grounds' to believe that there is evidence with respect to the commission of a criminal offence in a "building, receptacle or place". At this stage of the proceedings no criminal charge has been laid and there is no assurance that a charge ever will be laid. Moreover, search warrants are often issued to search the premises of a third party who is in no way privy to any wrongdoing, but is in possession of material necessary to the inquiry. Why, it is asked, submit these individuals to embarrassment and public suspicion through release of search warrants?

The second, independent, submission of the appellant might be termed the 'administration of justice' argument. It is suggested that the effectiveness of the search warrant procedure depends to a large extent on the element of surprise. If the occupier of the premises were informed in advance of the warrant, he would dispose of the goods. Therefore, the public must be denied access to the warrants, otherwise the legislative purposes and

occasionner des abus et la publicité a une grande influence préventive contre toute inconduite possible.

En bref, ce qu'il faut viser, c'est le maximum de responsabilité et d'accessibilité, sans aller jusqu'à causer un tort à un innocent ou à réduire l'efficacité du mandat de perquisition comme arme dans la lutte continue de la société contre le crime.

IV

Le procureur général de la Nouvelle-Écosse appelant affirme que les mandats de perquisition ne concernent pas M. MacIntyre. M. MacIntyre n'est pas directement visé, en ce sens que ce ne sont pas ses locaux qui ont fait l'objet de la perquisition. Pourquoi devrait-il alors avoir le droit d'en prendre connaissance?

L'appelant avance essentiellement deux arguments en faveur de sa thèse. Le premier pourrait s'appeler l'argument relatif au droit à la vie privée. On soutient que le droit à la vie privée des personnes qui ont fait l'objet de perquisitions serait violé si l'on permettait à quelqu'un comme M. MacIntyre de consulter les mandats. On allègue que les mandats sont délivrés sur la seule preuve de l'existence de «motifs raisonnables» de croire qu'il y a des éléments de preuve de la perpétration d'un acte criminel dans un «bâtiment, contenant ou lieu». A cette étape des procédures, aucune accusation criminelle n'a encore été portée et il n'est pas sûr qu'il en soit éventuellement porté. De plus, on délivre souvent des mandats pour perquisitionner dans les locaux d'un tiers qui n'a aucunement participé à une infraction, mais qui se trouve en possession d'un objet nécessaire à l'enquête. Pourquoi, demande-t-on alors, exposer ces personnes à l'embarras et à la suspicion générale en divulguant les mandats de perquisition?

Le second argument de l'appelant, qui n'est pas lié au premier, pourrait s'appeler l'argument relatif à «l'administration de la justice». On fait valoir que l'efficacité de la procédure par mandat de perquisition dépend largement de l'effet de surprise. Si l'occupant des lieux avait connaissance du mandat avant la perquisition il se déferait des biens. En conséquence, il faut empêcher le public d'avoir accès aux mandats, ce qui autrement irait à

intention of Parliament, embodied in s. 443 of the *Criminal Code*, would be frustrated.

V

Let me deal first with the 'privacy' argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417. In the later case of *McPherson v. McPherson*, [1936] A.C. 177, at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

It is, of course, true that *Scott v. Scott* and *McPherson v. McPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy con-

l'encontre du but de la loi et de l'intention du législateur exprimés dans l'art. 443 du *Code criminel*.

V

Je prends d'abord l'argument relatif à la vie privée. Ce n'est pas la première fois qu'on soulève cet argument devant les tribunaux. On a maintes fois soutenu que le droit des parties au litige de jouir de leur vie privée exige des audiences à huis clos. Il est aujourd'hui bien établi cependant que le secret est l'exception et que la publicité est la règle. Cela encourage la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice. En règle générale, la susceptibilité des personnes en cause ne justifie pas qu'on exclut le public des procédures judiciaires. Les remarques suivantes du juge Laurence dans *R. v. Wright,* 8 T.R. 293 sont pertinentes et le juge Duff les cite et confirme dans l'arrêt *Gazette Printing Co. c. Shallow* (1909), 41 R.C.S. 339, à la p. 359:

> [TRADUCTION] Même si la publicité de ces procédures peut comporter des inconvénients pour la personne directement en cause, il est extrêmement important pour le public que les procédures des cours de justice soient connues de tous. L'avantage que tire la société de la publicité de ces procédures fait amplement contrepoids aux inconvénients que subit l'individu dont les agissements sont ainsi visés.

L'arrêt de principe est celui que la Chambre des lords a rendu dans l'affaire *Scott v. Scott*, [1913] A.C. 417. Dans l'affaire plus récente *McPherson v. McPherson*, [1936] A.C. 177, à la p. 200, lord Blanesburgh, qui prononce le jugement au nom du Conseil privé, parle de la «publicité» comme [TRADUCTION] «la marque authentique qui distingue l'acte judiciaire de l'acte administratif».

En fait, il est vrai que dans les affaires *Scott v. Scott* et *McPherson v. McPherson*, les procédures en étaient au stade du procès, alors que la délivrance d'un mandat de perquisition se fait au stade de l'enquête avant le procès. Ces arrêts cependant, ainsi que beaucoup d'autres que l'on pourrait citer, établissent le principe général de la «transparence» des procédures judiciaires, de quelque nature qu'elles soient, et de l'exercice des pouvoirs judi-

siderations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pretrial stage. Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy.

The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. *Ex parte* applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the 'open court' rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of *Halsbury's* 4th Edition states the rule in these terms:

> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera [Vol. 10, para. 705, at p. 316].

At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate

ciaires. On retrouve avant le procès les mêmes raisons de principe qui soulèvent notre répugnance à interdire l'accessibilité au stade du procès, et il y a lieu de les considérer. Le législateur a jugé bon, et à juste titre, compte tenu de l'importance de la dérogation aux droits fondamentaux que reconnaît la *common law*, de confier au judiciaire la délivrance des mandats de perquisition et les dispositions à prendre à l'égard des biens saisis, s'il en est. Je puis difficilement accepter l'opinion qu'un acte judiciaire accompli au cours d'un procès soit assujetti à l'examen minutieux du public alors qu'un acte judiciaire accompli au stade précédant le procès soit gardé secret.

Les décisions publiées ne font généralement aucune distinction entre les procédures judiciaires qui font partie intégrante du procès et les autres. Les requêtes *ex parte* en injonction, les procédures interlocutoires ou les enquêtes préliminaires ne sont pas des éléments du procès, pourtant la règle de la «publicité» des débats s'y applique. Selon les autorités, sauf à quelques exceptions bien établies, comme le cas des enfants, des malades mentaux ou des procédés secrets, les procédures judiciaires doivent toutes se dérouler en public. Le rédacteur de *Halsbury*, 4e édition, énonce la règle en ces termes:

> [TRADUCTION] En général, toutes les affaires, aussi bien civiles que criminelles, doivent être entendues en audience publique, mais dans certaines affaires exceptionnelles où la présence du public rendrait l'administration de la justice impossible, la cour peut siéger à huis clos [Vol. 10, par. 705, à la p. 316].

A chaque étape, on devrait appliquer la règle de l'accessibilité du public et la règle accessoire de la responsabilité judiciaire; tout cela en vue d'assurer qu'il n'y a pas d'abus dans la délivrance des mandats de perquisition, qu'une fois accordés, les mandats sont exécutés conformément à la loi et enfin qu'on dispose conformément à la loi des éléments de preuve saisis. Une décision de la poursuite de ne pas poursuivre nonobstant la découverte d'éléments de preuve qui paraissent établir la perpétration d'un crime peut, dans certains cas, soulever des questions importantes pour le public.

A mon avis, restreindre l'accès du public ne peut se justifier que s'il est nécessaire de protéger des valeurs sociales qui ont préséance. C'est notam-

importance. One of these is the protection of the innocent.

Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

VI

That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted *in camera*, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would

ment le cas de la protection de l'innocent.

Bien des mandats de perquisition sont délivrés et exécutés sans que rien ne soit trouvé. Dans ces cas, l'intérêt protégé par l'accès du public l'emporte-t-il sur celui de la protection des personnes chez qui une perquisition a eu lieu sans que l'on n'ait rien trouvé? Ces personnes doivent-elles souffrir l'opprobre qui entacherait leur nom et leur réputation du fait de la publicité de la perquisition? La protection de l'innocent à l'égard d'un préjudice inutile est une considération de principe valable et importante. A mon avis, cette considération l'emporte sur le principe de l'accès du public dans les cas où l'on effectue une perquisition sans rien trouver. Le droit du public à l'information doit céder le pas devant la protection de l'innocent. Si le mandat est exécuté et qu'il y a saisie, d'autres considérations entrent en jeu.

VI

Cela m'amène au second argument avancé par l'appelant. Cet argument porte que s'il était permis aux particuliers d'être présents lors de la délivrance des mandats, l'administration efficace de la justice deviendrait impossible. En conséquence, la procédure doit se dérouler à huis clos, par exception à la règle de l'audience publique. Je suis d'accord. L'administration efficace de la justice justifie que le public soit exclu des procédures qui portent sur la délivrance même du mandat. Les procureurs généraux ont démontré, à ma satisfaction du moins, que si la demande de mandat se déroulait en audience publique, la recherche d'objets relatifs aux crimes serait, au mieux, grandement entravée et, au pire, rendue tout à fait vaine. Dans une démarche où la surprise et le secret peuvent jouer un rôle décisif, l'occupant des lieux à perquisitionner serait prévenu de l'exécution du mandat, avec, comme conséquence probable, la destruction ou l'enlèvement d'éléments de preuve. Je suis d'accord avec le substitut du procureur général de l'Ontario que la présence à l'audience de particuliers, de représentants des média et éventuellement de contacts des suspects que la perquisition doit viser rendrait complètement inutile le

render the mechanism of a search warrant utterly useless.

None of the counsel before us sought to sustain the position of the Appeal Division of the Supreme Court of Nova Scotia that the issue of the search warrant is a judicial act which should be performed in open court by a justice of the peace with the public present. The respondent Mr. MacIntyre stated in paragraph 5 of his factum:

> One must note that the Respondent never sought documentation relating to unexecuted search warrants nor did he ever request to be present during the decision making process . . .

It appeared clear during argument that the act of issuing the search warrant is, in practice, rarely, if ever, performed in open court. Search warrants are issued in private at all hours of the day or night, in the chambers of the justice by day or in his home by night. Section 443(1) of the *Code* seems to recognize the possibility of exigent situations in stating that a justice may "at any time" issue a warrant.

Although the rule is that of "open court" the rule admits of the exception referred to in *Halsbury*, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit *in camera*. The issuance of a search warrant is such a case.

In my opinion, however, the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. The appellant concedes that at this point individuals who are directly 'interested' in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between

mécanisme que constitue le mandat de perquisition.

Aucun des avocats en cette Cour n'a prétendu soutenir la position adoptée par la Division d'appel de la Cour suprême de la Nouvelle-Écosse selon laquelle la délivrance d'un mandat de perquisition est un acte judiciaire qui devrait être fait à l'audience par un juge de paix en présence du public. L'intimé MacIntyre dit au paragraphe 5 de son mémoire:

> [TRADUCTION] Il faut souligner que l'intimé n'a jamais demandé à voir de pièces relatives à un mandat non exécuté ni n'a jamais demandé à être présent pendant le processus de décision . . .

Il est ressorti clairement pendant les plaidoiries que l'acte qui consiste à délivrer un mandat de perquisition n'est en réalité presque jamais, sinon jamais, fait en audience publique. Les mandats de perquisition sont délivrés en privé à toute heure du jour ou de la nuit, au cabinet du juge de paix le jour et à son domicile la nuit. Le paragraphe 443(1) du *Code* semble reconnaître la possibilité de situations d'urgence en énonçant qu'un juge de paix peut délivrer un mandat «à tout moment».

Même si la règle est celle de l'audience publique, elle comporte l'exception mentionnée dans *Halsbury*, savoir que dans les affaires exceptionnelles où la présence du public rendrait l'administration de la justice impossible, la cour peut siéger à huis clos. La délivrance d'un mandat de perquisition relève de cette catégorie.

A mon avis, cependant, la valeur de la thèse de «l'administration de la justice» diminue après l'exécution du mandat, c.-à.-d. après la visite des lieux et la perquisition. Le caractère confidentiel de la procédure a, par la suite, moins d'importance puisque les objectifs que vise le principe du secret sont en grande partie sinon complètement atteints. La nécessité de maintenir le secret a en pratique disparu. L'appelant reconnaît qu'à ce stade les particuliers qui sont directement «concernés» par le mandat ont le droit de le consulter. Dans cette mesure au moins, il tombe dans le domaine public. L'appelant doit cependant d'une certaine manière justifier l'accès aux mandats dont bénéficient les personnes directement concernées et l'interdiction

the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.

The 'administration of justice' argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (*i.e.* those 'directly interested') have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercice of the right.

I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

VII

I conclude that the administration of justice argument does justify an *in camera* proceeding at the time of issuance of the warrant but, once the warrant has been executed, exclusion thereafter of members of the public cannot normally be coun-

imposée au grand public. Je ne puis voir de raison impérative de distinguer entre le public et l'occupant des lieux où l'on a perquisitionné. C'est avec beaucoup d'hésitation que l'on se résoudra à restreindre l'accès traditionnellement absolu du public aux travaux des tribunaux.

L'argument fondé sur «l'administration de la justice» s'appuie sur la crainte que certaines personnes ne détruisent des éléments de preuve et ne privent ainsi la police des fruits de ses recherches. Même à cela, l'appelant admet que ces personnes mêmes (c.-à.-d. les personnes «directement concernées») ont le droit de voir le mandat et les pièces sur lesquelles le mandat se fonde, après qu'il a été exécuté. Les appelants ne prétendent pas à une confidentialité absolue des mandats. Logiquement, si ceux qui sont directement concernés peuvent prendre connaissance des mandats, un tiers qui n'a aucun intérêt dans l'affaire ne représente pas une menace pour l'administration de la justice. Par définition, il ne possède aucun élément de preuve qu'il pourrait détruire. Le souci de la sauvegarde des éléments de preuve et de l'administration efficace de la justice ne peut justifier qu'on exclue ce tiers.

Il n'y a pas de doute qu'une cour possède le pouvoir de surveiller et de préserver ses propres dossiers. L'accès peut en être interdit lorsque leur divulgation nuirait aux fins de la justice ou si ces dossiers devaient servir à une fin irrégulière. Il y a présomption en faveur de l'accès du public à ces dossiers et il incombe à celui qui veut empêcher l'exercice de ce droit de faire la preuve du contraire.

Je suis conscient que ce qui précède peut paraître s'écarter de la pratique anglaise, comme je l'interprète, mais cela cadre mieux, à mon avis, avec la transparence des procédures judiciaires que la jurisprudence anglaise semble préconiser.

VII

Je conclus que l'argument relatif à l'administration de la justice justifie que l'on procède à huis clos au moment de la délivrance du mandat, mais qu'une fois celui-ci exécuté, il n'est normalement pas possible d'admettre encore l'exclusion du

tenanced. The general rule of public access must prevail, save in respect of those whom I have referred to as innocent persons.

I would dismiss the appeal and vary the declaration of the Appeal Division of the Supreme Court of Nova Scotia to read as follows:

> IT IS DECLARED that after a search warrant has been executed, and objects found as a result of the search are brought before a justice pursuant to s. 446 of the *Criminal Code*, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the *Code*.

There will be no costs in this Court.

The reasons of Martland, Ritchie, Beetz and Estey JJ. were delivered by

MARTLAND J. (*dissenting*)—This appeal is from a judgment of the Appeal Division of the Supreme Court of Nova Scotia. The facts which gave rise to the case are not in dispute.

The appellant, Ernest Harold Grainger, is Chief Clerk of the Provincial Magistrate's Court at Halifax and is also a Justice of the Peace. The respondent is a television journalist employed by the Canadian Broadcasting Corporation who, at the material time, was researching a story on political patronage and fund raising. He asked the appellant, Grainger, to show him certain search warrants and supporting material and was refused on the ground that such material was not available for inspection by the general public.

The respondent gave notice to the appellants of an intended application in the Supreme Court of Nova Scotia, Trial Division, for "an Order in the nature of mandamus and/or a declaratory judgment to the effect that the search warrants and Informations relating thereto issued pursuant to Section 443 of the Criminal Code of Canada or other related or similar statutes are a matter of public record and may be inspected by a member of the public upon reasonable request".

public en général. La règle générale de l'accès du public doit prévaloir, sauf à l'égard de ceux que j'ai déjà appelés des innocents.

Je suis d'avis de rejeter le pourvoi et de modifier le jugement déclaratoire de la Division d'appel de la Cour suprême de la Nouvelle-Écosse de façon qu'il se lise ainsi:

> LA COUR DÉCLARE qu'après qu'un mandat de perquisition a été exécuté et que les objets trouvés par suite de la perquisition ont été portés devant un juge de paix conformément à l'article 446 du *Code criminel*, un particulier a le droit d'examiner le mandat et la dénonciation par suite de laquelle le mandat a été délivré conformément à l'article 443 du *Code*.

Il n'y aura pas d'adjudication de dépens en cette Cour.

Version française des motifs des juges Martland, Ritchie, Beetz et Estey rendus par

LE JUGE MARTLAND (*dissident*)—Cet appel attaque un arrêt de la Division d'appel de la Cour suprême de la Nouvelle-Écosse. Les faits qui ont donné naissance au litige ne sont pas contestés.

L'appelant Ernest Harold Grainger est greffier principal de la Cour de magistrat provinciale à Halifax et il est aussi juge de paix. L'intimé est journaliste de la télévision au service de la Société Radio-Canada et à l'époque en cause il faisait des recherches sur une affaire de favoritisme politique et de souscription de fonds. Il a demandé à l'appelant Grainger de lui montrer des mandats de perquisition et les documents justificatifs, ce qui lui fut refusé pour le motif que le public en général ne peut avoir accès à ces documents pour les consulter.

L'intimé a alors avisé les appelants qu'il s'adresserait à la Division de première instance de la Cour suprême de la Nouvelle-Écosse pour obtenir [TRADUCTION] «une ordonnance de la nature d'un *mandamus* ou d'un jugement déclaratoire ou l'un et l'autre, portant que les mandats de perquisition et les dénonciations qui s'y rapportent, délivrés en application de l'art. 443 du *Code criminel* du Canada ou d'autres lois semblables, sont des documents officiels et qu'ils peuvent être consultés par un particulier sur demande raisonnable».

The application was heard by Richard J. who ordered that the respondent "is entitled to a declaration to the effect that the Search Warrants and Informations relating thereto which have been executed upon and which are in the control of a Justice of the Peace or a Court Official are court records and are available for examination by members of the general public." It will be noted that this order was limited to search warrants which had been executed.

The appellants appealed unsuccessfully to the Appeal Division. The judgment dismissing the appeal contained the following declaration:

IT IS DECLARED that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the Criminal Code of Canada.

This declaration was broader in its scope than that made by Richard J. in that it was not limited to search warrants which had been executed. The basis for the Court's decision is set forth in the following paragraph of the reasons for judgment:

In my opinion any member of the public does have a right to inspect informations upon which seach warrants are based, pursuant to s. 443 of the Criminal Code, since the issue of the search warrant is a judicial act performed in open court by a justice of the peace. The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant. The information has become part of the record of the court as revealed at a public hearing and must be available for inspection by members of the public.

Subsection (1) of s. 443 of the *Criminal Code* provides:

443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

(*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

Le juge Richard a entendu la requête et statué que l'intimé [TRADUCTION] «a droit à un jugement déclarant que les mandats de perquisition qui ont été exécutés et les dénonciations qui s'y rapportent, qui se trouvent sous la garde du juge de paix ou du fonctionnaire d'une cour, sont des pièces du dossier judiciaire que le grand public peut consulter». Il y a lieu de noter que cette ordonnance ne porte que sur des mandats qui ont été exécutés.

Les appelants ont été déboutés en Division d'appel. L'arrêt rejetant l'appel comporte la déclaration suivante:

[TRADUCTION] IL EST STATUÉ qu'un particulier a le droit de consulter les dénonciations à l'origine des mandats de perquisition délivrés en application de l'art. 443 du Code criminel du Canada.

Cette déclaration a une portée plus étendue que celle du juge Richard qui ne portait que sur des mandats de perquisition exécutés. L'alinéa suivant des motifs du jugement énonce le fondement de l'arrêt de la Cour:

[TRADUCTION] A mon avis, tout particulier a le droit de consulter les dénonciations sur lesquelles se fondent les mandats de perquisition, en application de l'art. 443 du Code criminel, puisque la délivrance d'un mandat est un acte judiciaire accompli en audience publique par un juge de paix. Le public pourrait avoir droit d'être présent à ce moment-là et d'entendre la teneur de la dénonciation soumise au juge de paix quand on lui demande d'exercer le pouvoir qu'il possède de délivrer le mandat. Ayant été produite à une audience publique, la dénonciation est devenue partie des dossiers du tribunal et le grand public doit pouvoir y avoir accès pour le consulter.

Le paragraphe (1) de l'art. 443 du *Code criminel* est ainsi conçu:

443. (1) Un juge de paix qui est convaincu, à la suite d'une dénonciation faite sous serment suivant la formule 1, qu'il existe un motif raisonnable pour croire que, dans un bâtiment, contenant ou lieu, se trouve

a) une chose sur ou concernant laquelle une infraction à la présente loi a été commise ou est soupçonnée avoir été commise,

b) une chose qui, pour un motif raisonnable, porte à croire qu'elle fournira une preuve touchant la perpétration d'une infraction à la présente loi, ou

(*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

Section 446 of the *Criminal Code* provides that anything seized under a search warrant issued pursuant to s. 443 and brought before a justice shall be detained by him or he may order that it be detained until the conclusion of any investigation or until required to be produced for the purpose of a preliminary inquiry or trial.

Subsection (5) of s. 446 provides:

446. ...

(5) Where anything is detained under subsection (1), a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

The appellants, by leave of this Court, have appealed from the judgments of the Appeal Division. The two issues stated by the appellants are as follows:

(i) Are search warrants issued pursuant to Section 443 of the Criminal Code issued in open court and are they and the informations pertaining thereto consequently documents open for public inspection,

(ii) Whether there is otherwise a general right to inspect search warrants and the informations pertaining thereto.

With respect to the first issue, I am in agreement with my brother Dickson, for the reasons which he has given, that the broad declaration made by the Appeal Division cannot be sustained.

c) une chose qui, pour un motif raisonnable, porte à croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat,

peut, à tout moment, lancer un mandat sous son seing, autorisant une personne y nommée ou un agent de la paix à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose, la saisir et la transporter devant le juge de paix qui a décerné le mandat, ou quelque autre juge de paix de la même circonscription territoriale, afin qu'il en dispose d'après la loi.

L'article 446 du *Code criminel* prévoit que le juge de paix doit retenir tout ce qui a été saisi en exécution d'un mandat de perquisition décerné conformément à l'art. 443 et porté devant lui ou qu'il peut en ordonner la rétention jusqu'à la conclusion de toute enquête ou jusqu'à ce que sa production soit requise aux fins d'une enquête préliminaire ou d'un procès.

Le paragraphe (5) de l'art. 446 prévoit:

446. ...

(5) Lorsqu'une chose est détenue aux termes du paragraphe (1), un juge d'une cour supérieure de juridiction criminelle ou d'une cour de juridiction criminelle peut, sur demande sommaire de la part d'une personne qui a un intérêt dans la chose détenue, après un avis de trois jours francs au procureur général, ordonner qu'il soit permis à la personne par qui ou de la part de qui la demande est faite, d'examiner n'importe quelle chose ainsi détenue.

Les appelants interjettent appel de l'arrêt de la Division d'appel sur autorisation de cette Cour. Les deux questions posées par les appelants sont les suivantes:

[TRADUCTION]

(i) Les mandats de perquisition décernés conformément à l'art. 443 du Code criminel sont-ils décernés en audience publique et sont-ils en conséquence, de même que les dénonciations qui s'y rapportent, des documents que le public peut consulter?

(ii) Y a-t-il, par ailleurs, un droit général de consulter des mandats de perquisition et les dénonciations qui s'y rapportent?

Pour ce qui est de la première question, je suis d'accord avec mon collègue le juge Dickson, pour les motifs qu'il exprime, que la déclaration générale faite par la Division d'appel n'est pas défenda-

That being so, the respondent cannot assert a right to examine the search warrants and the related informations on the basis that the issuance of the search warrants was a judicial act in open court with a right for the public to be present.

That brings us to the second issue defined by the appellants as to whether there is a general right to inspect search warrants and the informations pertaining thereto. This was the real basis of the submission of the respondent who did not seek to sustain the position taken by the Appeal Division. His position is that search warrants issued under s. 443 and the informations pertaining thereto are court documents which are open to general public inspection.

The respondent relies upon an ancient English statute enacted in 1372, 46 Edward III. An English translation of this Act, which was enacted in law French, appears in a note at the end of the judgment of the Court of King's Bench in *Caddy v. Barlow* (1827), 1 Man. & Ry. 275 at pp. 279-80. I will quote that part of the note which includes the statutory provision:

It appears that originally all judicial records of the King's Courts were open to the public without restraint, and were preserved for that purpose. Lord Coke, in his preface to 3 Co. Rep. 3, speaking on this subject says, "these records, for that they contain great and hidden treasure, are faithfully and safely kept, (as they well deserve), in the king's treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto; which was the ancient law of England, and so is declared by an act of Parliament in 46 *Edw.* 3, in these words:— Also the Commons pray, that, whereas records, and whatsoever is in the King's Court, ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord, to make search or exemplification of any thing which can fall in evidence against the King, or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons (*fait as touts gentz*) of whatever record touches them in any manner, as well as that which falls against the King

ble. Il s'ensuit que l'intimé ne peut prétendre à un droit de consulter les mandats de perquisition et les dénonciations qui s'y rapportent sous prétexte que la délivrance des mandats de perquisition est un acte judiciaire accompli au cours d'une audience publique à laquelle le public a le droit d'être présent.

Cela nous amène à la seconde question soulevée par les appelants, celle de savoir s'il existe un droit général de consulter les mandats de perquisition et les dénonciations qui s'y rapportent. C'est là le fondement réel de l'argumentation de l'intimé qui n'a pas cherché à appuyer la conclusion de la Division d'appel. Il soutient que les mandats de perquisition décernés en application de l'art. 443 et les dénonciations qui s'y rapportent sont des documents judiciaires auxquels le grand public peut avoir accès pour les consulter.

L'intimé s'appuie sur une ancienne loi anglaise adoptée en 1372, 46 Edward III. Une traduction anglaise de la loi, rédigée en ancien français, figure dans une annotation à la fin du jugement de la Cour du Banc du Roi dans *Caddy v. Barlow* (1827), 1 Man. & Ry. 275, aux pp. 279 et 280. Je citerai la partie de la note qui comporte la disposition législative:

[TRADUCTION] Il ressort qu'au commencement le public avait accès à tous les dossiers judiciaires des cours royales sans restriction et que ceux-ci étaient conservés à cette fin. Lord Coke, dans la préface de 3 Co. Rep. 3, dit à ce sujet: «ces dossiers, parce qu'ils contiennent de grands trésors cachés, sont conservés fidèlement en sûreté (et c'est bien justifié) dans le trésor du Roi. Ils ne sont toutefois pas gardés de manière à empêcher tout sujet d'y avoir accès pour son besoin indispensable et son avantage; ce qui est l'ancien droit en Angleterre promulgué par une loi du Parlement sous 46 *Edw.* 3, dans les termes suivants: —Les Communes demandent de plus que, puisque les dossiers et tout ce qui se trouve dans la cour du Roi doivent nécessairement y rester, comme preuve et soutien perpétuels pour toutes les parties y présentes et pour tous ceux qu'ils concernent quand ils en ont besoin; et puisque récemment on refuse, dans la cour de notre dit Souverain de faire recherche ou copie de tout ce qui pourrait être apporté en preuve contre le Roi ou à son désavantage. Qu'il vous plaise d'ordonner par statut, que recherche et copie soient faites pour toute personne (*fait as touts gentz*) de tout document

as other persons. *Le Roy le voet.*"

The respondent cites this legislation in support of the proposition that a member of the public has access to all judicial records. However, the provisions of the statute did not go that far. It referred to "whatever record touches them in any manner". (Emphasis added.) I take this as meaning that to obtain the benefit of the statute the person had to show that the document sought to be searched in some way affected his interests.

This view is supported by the portion of the footnote which precedes the quotation of the statute. Lord Coke states that any subject may have access to the records "for his necessary use and benefit".

The case of *Caddy v. Barlow* itself related to the admissibility, in an action for malicious prosecution, of a copy of an indictment against the plaintiff which had been granted to her brother, the co-accused.

The respondent refers to the judgment of the Court of Appeal for Ontario in *The Attorney-General v. Scully* (1902), 4 O.L.R. 394, in which reference is made to *Caddy v. Barlow* and to the English statute. That case dealt with an application made to the clerk of the peace for a copy of the indictment in a criminal charge of theft against the applicant who had been acquitted. He obviously had an interest in obtaining the document.

The Appeal Division in the present case which, as previously noted, based its decision to permit the examination of the search warrants and informations upon its conclusion that these documents were produced at a judicial hearing in open court, did deal with the assertion of a general right to examine court documents in the following passage in its reasons:

In my opinion at common law courts have always exercised control over their process in open court and access to the records. Although the public have a right to any information they may gleam [*sic*] from attendance at a public hearing of a process in open court, and to those parts of the record that are part of the public presentation of the judicial proceeding in open court

qui les touche de quelque façon, aussi bien que de tout ce qui va contre le Roi que contre toutes autres personnes. *Le Roy le voet.*»

L'intimé invoque ce texte de loi pour appuyer l'argument qu'un particulier a accès à toutes les archives judiciaires. Cependant, la loi ne va pas aussi loin. Elle parle de «tout document qui les touche de quelque façon». (C'est moi qui souligne.) J'en conclus que pour se prévaloir de la disposition de la loi, la personne devait démontrer que le document dont elle voulait prendre connaissance touchait ses intérêts.

Une partie de la note en bas de page qui précède cette citation appuie cette interprétation. Lord Coke dit que tout sujet peut avoir accès aux dossiers [TRADUCTION] «pour son besoin indispensable et son avantage».

L'affaire *Caddy v. Barlow* porte elle-même sur la recevabilité, dans une action pour poursuite malveillante, d'une copie de l'acte d'accusation contre la demanderesse qui avait été accordée à son frère coaccusé.

L'intimé cite l'arrêt de la Cour d'appel de l'Ontario *The Attorney-General v. Scully* (1902), 4 O.L.R. 394 qui renvoie à l'affaire *Caddy v. Barlow* et à la loi anglaise. Cet affaire porte sur une requête faite au greffier de la paix sollicitant une copie de l'acte d'accusation dans une inculpation de vol contre le requérant qui avait été déclaré non coupable. Il avait manifestement un intérêt à obtenir le document.

Comme je l'ai déjà signalé, la Division d'appel a en l'espèce fondé sa décision de permettre la consultation des mandats de perquisition et des dénonciations sur sa conclusion que ces documents avaient été produits au cours d'une enquête judiciaire en audience publique et elle parle de l'existence d'un droit général de consulter des archives judiciaires dans le passage de ses motifs.

[TRADUCTION] A mon avis, les cours ont toujours eu la maîtrise, en *common law*, du déroulement de leurs procédures en audience publique et de l'accès à leurs dossiers. Même si le public a un droit à tout renseignement qu'il peut tirer en assistant à un procès tenu en audience publique et à cette partie du dossier qui appartient à la présentation publique de la procédure judi-

there have always been some parts of the court file that are available only to "persons interested" and this "interest" must be established to the satisfaction of the court. Parties to civil actions and the accused in criminal proceedings have always been held by the courts to be persons so interested. Other persons must establish their right to see particular documents before being entitled to do so.

The Appeal Division cited in its reasons paragraphs 1492 and 1493 of *Taylor on Evidence,* 11th ed. (The same paragraphs appear with the same numbers in the 12th edition):

1492. It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction; but it is clear that everyone has a right to inspect and take copies of the parts of the proceedings in which he is individually interested. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose. If his application be refused, the Chancery, or the King's Bench Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action. So, where a party, who had been sued in a court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.

1493. Indeed, it may be laid down as a general rule, that the King's Bench Division will *enforce by mandamus the production of every document of a public nature,* in which any one of his Majesty's subjects can prove himself to be *interested.* Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to

ciaire en audience publique, il y a toujours eu certaines portions du dossier judiciaire qui n'ont été accessibles qu'aux «personnes concernées» dont l'intérêt doit être prouvé à la satisfaction de la cour. Les cours ont toujours considéré les parties dans les actions civiles et l'accusé dans une poursuite criminelle comme des personnes ainsi concernées. Les autres personnes doivent faire la preuve de leur droit de voir certains documents avant d'être admises à le faire.

La Division d'appel a cité, dans ses motifs de jugement, les paragraphes 1492 et 1493 de *Taylor on Evidence,* 11e éd. (Les mêmes paragraphes figurent sous les mêmes numéros dans la 12e édition):

[TRADUCTION] 1492. Il n'est pas du tout certain que *les archives des tribunaux d'instance inférieure* puissent être consultées par n'importe qui, sans distinction, mais il est manifeste que toute personne a le droit de consulter et d'obtenir copie des pièces des procédures qui la concernent personnellement. Donc quiconque veut examiner un document précis de l'un de ces tribunaux, doit d'abord en faire la demande à ce tribunal et démontrer qu'il a un intérêt vis-à-vis du document en cause et qu'il le demande à une fin légitime. Si sa requête est rejetée, la Chancellerie ou la Division du Banc du Roi de la Haute Cour, sur déclaration sous serment de ce fait, pourra requérir soit la pièce elle-même soit sa copie, ou cette dernière cour obtiendra, par *mandamus*, pour le requérant, la consultation du document ou la copie demandée. Ainsi, dans le cas d'une personne qui a été déclarée coupable par un magistrat en vertu des lois sur le jeu et qui fait l'objet d'une action pour la même infraction, la Cour du Banc de la Reine a statué que cette personne avait droit à une copie de la déclaration de culpabilité; le magistrat ayant refusé de la lui donner, la Cour a accordé un bref de *certiorari* à la seule fin d'obtenir la copie et de permettre au défendeur de repousser l'action. De même, lorsqu'une personne poursuivie devant une cour de petites créances et emprisonnée pour dette a intenté une action pour abus et emprisonnement injustifié, les juges lui ont accordé une ordonnance lui permettant d'examiner toute la partie du registre des procédures qui avait trait à la poursuite dirigée contre elle.

1493. Certes, on peut affirmer en règle générale que la Division du Banc du Roi *forcera par mandamus la production de tout document de nature publique*, par lequel un sujet de sa Majesté peut démontrer qu'il est *concerné.* Donc, un fonctionnaire désigné en droit pour conserver des dossiers doit se considérer comme un fiduciaire de toutes les parties concernées et leur per-

inspect such documents as concern themselves,—without putting them to the expense and trouble of making a formal application for a mandamus. But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bona fide* required on some special and public ground, or the court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.

The first edition of this work was published in 1848, and so these propositions may be taken as representing the author's views of the law of England on this subject.

In *Halsbury's Laws of England*, 4th ed., vol. 1, para. 97, a similar statement of the law appears:

The applicant's interest in the documents must be direct and tangible. Neither curiosity, even though rational, nor the ascertainment of facts which may be useful for furthering some ulterior object, constitutes a sufficient interest to bring an applicant within the rule on which the court acts in granting a mandamus for the inspection of public documents.

Although reasonable grounds must be shown for requiring inspection, it is not necessary to show as a ground for the application for a mandamus to inspect documents that a suit has been actually instituted. It will suffice to show that there is some particular matter in dispute and that the applicant is interested therein.

It is quite clear that the respondent has no direct and tangible interest in the documents which he sought to examine. He wished to examine them to further an ulterior object, *i.e.* for the purpose of preparing a news story. Applying the rule applicable under English law, the appellant, Grainger, was entitled to refuse his request.

It is suggested that a broader right might be recognized consonant with the openness of judicial proceedings. This suggestion requires a consideration of the nature of the proceedings provided for in s. 443. That section provides a means whereby persons engaged in the enforcement of criminal law may obtain leave, *inter alia*, to search buildings, receptacles or places and seize documents or

mettre de consulter les documents qui les concernent,—sans qu'elles aient le mal de présenter une demande expresse de *mandamus* et d'en subir les frais. Le requérant doit cependant démontrer qu'il a un intérêt immédiat et réel dans les documents qu'il veut consulter et qu'il fait cette demande de bonne foi pour un motif public précis, autrement la cour n'interviendra pas en sa faveur. Donc, si son but est simplement de satisfaire une curiosité légitime, d'obtenir des renseignements d'ordre général ou de vérifier des faits qui lui seront indirectement utiles dans d'autres procédures, il ne peut demander de consulter les documents en tant que droit strict.

La première édition de cet ouvrage est parue en 1848 et on peut considérer que ces énoncés représentent l'opinion de l'auteur quant au droit anglais sur le sujet.

Dans *Laws of England* de Halsbury, 4e éd., vol. 1, par. 97, on trouve un énoncé semblable:

[TRADUCTION] L'intérêt du requérant dans les documents doit être réel et direct. Ni la curiosité, même légitime, ni la vérification de faits qui pourraient être utiles à un autre objet, ne constitue un intérêt suffisant pour rendre applicable au requérant la règle en vertu de laquelle la cour ordonne par *mandamus* qu'on le laisse consulter des documents publics.

Même s'il faut faire la preuve de motifs raisonnables pour demander de consulter des documents, il n'est pas essentiel d'invoquer comme motif d'une requête en *mandamus* visant la consultation de documents, qu'une poursuite ait effectivement été engagée. Il suffit de prouver qu'il y a un point contesté et qu'il concerne le requérant.

Il est tout à fait clair que l'intimé n'est pas concerné de façon directe et réelle par les documents qu'il veut consulter. Il veut les consulter pour réaliser une autre fin, c.-à-d. pour préparer un reportage. Si on applique la règle qui prévaut en vertu du droit anglais, l'appelant Grainger était en droit de rejeter la demande de l'intimé.

On suggère qu'on pourrait reconnaître un droit plus large en accord avec le caractère public des procédures judiciaires. Cette proposition appelle une analyse de la nature des procédures prévues à l'art. 443. Cet article donne aux personnes chargées de l'application du droit criminel la possibilité d'obtenir notamment l'autorisation de faire une perquisition dans des bâtiments, contenants ou

other things which may afford evidence with respect to the commission of a criminal offence. A justice is empowered by the section to authorize this to be done. Before giving such authority, he must be satisfied by information on oath that there is reasonable ground for believing that there is in the building, receptacle or place anything in respect of which an offence has been committed or is suspected to have been committed; anything that there is reasonable ground to believe will afford evidence of the commission of a criminal offence; or anything that there is reasonable ground to believe is intended to be used for the commission of an offence against the person for which a person may be arrested without warrant.

The function of the justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him and, in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the justice should perform his function in court. The justice does not adjudicate, nor does he make any order. His power is to give authority to do certain things which are a part of pretrial preparation by the Crown. No provision is made in either s. 443 or s. 446 for an examination by anyone of the documents on the basis of which the justice issued a search warrant.

As the function of the justice is not adjudicative and is not performed in open court, cases dealing with the requirement of court proceedings being carried on in public, such as *Scott v. Scott*, [1913] A.C. 417, and *McPherson v. McPherson*, [1936] A.C. 177, are not, in my opinion, relevant to the issue before the Court. The documents which the respondent seeks to examine are not documents filed in court proceedings. They are the necessary requirements which enable the justice to grant permission for the Crown to pursue its investigation of possible crimes and to prepare for criminal proceedings.

lieux et de saisir des documents ou autres objets qui peuvent fournir la preuve de la perpétration d'un acte criminel. L'article permet à un juge de paix d'accorder l'autorisation de le faire. Avant d'accorder cette autorisation, le juge de paix doit être convaincu, par suite d'une dénonciation faite sous serment, qu'il y a un motif raisonnable de croire qu'il y a dans le bâtiment, contenant ou lieu une chose concernant laquelle une infraction a été commise ou est soupçonnée avoir été commise; une chose qui, pour un motif raisonnable, porte à croire qu'elle fournira une preuve de la perpétration d'une infraction criminelle ou une chose qui, pour un motif raisonnable, porte à croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat.

Le rôle du juge de paix peut être vu comme un rôle judiciaire, mais pourrait être mieux qualifié comme une fonction remplie par un officier de justice, puisque aucun avis à qui que ce soit n'est exigé, qu'il n'y a pas de partie adverse devant lui et qu'en réalité, si le mandat est demandé avant l'institution des procédures, il n'existe pas de partie adverse. Il n'est pas nécessaire que le juge de paix remplisse sa fonction en cour. Le juge de paix ne juge pas et il ne rend pas d'ordonnance. Son pouvoir consiste à permettre de faire certaines choses qui font partie de la préparation du procès faite par la poursuite. Rien à l'art. 443 ni à l'art. 446 ne prévoit la consultation des documents en vertu desquels le juge de paix a décerné un mandat de perquisition.

Puisque la fonction du juge de paix n'est pas judiciaire et n'est pas remplie en audience publique, selon moi, les arrêts qui portent sur l'obligation de tenir les audiences des tribunaux en public, tels *Scott v. Scott*, [1913] A.C. 417 et *McPherson v. McPherson*, [1936] A.C. 177, ne sont pas pertinents en l'espèce. Les documents que l'intimé demande à consulter ne sont pas des documents produits à l'occasion de procédures judiciaires. Ils constituent des conditions essentielles qui permettent au juge de paix d'autoriser la poursuite à continuer d'enquêter sur des actes criminels qui ont pu être commis et à se préparer en vue des procédures pénales.

If the documents in question in this appeal are not subject to public examination prior to the execution of the search warrants, I see no logical reason why they should become subject to such examination thereafter, at least until the case in respect of which the search has been made has come to trial. It is true that a search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. The element of surprise is essential to the proper enforcement of the criminal law. There are, however, additional and important reasons why such documents should not be made public which continue even after the warrant has been executed.

The information upon oath on the basis of which a search warrant may be issued is in Form 1 contained in Part XXV of the *Criminal Code*. It requires a description of the offence in respect of which the search is to be made. The informant must state that he has reasonable grounds for believing that the things for which the search is to be made are in a particular place and must state the grounds for such belief. This document, which may be submitted to the justice before any charges have been laid, discloses the informant's statement that an offence has been committed or is intended to be committed.

The disclosure of such information before trial could be prejudicial to the fair trial of the person suspected of having committed such crime. Publication of such information prior to trial is even more serious.

In *R. v. Fisher* (1811), 2 Camp. 563, 170 E.R. 1253, a prosecution was instituted for criminal libel in consequence of the publication by the defendants of the preliminary examinations taken *ex parte* before a magistrate prior to the committal for trial of the plaintiff on a charge of assault with intent to rape. In his judgment, Lord Ellenborough said, at p. 570:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks

Si le public ne peut consulter les documents en cause dans le présent appel avant l'exécution des mandats de perquisition, je ne vois pas de raison logique d'en permettre la consultation après l'exécution, du moins jusqu'à ce que l'affaire qui a donné lieu à la perquisition vienne à procès. Il est vrai que l'examen de ces documents avant l'exécution du mandat de perquisition pourrait empêcher l'objet même du mandat de se réaliser en prévenant la personne au local de laquelle on devait perquisitionner. L'élément de surprise est essentiel à la bonne administration du droit criminel. Il y a toutefois d'autres motifs importants de ne pas rendre publics de tels documents même après l'exécution du mandat.

La dénonciation faite sous serment qui sert de fondement à la délivrance d'un mandat de perquisition se fait selon la formule I de la Partie XXV du *Code criminel*. Elle doit comporter une description de l'infraction à l'égard de laquelle on doit faire une perquisition. Le dénonciateur doit déclarer qu'il a des motifs raisonnables de croire que les objets que l'on cherche sont dans un lieu particulier et énoncer les motifs de cette conviction. Cette pièce, qui peut être présentée au juge de paix avant qu'une accusation soit portée, révèle la déclaration du dénonciateur selon laquelle quelqu'un a commis ou a l'intention de commettre une infraction.

La divulgation de cette dénonciation avant le procès pourrait empêcher la personne soupçonnée d'un tel crime de jouir d'un procès juste. La publication de ces renseignements avant le procès est encore plus grave.

Dans l'affaire *R. v. Fisher* (1811), 2 Camp. 563, 170 E.R. 1253, il y a eu poursuite pénale en diffamation à la suite de la publication par les défendeurs des enquêtes préliminaires qui s'étaient déroulées *ex parte* devant un magistrat avant le renvoi à procès du demandeur sur une inculpation de voies de fait avec intention de viol. Dans son jugement, lord Ellenborough dit, à la p. 570:

> [TRADUCTION] S'il est quelque chose qui prime sur le reste dans l'administration de la justice, c'est que les jurés arrivent au procès des personnes dont ils doivent juger de la culpabilité ou de l'innocence sans préjugés et l'esprit libre. Est-ce possible s'ils ont lu pendant les

and months before, *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert? ... The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal.

Inspection of the information and the search warrant would enable the person inspecting the documents to discover the identity of the informant. In certain types of cases this might well place the informant in jeopardy. It was this kind of risk which led to the recognition in law of the right of the police to protect from disclosure the identity of police informants. That right exists even where a police officer is testifying at a trial. The same kind of risk arises in relation to persons who give information leading to the issuance of a search warrant. For the same reasons which justify the police in refusing to disclose the identity of an informer, public disclosure of documents from which the identity of the informant may be ascertained should not be compelled.

In his reasons, my brother Dickson has referred to the fact that in recent years the search warrant has become an increasingly important investigatory aid as crime and criminals become increasingly sophisticated and has pointed out that the effectiveness of a search pursuant to a search warrant depends, *inter alia*, on the degree of confidentiality which attends the issuance of the warrant. To insure such confidentiality, it is essential that criminal organizations, such as those involved in the drug traffic, should be prevented, as far as possible, from obtaining the means to discover the identity of persons assisting the police.

Apart from the protection of the identity of the person furnishing the information upon which the issuance of a search warrant is founded, it is undesirable, in the public interest, that those engaged in criminal activities should have available to them information which discloses the pattern of police activities in connection with searches. In *Inland Revenue Commissioners v.*

semaines et les mois qui précèdent les déclarations *ex parte* au sujet de preuves défavorables à l'accusé que celui-ci n'a pas eu la possibilité de contester ni de réfuter? ... La publication des procédures des tribunaux judiciaires où les deux parties se font entendre et où les questions reçoivent une solution définitive est salutaire et, par conséquent, permise. La publication de ces enquêtes préliminaires a tendance à fausser l'esprit du public et à détourner le cours de la justice et est, en conséquence, illégale.

La consultation de la dénonciation et du mandat de perquisition permettrait à quiconque examine ces documents de connaître l'identité du dénonciateur. Dans certains genres d'affaires, cela pourrait bien mettre le dénonciateur en danger. C'est ce genre de risque qui a amené la justice à reconnaître le droit de la police de ne pas révéler l'identité de ses informateurs. Ce droit existe même pour un agent de police qui dépose à un procès. Le même genre de risque se présente pour les personnes qui fournissent des renseignements qui amènent la délivrance d'un mandat de perquisition. Pour les mêmes motifs qui justifient le refus de la police de dévoiler l'identité d'un informateur, il faut empêcher la divulgation au public de documents qui pourraient révéler l'identité du dénonciateur.

Dans ses motifs, mon collègue le juge Dickson a mentionné que depuis quelques années, le mandat de perquisition a acquis une importance accrue comme moyen d'enquête puisque le crime et les criminels deviennent de plus en plus astucieux et il a souligné que l'efficacité d'une perquisition faite par suite d'un mandat dépend, pour une part, du degré de confidentialité qui en accompagne la délivrance. Pour maintenir ce caractère confidentiel, il est essentiel qu'on empêche autant que possible les organisations de malfaiteurs, comme celles qui s'adonnent au trafic de stupéfiants, de connaître l'identité des personnes qui aident la police.

Outre la protection de l'identité de la personne qui fournit la dénonciation sur laquelle on se fonde pour délivrer le mandat de perquisition, il n'est pas souhaitable, dans l'intérêt du public, que ceux qui se livrent à des activités criminelles puissent se procurer des renseignements qui révèlent la façon dont la police procède en matière de perquisition. Dans l'arrêt *Inland Revenue Commissioners v.*

Rossminster Ltd., [1980] 2 W.L.R. 1, the House of Lords considered the validity of a search warrant procured pursuant to an English statute, the *Taxes Management Act 1970*, 1970 (U.K.), c. 9. The warrant was obtained because of suspected tax frauds. When executed, the occupants of the premises were not told the offences alleged or the "reasonable ground" on which the judge issuing the warrant had acted. In his reasons for judgment, Lord Wilberforce said, at pp. 37-38:

> But, on the plain words of the enactment, the officers are entitled if they can persuade the board and the judge, to enter and search *premises* regardless of whom they belong to: a warrant which confers this power is strictly and exactly within the parliamentary authority, and the occupier has no answer to it. I accept that some information as regards the person(s) who are alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the board and the judge. But the occupier has no right to be told of this at this stage, nor has he the right to be informed of the "reasonable grounds" of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers investigations into possible criminal offences. With reference to the police, Lord Reid stated this in these words:
>
> > "The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities. And it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution: but after a verdict has been given or it has been decided to take no proceedings there is not the same need for secrecy." (*Conway* v. *Rimmer* [1968] A.C. 910, at pp. 953-954.)

The release to the public of the contents of informations and search warrants may also be harmful to a person whose premises are permitted to be searched and who may have no personal connection with the commission of the offence. The fact that his premises are the subject of a search warrant generates suspicion that he was in some way involved in the offence. Publication of

Rossminster Ltd., [1980] 2 W.L.R. 1, la Chambre des lords examine la validité d'un mandat de perquisition délivré en exécution d'une loi anglaise intitulée *Taxes Management Act 1970*, 1970 (R.-U.), c. 9. Le mandat avait été délivré parce qu'on soupçonnait des fraudes fiscales. Au moment de l'exécution, on n'a pas indiqué aux occupants des lieux quelles étaient les infractions alléguées ou les «motifs raisonnables» sur lesquels le juge s'était fondé pour décerner le mandat. Dans ses motifs de jugement, lord Wilberforce dit, aux pp. 37 et 38:

> [TRADUCTION] Mais, en vertu du texte même de la loi, les fonctionnaires ont le droit, s'ils peuvent persuader la commission et le juge, de pénétrer dans les lieux et de perquisitionner quel que soit le propriétaire: un mandat qui donne ce pouvoir relève strictement et précisément de la compétence du Parlement, et l'occupant des lieux ne peut s'y opposer. Je conviens qu'il a tout probablement fallu fournir à la commission et au juge des renseignements sur la ou les personnes qui, selon les allégations, auraient commis une infraction et aussi, probablement, les dates approximatives des infractions. Mais l'occupant des lieux n'a pas le droit d'en être informé à ce stade, pas plus qu'il n'a le droit d'être informé des «motifs raisonnables» dont le juge a été convaincu. L'une et l'autre cour ont été du même avis à ce sujet: tous ces renseignements tombent manifestement sous l'immunité d'intérêt public qui s'applique à la recherche d'actes criminels qui auraient pu être commis. Parlant des policiers, lord Reid a dit:
>
> > «Les policiers mènent une guerre incessante aux criminels, dont beaucoup sont aujourd'hui très intelligents. Il est donc essentiel que rien ne soit révélé qui pourrait fournir des renseignements utiles à ceux qui organisent des activités criminelles. Et il serait inopportun, dans la plupart des cas, d'exiger la divulgation, dans une affaire civile, de quelque chose qui porte à conséquence dans une poursuite en instance; cependant après le prononcé du verdict ou la décision de ne pas poursuivre, la nécessité de garder le secret n'est plus la même.» (*Conway* v. *Rimmer* [1968] A.C. 910, aux pp. 953 et 954.)

La divulgation au public de la teneur des dénonciations et des mandats de perquisition peut aussi nuire à celui dont les locaux sont visés par l'autorisation de perquisitionner et qui n'a peut-être aucun lien avec la perpétration de l'infraction. Comme son local fait l'objet d'un mandat de perquisition, on pourrait le soupçonner d'être mêlé à l'infraction. La publication du fait que son local a été

the fact that such a warrant had been issued in respect of his premises would be highly prejudicial to him.

For these reasons, I am not satisfied that there is any valid reason for departing from the rule as stated in *Halsbury* (*supra*) so as to afford to the general public the right to inspect documents forming part of the search warrant procedure under s. 443.

In summary, my conclusion is that proceedings before a justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted, in accordance with the practice established in England, to persons who can show an interest in the documents which is direct and tangible. Clearly the respondent had no such interest.

I would allow the appeal and set aside the judgments of the Court of Appeal and of Richard J. In accordance with the submission of the appellants, there should be no order as to costs.

Appeal dismissed, MARTLAND, RITCHIE, BEETZ *and* ESTEY JJ. *dissenting.*

Solicitors for the appellants: Reinhold M. Endres and Mollie Gallagher, Halifax.

Solicitors for the respondent: Robert Murrant and Gordon Proudfoot, Dartmouth.

l'objet d'un tel mandat pourrait lui être très préjudiciable.

Pour ces motifs, je ne suis pas convaincu qu'il y a lieu de déroger à la règle énoncée dans *Halsbury* (précité) et d'accorder au grand public le droit de consulter les documents qui font partie intégrante de la procédure du mandat de perquisition énoncée à l'art. 443.

En résumé, je conclus que les procédures qui ont lieu devant un juge de paix en application de l'art. 443, et qui font partie de la procédure d'enquête criminelle, ne sont pas assimilables aux procédures du procès qui doivent généralement se dérouler en audience publique. Autoriser le public à consulter les documents que détient le juge de paix n'équivaut pas au droit du public d'assister à l'audience et de suivre les procédures. Il y a lieu de restreindre l'accès à ces documents, selon l'usage établi en Angleterre, aux personnes qui peuvent démontrer qu'elles sont concernées de façon directe et réelle. L'intimé n'a manifestement pas cet intérêt.

Je suis d'avis d'accueillir l'appel et d'infirmer l'arrêt de la Cour d'appel et le jugement du juge Richard. Conformément à ce qu'ont fait valoir les appelants, il n'y aura pas d'adjudication de dépens.

Pourvoi rejeté, les juges MARTLAND, RITCHIE, BEETZ *et* ESTEY *sont dissidents.*

Procureurs des appelants: Reinhold M. Endres et Mollie Gallagher, Halifax.

Procureurs de l'intimé: Robert Murrant et Gordon Proudfoot, Dartmouth.

Tab 17

Fairview Donut Inc. et al. v. The TDL Group Corp. et al.

[Indexed as: Fairview Donut Inc. v. The TDL Group Corp.]

100 O.R. (3d) 510

2010 ONSC 789

Ontario Superior Court of Justice,
Strathy J.
February 8, 2010

Civil procedure -- Sealing order -- Franchisees bringing proposed class action against franchisor -- Franchisor moving for confidentiality or sealing order restricting public access to certain documents in certification and summary judgment motion record on grounds that disclosure of those documents would cause serious harm to its financial interests -- Motion dismissed -- Open court principle particularly important in class actions -- Affected interests are private commercial interests of franchisor and its franchisees rather than broader commercial interest in preservation of confidential information or [page511] promotion of fair competition -- Salutary effects of sealing order not outweighing its deleterious effects.

The plaintiff franchisees brought a proposed class action against the defendant franchisor. The franchisor moved for a confidentiality or sealing order restricting public access to certain documents in its certification and summary judgment motion record on the grounds that disclosure of those documents would cause serious harm to its financial interests.

Held, the motion should be dismissed.

A sealing order will be granted where it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and where the salutary effects of the order outweigh its deleterious effects. In the commercial context, the court is required to distinguish between an interest that is specific to the party requesting the order and a general interest that goes beyond the interest of the party. It is particularly important that the open court principle should be observed in class proceedings, and a request for a sealing order in a class action should be approached with particular caution. In this case, the interests affected did not extend beyond the private commercial interests of the defendant and its franchisees. Those interests could not be expressed in terms of the broader commercial interest in the preservation of confidential information or the promotion of fair competition. T he information described by the defendant as "trade secrets" was of the most general nature and at the very lowest level of "secrecy". Even if an important commercial interest were engaged in this case, the salutary effects of a sealing order would not outweigh its deleterious effects. A sealing order was not required to ensure a fair trial and could have significant adverse effects on public confidence in the administration of justice.

Cases referred to

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 2002 SCC 41, 211 D.L.R. (4th) 193, 287 N.R. 203, J.E. 2002-803, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 18 C.P.R. (4th) 1, 93 C.R.R. (2d) 219, 113 A.C.W.S. (3d) 36, apld

Other cases referred to

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Laboratories v. Canada (Minister of Health), [2005] F.C.J. No. 1669, 2005 FC 1368, 45 C.P.R. (4th) 468, 143 A.C.W.S. (3d) 352; Albrecht v. Northwest Protection Services Ltd., [2005] O.J. No. 2149, 139 A.C.W.S. (3d) 644 (S.C.J.); Camoplast Inc. v. Soucy International Inc., [2003] F.C.J. No. 1791, 2003 FC 1401, 135 A.C.W.S. (3d) 214; Canwest Global Communications Corp. (Re), [2009] O.J. No. 4286, 59 C.B.R. (5th) 72, 2009 CanLII 55114 (S.C.J.); Collins v. Beach, [1998] O.J. No. 43, 24 C.P.C. (2d) 228, [1988] 1 C.T.C. 261, 8 A.C.W.S. (3d) 104 (H.C.J.); CPC International Inc. v. Seaforth Creamery Inc., [1996] O.J. No. 2059, 6 O.T.C. 188, 49 C.P.C . (3d) 382, 70 C.P.R. (3d) 434, 63 A.C.W.S. (3d) 929 (Gen. Div.); Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304; DB Trust (Trustees of) v. J.B. (Litigation guardian of) (2009), 97 O.R. (3d) 544, [2009] O.J. No. 2693, 50 E.T.R. (3d) 50 (S.C.J.); Dupont Canada Inc. v. Russel Metals Inc., [2000] O.J. No. 2043 (S.C.J.); Eli Lilly and Co. v. Apotex Inc., [2008] F.C.J. No. 1593, 2008 FC 892; [page512] Guelph (City) v. Super Blue Box Recycling Corp., [2004] O.J. No. 4468, [2004] O.T.C. 961, 2 C.P.C. (6th) 276, 134 A.C.W.S. (3d) 787 (S.C.J.); Hyundai Auto Canada, a division of Hyundai Motor America v. Cross Canada Auto Body Supply (West) Ltd., [2006] F.C.J. No. 1402, 2006 FC 1127, 151 A.C.W.S. (3d) 802; Jane Doe 1 v. Manitoba, [2008] M.J. No. 292, 2008 . MBQB 217, 66 C.P.C. (6th) 125, 232 Man. R. (2d) 157; Janhevich v. Thomas (1977), 15 O.R. (2d) 765, [1977] O.J. No. 2227, 76 D.L.R. (3d) 656, 3 C.P.C. 303, [1977] 1 A.C.W.S. 739 (H.C.J.); John Deere Ltd. v. Long Tractor Inc., [2003] S.J. No. 57, 2003 SKQB 24, [2003] 5 W.W.R. 156, 229 Sask. R. 268, 120 A.C.W.S. (3d) 583; John Labatt Ltd. v. Molson Breweries, [1993] F.C.J. No. 1343, [1994] 1 F.C. 801, 72 F.T.R. 156, 52 C.P.R. (3d) 478, 45 A.C.W.S. (3d) 621 (T.D.); Kimberly-Clark Corp. v. Procter & Gamble Inc., [1990] F.C.J. No. 451, 31 C.P.R. (3d) 207, 21 A.C.W.S. (3d) 169 (T.D.); Laboratoires Servier v. Apotex Inc., [2006] F.C.J. No. 1764, 2006 FC 1405, 153 A.C.W.S. (3d) 543; Lederer v. 372116 Ontario Ltd. (c.o.b. Hemispheres International Manufacturing Co.) (2000), 50 O.R. (3d) 282,

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Canadian Charter of Rights and Freedoms, s. 2(b)

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Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 135, (2), 137(2)

Criminal Code, R.S.C. 1985, c. C-46, ss. 486 [as am.], 486.4 [as am.]

Substitute Decisions Act, 1992, S.O. 1992, c. 30

MOTION for a sealing order.

Peter Howard and Samaneh Hosseini, for defendants/moving parties.

Jerome Morse and Agap Lim, for plaintiffs/respondents.

[1] STRATHY J.: -- The defendants ("Tim Hortons") in this proposed class action move for a "confidentiality order" or

sealing order, restricting public access to certain documents, or portions of certain documents, in their motion record on certification and summary judgment. Tim Hortons seeks this order on the ground that these documents are said to contain highly sensitive and competitive financial information, the disclosure of which would cause serious harm to their commercial interests. They propose a mechanism that would allow the plaintiff, members of the proposed class and other advisors to have access to the information while preserving its confidentiality. They also propose an ongoing process for dealing with confidential information in this case, under which parties will be allowed to designate information as confidential, subject to a ruling by the court. The motion engages the test for confidentiality orders in Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42 ("Sierra Club").

The Proposed Class Action -- Certification and Summary Judgment Motions

[2] The two putative class representatives are franchisees of the well-known Tim Hortons organization. Their action asserts two basic complaints. The first relates to a franchise-wide conversion in 2002 from a full-baking system, whereby donuts and most other baked goods were baked on-site in each store, to a method called "Always Fresh" or "par baking", where donuts and "timbits" and later sandwich buns and pastries, were baked at a central facility, frozen and shipped to the retail stores, where they were prepared in a special convection oven. The plaintiffs claim that this conversion resulted in increased costs, increased [page514] capital expenses and was a breach of their individual licence agreements.

[3] The second complaint relates to the obligation of all franchisees to provide a lunch menu -- a requirement that the plaintiffs say was imposed on franchisees, and has caused them to lose money. They say that Tim Hortons breached their licence agreements by requiring them to sell lunch menu items at unreasonably low margins.

[4] The plaintiffs assert claims in breach of contract, unjust enrichment, breach of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 and misrepresentation.

[5] Tim Hortons has delivered its responding motion record on the certification motion and in support of a motion for summary judgment, to be brought at the same time as the certification motion. The materials are voluminous and include 15 affidavits of factual witnesses and an affidavit of one expert witness and numerous exhibits, including extensive financial information.

[6] Certain material has been redacted in the motion record, or has not been included in the record, but a complete and unredacted copy has been delivered to the plaintiffs' lawyers on their undertaking to keep the material confidential pending the outcome of this motion. I have been provided with a copy of the unredacted materials. The plaintiffs have acknowledged that a confidentiality order is warranted for some of the documents and information, but not for other documents.

[7] Tim Hortons' position on the summary judgment motion is that the plaintiffs' claims are entirely without merit. It says that while the conversion to "Always Fresh" baking had the predicted result of increasing the franchisees' food costs, it has also had the expected result of reducing their labour costs, because they no longer have to hire expensive professional bakers to produce baked goods "from scratch". The result, says Tim Hortons, is that franchisees' profits have generally increased and the program has been a resounding success. Tim Hortons says that lunch items have been part of its business plan since 1986 and that every franchisee is expected to provide a lunch menu.

[8] Much of the evidence in Tim Hortons' certification and summary judgment motion record, including some of the financial information at issue on this motion, is intended to refute the plaintiffs' assertion that the conversion to par baking, and the lunch menu, resulted in increased costs and lower margins for franchisees. Tim Hortons will argue that the putative plaintiffs were inefficient operators and that their experiences are not reflective of the positive and profitable experiences of the great majority of competent franchisees. It also says that the [page515] plaintiffs' financial information and margin analysis are fundamentally flawed.

The Information at Issue

[9] A list of the documents at issue, prepared by counsel for the defendants, is attached as a schedule to this endorsement. I will describe it in more detail shortly.

[10] In his affidavit filed in support of the summary judgment motion and in response to the certification motion, Mr. David Clanachan, the chief operating officer of Tim Hortons, describes the information at issue as "sensitive commercial information that is not public and would be of considerable interest and use to the competitors of Tim Hortons and its store owners". Mr. Jeff O'Rourke, director financial analysis franchise operations, who has also filed an affidavit in support of the summary judgment motion, describes the information as "commercially sensitive information".

[11] Mr. O'Rourke elaborates on his concerns in two affidavits filed in support of the motion for a confidentiality order. As well, a supporting affidavit has been sworn by Drew McLennan, a Tim Hortons franchisee and a member of the Tim Hortons Advisory Board of franchisees. I will briefly summarize their evidence.

[12] Mr. O'Rourke describes the information sought to be protected as including "highly confidential and competitively sensitive financial and business data such as profit margins and sales information of Tim Hortons franchisees from 2001 to 2009".

[13] Mr. O'Rourke says that public disclosure of this information would give competitors useful information about Tim Hortons' costs, sales and margins that would allow them to increase their market penetration. He says information concerning the "Always Fresh" conversion would facilitate the entry of competitors into the par baking market. He claims that competitors could target geographic areas with lower than average margins and could identify regions where there is untapped demand or lower costs; suppliers and landlords could gain useful information about margins that would lead them to increase franchisees' costs.

[14] Mr. O'Rourke says that Tim Hortons is careful to secure the confidentiality of this information through confidentiality provisions in its licence agreements with its franchisees and through express notices on some of its documents.

[15] While Mr. O'Rourke acknowledges that as a public company Tim Hortons makes disclosure of consolidated business and financial information, confidentiality is not claimed for [page516] information in the public domain. He says, however, that it is the "level of granularity and detail" in the documents at issue that would make them valuable to competitors and their disclosure would cause damage to Tim Hortons and its franchisees.

[16] Mr. McLennan, a franchisee and member of the Advisory Board, agrees with Mr. O'Rourke that the information at issue is provided to or by franchisees on a confidential basis. He also says:

> I also agree with [Mr. O'Rourke] that the material he describes is competitively sensitive and if it were made public could be used by our competitors and other third parties with whom we deal to the real disadvantage of the franchisees. [Mr. O'Rourke] has detailed some of the ways that this information could be used to the detriment of the franchisees and I believe that those are all valid and additionally that there are likely other negative consequences for franchisees from potential adverse publicity likely attendant upon that publication.

[17] Mr. McLennan says that the disclosure of sales and margin information would result in "real harm" to franchisees.

[18] The defendants say that the information redacted or deleted falls into four general categories.

(a) Personal information of Tim Hortons' franchisees

[19] The information redacted includes names, addresses and phone numbers of franchisees, which Tim Hortons claims was "collected from franchisees in the expectation that it would

not be widely disseminated". The personal information is contained in exhibits 7, 16 and 40 of Mr. Clanachan's affidavit. Exhibit 7 is a 2001 disclosure document, provided to prospective franchisees. It contains a "Confidentiality Notice" on its face. Names and addresses of franchisees have been redacted. Exhibit 16 is a franchise agreement that has been attached as an example. The name of the franchisee and other personal information about the franchisee have been redacted. The amount of the licence fee and other financial information pertaining to charges to the franchisee, as well as hours of operation, have been redacted. Exhibit 40 is a powerpoint presentation made at Tim Hortons' Ontario Regional Meeting in 2003. It contains some information about the financial experience of identified franchisees.

(b) Financial information of franchisees

[20] This information is described as financial information used to track operating margins, including sales and profit and loss information. This information is collected from franchisees by Tim Hortons on the basis that it is confidential. [page517]

[21] Exhibit 35 is part of a presentation made to franchisees in 2002 concerning the "roll-out" of the "Always Fresh" system. It contains breakdowns of food and labour costs at various franchise locations. Exhibit 38 is entitled "Always Fresh Financial Update" and was prepared in 2003. The information redacted includes profit and loss results and operating margins prior to and after the "Always Fresh" conversion. Exhibits 39, 40 and 41 contain similar information. Exhibit 43 was prepared for the 2004 meetings with franchisees and contains information about food unit costs, sales revenue and comparisons of gross margins before and after the "Always Fresh" conversion. Exhibit 2 to Mr. O'Rourke's affidavit shows historical operating margins for Ontario for the period from 2002 to 2008. It is tendered in evidence to support Tim Hortons' position that historical margins have increased as a result of the introduction of the "Always Fresh" baking method.

[22] Exhibit 3 to Mr. O'Rourke's affidavit is financial information provided by Mr. Jollymore, the operator of one of

the putative class representatives, and appears to be introduced to support the assertion that the experiences of the plaintiffs are due to their own inefficiencies and that their financial performance is not representative of those of other franchisees. Exhibit 4 to Mr. O'Rourke's affidavit contains profit margin information for all regions in Canada in the period from 2002 to 2008. It appears to be introduced to support the assertion that the "Always Fresh" conversion has not had a negative effect.

(c) Competitively sensitive commercial data

[23] This category includes earnings, projections, profitability and productivity information, historical costs of food, paper and labour, pricing information, operating margins and gross margins, profit and loss results, costs versus pricing per region and breakdowns of sales by time of day.

[24] Many of the documents in this category are presentations made at the time of the "Always Fresh" conversion in 2002-2003. They consist of analyses of food and labour costs, sales, profits and margins to demonstrate historic results and to project anticipated results of the conversion. Exhibits 28, 33, 35, 37-40 and 43-45 of Mr. Clanachan's affidavit fall within this description. Several of the documents contain more current information of the same kind: exhibit 46 (historic costs vs. price of donuts and timbits 2003-2009); exhibit 2 to Mr. O'Rourke's affidavit (historic operating margins for Ontario Region 2002-2008, including costs of food, paper, labour, rent, royalty, advertising fees, operating expenses and operating margins); exhibit 4 (historical operating [page518] margins 2002-2008, including costs and sales volumes); exhibit 5 (retail price change history); and exhibit 6 (costs versus price of donuts and timbits, 2003-2009) to Mr. O'Rourke's affidavit.

[25] Exhibit 3 to Mr. O'Rourke's affidavit, referred to above, contains financial information comparing the performance of the proposed representative plaintiffs to average performance figures.

[26] Paragraph 8 of Mr. Clanachan's affidavit contains

information pertaining to the labour costs of Ontario store owners in contrast with Mr. Jollymore's -- this information has been redacted. Also redacted is para. 20 and portions of one of the exhibits that shows information concerning the percentage of sales made at various times of the day, including during lunch times. This is introduced to respond to complaints that the introduction of the lunch menu was unreasonable and to support the argument that the plaintiffs' evidence is flawed.

(d) "Trade secrets"

[27] This information is generally described as "confidential product preparation methods and procedures" relating to the preparation of Tim Hortons' products. Tim Hortons claims disclosure of this information would allow competitors to make use of its experience to gain an unfair competitive advantage.

[28] The documents that Tim Hortons wishes to redact or seal on this basis include exhibit 29, a 2003 "Production Manual" that includes instructions and procedures for "Always Fresh". It is essentially a "how to" manual for the baking system. The parties agree that it should be excluded and sealed.

[29] Exhibit 34 is an extract from a meeting of the Advisory Board in 2002 that contains information about the "Always Fresh" roll-out and some very basic information about the par baking system. It describes various products and contains simple baking information such as "Muffins . . . bake at x [degrees] for y minutes". The plaintiff does not contest the claim for confidentiality of this document. Exhibit 35 contains similar information.

Redaction for relevance

[30] In addition to these documents, certain documents have been partially redacted on the basis that the redacted portions are not relevant to the issues before the court on certification or summary judgment.

The Sierra Club Test

[31] The general principle, expressed in s. 135 of the Courts of Justice Act, R.S.O. 1990, c. C. 43, is that "all court

hearings shall be open to the public". Subsection 135(2) permits the court to [page519] exclude the public from a hearing "where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings shall be open to the public".

[32] The principle is also expressed in s. 486 of the Criminal Code, R.S.C. 1986, c. C-46, as amended, which permits exclusion of the public only where "the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security". The "proper administration of justice" includes ensuring that witnesses under the age of 18 are safeguarded and that participants in the justice system are protected. Specific provision is made in s. 486.4 to prevent publication of the names of victims of sexual offences.

[33] The importance of the open court principle has been repeatedly affirmed by the Supreme Court of Canada in a line of cases interpreting s. 2(b) of the Canadian Charter of Rights and Freedoms: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104; R. v. Mentuck, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73; Vancouver Sun (Re), [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41; and Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41. In the civil context, the principle has been most recently and definitively stated by the Supreme Court in Sierra Club.

[34] The open court principle also governs applications, such as this, to seal portions of a court file. There is no doubt that the court has inherent jurisdiction, and jurisdiction under s. 137(2) of the Courts of Justice Act, to seal a portion of the court file:

> 137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

[35] Even before Sierra Club, it was clearly established that

a sealing order is an exceptional measure that violates the open court principle, a principle that should be curtailed only "where there is present the need to protect social values of superordinate importance": Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, 132 D.L.R. (3d) 385, at pp. 186-87 S.C.R.

[36] In Sierra Club, at para. 53, the Supreme Court of Canada held that a sealing order will be granted where:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; [the necessity stage of the test] and [page520]
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings [the proportionality stage of the test].

[37] In that case, Justice Iacobucci stated, at para. 53, that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in evidence and poses a serious threat to the commercial interest in question. As this case involves interests that are primarily commercial in nature, the words I have italicized bear emphasis -- the risk must be real, substantial and well-grounded in evidence, and disclosure must pose a serious threat to the interest in question.

[38] Second, Justice Iacobucci made it clear that a "commercial" interest must be an interest that goes beyond harm to the private commercial interests of a person or a business. In order to qualify as an "important commercial interest", the interest must be one that can be expressed in terms of a public interest in confidentiality. Justice Iacobucci stated, at para. 55:

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

(Emphasis added)

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

[40] In Sierra Club, the Supreme Court granted a confidentiality order over technical information concerning an environmental assessment of a site, in China, for the construction of two CANDU nuclear reactors. The documents were the property of the Chinese authority and had been provided to Atomic Energy [page521] of Canada Limited ("AECL") on condition that they be protected by a confidentiality order. The Supreme Court found that the test had been met. Under the necessity branch of the test, there was a commercial interest in preserving contractual obligations of confidentiality. The information had been treated as confidential, had been accumulated with a reasonable expectation that it would be kept

confidential, and proprietary commercial and scientific interests would be harmed by its disclosure. There was a serious risk of harm to an important commercial interest of AECL if there was disclosure. No alternative measures were available.

[41] On the application of the proportionality branch of the test, the salutary effect of the order was to promote a fair trial, which would otherwise have been impaired if AECL could not disclose the documents. Limiting disclosure of the documents to the parties, under the protection of a confidentiality order, would promote, rather than harm, the search for the truth. Finally, the technical nature of the information, pertaining as it did to a nuclear facility, gave rise to a public security interest in the confidentiality order.

[42] The deleterious effect of the order was, in general, to impair the open court principle. In these circumstances, the Supreme Court held that the salutary effects of the confidentiality order outweighed its deleterious effects.
Application of the Sierra Club Test in Various Contexts

[43] The Sierra Club case signals an important development of the open court principle and it has been applied in a number of cases. To illustrate the types of cases, and the interests they engage, they can be grouped as follows.
Trade Secret and Intellectual Property Cases

[44] Cases of true trade secrets and patents are likely to involve important public and private interests and sealing orders have frequently been granted in such cases: see Eli Lilly and Co. v. Apotex Inc., [2008] F.C.J. No. 1593, 2008 FC 892 (F.C.); Laboratoires Servier v. Apotex Inc., [2006] F.C.J. No. 1764, 2006 FC 1405; Camoplast Inc. v. Soucy International Inc., [2003] F.C.J. No. 1791, 2003 FC 1401; Merck & Co. v. Apotex Inc., [2004] F.C.J. No. 684, 2004 FC 567; AB Hassle v. Canada (Minister of National Health and Welfare), [2000] F.C.J. No. 283, 5 C.P.R. (4th) 149 (C.A.). They have been granted prior to Sierra Club -- see, for example, Dupont Canada Inc. v. Russel Metals Inc., [2000] O.J. No. 2043 (S.C.J.); CPC International

Inc. v. Seaforth Creamery Inc., [1996] O.J. No. 2059, 70 C.P.R. (3d) 434 (Gen. Div.). [page522] In Abbott Laboratories v. Canada (Minister of Health), [2005] F.C.J. No. 1669, 2005 FC 1368, Prothonotary Milczynski of the Federal Court refused to make a confidentiality order in a patent case, although she noted that such orders were common in patent cases. She found that, on the evidence, the Sierra Club test had not been met. See, also, Hyundai Auto Canada, a division of Hyundai Motor America v. Cross Canada Auto Body Supply (West) Ltd., [2006] F.C.J. No. 1402, 2006 FC 1127. Orders were refused in Osmose-Pentox Inc. v. Socit Laurentide Inc., [2005] F.C.J. No. 2093, 2005 FC 1689; and in Novopharm Ltd. v. Company "X", [2008] F.C.J. No. 1062, 2008 FC 840.

CCAA Cases

[45] Sealing orders have been granted in several Ontario cases under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 where the release of commercial information would have undermined the efficacy of the proceedings or prejudiced the position of stakeholders: Nortel Networks (Re), [2009] O.J. No. 4487, 56 C.B.R. (5th) 224 (S.C.J.); Stelco Inc. (Re), [2006] O.J. No. 275, 17 C.B.R. (5th) 76 (S.C.J.); Canwest Global Communications Corp. (Re), [2009] O.J. No. 4286, 2009 CanLII 55114 (S.C.J.). It makes sense in such "real time" litigation that confidential information should be protected where its release would jeopardize the very purpose of the proceeding.

Cases Involving Minors or Persons Under a Disability

[46] Cases involving children frequently engage public interests that transcend the interests of the parties: DB Trust (Trustees of) v. J.B. (Litigation guardian of) (2009), 97 O.R. (3d) 544, [2009] O.J. No. 2693, 50 E.T.R. (3d) 50 (S.C.J.). So too may cases involving persons under a disability. In Phelan (Re), [1999] O.J. No. 2465, 29 E.T.R. (2d) 82 (S.C.J.), a case prior to Sierra Club, Kiteley J. granted a partial sealing order in a proceeding under the Substitute Decisions Act, 1992, S.O. 1992, c. 30.

Commercial Cases

[47] The application of Sierra Club in the commercial context

requires the court to distinguish between an interest that is specific to the party requesting the order and a general interest that goes beyond the interest of the party. In Publow v. Wilson, [1994] O.J. No. 3036, 36 C.P.C. (3d) 33 (Gen. Div.) which pre-dated Sierra Club, Spence J. refused to grant a sealing order in spite of the argument that the disclosure of a company's insolvency to its suppliers and customers might cause them to cease dealing with [page523] the company, leading to its demise and possible unemployment for hundreds of employees. Relying on the then leading case of Nova Scotia (Attorney General) v. MacIntyre, above, Spence J. stated, at para. 18:

> The disclosure of internal corporate information in the course of legal proceedings may almost always have the potential for harm to the company concerned and perhaps to others as well. This consequence of the resort to the courts is not limited to corporate parties in commercial matters; individuals may suffer from the public disclosure which ordinarily accompanies litigation. If the prospect of harm were a sufficient basis for preventing disclosure, a great many litigants might justifiably seek to have their proceedings shielded from public view, whether through a sealing order, an order for in camera proceedings or otherwise. Widespread granting of such orders could tend to diminish public confidence in the administration of justice. These considerations suggest that such orders should be available only in exceptional cases.

[48] The observations of Spence J. in Publow v. Wilson were referred to by Nordheimer J. in Lederer v. 372116 Ontario Ltd. (c.o.b. Hemispheres International Manufacturing Co.) (2000), 50 O.R. (3d) 282, [2000] O.J. No. 3000 (S.C.J.), another pre-Sierra Club case, in which the moving party sought to seal a court file containing allegedly confidential and potentially damaging information. Nordheimer J. refused to seal the file. He observed, at paras. 26 and 27, that litigation frequently involves disclosure of sensitive, embarrassing and sometimes prejudicial information, but the principle of open justice admits of limited exceptions:

> There are, of course, many instances where matters that

> parties would prefer to keep private become public because the parties become embroiled in litigation. This applies not only to corporations, both public and private, but also to individuals. Many private matters are forced into the public view as a result of the fact that litigation ensues. That is a necessary consequence of maintaining an open and public judicial system.
>
> As Madam Justice Swinton observed [in Ethyl Canada Inc. v. Canada (Attorney General), [1998] O.J. No. 315 (Gen. Div.) at para. 9], over the years courts have made exceptions to the general principle that all matters before the court must be part of the public record. Matters involving minors are one example. Matters involving trade secrets or secret processes are other examples. Customer lists and pricing information may constitute even other examples. Also, in cases where victims might be precluded, as a result of trauma and embarrassment, from pursuing a claim or giving evidence then orders restricting the openness of the proceedings may be justified. In all of these situations, though, the court must be satisfied that there is a need to protect "societal values of superordinate importance" before such restrictions on public access to the proceedings of the courts can be justified -- see MacIntyre v. Nova Scotia (Attorney-General), supra, per Dickson J. at p. 186.

[49] Subsequent to Sierra Club, requests for confidentiality orders or sealing orders have been considered and rejected in [page524] SRM Global Master Fund Limited Partnership v. Hudbay Minerals Inc., [2009] O.J. No. 797 (S.C.J.); Rieger Printing Ink Co. (Re) (2009), 94 O.R. (3d) 440, [2009] O.J. No. 755 (S.C.J.); Ontario Council of Hospital Unions v. Ontario (Minister of Health), (2007), 85 O.R. (3d) 55, [2007] O.J. No. 411 (Div. Ct.); and John Deere Ltd. v. Long Tractor Inc., [2003] S.J. No. 57, 2003 SKQB 24.

Class Action Cases

[50] Class actions, such as this one, give rise to particular concerns in dealing with requests for confidentiality. They frequently attract public attention due to their relative novelty, the public interest in the issues involved, the size

of the proposed class and the large sums at issue. Apart from the public, members of the putative class have a substantial and direct interest in the proceedings, prior to certification, and they have a particular interest in observing and understanding the proceedings. While the defendant in this action is prepared to release the information at issue to members of the putative class who undertake to be bound by the confidentiality order, such undertakings are difficult to monitor and enforce.

[51] A class action engages broader interests than in an ordinary civil action. With its goals of access to justice, efficient use of judicial resources and behaviour modification, a class action serves public purposes that go beyond the immediate interests of the parties, including members of the putative class. It is particularly important, therefore, that the open court principle should be observed in such proceedings and a request for a sealing order in a class action should be approached with particular caution.

[52] A sealing order was granted by Master MacLeod in 1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada, [2003] O.J. No. 1016, 121 A.C.W.S. (3d) 426 (S.C.J.), a proposed class action in which franchisees alleged that the defendant franchisor had failed to pass on or account for discounts that had been provided by a supplier. The parties had reached an agreement that the confidential information would be sealed and made available only to the proposed class representatives and their counsel. Members of the proposed class would have access to summaries of the information, provided they signed a confidentiality agreement. The master was satisfied that the proposed order struck an appropriate balance and was prepared to sign it. However, some of the suppliers (whose discounts were at issue) attended court, having been put on notice that their rights might be [affected]. They claimed an interest as their sensitive, and allegedly proprietary, information was at issue. They were concerned [page525] that the release of summaries of information to class members who were not named parties could potentially enable third parties to calculate their prices, costs and contractual arrangements with the defendant.

[53] It is obvious from the master's reasons, at para. 6, that he considered the information to be highly confidential and that the release would have "devastating" effects for the suppliers:

> An affidavit was filed on behalf of Parmalat [one of the suppliers]. Other suppliers appeared but only Canada Bread and Hostess Frito-Lay made submissions. Parmalat and Canada Bread appear to be in the most vulnerable position. They are exclusive suppliers of certain products and as a result of their special relationship with the defendant, they have disclosed detailed information about pricing and profit margins. This is a complex and highly competitive business in which the interests of the parties and the suppliers may be congruent for some purposes and adverse for others. I am advised that an example of this sensitivity would be an agreement to supply certain lines at close to cost while entering into an agreement with the defendant to promote other lines which have a higher profit margin. This information could be used to devastating effect by other suppliers who might bid against the current supplier in dealing with A&P, by other grocery stores with whom they will be negotiating and by other suppliers who might bid with other customers.

[54] The master granted the suppliers standing and provided that they were entitled to enforce the order if the defendant failed to do so. They were entitled to be informed of the release of information to members of the class. It is noteworthy that in this case the information sought to be protected was, like the information in Sierra Club, confidential to persons who were not parties to the litigation.

[55] Hoy J., in an unreported endorsement dated November 16, 2007 in Peter v. Medronic Inc. (05-CV-295910-PD2), granted a sealing order at the conclusion of a certification motion, at the defendant's request and without opposition from the plaintiff. She found that the documents contained commercially sensitive market information and there was evidence that one of the defendant's competitors had taken an interest in the proceeding. She found that there was a public interest in not

granting an unfair advantage to competitors of the defendant, since the public financed the class of medical devices at issue. The information subject to the sealing order was "minimal" and had not even been referred to at the hearing. In that case, the order agreed upon by counsel and approved by Hoy J. permitted the court to refer to any facts in the sealed materials in its reasons. The order was amended by Hoy J. to provide that it would expire in seven years.

[56] In Prendiville v. 407 International Inc., [2002] O.J. No. 2548, 24 C.P.C. (5th) 184 (S.C.J.), leave to appeal refused [2002] O.J. No. 3913 (Div. Ct.), [page526] a decision subsequent to Sierra Club, Nordheimer J. declined to grant a sealing order in a proposed class action against the operators of Highway 407, a toll highway. The defendants, supported by the province, sought to seal the court file, which contained agreements between the defendants and the province. The defendants claimed that the disclosure of this information would put them at a competitive disadvantage in future highway privatizations because it would disclose their costs and pricing structures to their competitors. They argued that disclosure of this information would give third parties access to information about their business and their projections as well as historical financial information that could be used in the bid process. Nordheimer J. concluded, at paras. 14 and 15, that the commercial interest of th e defendants did not meet the Sierra Club test:

> In any event where the 407 defendants fail in their request for a sealing order is in their inability to establish that there is an important public interest in the confidentiality that is sought. As I set out in the quotation from Mr. Justice Iacobucci above, the important commercial interest which has to be established to justify such an order cannot be specific to the party requesting the order. Mr. Justice Iacobucci mentioned expressly that "a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests" and yet that is essentially what the argument of the 407 defendants boils down to here. For example, at para.

16 of their factum, the 407 defendants state:

> ". . . the disclosure of the Share Purchase Agreement and the 407 Agreements will put the 407 defendants at a competitive disadvantage vis--vis their cost and pricing structure in future competitive bidding processes concerning highway development and privatization."

While no doubt arguments could be made as to the actual degree of commercial sensitivity which attaches to such information given that the prospect of future private highway acquisitions is very much speculative both in its occurrence and its timing, it would seem almost by definition to be very specific to the party whose information is involved. While it may well be that the 407 defendants will indeed be put at a commercial disadvantage if their pricing and other information is publicly revealed, that result would appear to fall squarely within the category of commercial information which Mr. Justice Iacobucci said does not constitute the type of important commercial interest justifying a confidentiality or sealing order. In fact, it would appear to more properly fall within the type of information of which Mr. Justice Spence spoke in Publow v. Wilson (1994), 36 C.P.C. (3d) 33 (Ont. Gen. Div.) at p. 39 [quoted above] . . .

[57] Confidentiality orders or sealing orders have also been granted in class actions to limit or prevent disclosure of

(a) private medical information: Logan v. Harper (2004), 72 O.R. (3d) 706, [2004] O.J. No. 4132 (S.C.J.); [page527]

(b) names of victims of sexual assault: see M.G. v. Association Selwyn House, [2008] Q.J. No. 7721, 2008 QCCS 3695; White v. Canada (Attorney General), [2006] B.C.J. No. 760, 2006 BCSC 561;

(c) financial information concerning the defendant and the names of investors and shareholders, on the settlement of the class action where other proceedings were pending in another jurisdiction: Mortillaro v. Cash Money Cheque Cashing Inc., [2009] O.J. No. 2904, 73 C.P.C. (6th) 369 (S.C.J.); and

(d) information concerning young offenders: Richard v. British Columbia, [2008] B.C.J. No. 1794, 2008 BCSC 1275.

[58] The use of pseudonyms has also been permitted where private medical information is being disclosed: Jane Doe 1 v. Manitoba, [2008] M.J. No. 292, 66 C.P.C. (6th) 125 (Q.B.).

[59] It is my understanding that confidentiality orders have been made in the case management of some class actions to protect the names of victims of mass torts and in other cases on a consent basis, where it was in the interests of both parties to keep information confidential.

Redaction Based on Relevance

[60] There is no general authority to redact documents appended to affidavits, or portions thereof, on the grounds that they are irrelevant: see Albrecht v. Northwest Protection Services Ltd., [2005] O.J. No. 2149, 139 A.C.W.S. (3d) 644 (S.C.J.); Guelph (City) v. Super Blue Box Recycling Corp., [2004] O.J. No. 4468, 2 C.P.C. (6th) 276 (S.C.J.).

[61] Requests for redaction frequently come up at the discovery stage and are often resolved on consent. Although the practice of redacting has in some cases been sanctioned by the court, the cases in which it has been permitted are usually ones in which other important interests are affected: see, for example, Kimberly-Clark Corp. v. Procter & Gamble Inc., [1990] F.C.J. No. 451, 31 C.P.R. (3d) 207 (T.D.) (patent action); Janhevich v. Thomas (1977), 15 O.R. (2d) 765, [1977] O.J. No. 2227 (H.C.J.) (personal tax returns); United States Surgical Corp. v. Downs Surgical Canada Ltd., [1981] F.C.J. No. 164, [1982] 1 F.C. 733 (T.D.) (patent action); Collins v. Beach, [1988] O.J. No. 43, 24 C.P.C. (2d) 228 (H.C.J.) (personal tax returns); Manufacturers Life Insurance Co. v. Dofasco Inc., [1989] O.J. No. 1456, 38 C.P.C. (2d) 47 (H.C.J.) (confidential and sensitive market information); [page528] John Labatt Ltd. v. Molson Breweries, [1993] F.C.J. No. 1343, [1994] 1 F.C. 801 (T.D.) (confidential and sensitive commercial information); North American Trust Co. v. Mercer International Inc., [1999] B.C.J. No. 2107, 71 B.C.L.R. (3d) 72 (S.C.), at paras. 11, 13-16 (commercially sensitive information).

Application of Sierra Club Test

[62] As Spence J. observed in Publow v. Wilson, above, at para. 18, court proceedings frequently require parties, and even witnesses who have no stake in the outcome, to disclose information that they would much rather keep to themselves. The information can be embarrassing and sometimes prejudicial, both personally and financially. Yet the principle of open courts has generally prevailed except in the limited circumstances now permitted by the Sierra Club test. In spite of this, requests for sealing orders remain commonplace. It is appropriate to observe that sealing orders impose an additional layer of complexity on an already complicated and expensive litigation process. They require that separate court files be kept, one open to the public and one not. They may require bifurcation of discovery and trial transcripts to exclude references to information in sealed documents. They may require in camera hearings where reference is made to documents that are subject to a sealin g order. This can give rise to confusion by witnesses, counsel and the court as to what is and what is not sealed. They may restrict the ability of the court to give clear and comprehensible reasons where reference to sealed documents is necessary.

[63] The request for a sealing order itself raises questions about whether notice must be given to the media and the public to give them an opportunity to contest the order and to speak in favour of the open court principle. On a practical level, this may give the proceeding more notoriety than would otherwise be the case -- or than either party might wish.

[64] Applying the Sierra Club test to the facts of this case, I am not satisfied that the interests affected extend beyond the private commercial interests of Tim Hortons and its franchisees or that these interests can be expressed in terms of the broader commercial interest in the preservation of confidential information or the promotion of fair competition. I accept that much of the information has been treated by Tim Hortons and its franchisees as confidential -- obviously in the ordinary course of their businesses, they would have absolutely no reason to disclose it to third parties or to make it public. This is true in almost every business relationship, however,

and in almost every such relationship it would be possible to characterize the [page529] "interest" in terms of a broader public interest in the preservation of confidential information.

[65] That is not, however, the real interest at stake in this motion. Tim Hortons puts the case on the basis that it and its franchisees will suffer commercial harm if the information is disclosed to competitors. While the promotion of fair competition is an important societal interest, I am not satisfied that the risk of harm in this case is real and substantial or well-grounded in the evidence. Tim Hortons' evidence of harm is speculative, general and lacking in specifics. The par baking system was introduced at very substantial costs in 2002, some eight years ago. The system itself is not unique. The notion that information on the successful implementation of the system, even at a "granular" level, would give competitors an unfair advantage is simply speculative. So is the notion that competitors, landlords and suppliers could take advantage of information on costs, sales, profit margins and other financial information, to the detriment of Tim Hortons and its franchisees. The information sought to be dis closed is not dissimilar to the information in Prendiville v. 407 International Inc., above, and it is the kind of private commercial interest that Iacobucci J. in Sierra Club expressly excluded from the scope of protection.

[66] The information described as "trade secrets" is of the most general nature and at the very lowest level of "secrecy". In order to take advantage of the information, it would be necessary to create a substantial par baking infrastructure. There is no evidence that any competitor of Tim Hortons has done so or is in a position to do so. Any competitor with the resources to do so would not likely need to know that you must bake a frozen lump of ingredients for a particular length of time at a particular temperature in order to make a muffin.

[67] As I have noted earlier, sealing orders have been routinely and appropriately granted in cases involving true trade secrets, but this case does not involve that kind of information.

[68] In light of my conclusion that the information in this case does not meet the necessity test, I need not move to the second stage of the test in Sierra Club. However, if I had found that an important commercial interest was engaged in this case, I would not have found that the salutary effects of the order outweighed its deleterious effects. First, a sealing order is not required in this case to ensure a fair trial. In Sierra Club, AECL would have been prevented from disclosing the evidence without a sealing order. The absence of a sealing order would have impaired its right to a fair trial. There is no evidence that this is the case here. Nor is there any evidence that the request for disclosure is [page530] abusive or being used for the purpose of an unfair tactical advantage -- for example, to force the defendant to settle to avoid disclosure of potentially damaging information.

[69] Second, a sealing order in this case could have significant adverse effects on public confidence in the administration of justice. The defendants' case on the motion for summary judgment depends to a large degree on the proposition that the putative plaintiffs are inefficient operators, whose experience is not representative of the class. To make out this case, the devil will be in the details and I expect that a careful analysis of the defendants' and the franchises' financial information will be required. There is a real risk that the proceedings will not be comprehensible to the public without reference to the information sought to be sealed. If a detailed examination of the sealed information is required at the hearing, the proceeding may have to be held in camera. Any analysis of this issue in reasons may require reference to the confidential information so as to be intelligible. As I said earlier, as a putative class proceeding, openness is a particularly important consideration in this case.

[70] While the consent of the parties does not absolve the court of its responsibility to ensure that court proceedings are open and transparent, I would be reluctant to compel the parties to disclose information that neither of them wishes to produce, provided that such material forms no part of the court

record. If the parties can agree to any of the redactions proposed by Tim Hortons, and can undertake that the redacted information is not material to the motions and will not be relied upon by either party, the redacted information does not need to form part of the court record. The open court principle will not be infringed by excising irrelevant confidential material as long as the public has access to the same record as the parties and the motion judge.

[71] Although procedural orders have been granted in some cases to protect documents pending a determination of confidentiality, no purpose would be served by such an order in this case.

[72] For these reasons, the defendants' motion is dismissed, with costs. If counsel are unable to agree on costs, written submissions may be addressed to me in accordance with a timetable agreed upon by counsel.

Motion dismissed. [page531]

SCHEDULE

CONFIDENTIAL INFORMATION PUT IN ISSUE BY PLAINTIFFS

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[page532]

[QL:GRAPHIC NAME="100OR3d510-2.jpg"/]

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Tab 18

Ontario Council of Hospital Unions v. Ontario (Minister of Health), [2007] O.J. No. 411

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court

L.K. Ferrier J.

Heard: October 30, 2006.

Judgment: February 2, 2007.

Court File No. 245/06

[2007] O.J. No. 411 | 85 O.R. (3d) 55 | 222 O.A.C. 9 | 40 C.P.C. (6th) 46 | 155 A.C.W.S. (3d) 83 | 2007 CarswellOnt 615

IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1990, c. J-1, as amended; AND IN THE MATTER OF the Public Hospitals Act, R.S.O. 1990, c. P-40, as amended Between Ontario Council of Hospital Unions, Ontario Health Coalition and Ontario Public Service Employees Union, Applicants, and Tony Clement, Minister of Health and Long-Term Care for the Province of Ontario and Her Majesty the Queen in Right of Ontario, Respondents

(85 paras.)

Case Summary

Civil procedure — Courts — Jurisdiction — Masters or justices of the peace — Appeal by a private health care provider from a master's decision dismissed — A group of unions sought judicial review of a provincial government decision to privatize certain health care facilities — The appellant asserted confidentiality over aspects of the record to be filed in the judicial review proceeding and a confidentiality order was granted to determine relevancy — A master subsequently ordered disclosure — The appeal court found that no party objected to the referral of the matter to a master — The master's decision did not vary the confidentiality order and contained no reversible errors — Courts of Justice Act, s. 21(3) — Rules of Civil Procedure, Rules 37.02, 54.02(1).

Health law — Hospitals and health care facilities — Administration — Funding — Appeal by a private health care provider from a master's decision dismissed — A group of unions sought judicial review of a provincial government decision to privatize certain health care facilities — The appellant asserted confidentiality over aspects of the record to be filed in the judicial review proceeding and a confidentiality order was granted to determine relevancy — A master subsequently ordered disclosure — The appeal court found that no party objected to the referral of the matter to a master — The master's decision did not vary the confidentiality order and contained no reversible errors — Courts of Justice Act, s. 21(3) — Rules of Civil Procedure, Rules 37.02, 54.02(1).

Appeal by the Healthcare Infrastructure Company of Canada from a decision by an administrative master -- Certain unions sought judicial review of approvals and funding commitments made by the respondent, the provincial Minister of Health and Long-term Care, in relation to the privatization of certain hospital facilities -- The appellant was the private sector consortium designated to build, finance and manage the new facilities -- The respondent was required by statute to file a record of the approvals at issue, but did not do so due to an

assertion of confidentiality by the appellant -- A confidentiality order was made on consent that identified the documents to receive confidential treatment -- The matter was referred to an administrative master when matters of relevancy and the content of the record to be filed by the respondent could not be resolved -- On a motion for directions by the respondent, the master ruled that the confidentiality order was not determinative of the issue and held that there was no evidence that established confidentiality in respect of the documents in question -- The appellant submitted that the master did not have jurisdiction over the subject matter, and exceeded his jurisdiction by varying the confidentiality order -- HELD: Appeal dismissed -- The master had no jurisdiction to hear the matter -- However, the judge had the power to direct a reference to the master, and no party objected to or appealed that referral -- The confidentiality order was made for the purpose of permitting the assessment of relevance, and did not establish the confidential nature of the documents, or determine whether they should be part of the public record -- Thus the master did not vary the order of the judge -- The master made no reversible error in his decision.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 7(2), s. 18, s. 19, s. 21(1), s. 21(2), s. 21(3), s. 134(2), s. 137

Judicial Review Procedure Act, R.S.O. 1990, c. J-1, s. 2, s. 4, s. 5, s. 10

Public Hospitals Act, R.S.O. 1990, c. P-40, s. 4

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194, Rule 1.03*(1), Rule 1.04(1) Rule 1.05, Rule 2.01(1), Rule 2.03, Rule 37, Rule 37.02, Rule 37.02(1), Rule 37.02(2)(a), Rule 37.02(2)(b), Rule 37.02(2)(f), Rule 37.02(2)(g), Rule 54, Rule 54.01(1), Rule 54.02(1), Rule 54.02(1)(b), Rule 54.09(1)(b), Rule 54.09(3)(b)

Counsel

Sean Dewart and Steven Shrybman for the applicants.

Leslie M. McIntosh for Tony Clement, Minister of Health and Long-Term Care for the Province of Ontario and Her Majesty the Queen in Right of Ontario.

Robert W. Staley and Evangelia L. Krialis for The Healthcare Infrastructure Company of Canada Inc.

L.K. FERRIER J.

1 This appeal from a decision of Master Polika raises significant questions of jurisdiction and procedure.

2 Does a Master have jurisdiction to hear an interlocutory motion in a Judicial Review application?

For the reasons that follow, the answer is "no".

3 May a judge, in a judicial review application, refer an interlocutory issue to a referee, in this case a Master acting as a referee?

For the reasons that follow, the answer to the question is "yes".

4 Did Winkler J. direct a reference in this case?

For the reasons that follow, the answer is "yes".

Overview

5 In September 2003, the Ontario Public Service Employees Union, the Ontario Council of Hospital Unions and the Ontario Health Care Coalition (the "applicants") filed an application for judicial review of certain decisions of the respondent Minister of Health. The applicants seek to quash a number of approvals and funding commitments pertaining to the privatization of certain hospital facilities at the William Osler Health Centre. The issues in the application concern the expenditure of substantial public funds and the delivery of health care services and raise matters of broad public concern, in addition to being of direct concern and interest to the applicants.

6 Section 10 of the *Judicial Review Procedures Act*, R.S.O. 1990, c. J-1 (*JRPA)* requires that the Minister file the record of the approvals at issue in the proceeding, forthwith after notice of the application is served. More than 2 1/2 years have passed since the application was filed, however the Minister has yet to file the record, because of assertions made by a non-party, the Healthcare Infrastructure Company of Canada Inc. ("THICC"), that parts of the record are confidential.

7 Winkler J. had been case managing the file and on May 3, 2004, he made an order that certain documents, which THICC agreed to produce, were confidential and were to be produced subject to restrictions on public access (the "Confidentiality Order"). The Confidentiality Order specifically identified the documents that were to receive confidential treatment. The Confidentiality Order was made on the consent of all parties, including the applicants. The Confidentiality Order provided that if there were issues of relevance concerning any document, the parties were to return to Winkler J. to resolve those issues.

8 The parties could not resolve issues of relevance of various documents and could not resolve issues concerning the ultimate confidentiality of documents in the hands of the Minister, which THICC asserted should be sealed and not form part of the public record.

9 The applicants wrote to Winkler J. for the purpose of scheduling a motion before him to resolve relevance and confidentiality issues.

10 Winkler J. referred the matter to the Administrative Master who in turn assigned Master Polika to deal with the matter.

11 The parties ultimately agreed to leave the outstanding questions of relevance of documents to the panel hearing the judicial review application. However, they were unable to agree on the content of the record to be filed by the Minister, specifically with respect to documents alleged by THICC to be confidential.

12 Thus, on December 2, 2005, Master Polika heard a motion brought by the Minister for directions regarding the content of the record to be publicly filed with the Divisional Court for the judicial review proceedings, pursuant to s. 10 of the *JRPA,* (the "Section 10 Record"). Upon hearing the motion, Master Polika ruled that the documents in question were to be placed in the Section 10 Record. In making his decision, Master Polika ruled that the Confidentiality Order of Winkler J. did not determine the issue. In making his order (the "Order"), Master Polika held that there was no evidence to satisfy the court that both *"Sierra Club"* tests had been met with respect to the documents THICC asserted were confidential.

13 In this appeal THICC seeks an order setting aside or varying the Master's Order on the grounds that:

(a) the Master did not have jurisdiction over the subject matter of the motion; and,

(b) the Master exceeded his jurisdiction by varying the previous order by Winkler J. concerning the production of the information by THICC.

FACTS

14 On September 22, 2003, the applicants brought an application for judicial review, amended on August 18, 2004, in the Divisional Court, seeking among other relief to quash approvals granted by the Minister, pursuant to s. 4 of the *Public Hospitals Act,* R.S.O. 1990, c. P-40, of any plans by the William Osler Health Centre or the Royal Ottawa Health Care group to permit for-profit corporations to design, build, finance, lease/own, maintain, operate, manage and use a hospital facility.

15 THICC is the private sector consortium that was selected to design, build, finance, operate, property manage and maintain new hospital facilities for both the William Osler Health Centre and the Royal Ottawa Health Care Group. It is a non-party to the judicial review proceedings.

16 The application for judicial review came before Gravely J. on September 30, 2003. He adjourned the application "to allow for filing of material and other preparation".

17 The applicants sought to obtain documents from THICC, which they asserted were necessary for a determination of the application. This request resulted in an agreement between the parties on the terms under which documents, which THICC asserted were proprietary and confidential, were to be produced. THICC then brought a motion before Winkler J. for an order regarding the protection and maintenance of the confidential documents.

18 In addition to asserting that the documents contained proprietary and confidential information, THICC asserted that they were not relevant to issues in this proceeding. On May 3, 2004, Winkler J. made the Confidentiality Order, on consent of the parties, which dealt with the production of documents to the applicants for the purpose of resolving disputes about their relevance:[1]

> THIS COURT ORDERS THAT the Confidential Information shall be disclosed to the Designated Individuals solely for the purpose of this application and, more particularly, for the purpose of permitting the Applicants to assess, through the Designated Individuals, THICC's contention that the Confidential Information is not relevant to the issues raised on this application.

19 Justice Winkler had been case managing the file. The Confidentiality Order also provided in para. 10 that:

> Any disagreement concerning the relevance of the Confidential Information ... shall be resolved on a motion brought before Justice Winkler for that purpose.

20 As stated in para. 9, the purpose of the Confidentiality Order was to permit the applicants to assess "THICC's contention that the Confidential Information is not relevant to the issues raised on this application".

21 After the applicants received and reviewed the documents in accordance with the detailed procedure provided for by the Confidentiality Order, they went back before Winkler J. for a determination of the relevance of the documents to the issues raised on the application. Justice Winkler referred the matter to the Administrative Master, who subsequently assigned it to Master Polika.

22 A number of case conferences were subsequently convened before Master Polika to resolve the relevance

issue. Ultimately, without conceding that the documents were relevant to the application, THICC agreed that this issue would be resolved by the Divisional Court panel dealing with the application on the merits.

23 This left open the question of what would be publicly filed by the Minister. Despite specifically being given an opportunity by Master Polika to do so, THICC declined to bring any motion of its own for any relief protecting the alleged confidential nature of the documents in question. The Minister therefore filed a motion before Master Polika seeking advice and directions of the Court about the filing of its record pursuant to s. 10 of the *JRPA*.

24 At the motion brought by the Minister before Master Polika, THICC argued that the documents were proprietary and confidential in nature and that public disclosure would harm its interests. It adduced no evidence on the motion.

25 THICC also argued the Master had no jurisdiction in view of the wording of Winkler J.'s Confidentiality Order.

26 It is apparent that THICC did object to the Master's jurisdiction but not on the basis argued in this appeal.

27 In my view that is of no consequence. The Master either had jurisdiction or did not. Parties cannot confer jurisdiction by waiver or consent.

28 Master Polika held that the documents were properly part of the public record and ordered the Minister to file the record, subject only to certain redactions that the applicants do not dispute. The documents in question consist solely of documents and information provided to the Minister by William Osler Health Centre, or documents produced independently by, or for, Ministry officials.

29 As noted above, on this appeal, THICC argued that Master Polika had no jurisdiction but that if he did he erred in not ordering the documents to be sealed.

30 The Master held he had jurisdiction by virtue of provisions of the *Courts of Justice Act*, R.S.O. 1990, c. 43 (*CJA*), the *JRPA* and the *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*.

31 Master Polika also held, in the alternative, that if he were incorrect in this respect, he had jurisdiction by reason of the matter having been directed on a reference to him by Winkler J., pursuant to rule 54.02(1)(b).

32 I turn now to an examination of the relevant statutes and rules concerning the jurisdiction of the Master, and the appointment and jurisdiction of a referee.

The Jurisdiction of the Master to hear Motions in Applications for Judicial Review

33 A brief history of the Superior Court's jurisdiction in prerogative writs confirms that the jurisdiction is inherent in the court.

34 The Divisional Court was created in 1970 by amendment to the *Judicature Act*, R.S.O. 1970, c. 228. Section 6 (now s. 18 of the *CJA*) established the Divisional Court as a division of the High Court of Justice of Ontario. Section 17 (now s. 19 of the *CJA*) set out the Divisional Court's jurisdiction. Clauses 17(1)(b) and (c) gave the Divisional Court jurisdiction over applications for judicial review made under *The Judicial Review Procedure Act, 1971*, S.O. 1971, v. 2, c. 48 (*JRPA, 1971*). The *JRPA, 1971* came into effect on the same day that the Divisional Court first became operative - April 17, 1972.[2]

35 Prior to this date, judicial review through the prerogative writs was exercised by the Superior Courts. The Superior Court's power to engage in judicial review derives from its inherent jurisdiction. At the time of Confederation, the Canadian Courts of Queen's Bench had the powers of the Court of King's Bench in England. The King's Bench in England was a Court of Record, possessing inherent jurisdiction independent of any statute, and had power to issue the prerogative writs.[3]

36 In Ontario, the prerogative writ of *mandamus* was first codified in 1872.[4] The first statutory expression of the writ of prohibition was set out in 1888 in rules 1137 and 1138.[5] The writ of *certiorari* was discontinued in 1888 by rule 1140 (and was later codified in the *Judicature Act* in 1908), and was replaced by an order for *certiorari* that had the same effect as the writ.[6] From Confederation to April 17, 1972 (the date the *JRPA, 1971* came into force), an order for prohibition or *mandamus* was sought through an application by originating notice to a judge in chambers, and an order for *certiorari* was sought by motion to a judge.[7]

37 Masters have no inherent jurisdiction and derive their powers from statutes: *Ernst v. Ernst*, *[1977] O.J. No. 2447* para. 4 (H.C.J.).

38 The Divisional Court is a branch of the Superior Court of Justice: *CJA*, s. 18(1).

39 The Divisional Court has limited appellate jurisdiction: *CJA,* s. 19. It also has jurisdiction in applications for Judicial Review: *JRPA* s. 2. The judicial review jurisdiction includes the power to make an order in the nature of *mandamus*, prohibition and *certiorari*; as well as an order for a declaration or injunction in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power: *JRPA*, s. 2. This judicial review jurisdiction in the Divisional Court continues the jurisdiction formerly exercised by single judges of what is now the Superior Court of Justice.

40 A proceeding in the Divisional Court (whether an appeal or application for judicial review) is required to be heard by a three-judge panel: *CJA*, s. 21(1). In limited instances, not relevant here, a proceeding may be heard and determined by one judge: *CJA,* s. 21(2).

41 Motions in the Divisional Court are dealt with in the *CJA*, s. 21(3), a provision at the core of the issue before me:

> A motion in the Divisional Court shall be heard and determined by one judge, unless otherwise provided by the rules of court.

42 Before turning to the provisions in rule 37.02, which define the jurisdiction of the Master, it is to be noted that in rule 37.02(1), a judge is given jurisdiction "to hear any motion in a proceeding."

43 A "proceeding" means an action or application and accordingly includes an application to the Divisional Court: rule 1.03(1). Thus a judge has jurisdiction to hear any motion in a judicial review application. The requirement in the *CJA*, s. 21(3), that a motion in the Divisional Court shall be heard by one judge unless otherwise provided by the rules leaves open the possibility that the rules may confer jurisdiction on the Master.

44 I turn now to the jurisdiction of the Master as provided in rule 37.02(2). The provisions relevant to this motion are as follows:

> (2) *Jurisdiction of a master* - A master has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,
>
> (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
>
> (b) to set aside, vary or amend an order of a judge;
>
> ...
>
> (f) under section 4 or 5 of the *Judicial Review Procedure Act*; or
>
> (g) in an appeal.

Thus, a Master has jurisdiction to hear any motion, subject to the exceptions listed.

45 "Any motion" would include a motion such as that heard by Master Polika, in this application for judicial review, unless the motion falls within any of the exceptions.

46 It is trite that, as provided in rule 37.02(2)(b), the Master has no jurisdiction to vary an order of a judge. THICC argues that that is what Master Polika purported to do. I disagree. The Master decided issues unrelated to the consent order of Winkler J.

47 Subsections (a) and (f) of rule 37.02(2) are particularly relevant.

48 In considering rule 37.02(2)(a) the question is whether the *CJA*, s. 21(3), expressly confers on a judge the power to grant relief in motions in the Divisional Court.

49 I note that in its use of the word "shall", s. 21(3) is mandatory. It is apparent that the concluding words of the section "unless otherwise provided by the rules" leave open the possibility that the rules may provide that some motions may be required to be heard by the panel, or indeed by the Master. However, there are no such rules.

50 I also note the difference between s. 7(2) of the *CJA*, which provides:

> A motion in the Court of Appeal shall be heard and determined by one judge.

Thus, the rules cannot confer jurisdiction on a Master for motions in appeals at the Court of Appeal.

51 Further, if Rule 37 were interpreted to give the Master jurisdiction in a judicial review application to the Divisional Court, such would produce the curious result that by operation of rule 37.02(2)(g) the Master would nevertheless not have jurisdiction in an appeal to the same court.

52 As noted, rule 37.02(2)(f) exempts from the Master's jurisdiction motions under ss. 4 or 5 of the *JRPA*:

> 4. On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application.
> 5. Despite any limitation of time for the bringing of an application for judicial review fixed by or under any Act, the court may extend the time for making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.

53 The applicants argue that the Minister's motion was not an "interim order" under s. 4 of the *JRPA*, but rather was an "interlocutory order" on a motion brought pursuant to s. 137 of the *CJA*, s. 10 of the *JRPA* and rules 1.05 and 37 of the *Rules of Civil Procedure*.

54 Further, argues the applicants, s. 4 vests a broad discretion with the court to grant interim relief, such as a stay of proceedings or other injunctive relief, when an application for judicial review is pending. Section 4 deals with *interim* orders *'on'* the application, pending *'final determination'*, and does not purport to address any and all interlocutory orders made *'in'* the proceeding, such as orders made on practice motions. The applicants submit that an "interim" order is sought to preserve the underlying positions of the parties pending a determination of any particular dispute on the merits, whereas an "interlocutory" order may deal with any number of procedural or other issues that arise within on-going litigation.

55 I note that the respondents cite no authority for the propositions advanced.

56 The use of the term "interim" and "interlocutory" in Ontario statutes is inconsistent. Certain provisions support at

least part of the applicants' proposition. For example, s. 134(2) of the *CJA* says, "On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal." Likewise, s. 49.27 of the *Law Society Act*, R.S.O. 1990, c. L-8 empowers the Hearing Panel to make an interlocutory order suspending the rights and privileges of a member or student member or restricting the manner in which a member may practise law if it is in the public interest. (Emphasis added.)

57 Yet there are also numerous examples that undermine the applicants' proposition. Clauses 48(12)(i) and 98(1)(a) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 Sch. A (*LRA*), and s. 53(9)(i) of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4 empower arbitrators and the Ontario Labour Relations Board (the "OLRB") to "make interim orders concerning procedural matters." (Emphasis added.)

58 The following are examples of bodies statutorily empowered to make interim orders that do not maintain the *status quo*:

* Clauses 98(1)(b) and (c) of the LRA empower the OLRB to make interim orders requiring an employer to reinstate a terminated employee, and to alter the terms and conditions of employment of an employee who has been subject to reprisal, penalty or discipline by the employer.
* Subsection 58(6) of the *Insurance Act*, R.S.O. 1990, c. I-8 empowers the Superintendent to make interim orders to cancel the licence of an insurer, or control the assets of an unincorporated insurer if it is in the public interest.
* Subsection 29(1) of the *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12 empowers the Council or the Executive Committee to make an interim order suspending the licence of a member who is facing discipline or whose conduct will likely cause harm to students.
* Subsections 24(1) and (2) of the *Police Services Act*, R.S.O. 1990, c. P-15 empowers the Commission to make an interim order, prior to holding a hearing, suspending a police chief for repeatedly failing to comply with prescribed standards of police services, only if it is in the public interest.
* Subsection 37(1) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 empowers the Executive Committee to make an interim order suspending the licence of a member who is facing discipline or whose conduct will likely cause harm to patients.
* Subsection 25(3) of the *Social Work and Social Service Work Act, 1998*, S.O. 1998, c. 31 empowers the Council or the Executive Committee to make an interim order suspending the licence of a member who is facing discipline or whose conduct will likely cause harm to persons.

59 In the case law, the difference between an "interim" order and an "interlocutory" order has been addressed almost exclusively within the context of injunctions.

60 In *Century Engineering Co. Ltd. v. Greto et al.*, [1961] O.R. 85 at 90 (H.C.J.), McRuer C.J.H.C. addressed the difference between an "interim" injunction and an "interlocutory" injunction:

> The authorities clearly indicate that the word "interim" in the legal sense has a well-established usage. It connotes a definite period of time with a fixed beginning and ending. It may well be that the words "interim" and "interlocutory" are used interchangeably but I do not think that they are strictly interchangeable. The term "interlocutory injunction" comprehends any order for an injunction made before the final disposition of the case.

61 Therefore an injunction that lasts until a fixed date is an "interim" injunction, and an injunction that lasts until the final disposition of a trial is an "interlocutory" injunction. This same distinction was adopted in *Solomon v. Solomon*, [1991] O.J. No. 265 at 4 (Gen. Div.) (cited to QL). However, the Divisional Court has concluded that there is no

substantive legal distinction between an interim or interlocutory injunction since the same legal test set out in *R.J.R. MacDonald*, [1994] 1 S.C.R. 311, applies: see *Kanda Tsushin Kogyo Co. v. Coveley*, [1997] O.J. No. 56 at para. 7 (Div. Ct.); *Dempster v. Mutual Life of Canada*, [2001] O.J. No. 3336 at para. 19 (Div. Ct.).

62 In my view, not only is there no substantial distinction between an "interlocutory order" and an "interim order", the terms have been used interchangeably in recent decades to such a degree that there can no longer be a rational basis for a distinction in the meaning of the terms. This is evident from the statutory references noted above. To the extent that any distinction remains, it can only be reasonably said to apply in matters of injunctions.

63 Even if I am wrong in this conclusion, the respondents' ultimate position is not saved. There remains the provision of s. 21(3) of the *CJA* requiring "a motion" to be heard by a judge and therefore is outside the jurisdiction of the Master by virtue of rule 37.02(2)(a).

64 I conclude that the learned Master had no jurisdiction *qua* Master to determine the matters before him.

The Reference

65 Following the order of Winkler J. of May 3, 2004, issues of relevance, and the confidentiality of documents in the hands of the Minister, remained unresolved. Thus, counsel for the applicants wrote a letter to Winkler J. indicating the impasse "regarding how the issue of confidentiality might be resolved," and asked for a date on which a motion might be heard.

66 In the correspondence, it was pointed out that the material "is voluminous and the documents and details of the documents are clearly part of an integrated set of transactions which are the subject of the ministerial approvals being challenged by the applicants."

67 In a written response to the request for a motion date, Winkler J. wrote in part:

> I have referred the matter to Administrative Master McLeod and have forwarded to him a copy of your correspondence.

68 Subsequently, in a series of case conferences before Master Polika, issues of relevance were left, on agreement, to be dealt with by the panel on the hearing of the application. There remained the question of what should form part of the public record filed by the Minister.

69 As noted above, no party took issue with the jurisdiction of the Master *qua* Master, although THICC took issue with the Master's jurisdiction in light of the Confidentiality Order of Winkler J. of May 3, 2006, taking the position that the issues had to be dealt with by Winkler J.

70 No party appealed the referral to the Master, and no party objected to the referral to the Master in the context of a "reference". From oral submissions on this appeal, I conclude that it did not occur to counsel at the time that Winkler J. was directing a reference under Rule 54. Nonetheless, I conclude that Winkler J. did have the power to direct such a reference and that he did so.

71 Rule 54 provides:

> 54.02(1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,
>
> (a) all affected parties consent;
>
> (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or
>
> (c) a substantial issue in dispute requires the taking of accounts.

72 Although the matter will not proceed to a "trial", it is nevertheless a "proceeding" and falls within clause (b) of subsection (1).

73 I note the oft referred to provisions of the Rules which focus the court's attention on the just and expeditious determination of proceedings:

> 1.04(1) *General principle* - These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> 2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; ...
>
> 2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

74 Rule 54.01(1) requires the order directing the reference to specify the nature and subject matter of the reference. Although no formal order was issued, this requirement was met in the exchange of correspondence.

75 No report back was required and the report of the referee (Master Polika) was, by virtue of rule 54.09(1)(b), confirmed 15 days after it was delivered. Rule 54.09(3)(b) requires that a motion opposing confirmation of the report be served within 15 days. Needless to say, no such motion was launched. I hereby extend the said 15 days and treat the appeal as a motion to oppose confirmation of the report.

76 For the following reasons, I confirm the report of the referee, Master Polika.

The Merits

77 There is a heavy onus on anyone seeking to deny public access to court documents or proceedings. It must be demonstrated that it is necessary to deny public access in order to protect a value of "super-ordinate importance.": *MacIntyre v. Nova Scotia (Attorney General)*, *[1982] 1 S.C.R. 175* at 185-187.

78 In *Sierra Club of Canada v. Canada (Minister of Finance)*, *[2002] 2 S.C.R. 522*, the Supreme Court of Canada enunciated a two-step test for determining under what circumstances the public should be denied access to court documents filed in a civil proceeding:

> (a) First, it must be established that such an order is necessary to prevent a serious risk to an important interest.
>
> (b) Second, the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

79 As Iacobucci J. explained for a unanimous court in *Sierra Club, supra*, a party seeking such a sealing order must show that the order is necessary to prevent a serious risk to an important interest including a commercial interest. In this regard, the "risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question."

80 The commercial interest in question must be one "expressed in terms of the public interest in confidentiality" and cannot simply be specific to the party requesting the order: *Prendiville v. 407 International Inc.*, *[2002] O.J. No. 2548* (Sup. Ct.), leave to appeal to Div. Ct. refused, *[2002] O.J. No. 3913*.

81 THICC argues that the learned Master erred:

(i) in finding that the Confidentiality Order of Winkler J. was irrelevant to the confidential character of the documents when the documents were in the hands of another party, the Minister, who had consented to the Confidentiality Order;

(ii) in finding that there was no evidence to satisfy the court that both *Sierra Club* tests had been met with respect to the documents THICC asserted were confidential, effectively requiring THICC to re-litigate an issue that had already been determined by Winkler J.;

(iii) by not recognizing that a consent order is of the same force and effect as other judicial orders, and is determinative of an issue; and

(iv) by varying Winkler J.'s Confidentiality Order without applying the test for amending, setting aside or varying a consent order.

82 In reference to these submissions, I note the following:

(i) The Confidentiality Order was made for the purpose of permitting the applicants "to assess the relevance" of the documents. Furthermore, the documents in question were those in the hands of the Minister, not THICC.

(ii) and (iii) THICC, although given ample opportunity to move for a confidentiality order, did not do so. Nor did it lead any evidence on the motion brought by the Minister. The Confidentiality Order did not establish the confidential nature of the documents at issue, and did not determine whether they should be part of the public record.

(iv) As indicated above, the Master did not vary the order of Winkler J.

83 The learned Master delivered a comprehensive, well reasoned decision in reference to the merits and dealt effectively with THICC's submissions. He made no reversible error in this respect.

84 Accordingly, the report of Master Polika is confirmed and the appeal is dismissed.

85 If the parties are unable to agree on costs, they may make brief written submissions within 20 days, with a right of reply within a further 10 days.

L.K. FERRIER J.

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1 The order dealt with two categories of documents, namely un-redacted copies of the plans and leases for the Public-Private Partnership scheme (the "P3 scheme") that had previously been provided in redacted form by the Ministry, and additional documents about the P3 scheme, which had not been shared with or reviewed by the Ministry. Documents and materials in this second category are not the subject of this appeal.

2 The Honourable Mr. Justice R.F. Reid, "Jurisdiction of the Divisional Court" (Statutory powers and judicial review: edited proceedings from the programme held on November 27, 1976) at pp. 3-4 [Toronto: Dept. of Continuing Education, Law Society of Upper Canada, c1978].

3 David J. Mullan, ed., *Administrative Law: Cases, Text and Material*, 5th ed. (Toronto: Emond Montgomery Publications Limited, 2003) at 1093; *Simmons and Dalton (Re)*, [1886] O.J. No. 80 at para. 26 (H.C.J.Ch.D.) (QL); *McDonald's Restaurants of Can. Ltd. v. Humm*, [1983] O.J. No. 2445 at para. 72 (Co. Ct.) (QL).

4 George Smith Homestead et al., *Homestead and Gale on the Judicature Act of Ontario and Rules of Practice*, looseleaf (Toronto, On.: Carswell, 2006), Vol. 1 p. 164 ss. 30-31; Vol. 4, p. 2588 ss. 3-4 [Homestead and Gale]

5 *Ibid*. Vol. 4., p. 2615 s. 35.

6 *Ibid*. Vol. 4., p. 2650 s. 75.

7 *Ibid.*, Vol. 4, p. 2592.6 s. 11 [order of *mandamus*]; Vol. 4., p. 2618 s. 40 [order of prohibition]; Vol. 4., pp. 2666.8, 2666.10 ss. 87, 89 [order of *certiorari*].

End of Document

Tab 19

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(*b*) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale* (« *LCÉE* ») exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la *Charte* parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2*b*). On ne doit l'accorder que (1) lorsqu'elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(*b*), 8, 54, 54(2)(*b*).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and *Peter Chapin*, for the appellant.

Timothy J. Howard and *Franklin S. Gertler*, for the respondent Sierra Club of Canada.

Graham Garton, *Q.C.*, and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)*b*), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et *Peter Chapin*, pour l'appelante.

Timothy J. Howard et *Franklin S. Gertler*, pour l'intimé Sierra Club du Canada.

Graham Garton, *c.r.*, et *J. Sanderson Graham*, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le

issues of when, and under what circumstances, a confidentiality order should be granted.

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

II. Facts

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

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

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

In the course of the application by Sierra Club to set aside the funding arrangements, the appellant

pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

2 Pour les motifs qui suivent, je suis d'avis de rendre l'ordonnance de confidentialité demandée et par conséquent d'accueillir le pourvoi.

II. Les faits

3 L'appelante, Énergie atomique du Canada Limitée (« ÉACL »), société d'État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l'intimé, Sierra Club du Canada (« Sierra Club »), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d'emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l'appelante. Les réacteurs sont actuellement en construction en Chine, où l'appelante est entrepreneur principal et gestionnaire de projet.

4 L'intimé soutient que l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, ch. 37 (« *LCÉE* »), qui exige une évaluation environnementale avant qu'une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d'évaluation entraîne l'annulation des ententes financières.

5 Selon l'appelante et les ministres intimés, la *LCÉE* ne s'applique pas à la convention de prêt et si elle s'y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L'article 8 prévoit les circonstances dans lesquelles les sociétés d'État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu'elles soient compatibles avec les dispositions de la *LCÉE*.

6 Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l'appelante a

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

déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l'affidavit, M. Pang mentionne et résume certains documents (les « documents confidentiels ») qui sont également mentionnés dans un affidavit de M. Feng, un expert d'ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu'il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L'appelante s'oppose pour plusieurs raisons à la production des documents, dont le fait qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l'autorisation de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, l'appelante a cherché à les produire en invoquant la règle 312 des *Règles de la Cour fédérale (1998)*, DORS/98-106, et a demandé une ordonnance de confidentialité à leur égard.

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

Aux termes de l'ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l'accès du public aux débats. On demande essentiellement d'empêcher la diffusion des documents confidentiels au public.

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

Les documents confidentiels comprennent deux Rapports d'impact environnemental (« RIE ») sur le site et la construction, un Rapport préliminaire d'analyse sur la sécurité (« RPAS ») ainsi que l'affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S'ils étaient admis, les rapports seraient joints en annexe de l'affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l'appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l'évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

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

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

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

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

IV. Judgments Below

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

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

9 Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

10 La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

11 *Règles de la Cour fédérale (1998)*, DORS/98-106

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. *Cour fédérale, Section de première instance*, [2000] 2 C.F. 400

12 Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes

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

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

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

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

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the

interlocutoires qui ont entraîné les délais, les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : « J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne » (par. 23).

Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante,

appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

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

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

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

par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

17 En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL, le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, « les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité » (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

18 Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

19 Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

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

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

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

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

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

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

Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. *Cour d'appel fédérale*, [2000] 4 C.F. 426

(1) Le juge Evans (avec l'appui du juge Sharlow)

ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*, et Sierra Club forme un appel incident en vertu de la règle 312.

Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)*b*) de la *LCÉE* doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la *LCÉE*. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids

the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

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

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

Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without

comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

24 À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360 (C.A.), où la cour a tenu compte du peu d'intérêt du public, et *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la *LCÉE*, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

25 Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doive être écartée. Le juge Evans est d'avis que l'erreur n'entâche pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

26 Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

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

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

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

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

sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

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

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

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

Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l'imputabilité dans l'exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l'emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

Il fait observer qu'en droit commercial, lorsque les renseignements qu'on cherche à protéger ont trait à des « secrets industriels », ils ne sont pas divulgués au procès lorsque cela aurait pour effet d'annihiler les droits du propriétaire et l'exposerait à un préjudice financier irréparable. Il conclut que, même si l'espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d'une ordonnance de confidentialité (au par. 13) :

1) les renseignements sont de nature confidentielle et non seulement des faits qu'une personne désire ne pas divulguer; 2) les renseignements qu'on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont « nécessaires » à la résolution de ces questions; 6) l'octroi d'une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l'intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l'ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l'ordonnance de confidentialité. Pour le septième critère, c'est la partie adverse qui doit démontrer que le droit *prima facie* à une ordonnance de non-divulgation doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l'ai dit au tout début, je ne crois pas que le degré d'importance qu'on croit que le public accorde à une affaire soit une considération pertinente.

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

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

V. Issues

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

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

VI. Analysis

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

(1) The General Framework: Herein the *Dagenais* Principles

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

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

Appliquant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. *Méthode d'analyse applicable aux ordonnances de confidentialité*

(1) Le cadre général : les principes de l'arrêt *Dagenais*

Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480. Le juge La Forest l'exprime en ces termes au par. 23 :

> Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2*b*). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur

freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place.

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

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

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

Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at

le fonctionnement des tribunaux relève clairement de la liberté garantie à l'al. 2*b*), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

37 L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

38 Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans *Dagenais* fait appel aux principes déterminants de la *Charte canadienne des droits et libertés* afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par *Dagenais*, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

39 L'affaire *Dagenais* porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et

religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

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

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(*b*) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, at para. 33;

sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la *Charte*. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la *Charte* de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103. À la page 878 de *Dagenais*, le juge en chef Lamer énonce le critère reformulé :

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

Dans *Nouveau-Brunswick*, précité, la Cour modifie le critère de l'arrêt *Dagenais* dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un « préjudice indu » aux victimes et à l'accusé.

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2*b*) en créant un « pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux

however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

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

This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(*d*) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the

tribunaux » (*Nouveau-Brunswick*, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la *Charte*. Donc l'analyse de l'exercice du pouvoir discrétionnaire en vertu du par. 486(1) du *Code criminel*, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par *Dagenais* :

> a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;
>
> b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et
>
> c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la « nature délicate » des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

43 La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, et l'arrêt connexe *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77. Dans *Mentuck*, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11*d*) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

44 La Cour fait remarquer que *Dagenais* traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, le

accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to

droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d'ordonner des interdictions de publication n'est pas assujetti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l'essence de l'article premier de la *Charte* et le critère *Oakes* dans l'analyse applicable aux interdictions de publication. Comme le même objectif s'applique à l'affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l'accusé à un procès équitable) de manière à fournir un guide à l'exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression « bonne administration de la justice » doit être interprétée

allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

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

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

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

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

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

47 Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

> Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [. . .] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

48 *Mentuck* illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the *CEAA*, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

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

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

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

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

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

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

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

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

B. *Application of the Test to this Appeal*

(1) Necessity

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

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

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. nº 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

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

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

l'exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu'ils ont été « recueillis dans l'expectative raisonnable qu'ils resteront confidentiels », par opposition à « des faits qu'une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l'appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu'il s'agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d'ÉACL (par. 16). Par conséquent, l'ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

Le premier volet de l'analyse exige aussi l'examen d'options raisonnables autres que l'ordonnance de confidentialité, et de la portée de l'ordonnance pour s'assurer qu'elle n'est pas trop vaste. Les deux jugements antérieurs en l'espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l'appelante en vertu de la *LCÉE*, et cette conclusion n'est pas portée en appel devant notre Cour. De plus, je suis d'accord avec la Cour d'appel lorsqu'elle affirme (au par. 99) que vu l'importance des documents pour le droit de présenter une défense pleine et entière, l'appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l'appelante, il ne reste qu'à déterminer s'il existe d'autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

Deux options autres que l'ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

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

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

La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

64 Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

65 De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de

authorities require prior approval for any request by AECL to disclose information.

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

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

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

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour « dans une large mesure, compenser [leur] absence » (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une « autre option raisonnable » à la communication aux parties des documents de base.

Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) L'étape de la proportionnalité

Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit

expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

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

Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and

à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) *Les effets bénéfiques de l'ordonnance de confidentialité*

70 Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la *Charte*; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : *Ryan*, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la *Charte*, la bonne administration de la justice exige une ordonnance de confidentialité : *Mentuck*, précité, par. 31. En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

71 Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la *LCÉE* s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

72 En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au

permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

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

(b) *Deleterious Effects of the Confidentiality Order*

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

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

b) *Les effets préjudiciables de l'ordonnance de confidentialité*

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2*b*) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

Les valeurs fondamentales qui sous-tendent la liberté d'expression sont (1) la recherche de la vérité et du bien commun; (2) l'épanouissement personnel par le libre développement des pensées et des idées; et (3) la participation de tous au processus politique : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; *R. c. Keegstra*, [1990]

927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(*b*) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

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

3 R.C.S. 697, p. 762-764, le juge en chef Dickson. La jurisprudence de la *Charte* établit que plus l'expression en cause est au cœur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la *Charte*, une atteinte à l'al. 2*b*) à son égard : *Keegstra*, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la *Charte*, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

76 La recherche de la vérité est non seulement au cœur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : *Edmonton Journal*, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

77 Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appelante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-

documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

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

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

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would

interrogatoire. De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même

restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

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

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

81 La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans *Edmonton Journal*, précité, p. 1339 :

> On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

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

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

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

82 Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court

83 Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur

principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

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

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

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accentue lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

> Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la *LCÉE*. En effet, par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection. À cet égard, je suis d'accord avec le juge Evans pour conclure que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés.

J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accentue le besoin de transparence, et cette nature publique ne se reflète

I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity".

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

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

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:

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

pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans *Keegstra*, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, « nous devons veiller à ne pas juger l'expression en fonction de sa popularité ».

86 Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

> Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans *Edmonton Journal*, précité, p. 1353-1354 :

> Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

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

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

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

À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. La portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires.

Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la *LCÉE*, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la *LCÉE* ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la *LCÉE* ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la *LCÉE*, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

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

VII. Conclusion

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

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

équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

90 En résumé, les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

91 Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la *LCÉE*, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

92 Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*.

Appeal allowed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Procureur des intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada : Le sous-procureur général du Canada, Ottawa.

Tab 20

Latvian House Toronto Ltd. v. Fraternity "Lidums", [2012] O.J. No. 760

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

D.M. Brown J.

Heard: February 16, 2012.

Judgment: February 17, 2012.

Court File No. CV-08-7745-00CL

[2012] O.J. No. 760 | ***2012 ONSC 1195***

RE: Latvian House Toronto Limited, Applicant, and Fraternity "***Lidums***" et al., Respondents

(22 paras.)

Counsel

J. Heller and D. Kuze, for the Applicants.

S. Tint, for the Respondent, Toronto Latvian Association.

R. Watt, for Visvaldis Freimanis, a shareholder.

U. Kancharla, for Baiba Kurens.

REASONS FOR DECISION

D.M. BROWN J.

I. Motions for directions on the liquidation of a corporation

1 A private for-share capital corporation incorporated under the Ontario *Corporations Act*, the Latvian House Toronto Limited was authorized to wind up its affairs by order of Pepall J. made April 8, 2009. LHTL has sold its real estate assets, and the corporation applies for a variety of relief in order to commence the distribution of its assets to its shareholders.

2 On the motion before me several issues were raised: (i) the process for setting the list of shareholders eligible to receive distributions; (ii) the treatment of the portion of distributable assets to those shareholders whose addresses are not known; (iii) whether the funds of LHTL should continue to be invested in an interest-bearing account; (iv) whether the list of shareholders filed with the court should be sealed; and (v) how to deal with the claim of Ms. Baiba Kurens to a share of the distribution.

II. The shareholders' list and the submissions of Mr. Freimanis and Ms. Kurens

3 LHTL filed extensive evidence detailing its efforts to identify the shareholders of the corporation entitled to share in the distribution of its assets, as well as the history of the structure of the shareholdings in the company. I am satisfied that LHTL has used reasonable efforts to locate its shareholders, including publishing notices in community media. LHTL set a record date of August 15, 2011 for its shareholders' list. It updated the list on November 24, 2011 as a result of further information which came into its hands.

4 As a result of its efforts LHTL has identified 845 shareholders who hold the 2,000 issued and outstanding common shares of the corporation. LHTL prepared a list of 717 shareholders with confirmed addresses who own 1,844 shares; it has prepared another list identifying 128 shareholders who own 156 shares and whose addresses are unknown (collectively the "Shareholder Lists"). The Shareholder Lists were filed with the court on a confidential basis.

5 As presently forecast, each shareholder will receive a distribution of approximately $1,250 per share.

6 Visvaldis Freimanis owns one share of LHTL. Mr. Freimanis has filed a notice of appearance on behalf of himself and the estate of his late father, Ainis Freimanis, who died intestate. LHTL states that Mr. Freimanis has not produced a certificate of appointment of estate trustee without a will for his father's estate; accordingly, Mr. Freimanis lacks the status to represent his father. Mr. Freimanis deposed that he has been orally authorized by his two brothers who do not live in Canada to represent them in this proceeding. Mr. Freimanis has not produced powers of attorney signed by his brothers providing him with that authority, so he lacks standing to represent them in this proceeding. I will therefore consider the submissions of Mr. Freimanis on the basis that he represents the interests of one shareholder, himself, who is entitled to a distribution of $1,250.

7 Mr. Freimanis has brought a companion motion seeking an order that this court direct a reference to a Master in Toronto to identify the shareholders of LHTL and for an accounting of the sale of the corporation's two properties. In paragraph 16 of his affidavit Mr. Freimanis posed a number of questions which he asserted must be answered in order to determine who are the shareholders of LHTL.

8 It is apparent that since March, 2009 Mr. Freimanis has attempted to insert himself into the process of identifying the shareholders. As appears from his counsel's letter of August 29, 2011 LHTL provided Mr. Freimanis with some information about shareholders. In paragraph 19 of his affidavit Mr. Freimanis admitted that LHTL provided him with lists of shareholders with ownership rights in the corporation, but he complained that the corporation "has refused to identify how those shareholders were put on the list". With respect, the process of putting together the Shareholders List was described by Mr. Liepins in his affidavit of January 10, 2012.

9 Mr. Freimanis deposed that nine of the respondents were now defunct, creating some uncertainty about the status of some shares. He did not identify which respondents allegedly were defunct. Mr. Liepins fully addressed that point in paragraphs 7 through 10 of his supplementary affidavit dated February 7, 2012.

10 On my review of the evidence, Mr. Freimanis offered nothing more than speculation to support his request for a reference to the Master. By contrast, LHTL has adduced evidence about how it put together the Shareholder Lists and it has addressed the specific points raised by Mr. Freimanis. I see no need to order a reference - it would simply be an expensive make-work project with no apparent benefit. I therefore dismiss the motion of Mr. Freimanis, including his request for an accounting - LHTL's motion record contained ample evidence of how funds have been used.

11 Ms. Baiba Kurens filed a notice of appearance and she claims that she is a shareholder of LHTL. The Shareholder Lists do not record her as a shareholder. The reason for that was explained by Mr. Liepins in his affidavit: a share had been held by the husband of Ms. Kurens; prior to his death he transferred it to a Latvian community organization called "Skolas Funds"; following her husband's death Ms. Kurens wrote that organization

requesting the return of the share, and on June 17, 2009 the organization refused to do so. That was over two years ago. Ms. Kurens has taken no steps to adjudicate her dispute with Skolas Funds since it refused to return the share (which has a maximum value of $1,250). Ms. Kurens's dispute is with Skolas Funds, not LHTL. I see no reason to alter the process for the distribution of funds to deal with a claim which is over two years old and for which the claimant has not sought legal recourse.

III. Sealing the shareholders' list

12 LHTL filed the Shareholder Lists with the Court on a confidential basis and seeks a sealing order for those documents (Exhibits "N" and "O").

13 As explained by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, *[2002] 2 S.C.R. 522*, a sealing order should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[1]

14 The risk in question must be real and substantial, in that the risk is well grounded in the evidence. Our Court of Appeal has stressed the need for a solid evidentiary basis to support any sealing order or publication ban.[2] The risk must also pose a serious threat to the commercial interest in question.[3] In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality.

> For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test.[4]

In *Sierra Club* the Supreme Court emphasized that courts must be cautious in determining what constitutes an "important commercial interest" and must remain alive to the fundamental importance of the open court rule.[5]

15 As part of the evaluation of "reasonably alternative measures" a judge must consider not only whether reasonable alternatives to a confidentiality order are available, but also must restrict the order as much as is reasonably possible while preserving the commercial interest in question.[6]

16 I conclude that granting a sealing order over the Shareholder Lists would be appropriate in the circumstances. LHTL filed the Lists with the court in order to obtain approval of them and to reference them in the approval order. In the ordinary course the Shareholder Lists would not be public information - requests to access those lists would have to be made through the corporation and meet the applicable tests of corporate law. Accordingly, I think a sealing order is appropriate in order to preserve the important public principle that access to the shareholder lists of private corporations remain through the channels specified by Ontario corporate law, unless a person can demonstrate, on application to the Court, some legitimate reason why it should be granted access to the Shareholder Lists. A sealing order shall issue.

IV. The distribution of assets, including the treatment of the portion of distributable assets to those shareholders whose addresses are not known

17 LHTL seeks approval to make an initial distribution of assets to shareholders. LHTL filed evidence showing that it has addressed claims by any creditors, including the tax authorities. No person opposed the distribution. I am satisfied from the evidence that such an initial distribution of $1 million can be made and I approve LHTL doing so.

18 The corporation proposes that a second distribution of $1 million and a final distribution of any residuary be authorized without further resort to the Court. I am not prepared to grant this request. I think the second distribution of $1 million, or just under half of the assets of the corporation, should be done by seeking further approval of the court.

19 As to the investment of the funds following the initial distribution, it is unclear how long it will take to obtain a tax clearance certificate. Under those circumstances, given the amount of money in issue, the corporation should continue to invest its funds in an interest-bearing account.

V. Shareholders whose addresses are unknown

20 LHTL sought directions on how to distribute the portion of its assets to shareholders for whom it does not have current addresses. At the hearing counsel informed me that LHTL was in the process of discussing this issue with the Public Guardian and Trustee. I think the best way to proceed is to require counsel to book a 9:30 appointment with me for the week of March 12 at which time this issue can be further discussed and directions given.

VI. Conclusion

21 I grant the motion of LHTL, subject to the determinations which I have made above. I dismiss the motion of Mr. Freimanis. I have placed my fiat on a marked-up copy of an order which counsel for LHTL may pick-up at 9:30 on any day during the week of February 21, 2012 at Courtroom 8-6, 330 University Avenue, Toronto.

22 I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office (c/o Judges' Reception, 361 University Avenue) written cost submissions, together with a Bill of Costs, by February 29, 2012. Any party opposing a requested cost award may serve and file with my office responding written cost submissions by March 8, 2012. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D.M. BROWN J.

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1 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para. 53.

2 *M.E.H. v. Williams*, 2012 ONCA 35.

3 *Ibid*., para. 54.

4 *Ibid*., para. 55

5 *Ibid*., para. 56.

6 Ibid., para. 57.

Tab 21

Publow v. Wilson, [1994] O.J. No. 3036

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Spence J.

Heard: November 21 and 23, 1994.

Further submissions received: December 6, 1994.

Judgment: December 22, 1994.

Court File No. 94-CQ-54423 Commercial Court File No. B239/94

[1994] O.J. No. 3036 | 9 C.C.E.L. (2d) 22 | 36 C.P.C. (3d) 33 | 59 C.P.R. (3d) 294 | 52 A.C.W.S. (3d) 507 | 1994 CanLII 7421

Between Paul F. Publow, plaintiff, and Larry Wilson, Bennington Gate Management Ltd., Clifford R. Topping, Alex R. Paterson, Dan B. Mills, Cottrell Investment Corporation, Cottrell Capital Corporation, Pal Transport Inc., Cannet Freight Cartage Limited, Cottrell Cartage Ltd., Cottrell Transport Inc., Cottrell Air Freight Ltd., Cottrell Information & Distribution Services Inc., defendants

(15 pp.)

Case Summary

Evidence — Confidentiality — Application for order to protect confidentiality — Considerations — Reasonable apprehension of harm.

The defendants sought an order to protect the confidentiality and secrecy of certain information and documentation disclosed in the proceedings. They submitted that if disclosed, the information would adversely affect the competitive position of the defendants in the market place. The plaintiff claimed against the defendants for wrongful dismissal from his senior position. The documents in question consisted of all documents produced in connection with two motions, including answers given in cross- examination on affidavits and exhibits. The concern was that some of these documents showed that the parent company was insolvent. The defendants argued that there was a reasonable apprehension of harm to persons not involved in the proceedings, namely some 600 employees. It was alleged that the plaintiff threatened to harm the company by disclosing the information to suppliers and customers of the company.

HELD: The application was dismissed.

It was not established that this was a proper case for a protective order. It did not seem likely that a sealing order of a limited scope and duration would be effective to avoid the harm foreseen. Such an order could detrimentally affect the interests of other persons, i.e. trade creditors and prospective investors.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, *R.S.O. 1990, c. C43, s. 137*(1), 137(2).

No counsel mentioned.

SPENCE J. (endorsement)

1 The defendants (except for Larry Wilson and Bennington Gate Management Ltd.) seek an order to protect the confidentiality and secrecy of certain information and documentation disclosed in these proceedings. The applicant defendants submit that the information if disclosed would adversely affect the competitive position of the defendants in the market place. The other two defendants consent to the order being sought.

2 In these proceedings, the plaintiff claims against the defendants for wrongful dismissal from his senior position in certain of the defendant companies in the Cottrell group of companies, which are engaged in freight forwarding. The defendants assert that the plaintiff was largely responsible for the adverse developments in the financial circumstances of the parent Cottrell company and it is these financial circumstances which the defendants seek to keep confidential, as matters private to that company and its owners.

3 The documents sought to be kept confidential consist of all documents produced in connection with the motion in this matter now pending for December 23, 1994 and in the present motion, including answers given in cross-examination on affidavits and certain exhibits and documents produced through a Request to Inspect.

4 The concerns advanced are that these documents, or certain of them, show that the parent Cottrell company is insolvent and that if this information, which would not be subject to disclosure apart from the present litigation, were to be available to interested persons, competitors would bring it to the attention of customers, suppliers and other interested persons, who would be moved to cease their dealings with the company, leading to the demise of the company. It is submitted that the company is now at a sensitive point in its business and affairs. If it can keep a breathing space during which it can pursue a search for new capital investment, its fortunes may be repaired. At the present time the company is keeping its obligations to suppliers and customers current and it is argued that the exposure which they will incur through continued dealing is not worse than if the company were caused to fail through adverse reaction to disclosure of the information in question. The plaintiff when he was the chief executive officer of the Cottrell parent company, sought to avoid disclosure of information about its financial circumstance because of the potentially damaging effect that disclosure would have.

5 A key consideration which is advanced is that if the material in question is disclosed and that disclosure leads to the anticipated collapse of the business of the company, the 600 employment positions in the company will be at risk.

6 The plaintiff contends that there must be significant trade creditors of the company who are not aware of its difficulties and stand to suffer if disclosure of its present circumstances is not made. The plaintiff challenges the claim that there is evidence of principal competitors of the company who are looking for detrimental information to damage the company's relations with its suppliers and customers. The plaintiff contends that disclosure of the bad 1993 fiscal year results of the company will not affect the current dealings of the company with its suppliers because these results are historical. In any event, the plaintiff says the evidence suggests that it is the existence and nature of the dispute between the plaintiff and the defendants which has the potential to affect confidence in the Cottrell companies not the financial difficulty of the parent company which is already widely rumoured, as well

as being alleged in the plaintiff's statement of claim. The plaintiff says certain of the defendants have been advising interested parties that the Cottrell parent company has grown stronger financially since its last fiscal year. The plaintiff questions whether, even if the Cottrell parent company were to fail, the 600 jobs provided by its operations would be lost. The plaintiff alleges that it is apparent that the principal lenders to the company, Imperial Life Assurance and the defendant Bennington Gate Management Ltd. are providing it with an indulgence to assist it in its effort to find new capital, and it is this support which is the key to its continued functioning for the time being. The plaintiff disputes the breadth of the order sought by the defendants, saying that it encompasses various matters, including details of the present dispute, which do not bear on the allegedly sensitive issue of the company's financial viability. The plaintiff disputes that the financial information concerning the Cottrell parent company will affect adversely the dealings of customers and suppliers with the operating subsidiaries. Other parts of the proposed order are challenged as overreaching in various respects and potentially prejudicial to the plaintiff.

The Test to be Applied

7 Section 137(1) of the Courts of Justice Act *R.S.O. 1990 c. C43* provides that on payment of the prescribed fee a person may see any document filed in a civil proceeding unless an Act or an order of the court provides otherwise. Section 137(2) provides that a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

8 The paramount importance of openness in court proceedings is reflected in the following remarks of Dickson J., as he then was, in Attorney General of Nova Scotia et al. v. McIntyre *(1982) 122 D.L.R. (3d) 385* (S.C.C.) at p. 401-402:

> Many times it has been urged that the "privacy" of litigants requires that the public be excluded from Court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are not a basis for exclusion of the public from judicial proceedings.

At page 403, Dickson J. said:

> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

9 The approach endorsed in this decision was applied in MDS Health Group Ltd. v. Canada (Attorney General), (1993) 20 CPC (3d) 137 (O.C.J. (G.D.)). The case involved a dispute with Atomic Energy of Canada Limited concerning supply arrangements between it and the plaintiff. The plaintiff's concern was that if its lawsuit with AECL were to be publicly known, customers of the subsidiary of the plaintiff would lose confidence in its subsidiary's capacity to supply their needs and they would likely seek other sources of supply. The plaintiff brought a motion for an order allowing the proposed action to proceed under a pseudonym and to seal the court record.

10 D. Lane J. quoted from the Supreme Court decision in MacIntrye, including the passages set out above. Lane J. concluded as follows:

> In my view, that case sets the standard which an applicant in a case like this must meet. I have every sympathy with the plaintiff company which finds itself in an unenviable position, but I can find no value of superordinate importance in this motion. On the contrary, I am of the view that the arguments of the defendants are very persuasive. The public nature of the defendants, the protection of the public who may trade in the shares of the plaintiff, the nature of the allegations made against public officers, the fact that the matter arises out of a controversial government policy, all lead inexorably to the conclusion that this is not a case where secrecy can be justified to protect private interests. This is not a case where the publicity destroys the subject matter of the action itself but rather one where the publicity is likely to upset the

> confidence of customers in their source of supply and perhaps lead to the entry of a new competitor in the marketplace. Similar considerations arise in many cases. To give effect to them would undermine the openness of our system.

11 In the present case, the defendants argue that there is a reasonable apprehension of harm to persons not involved in these proceedings. They refer to the potential loss of 600 jobs if the Cottrell business operations collapse as a result of loss of confidence on the part of suppliers and customers, which would be caused by public access to information as to the financial situation of Cottrell. I think support for this concern is to be found in the affidavit evidence, including the evidence as to the plaintiff's efforts while he was a senior office of Cottrell to keep information of this type confidential.

12 The defendants seek a very broad protective order, which would effectively apply to all of the materials filed on the motion which is scheduled to be heard on December 23, which is to address part of the substantive dispute between the parties. That there is such a dispute is apparently widely known among interested persons. The court should be concerned not to frame a sealing order so broadly that it would effectively preclude public access to these proceedings on an informed basis.

13 If the breadth of the order sought were the only concern, it might be in order to grant a narrow order for a limited period. I infer from the material and the submissions that the maximum potential harm to the continuing business prospects would be done by the disclosure of the 1993 financial statements and the statements in the materials to the effect that Cottrell is insolvent and its shares have no value. The financial statements and these other statements have an apparently definitive character that could allow them to be interpreted in a detrimental way without reference to the context of the ongoing business and affairs of the company. On the other hand it would be inappropriate to remove from the public record those materials which reflect the dispute between the parties and the adverse events which have happened to the company in the course of that dispute. To do so would potentially create a misleading impression about the matter before the court. Limiting the period for the duration of the sealing order would also avoid the potential for persons to be misled.

14 The defendants also seek certain ancillary orders with respect to the disclosure and use of the sealed information which might curtail the proper use of the information in these proceedings or in certain other respects and seem excessive for purposes of an order with a limited duration. The order sought by the defendants requires, not only an order to seal the court record, but also an order restricting the plaintiff from, among other things, communicating the contents of the financial statements. It was not contended that the plaintiff had come into possession of these statements improperly. As a shareholder of the company, he would presumably be entitled to receive a copy of its financial statements. It was suggested he would be in breach of his duty to the corporation if he were to disclose information about it to its detriment. While his having been a senior officer and director of the company would constrain what he could properly do now in the way of disclosing company information, the nature and scope of that constraint would, or might, depend on the capacity in which he received information and the circumstances in which he proposed to disclose it. For example, it was mentioned that the plaintiff has certain rights to seek to sell his shares and it was suggested he might be improperly constrained in the exercise of those rights by the order sought by the defendants against him. It seems to me that this matter merited more attention than it received in the submissions. At the conclusion of the defendants' submissions, emphasis was placed, not on the order requested against communications by the plaintiff, but on the order to seal the documents filed in court; that order was said to be the key request.

15 Having regard to the foregoing considerations, an order could be fashioned along the above lines, so as to seal only certain information and only for a limited period.

16 However, without a related order against disclosure by the plaintiff, it is doubtful that the sealing order could have its desired effect. As I understand the submissions of the defendants, their concern is that the plaintiff will follow through on his alleged threat to harm the company, by disclosing the potentially damaging information to the suppliers and customers of the company, who will then seek to minimize their risk by refusing further credit to the

company, with the result that the company's operations will be halted and its employees will be put out of work. Merely sealing the documents on file in court without ancillary orders against other disclosure would not prevent the disclosure of damaging information, at least with respect to the results shown in the financial statements.

17 The scenario which the defendants advance as the justification for the order sought poses a further difficulty for the court. The defendants fear that if the detrimental information comes to the attention of suppliers and customers they will withdraw their credit from the company and cease dealing with it. From this, it must be inferred that these trade creditors would regard the information as disclosing a risk which requires avoidance action on their part. Thus if the adverse information is ordered not to be disclosed, the suppliers are to be deprived of information they would consider beneficial and the non-disclosure of which they would therefore presumably consider harmful. The defendants say that the suppliers and customers will be no worse off if they are obliged to wait while the company seeks to resolve its problems and that they may be better off, if a favourable resolution is achieved. Perhaps that is so but those persons are not before the court and the action it is anticipated they would take if they were to receive the disputed information seems to me to speak for itself as to how they would judge the withholding of the information. In the circumstances the court is in effect being asked to disregard the potential harm to one group of people, the suppliers and customers, in order to avoid a potential harm to another group of people, the employees. If no order is made, a harm may occur, but it will not be on account of any order made by the court in the particular case but rather by reason of the operation of the generally applicable rules of the court. No basis is presented on which the court could properly decide that in this case it ought to shift the risk of harm from one third party group to another.

18 The disclosure of internal corporate information in the course of legal proceedings may almost always have the potential for harm to the company concerned and perhaps to others as well. This consequence of the resort to the courts is not limited to corporate parties in commercial matters; individuals may suffer from the public disclosure which ordinarily accompanies litigation. If the prospect of harm were a sufficient basis for preventing disclosure, a great many litigants might justifiably seek to have their proceedings shielded from public view, whether through a sealing order, an order for in camera proceedings or otherwise. Widespread granting of such orders could tend to diminish public confidence in the administration of justice. These considerations suggest that such orders should be available only in exceptional cases.

19 It was submitted for the defendants that support for their request for a confidential order is to be found in those cases which have held that there is an implied undertaking that information and materials produced on discovery will not be used for purposes other than the related litigation. The argument is that if the materials sought to be sealed in this case had been produced in the course of discovery instead of being incorporated in affidavits for use on the pending motion, they would have been subject to such an implied undertaking and there is no good reason in principle to limit the implied undertaking to discovery. Against this, it is argued that the original rationale for the implied undertaking is that discovery is an involuntary process which compels disclosure of matters that could otherwise remain private and it is therefore appropriate to require that information yielded through that process not be used for any purposes other than the related litigation. This rationale it is said, has no bearing on a situation where the disclosure is made voluntarily by the parties in the course of litigation, to advance their respective positions. This distinction seems sound to me. Whether the doctrine of the implied undertaking in respect of discovery is law in Ontario was recently considered in Goodman v. Rossi (O.C.J.(G.D.) Div. Ct.)), released November 29, 1994). A majority of the Divisional Court were of the opinion that the implied undertaking is not a rule of law in Ontario. For the above reasons, invoking the implied undertaking doctrine does not assist in resolving the issue in the present case.

20 For the reasons given, despite the desirability of avoiding unnecessary harm to the employees, it has not been established that this is a proper case for a protective order. The order sought is too broad. It does not seem likely that a sealing order of limited scope and duration would be effective to avoid the harm foreseen. Such an order could detrimentally affect the interests of other persons - the trade creditors, and possibly also prospective investors. In the circumstances, this case should not be singled out for an exception to the important rule that the business of the courts is to be conduct in the open, where it can be subjected to public scrutiny.

21 Accordingly, the motion is dismissed. To allow the defendants an opportunity to address themselves to the consequences this decision, the sealing order which is now in effect will continue in effect until the hearing of the motion now returnable on December 23 or until 5:00 p.m. on December 30, 1994, whichever is earlier, subject to any further order of the court. Counsel may make submissions as to costs.

SPENCE J.

Tab 22

Boeing Satellite Systems International Inc. v. Telesat Canada, [2007] O.J. No. 945

Ontario Judgments

Ontario Superior Court of Justice

C.T. Hackland J.

Heard: March 13, 2007.

Judgment: March 16, 2007.

Court File Nos. 06-CV-36714 and 07-CV-37280

[2007] O.J. No. 945 | 62 Admin. L.R. (4th) 236 | 155 A.C.W.S. (3d) 1225 | 2007 CarswellOnt 1557

Between Boeing Satellite Systems International, Inc., Applicant, and Telesat Canada, Respondent And between Telesat Canada, Plaintiff, and Boeing Satellite Systems International, Inc., Defendant

(20 paras.)

Case Summary

Civil evidence — Documentary evidence — Publication bans and confidentiality or sealing orders — Motion by parties for sealing order dismissed where allegedly sensitive contract between parties was unremarkable and where insufficient evidence establishing likelihood of serious harm resulting from public access to statement of claim or affidavit material.

Motion by parties for sealing order -- Parties involved in commercial dispute about alleged breach of contract -- Parties argued that contents of contract were confidential and that contract contained sensitive information -- Court record contained statement of claim, affidavits and copy of contract -- HELD: Motion dismissed -- Parties failed to adduce evidence establishing likelihood of irreparable or serious harm resulting from public access to statement of claim or affidavit material -- Contract was unremarkable procurement contract -- Fact that parties agreed that contract was confidential insufficient to justify sealing order -- Parties allowed to remove from contract from court record, as only reason contract part of records was to facilitate determination of motion for sealing order.

Counsel

K. Scott McLean and David R. Elliott, for Boeing.

J. Bruce Carr-Harris and Mandy E. Moore, for Telesat.

Peter Jacobsen, for CTVglobemedia/The Globe and Mail, intervenor.

REASONS FOR DECISION

C.T. HACKLAND J.

Background

1 These two proceedings arise out of a dispute between Boeing Satellite Systems International, Inc. (Boeing) and Telesat Canada (Telesat) concerning a commercial contract between the parties dated May 20, 1998 (the contract). One of the original contracting parties was Hughes Space and Communication International Inc., whose interests were later acquired by Boeing. Pursuant to this contract Boeing built for Telesat a communications satellite currently known as Anik F1 (the satellite). Telesat claims to have suffered losses resulting from a power performance deviation in relation to the in-orbit performance of the satellite. Telesat initially delivered a Notice Demanding Arbitration.

2 The first pending proceeding herein is an application by Boeing for a determination by the Court as to whether the issues between the parties are required to be arbitrated under the contract. Boeing's position is that the dispute cannot be arbitrated due to an alleged non-compliance with a procedural pre-requisite in the contract and because the arbitration agreement is said not to encompass subrogated claims. Pending the argument of this application, currently scheduled for April 24, 2007, I granted an interim order staying Telesat's Notice Demanding Arbitration and, at Boeing's request (not opposed by Telesat) I made an order dated January 4, 2007 temporarily sealing the Court file to protect the claimed confidential and proprietary nature of the contract pending a motion to determine if a sealing order was justified. I directed that certain media be notified of the motion to allow them to make submissions. This procedure is contemplated by cases such as *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442 and *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

3 Subsequently Telesat commenced the action herein against Boeing to preserve its rights (due to a limitations concern), pending the outcome of Boeing's application. On February 9, 2007 I granted at Telesat's request, a temporary order requiring that the Court file, including the Statement of Claim, be sealed subject to further directions of the Court and requiring that the media be notified that Telesat's motion for a sealing order be heard at the same time as Boeing's motion for the same relief in their pending application.

4 The motions by Boeing and by Telesat for a sealing order in the two proceedings was argued before me on March 13, 2007. I granted leave to CTVglobemedia/The Globe and Mail to intervene in opposition to the relief sought by Boeing and Telesat.

5 The parties have agreed that pending the disposition of Boeing's application to determine whether the dispute will proceed to arbitration under the contract, the requested sealing order need only address the current contents of the two Court files, which consist of the Statement of Claim in Telesat's action and certain affidavit materials filed in both proceedings. These materials include a copy of the contract between the parties and attachments including a Statement of Work. Not included at this point is technological and engineering data of the type that one would expect to be produced in proceedings of this nature. It may well be that a sealing order or other special procedure may be justified with respect to some of this type of data in the event the action proceeds in this Court. Nothing in these reasons is intended to dispose of that issue. If required, a further motion can be convened to address issues of this type should they arise at the production and discovery stage of the action.

6 Telesat and Boeing submit that certain sentences and references should be redacted from the copy of the Statement of Claim which would be available for public reference in the Court file (unless the entire Court files remain sealed), with the original unredacted pleading remaining sealed. Having reviewed the redacted portions of the Statement of Claim against the original unredacted Statement of Claim, I note that what is sought to be

protected from public access are references to the terms of the contract and to representations allegedly made by Boeing to Telesat.

Analysis

7 The position of the parties is that the entire Court file in both proceedings should be sealed. In the alternative they submit that the contract, including appendices and attachments, should be sealed and the Statement of Claim should be redacted.

8 The basis for the position taken by both Boeing and Telesat is that they have a contractual obligation of confidentiality concerning the contract itself. The matter is put in this way in paragraph 10 of Boeing's factum:

> **The Contract**
>
> 10. Article 32.2 of the Contract treats the terms, conditions, appendices, and attachments of the Contract as proprietary and confidential, and Boeing and Telesat must not disclose such confidential information to any third parties without first obtaining the prior written consent of the other party, except as expressly allowed for particular documents and for particular third parties specified in this Article.

9 It is not argued that the contract itself is in the nature of a trade secrete so as to attract legal protection. Counsel for Boeing did however make the point that Appendix A to the contract sets out a detailed "schedule of payment milestones" that may disclose financial and technical information that could be potentially harmful if misused by a competitor. Attachment 1, the Statement of Work, also contains confidential information concerning the manufacturing process. Counsel also argued that the identification of specific terms of the contract could create a "slippery slope" leading to the potential disclosure of highly confidential information relevant to such terms. Apart from Appendix A and the Statement of Work, I take the parties' argument to be essentially that they intended to form a highly confidential business relationship, as evidenced by the contract, and it is therefore in the public interest, for valid commercial reasons, that the parties' privacy expectations be protected. To put this another way, it is not in the public interest that the parties should be required to sacrifice the confidentiality of their business relationship to achieve an adjudication of their dispute in the Court.

10 To the extent Boeing advances this argument, it invites the response that if confidentiality is an overarching concern, a confidential arbitration process is available under the contract. Further, the open Courts principle requires a weighing of the constitutionally protected public interest in freedom of expression and freedom of the press against the "important commercial interest" that is said to exist here and which may be seen as creating a public interest in confidentiality.

11 The Supreme Court recognized in *Sierra Club* that confidentiality orders may be granted to protect a party's commercial interests, in limited circumstances, particularly when there is a contractual obligation of confidentiality. In *Sierra Club*, the Court upheld a confidentiality order restricting the use of an affidavit summarizing confidential documents consisting of thousands of pages of technical information concerning an ongoing environmental assessment of the construction site of a nuclear reactor which was being constructed for a foreign government. The foreign government insisted that the information only be made available to the parties and to the Court, but with no restriction on access to the judicial proceedings. The Court upheld a confidentiality order to that effect as requested by the company constructing the reactor.

12 Iacobucci J. discussed the framework for assessing whether a confidentiality order should be granted at paragraphs 53-57 of *Sierra Club*:

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

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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

para. 56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second [page545] branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* [*(1994), 56 C.P.R. (3d) 437*]() (F.C.T.D.), at p. 439.

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

13 An important aspect of the analysis required by the Court in *Sierra Club* is the requirement that the party seeking the confidentiality order demonstrate an "important commercial interest" in the information, such that there is a necessity to restrict its availability to the public. Iacobucci J. stated at para. 59:

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

14 The Court in *Sierra Club* did not make it clear whether an applicant must establish irreparable harm to its interests as a basis for obtaining a confidentiality order. However it is apparent from the Court's reasoning that at least significant potential harm must be demonstrated and the burden of proof is on the applicant to establish this. Only once the applicant meets this requirement does the Court need to go on and assess the fair trial implications of such an order.

15 Mr. Jacobsen for the intervenor stated that the media he represents has no interest in seeing or reporting on the

technical engineering data which might come before the Court. However he submits that this is a significant commercial dispute between two public companies who, in the case of Boeing, manufacture and provide satellites to the Canadian market, and, in the case of Telesat, provide broadcast distribution and telecommunications services to Canadians. All of which strongly indicates that the litigation between Boeing and Telesat is a matter of public interest. He argues that the media requires access to the Court file and the proceedings so that it can report on this matter of public interest. I respectfully agree with this submission.

16 I also agree with the submission of the intervenor that there is no cogent evidence before the Court to establish the likelihood of irreparable or serious harm resulting from public access to the Statement of Claim or to affidavit material that discloses the contract between the parties or discusses the nature of the dispute. As noted, the contract itself is a relatively unremarkable procurement contract and the redacted portions of the Statement of Claim merely quote parts of the contract or refer to non technical representations attributed to Boeing.

17 It is not sufficient that the parties have agreed between themselves to keep the particulars of their contractual and business relationship confidential in the absence of cogent evidence of potential serious harm resulting from public access to the information. In my opinion, outside the realm of confidential technical, scientific or financial information, it will be the rare case where a confidentiality order is justified in a commercial dispute. This is not such a case.

18 I have considered the fact that counsel have put the contract in its entirety in the Court record in large part to facilitate the Court's consideration as to whether or not the contract justifies a sealing order of the Court files and whether references to the contract in the Statement of Claim should be redacted. There is no other reason for the contract in its entirety, including appendices and attachments, being in the Court file (as opposed to the several paragraphs strictly referable to the arbitration issue and those quoted in the Statement of Claim). I am of the opinion that it would be unfair to have the entire contract disclosed when the only reason it was filed was to facilitate an adjudication of whether it is confidential to the point of justifying a sealing order for the Court files or of the contract itself. Since I am refusing to allow any redaction of the Statement of Claim or any sealing order in respect of the Court files at this stage of the proceedings, I will allow the parties, if they both agree to do so, to remove the copies of the contract, including appendices and attachments, from the two Court files herein, prior to the unsealing of the said files.

Disposition

19 In summary, the motion by the parties for an order sealing the Court files is refused, without prejudice to the right of either party to renew their application subsequent to the close of pleadings and in the event that Telesat's Notice to Arbitrate is set aside. There will be no redaction of the pleadings. The temporary sealing requirement in respect to the Court files contained in my order of December 7, 2006 will remain in effect until seven days following the release of this decision.

20 There will be no costs of this motion.

C.T. HACKLAND J.

Tab 23

Himel v. Greenberg, [2010] O.J. No. 4623

Ontario Judgments

Ontario Superior Court of Justice

N.J. Spies J.

Heard: April 19, 2010.

Judgment: April 30, 2010.

Court File No. FS-09-348983

[2010] O.J. No. 4623 | 2010 ONSC 2325 | 194 A.C.W.S. (3d) 1082 | 93 R.F.L. (6th) 357 | 2010 CarswellOnt 8261

Between Naomi Himel, Applicant, and Alan Greenberg, Respondent, and GF7 Holdings Inc.[1]

(79 paras.)

Counsel

Harold Niman, *Daryl Gelgoot* and *L. David Roebuck*, for the Applicant.

Cheryl Goldhart, for the Respondent, Alan Greenberg.

Larry Lowenstein and *Jeanie Demarco*, for the Respondent on the motion, GF7 Holdings Inc.

DECISION ON MOTION FOR DISCLOSURE AND

MOTION TO SEAL[2]

N.J. SPIES J.

Introduction

1 The Applicant, Naomi Himel ("Dr. Himel"), brought a motion for an order requiring the Respondent, Alan Greenberg ("Mr. Greenberg"), or in the alternative GF7 Holdings Inc. (hereinafter "Minto" or "GF7"), to provide the financial disclosure set out in the production requests of her valuation experts. Mr. Greenberg brought a motion seeking an order sealing the entire file and excluding the public from any hearing. Minto's notice of motion sought a sealing order but only with respect to all information relating to Minto or any of its subsidiaries and related companies, including the value of assets or income of Mr. Greenberg. Minto also sought an order excluding the public from any hearing where any of the above information may be referred to. At the hearing of the motion, however, Mr. Lowenstein, counsel for Minto, took the position that the entire court file should be sealed and that the public should be excluded from all hearings.

2 Minto also sought injunctive relief against Dr. Himel and her lawyers and advisors to address an alleged breach of a confidentiality agreement that Dr. Himel and her lawyers entered into with Minto as a precondition for the

voluntary production of certain documents to Mr. Niman. On the hearing of the motion Mr. Lowenstein, counsel for Minto, advised that this relief was only being sought against Dr. Himel. Mr. Roebuck, counsel for Dr. Himel, argued that there is no basis for this Court to enforce the confidentiality agreement in a motion within these matrimonial proceedings in that Minto is before the Court only as a party to the motion because it is affected by the disclosure requests. That appears clear from the endorsement of Mesbur J. dated January 8, 2010. There is no reference in either of these endorsements to Minto bringing a motion for an injunction. I accepted Mr. Roebuck's position and ruled that Minto could not seek injunctive relief on this motion as it is not a party to this proceeding and has not brought a separate action or application against Dr. Himel seeking this relief. Accordingly this aspect of Minto's motion was dismissed without a hearing on the merits. I ruled however, that Minto could rely on the evidence of the alleged breach of the confidentiality agreement in support of its motion for a sealing order.

Background Facts

3 The parties separated in September of 2007. They have two sons. Dr. Himel is a family physician. Mr. Greenberg is a businessman. GF7 Holdings Inc. ("GF7") is a private corporation, incorporated pursuant to the laws of Ontario. GF7 owns a number of subsidiary corporations, including Minto, an international real estate development company with operations in Ottawa, Toronto, and Florida. Minto builds new homes, high-rise condominiums, and rental accommodations (including apartments, furnished suites, executive offices and commercial space).

4 Mr. Greenberg is one of seven shareholders of GF7. The vast majority of Mr. Greenberg's holdings are in a numbered company. The other six shareholders are all members of the Greenberg family. GF7's Board of Directors is compromised of three shareholders (including Mr. Greenberg), one senior officer (Eric McKinney) and three independent directors. Mr. Greenberg is the President of Minto Apartments Limited, a subsidiary of Minto.

5 Minto, various Minto entities, various holding companies, and the seven Greenberg family members who own Minto shares directly or indirectly, are all parties to a Unanimous Shareholders Agreement dated November 5, 2004 (hereinafter the "Shareholders' Agreement").

6 Dr. Himel hired Andrew Freedman of Cole and Partners and David Atlin of Integris Real Estate to assist her in determining Mr. Greenberg's net family property. She has alleged that over the course of 30 months, Mr. Greenberg has consistently attempted to prevent her from obtaining even the most basic of disclosure. Mr. Greenberg denies this and submits that he has produced all of the documents in his possession and has asked Minto for the documents that Dr. Himel's experts have requested. Minto has refused to provide these documents, which has resulted in these motions. I do not need to decide whether or not Mr. Greenberg has delayed disclosure. I do have to decide whether or not he can obtain the requested documents from Minto in either his capacity as a shareholder or director, an issue I will come to.

7 At the request of Minto, Dr. Himel and her solicitors signed confidentiality agreements in a form approved by Minto on June 9, 2008. The confidentiality agreements were in the from of letters signed by Mr. McKinney, the Executive Vice President of Minto Group Inc. and addressed to Dr. Himel and Mr. Niman. When Mr. Freeman and Mr. Atlin were retained, they signed a copy of the confidentiality agreement addressed to Mr. Niman without notice to Minto. Minto has objected to this on various grounds, including a concern that the agreements would not be enforceable against Mr. Freeman or Mr. Atlin because they were not privy to an agreement with Minto in that the letters were not addressed to them. However, in their affidavits filed in support of the disclosure motion both Mr. Atlin and Mr. Freedman confirm that they signed the confidentiality agreements prepared by Minto and Mr. Freeman deposes that he is similarly bound from disclosing confidential information by the Canadian Institute of Chartered Business Valuators' Rules of Professional Conduct. Although, in light of this evidence, it is my view that the confidentiality agreements executed by Mr. Freeman and Mr. Atlin are binding, to address Minto's concerns I requested a copy of the confidentiality agreement executed by Mr. Greenberg's valuator, Ms. Linda Brent. I will come back to this issue.

8 Following execution of the confidentiality agreement by Dr. Himel's solicitors, Minto provided some financial information which Minto considers "commercially sensitive" to Mr. Greenberg "on a voluntary basis." Mr. Greenberg

then disclosed this information to Dr. Himel. Mr. Greenberg provided, *inter alia,* a copy of a valuation report of Minto's shares, commissioned by Minto and prepared by KPMG LLP (Minto's auditors) as at December 31, 2007, although several schedules were missing. This KPMG Report includes significant references to appraisal reports conducted by [the Valuators], as well as management valuations. For each type of real estate identified in the report, appraised values are listed for a category identified as "other property." Appendix "C" to that KPMG Report references 17 appraisal reports prepared by these other valuators as well as the management valuations with respect to key Minto properties in Canada and in the State of Florida. Appendix "C" expressly states that KPMG "reviewed and relied on" the 17 appraisal reports listed.

9 Mr. Greenberg also produced a Calculation Valuation Report prepared by his valuator, Linda Brent (the "Brent Report"). Ms. Brent relied on the conclusions/opinion contained in two valuation reports of Minto prepared by KPMG as at December 31, 2006 and December 31, 2007, and assumes the accuracy of those reports in order to express her own opinion. It does not express an opinion as to the value of Mr. Greenberg's share interest in Minto as of the date of separation (the "Valuation Date"). The Brent Report assumes that the "Fair Market Value" of Mr. Greenberg's shares calculated by KPMG approximates the Fair Market Value of those shares as of the Valuation Date. To the extent that the Brent Report provides an opinion of its own, it is an opinion as to the minority discount to be applied to a value of Mr. Greenberg's shares in Minto, which KPMG had determined in its reports.

10 According to Mr. McKinney, all the information that was made available to Ms Brent was also made available to Dr. Himel and much of that information was information which Mr. Greenberg did not previously have access to, and had never seen. The documents provided by Minto to Mr. Niman included the KPMG valuations provided to Ms. Brent. It is the position of Mr. Niman that the underlying appraisal reports represent key documents requested on this motion. Dr. Himel's valuators have sworn affidavits stating that they cannot conduct an independent appraisal without them. The production requests of Mr. Atlin dated December 2nd, 2009 and Mr. Freedman dated December 1st, 2009 as set out in Exhibit "L" to the Affidavit of Naomi Himel sworn February 8th, 2010 and the Request for Information as set out in Exhibit "M" to the Affidavit of Naomi Himel sworn February 8th, 2010, (hereinafter collectively referred to as the "requested documents"), have been requested in the event there is a decision to value these assets without reliance on the KPMG reports.

Issues

11 I must consider the following issues in deciding these motions:

(a) Is Mr. Greenberg entitled to obtain the requested documents from Minto and produce them to Dr. Himel in this proceeding?

(b) If not, should Minto be ordered to produce the requested documents and if so on what terms?

(c) Should there be a partial or complete sealing order?

(d) Should the public be excluded from any further motions in this proceeding?[3]

Analysis

(a) Is Mr. Greenberg entitled to obtain the requested documents from Minto and produce them to Dr. Himel in this proceeding?

12 Rule 30.02(1) of the Rules of Civil Procedure provides that relevant documents in the "possession, control or power" of a party to the action shall be disclosed. Similarly, Rule 19(1) of the Family Law Rules requires every party to prepare an affidavit listing all relevant documents in the "party's control, or available to the party on request." As J. Mackinnon J. stated in Matthys v. Foody,[4] these words cover the situation where the party has legal authority to require another party to turn documents over. She went on to state that the words also encompass the ability of a party to make a formal request for documents from a non-party with the expectation that the request, if reasonably made, will be granted. In his March 4, 2010 Affidavit, Mr. Greenberg raised no personal objection to producing the

information requested, nor did he dispute the relevance of the information requested. On the contrary, Mr. Greenberg deposed that he asked Minto for the documents requested by Dr. Himel's valuators but Minto is unwilling to provide these documents and so he is unable to comply with the disclosure request. I accept that evidence and that Minto has refused to produce the documents, necessitating the disclosure motion. That leaves the question of whether or not Mr. Greenberg has control over the requested disclosure and the legal authority to compel Minto to produce the requested disclosure to him.

13 In an affidavit filed on the motion, Mr. McKinney deposed: that GF7 operates in a highly competitive and volatile business environment and that, from its inception in 1955, all corporate information has been considered to be highly confidential and commercially sensitive. Mr. McKinney deposed that a competitor or customer would obtain an unfair advantage in negotiations to buy, sell or develop a property if internal corporate information were to become public, particularly any information relating to individual properties. He also deposed that Minto attributes "much of its success" to its practice of maintaining the confidentiality of financial information and that it considers the requested information to be "commercially sensitive." All Minto employees are required to sign Confidentiality Agreements.

14 It is the position of Minto that the Shareholders' Agreement and provisions in the Ontario Business Corporations Act[5] ("OBCA") restricts Mr. Greenberg from disclosing Minto's financial information to third parties. Mr. Lowenstein submits that pursuant to the provisions of the OBCA, Mr. Greenberg was entitled to receive and did receive Financial Statements relating to GF7 and some of its subsidiaries. However, by the express terms of Article 8 of the Shareholders' Agreement, Mr. Greenberg is required to maintain confidentiality with respect to these and various other documents. It is his position that the documents now requested by Dr. Himel's advisors are documents which Mr. Greenberg is not entitled to receive as a shareholder. It is his further submission that, to the extent Mr. Greenberg has access to the requested documents as a director, Article 8 and the provisions of the OBCA prohibit him from obtaining those documents for the purpose of disclosure to Dr. Himel.

15 There is no provision in the Shareholders' Agreement setting out what documents Mr. Greenberg is entitled to from Minto in his capacity as a shareholder. Pursuant to ss. 140(1) and 145(1) of the OBCA a shareholder is entitled to examine the articles, by-laws, unanimous shareholders' agreements, minutes of meetings and resolutions of shareholders, the register of directors, and the securities register. Pursuant to s. 154 of the OBCA a shareholder is entitled to copies of the audited financial statements of the corporation and any subsidiary. These documents have already been produced my Minto.

16 Mr. Greenberg is also a director of Minto, and as a director he has access to additional information, which would no doubt include the documents requested by Dr. Himel's advisors. However, I accept the submission of Mr. Lowenstein that he is only entitled to these documents in his capacity as a director in the context of a *bona fide* exercise of his position as a director. Section 134(1) of the OBCA explicitly imposes duties upon directors to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The Supreme Court of Canada[6] has referred to these duties as a fiduciary duty or duty of loyalty and a duty of care. As a director, Mr. Greenberg must maintain the confidentiality of information he requires in his position as a director.

17 In this case there is a provision in the Shareholders' Agreement that provides for confidentiality. Article 8.1(a) provides as follows:

> Each of the parties agrees that it shall not, at any time or under any circumstances, without the unanimous consent of the Shareholders and GF7, directly or indirectly communicate or disclose to any Person ... any confidential knowledge or information ... regarding the property, business and affairs, of GF7 or any of its Subsidiaries *except*:
>
> (ii) Information which is reasonably required to be disclosed by a Party to protect its interest in connection with any valuation or legal proceeding under this Agreement; or

(iii) Information which is *required to be disclosed by law* or by the applicable regulations or policies of any regulatory agency or competent jurisdiction or any stock exchange; [emphasis mine]

18 Paragraph (ii) clearly does not apply but Mr. Niman argues that paragraph (iii) requires Mr. Greenberg to disclose these documents in order to fulfill his disclosure obligations as legally required under the Civil and Family Law Rules.

19 A distinction must be made with regard to the documents in Mr. Greenberg's possession or control in his personal capacity as opposed to his capacity as a director of Minto. He is a party to this proceeding in his personal capacity. Minto is not a party to these proceedings. Mr. Greenberg is required to produce the documents that are in his personal possession and control. The documents he is entitled to as a shareholder have already been produced. The fact that Mr. Greenberg has access to documents in his capacity as a director of Minto does not permit him to obtain those for use in his personal capacity as a party to personal litigation. The information required of Mr. Greenberg is not required "by law" to be disclosed in this litigation as he has been sued in his personal capacity. Simply put, the phrase "by law" in the above provision merely begs the question that is the subject of Dr. Himel's request. The "law" distinguishes between Mr. Greenberg's personal capacity, and his capacity as a director of Minto. Accordingly, Mr. Greenberg is not required "by law" to disclose, in this personal litigation, confidential information acquired as a director. For these reasons I find that Mr. Greenberg does not have the legal authority to compel Minto to produce the requested documents to him so that he can disclose them to Dr. Himel. His only recourse would have been to bring the motion for third party production that has been brought by Dr. Himel.

(b) Should Minto be ordered to produce the requested documents and if so on what terms?

20 I turn then to whether or not Minto should be required to produce the requested documents. The documents requested by Dr. Himel's advisors all relate to a valuation of Mr. Greenberg's shareholdings in Minto. Article 6 of the Shareholders' Agreement stipulates that [Redaction]

21 [Article 6 redacted from this decision.]

22 Rule 30.10(1) of the Rules of Civil Procedure provides that the court *may*, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) The document is relevant to a material issue in the action; and

(b) It would be *unfair* to require the moving party to proceed to trial without having discovery of the document. (emphasis mine)

23 Rule 19(11) of the Family Law Rules provides as follows:

> Document in Non-Party's Control - If a document is in a non-party's control, or is available only to the non-party, and is not protected by a legal privilege, and it would be unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,
>
> (a) Order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and
>
> (b) Order that a copy be prepared and used for all purposes of the case instead of the original.

24 Rule 20(5) permits a court to order disclosure from a non-party by questioning, affidavit, or by another method, if:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it;
2. The information is not easily available by any other method;
3. The questioning or disclosure will not cause unacceptable delay or undue expense.

25 The onus is on Dr. Himel to establish that it would unfair were she not to obtain the disclosure requested. The rules are discretionary, and require the Court to consider the interests of all concerned in the exercise of its discretion, while being mindful that the underlying objective of the Family Law Rules is to resolve matters in the least contentious, least litigious manner possible.

26 The Family Courts have adopted to a large extent the jurisprudence of Rule 30.10(1) of the Rules of Civil Procedure.[7] The factors to be considered in determining whether production should be ordered from non-parties under Rule 30.10(1) was set out by the Ontario Court of Appeal in *Ontario (Attorney General) v. Stavro:*[8]

(a) the importance of the documents in the litigation;

(b) whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;

(c) whether the discovery of the defendant with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;

(d) the position of the non-parties with respect to production;

(e) the availability of the document or their informational equivalent from another source which is accessible to the moving parties;

(f) the relationship of the non-parties from whom production is sought to the litigation and the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true stranger to the litigation.

27 Relevance alone is insufficient to warrant production. To order production, the judge must be satisfied that it would be "unfair" to the moving party to go on with the case without the document.[9]

28 It is the position of GF7 that it would not be unfair for Dr. Himel to proceed without the requested production. GF7 argues, first of all, that there is no evidence to suggest that KPMG's valuations were not bona fide valuations, prepared completely independent of Mr. Greenberg for valid business purposes that are unrelated to the matter at hand. Implicit in that submission is that Dr. Himel and her advisors should simply accept the KPMG valuations as did Ms. Brent. That, however, was the decision Ms. Brent made, no doubt based on the instructions she received. There can be no doubt that Dr. Himel's advisors have not been given the necessary information to determine if there is a basis for Dr. Himel to challenge the KPMG numbers. In her report, Ms. Brent stated that her scope of review was "inherently limited by the nature of a Calculation Valuation Report and the conclusions expressed herein may have been different had a Comprehensive Valuation Report been prepared ...". Furthermore, the KPMG Reports provided to Dr. Himel are as at December 31, 2006 and December 31, 2007. The Valuation Date in this case is September 12, 2007. The trial judge will require that the value of Minto and of Mr. Greenberg's interest in particular be calculated as of this date. Dr. Himel's professionals therefore require access to the necessary information in order to be able to assess the KPMG valuation and if so instructed, to do their own independent determination of the value of Minto's assets and liabilities, and in turn, the value of Mr. Greenberg's share interest, on this specific date.

29 Mr. Lowenstein argued that in addition to the KPMG valuations being bona fide and reliable, that Mr. Greenberg is bound by these valuations and Dr. Himel should be as well. I suggested to him that this would be an argument for the trial judge but he submitted that I could and should make that determination now. I do not accept this argument

because this is not a motion for summary judgment and in my view it will be up to the trial judge to decide how to value Mr. Greenberg's shares as of the Valuation Date. [Redaction] It will be open to Dr. Himel to lead evidence to try and establish that had Mr. Greenberg tried to sell his shares on the Valuation Date, that he would probably have asked for a higher price than the KPMG valuation price and that one or more shareholders would probably have been willing to buy his shares at the higher price. It may be, for example, that Dr. Himel can establish that one or more of the shareholders would have been interested in increasing their holdings. Dr. Himel may argue that, in considering what price to ask for, the true market value of those shares, inclusive of goodwill, is relevant. It is also possible for Dr. Himel to argue that the trial judge should consider Minto's value assuming it had been sold "en bloc" at the time of separation. I expect that Mr. Niman will develop other arguments as well. [Redaction]. In argument Mr. Lowenstein conceded that if Dr. Himel is not bound by the KPMG valuation that it would be unfair that she not receive the requested disclosure.

30 In my view the requested documents are very important to Dr. Himel's case. The documents requested by Dr. Himel's advisors are central to a material issue in this case, namely, the value of Mr. Greenberg's net family property and Dr. Himel's entitlement to a portion thereof. Without them she will have no alternative but to accept the KPMG valuation for the purpose of valuing Mr. Greenberg's shareholdings.

31 There is a substantial amount of money at stake, which is illustrated by the fact that even with significant discounts and on his own numbers, Mr. Greenberg owes Dr. Himel as very significant sum for equalization. Dr. Himel's advisors should be able obtain the necessary information to test the KPMG valuations and the underlying property appraisals and if instructed, prepare an independent valuation of Mr. Greenberg's shareholdings provided Minto's confidentiality concerns can be addressed.

32 There is no information provided in the KPMG Reports which would allow Mr. Atlin to independently assess the values attributed to the Minto properties. In some cases, it is not even clear which properties are represented or where they are located. In many cases, no municipal address is provided. This is clearly not a case where production at trial is an alternative and questioning of Mr. Greenberg will be limited to the documents he has produced and is therefore not a solution.

33 Mr. Lowenstein relies on the fact that Minto's management, with the assistance of KPMG personnel, has been willing to meet with Dr. Himel's experts since early 2009 to answer questions concerning the KPMG valuations. He relies on family law cases where a "fielding of questions" was ordered, rather than formal disclosure or questioning.[10] I agree with the submission of Mr. Niman that without the relevant documentation, Dr. Himel's counsel cannot have any meaningful discussions with representatives of Minto. All information requested by Mr. Freedman and Mr. Atlin is necessary in order for them to perform their due diligence and to assess the KPMG Report. A discussion of the general principles underlying the KPMG valuation as proposed by Mr. McKinney is not an adequate substitute for this process. Although hopefully this offer will be repeated after disclosure of the requested documents has been made, as it may assist the parties in reaching a resolution, this offer is not an answer to this motion at this stage.

34 Mr. Greenberg has served the Brent Report. Although proceedings in Family Court do not allow for a discovery process (except with leave of the Court), Mesbur J. has held that the disclosure obligations that accompany the use of an expert report in a proceeding under the *Family Law Rules* should nevertheless follow the disclosure requirements imposed under Rule 31.06(3).[11] Arguably this approach would not assist Dr. Himel on this motion as Ms. Brent was not given the requested documents. In light of my conclusion that the requested disclosure should be provided by Minto so that Dr. Himel's advisors can test the KPMG valuations and if instructed prepare their own valuation, it is not necessary to consider the arguments advanced by counsel for Dr. Himel seeking this disclosure on the basis of Rule 31.06(3) of the Rules of Civil Procedure.

35 Considering the final two factors, Dr. Himel has no other source for the requested documents other than Minto. As Minto is owned by the Greenberg family, I think it would be fair to say that its interests are allied with the position of Mr. Greenberg is this proceeding. Even if that is not the case, all the other factors strongly favour disclosure by Minto of the requested documents.

36 In my view, based on a balancing of the burden of production to Minto and the necessity of this disclosure to Dr. Himel, there should be a two staged disclosure in this case, subject to the terms that follow. It may be that once all of the appraisals relied upon by KPMG in its two reports are produced to Dr. Himel's advisors that they will not require all of the information they have asked for at this time, or at least they may not require it with respect to every property. Accordingly, as a first step, on or before May 28, 2010, GF7 is ordered to produce a copy of all of the appraisal reports conducted by [the Valuators], as well as management valuations, and referenced in the KPMG reports as at December 31, 2006 and December 31, 2007. These documents shall be produced at Minto's expense, save for photocopy charges to Dr. Himel at the Legal Aid rate.

37 If Mr. Niman advises Mr. Lowenstein in writing that Dr. Himel has instructed her advisors to conduct their own valuation of some or all of the properties owned by GF7 or any of its related companies and subsidiaries, then GF7 is to provide the financial disclosure requested provided that it is set out in the production requests of Mr. David Atlin dated December 2, 2009 and Mr. Andrew Freedman dated December 1, 2009 as set out in Exhibit "L" to the Affidavit of Naomi Himel sworn February 8th, 2010 and the Request for Information set out in Exhibit "M" to the Affidavit of Naomi Himel sworn February 8th, 2010.

38 Minto requests costs if further production is ordered. In my view, if more than the underlying appraisals are requested, it is not reasonable to limit GF7's recovery to the cost of copying at the legal aid rate. However I do not accept the submission by Mr. Niman that Mr. Greenberg should pay these costs since his valuator was not provided with these documents and I have found he has no legal authority to obtain them for disclosure purposes. Accordingly in addition, pursuant to Rule 30.10(5), Dr. Himel will be responsible for the reasonable cost incurred by GF7 in assembling these documents which shall then be copied for the purpose of disclosure at the legal aid rate. If the parties cannot agree, I can be contacted for a further brief attendance to resolve the issue. I trust this will not be necessary.

39 The production of all documents already produced by GF7 and all further documents produced by GF7 in accordance with this order will be subject to the terms of the confidentiality agreements already executed by Dr. Himel and Mr. Niman. Given the concerns expressed by GF7 as to the enforceability of the confidential agreements Mr.Atlin and Mr. Freedman signed, before any further documents from Minto are disclosed to them, it is ordered that they each sign a new confidentiality agreement in the form signed by Ms. Brent, dated April 1, 2008, as produced to me by Mr. Lowenstein following the argument of the motions, (the "Brent Confidentiality Agreement"). I have reviewed the terms of this letter agreement, and subject to necessary modifications, it appears to be in the same form as the one signed by Mr. Niman. There will obviously be a need for some further modifications to reflect the fact that Mssrs. Atlin and Freedman are the valuators for Dr. Himel, but otherwise the agreement they are asked to sign should be the same as the Brent Confidentiality Agreement. If the parties cannot agree on the form of the agreement, I can be contacted for a further brief 9:30 attendance to resolve the issue. Again, I trust this will not be necessary.

40 In oral argument Mr. Lowenstein asked that counsel for Dr. Niman undertake to advise what they have done to ensure the documents produced by Minto are kept segregated and confidential. The confidentiality agreement executed by Mr. Niman requires him to store the information provided securely and put in adequate means in place to protect the information against unauthorized or improper use. Accordingly no undertaking is necessary as this is already provided for in the agreement.

(c) Should there be a partial or complete sealing order? This requires a separate consideration of the motion by Minto and Mr. Greenberg

41 Minto's notice of motion requests a sealing order pursuant to s. 137(2) of the Courts of Justice Act,[12] ("CJA") respecting all information relating to Minto or any of its subsidiaries or related companies, and including the value of assets or income of Mr. Greenberg. As already stated, in argument Mr. Lowenstein pressed for an order sealing the entire court file. Minto puts forth three grounds to support this sealing order. First, it argues that the disclosure of

this information would harm the corporate interests of Minto and give its competitors an unfair advantage. Second, Minto argues that a sealing order should be granted due to the confidentiality agreement signed by Dr. Himel and her lawyers as a pre-condition for disclosure of Minto's financial documents. Third, Minto argues that a sealing order should be granted to protect information that is subject to the above noted confidentiality clause in the Shareholders' Agreement, to which Mr. Greenberg is a party.

42 Mr. Greenberg requests a sealing order respecting all documents filed with the Court in this proceeding on the basis of the safety and best interests of the two children of the marriage.

(i) The Legal Test for Sealing Orders

43 Section 137(2) of the CJA provides the jurisdiction to issue a sealing order:

> A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

44 Sealing orders are an exception rather than the rule. All courts and court documents in Canada are presumed to be open to the public. As Ferrier J. recently stated in *Ontario Council of Hospital Unions v. Ontario (Minster of Health)*[13]:

> There is a heavy onus on anyone seeking to deny public access to court documents or proceedings. It must be demonstrated that it is necessary to deny public access in order to protect a value of "super-ordinate" importance": Nova Scotia (Attorney General) v. MacIntyre, *[1982] 1 S.C.R. 175*, p *[1982] S.C.J. No. 1* at pp/ 185-87 S.C.R.

45 This is an important component of our constitutional right to freedom of expression contained in s. 2(b) of the Charter. The importance of this principle, and the plethora of Supreme Court of Canada cases stating it, was recently noted by my brother Strathy J. in *Fairview Donut Inc. v. TDL Group Corp*,[14] citing the Supreme Court of Canada's decisions of *Dagenai v. Canadian Broadcasting Corp.*,[15] *R. v. Mentuck*,[16]; *Vancouver Sun (Re.)*,[17]; and *Toronto Star Newspapers Ltd. v. Ontario*.[18]

46 The test for determining when the open court principle should give way to considerations of 'super-ordinate importance" was set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*.[19] Justice Iacobucci, speaking for the Court at para. 53, established a two part test:

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

47 Justice Iacobucci clarified the meaning of the phrase "important commercial interest" in paras. 55-56:

> ... In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there

> is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in F.N. (Re), *[2000] 1 S.C.R. 880*, *2000 SCC 35*, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".

The important commercial interest cannot be one specific to the moving party. Rather, the moving party must establish an important commercial interest that is grounded in a broader public interest: see also *Prendiville v. 407 International Inc.*[20]

48 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second [para. 53] branch of the test, courts must be alive to the fundamental importance of the open court rule.[21]

49 Where the sealing order relates to the personal information of a child, the best interests of the child, is a value of super-ordinate importance that can override the open court principle: *M.S.K. v. T.L.T.*[22]

50 Accordingly, I must consider, first, whether not granting the sealing order would create a serious risk to an important interest. At this stage of the analysis, I must consider reasonable alternatives, short of a sealing order, sufficient to prevent harm to the important interest (*Sierra Club*, at para. 57). Second, I must balance the interest against the right to freedom of expression and the open court principle, as well as any other deleterious effects of granting the sealing order.

(ii) Motion by Minto

51 As stated above, Minto seeks a sealing order on three grounds. Dr. Himel consents to a sealing order with respect to financial information relating to Minto that has been or may be produced by Minto. Despite that consent, it is for Minto to establish that it meets the conditions for a sealing order which are well established in the case law.

52 First, Minto seeks a sealing order based on the economic harm it claims it would suffer if this financial information were made public. This ground fails at the first stage of the Sierra Club test. As Justice Iacobucci noted, above, mere economic harm is not an important commercial interest sufficient to override the open court principle. Minto has failed to frame this ground as anything more than its own commercial interest.

53 Second, Minto argues that a sealing order should be granted on the basis of the confidentiality agreements signed by Dr. Himel and her lawyers as a precondition for receiving financial disclosure. While protecting confidentiality agreements is an important commercial interest, and was recognized as such by Justice Iacobucci in *Sierra Club*, I do not believe that protecting this particular type of confidentiality agreement is an interest of super-ordinate importance. This agreement was entered into after the commencement of litigation, and was forced upon Dr. Himel and her lawyers as a precondition for receiving disclosure. In my view, there are substantial public policy considerations militating against finding that protecting this confidentiality agreement is an important commercial interest. If this type of confidentiality agreement were accepted as an important commercial interest, it could significantly narrow the open court principle by effectively allowing litigants to contract-out of the constitutionally protected right to freedom of expression through the use of confidentiality agreements as a pre-condition to disclosure.

54 Accordingly, this ground also fails on the first stage of the Sierra Club test. Even if this ground had not failed the first stage of the test, it would fail the second stage: as the harm to the open court principle would far outweigh the salutary effects, if any, of promoting this type of confidentiality agreement.

55 In relation to this second ground, Minto submits that Dr. Himel agreed to the sealing order in the confidentiality agreement, and that consent is a factor that the court can consider in granting a sealing order. While it may be true that consent to a sealing order can be considered by the court, it is certainly not determinative. The right to open

courts does not reside with the litigants: it belongs to the entire public. All restrictions of this principle must be carefully scrutinized by the court.

56 Third, Minto submits that the sealing order should be granted to protect the confidentiality provisions in the Shareholders' Agreement. At the first stage of the Sierra Club test, this confidentiality agreement, unlike the second ground raised by Minto, is capable of being framed as a broader public interest of super-ordinate importance. Society as a whole has an interest in the enforcement of these confidentiality agreements, and there are no alternative measures that could achieve the same end. At the second stage of the test, I find that the salutary effects of granting the sealing order outweigh the deleterious effects to the right to free expression. Specifically, this order would further an important commercial interest, namely the protection of sensitive confidential information. While the deleterious effects of this order are serious, they are not out of proportion to the commercial interest protected: the vast majority of the court file will remain open, and the sealed material is only tangentially important to the substance of this proceeding.

57 This sealing order, however, will only relate to the financial information of Minto, its subsidiaries, and relating companies. Information relating to the value of assets held by Mr. Greenberg and his personal income are not subject to this sealing order. Counsel have been unable to provide any basis for concluding that the disclosure of this information would lead to the disclosure of confidential information relating to Minto. I do not accept Minto's submission that a limited sealing order is impracticable as it will not be the court staff that is expected to redact the court documents. That will be the responsibility of counsel.

58 In granting this limited sealing order, I have considered the fact that Minto is not a party to this litigation, and has been forced to provide disclosure due to the marital troubles of one of its shareholders. Whereas most litigants are forced to disclose sensitive information because their dispute is being settled by the court, this is not true of third parties who, like Minto, have been dragged into litigation. I have considered this factor under the second, balancing, stage of the Sierra Club test.

59 In my view, Minto's commercial interests would be adequately protected by the granting of a partial sealing order aimed at protecting information provided by Minto that is subject to the confidentiality provisions of the Shareholders' Agreement that has already been provided to Dr. Himel or will be pursuant to my order. In any event, Minto's commercial interests do not trump Mr. Greenberg's duty of disclosure or Dr. Himel's right to information necessary to prepare an independent valuation of Minto. This is particularly so in circumstances where the Brent Report relies on the KPMG Report which in turn relies upon numerous land appraisals.

60 This decision shall be released and published in the usual manner as I have not included the particulars of any of the information that should remain confidential. However, all of the documents for these motions were sealed pursuant to the endorsement of Mesbur J. of January 8, 2010 pending the decision on Minto's motion. In light of my decision, much of that material should not continue to be sealed. Counsel for Minto shall provide me with a list of the documents or portions of documents from the motions that were heard by me that Minto submits should be sealed by May 21, 2010. I will then determine what parts of the materials filed on the motions shall be sealed and advise all counsel. Each party shall then be responsible for filing a redacted version of all of their materials on the motion, so those documents can be placed in the Continuing Record. I will then re-seal all of the original material filed on the motions with the exception of the authorities' briefs.

(iii) *Motion by Mr. Greenberg*

61 With regards to the children, Mr. Greenberg argues that their best interest requires that a sealing order be granted for the entire file. Mr. Greenberg bases this request on the safety of his oldest son and the perceived susceptibility to peer pressure and immaturity of his teenage son. While, at the first stage of the Sierra Club analysis, I accept that the best interests of the children can be an interest of super-ordinate importance, the particular risks to the children in this case do not justify sealing the entire court file.

62 Mr. Greenberg has deposed that his older son has recently become a citizen of Israel and has enlisted in the

Israeli Army and that disclosure of information relating to his son's family fortune and his presence in Israel would endanger his safety by making him a target for kidnapping by organizations such as Hamas or Hezbollah, or by the Russian-Israeli mafia. It is argued that releasing the information in the court file to the public will increase the risk of potential harm to him in that radical and/or criminal groups could use not only his Canadian status to advance their cause, but also information of Mr. Greenberg's wealth or his connection to Minto to seek ransom. No evidence in support of these fears was filed save for an affidavit provided on the day of argument which included newspaper articles detailing alleged Hama threats to kidnap Israelis.

63 Ms. Goldhart, counsel for Mr. Greenberg, relies on *Kolesa v. Thomson*[23] where Kitely J. held that the courts ought to ensure that children who are the subject matter of legal proceedings are not harmed. The protection of children in such circumstances is a "social value of superordinate importance." In that case, however, there was affidavit evidence before the court from the company providing security personnel assistance to the family who opined that the great wealth and public profile of the Thomson family made it more vulnerable to media coverage. Such coverage, it was said, would place the child at serious risk of harm because it would enable access to information that was otherwise not available and that the information would be of value for perverse, monetary and dangerous purposes. On this evidence, Kitely J. ordered that certain information including the name of the child, the birth date of the child, addresses of residences, schools and activities and other information related to the child be redacted. Importantly, Kitely J. also found there was no reason to seal information that had no bearing on the potential harm to the child, and the fact that the defendant was wealthy and wanted to protect her own privacy did not justify sealing of the entire file.

64 On appeal,[24] the Court of Appeal stated that Kitely J. had found there was an "appreciable risk" of harm to the child by kidnapping if the information respecting the child were left in the public domain. In light of that finding the Court of Appeal sealed the entire file, noting that the evidence of one of the experts supported this conclusion. The Court found that the risk of potential harm to a child is an exception to the general rule in favour of openness of the Court and that a sealing order may be made where it is considered to be in the best interest of the child.[25]

65 In my view the case at bar is clearly distinguishable from the facts before Kitely J. in *Kolesa*. Although I accept that Mr. Greenberg's affidavit sets out what he fears, I do not accept that his evidence supports a finding of fact that there is an appreciable risk of harm to his older son if the limited background information that has been disclosed in the application and on these motions is not sealed. The risk to Mr. Greenberg's oldest son is largely speculative. Furthermore, I accept the submission of Mr. Niman that prior to this disclosure motion, it was evident from the public record that Mr. Greenberg was an enormously wealthy man. To the extent that Mr. Greenberg's wealth could put his children at risk of ransom, extortion, or being pestered for donations, they were already at that risk.

66 The younger teenage son is described as an immature and rebellious teenager who is actively involved in several social activist organizations. Mr. Greenberg submits that his younger son is too immature to handle the full knowledge of his family fortune, and would be peer pressured or coerced into foolish decisions. He also submits that he would be relentlessly harassed by these social activist organizations for donations. With respect to both children, Mr. Greenberg is concerned that knowledge of their true fortune would impede their personal development and professional ambitions.

67 With respect to the teenage son, the risk asserted by Mr. Greenberg is wildly speculative and is not serious enough to justify granting a sealing order. I come to the same conclusion with respect to the concern that it would harm the sons to learn the true extent of Mr. Greenberg's personal wealth. I find it highly unlikely that his sons are not already aware of the fact of his wealth, even though they may not be aware of its exact scope. More importantly, even if this risk exists it is simply not serious enough to be of super-ordinate importance. Again, while the best interest of a child can be such an interest, the particular risks to the child must also be serious enough to be classified as an important interest under the first stage of the Sierra Club test.

68 Mr. Greenberg also takes the position that should Minto suffer financial harm as a result of the disclosure of certain financial information in the public forum, his income may be adversely affected which could impede his ability to continue to make significant monthly payments to Dr. Himel and to pay for the children's various expenses.

This would contravene not only the Children's best interest, but also Dr. Himel's best interest. He argues that such interests are a matter of "superordinate importance" which supersedes the policy of public accessibility to these proceedings. As I have made a sealing order with respect to the information produced by Minto, I do not accept that Minto will suffer financial harm as a result of the ordered disclosure and so there is no basis to this argument.

69 For these reasons, Minto's motion for a partial sealing order is granted. Mr. Greenberg's motion for a sealing order of the entire file is dismissed.

(d) Should the public be excluded from any further motions in this proceeding?

70 The court may order the public to be excluded from a hearing pursuant to section 135 of the CJA where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public. As with a sealing order, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance.[26]

71 Accordingly, to the extent there are further motions in this proceeding, and if the documents produced by Minto that are subject to the sealing order are included in the motion material, or extracts of those documents are set out in affidavits or facta, as already ordered, the document in question will be filed in sealed envelopes. In my view, it should then be up to the judge hearing the motion to determine whether or not the public should be excluded from any part or all of that motion. There may be other motions that are completely unrelated to the Minto documents. In my view I ought not to rule now that the public be excluded from any and all future motions. That decision should be left to the judge or judges hearing those motions.

72 As already stated, Mr. Lowenstein and Ms. Goldhart conceded that there should be no order now binding the trial judge.

73 Accordingly, for these reasons, the motions by Mr. Greenberg and Minto to exclude the public from future hearings are dismissed.

Disposition

74 For these reasons I order as follows:

(a) On or before May 28, 2010, GF7 is ordered to produce a copy of all of the appraisal reports conducted by [the Valuators], as well as management valuations, referenced in the KPMG reports as at December 31, 2006 and December 31, 2007 to counsel for Dr. Himel. These documents shall be produced at Minto's expense, save that Dr. Himel shall pay for photocopy charges at the Legal Aid rate.

(b) If counsel for Dr. Himel advises counsel for GF7, in writing, that Dr. Himel has instructed Mr. Atlin and/or Mr. Freeman to prepare valuations that require some or all of the production requests of Mr. David Atlin dated December 2, 2009 and/or Mr. Andrew Freedman dated December 1, 2009 as set out in Exhibit "L" to the Affidavit of Naomi Himel sworn February 8, 2010 and/or the Request for Information set out in Exhibit "M" to the Affidavit of Naomi Himel sworn February 8, 2010, GF7 shall produce the requested information as quickly as possible. Dr. Himel will be responsible for the reasonable cost of assembling these documents, which shall then be copied for the purpose of disclosure at the legal aid rate. If the parties cannot on these costs, I can be contacted for a further brief attendance to resolve the issue. If the parties cannot agree, I can be contacted for a further brief attendance to resolve the issue.

(c) The production of all further documents by GF7 in accordance with this order will be subject to the terms of the confidentiality agreements already executed by Dr. Himel and Mr. Niman on June 9, 2008.

(d) Mr. Atlin and Mr. Freedman shall not be provided with any of the additional disclosure produced as a result of this order, unless they have first signed a confidentiality agreement in the form of the Brent Confidentiality Agreement as defined herein and counsel for Dr. Himel has provided an originally executed copy to counsel for GF7. If the parties cannot agree on the necessary modifications, I can be contacted for a further brief attendance to resolve the issues.

(e) All financial information of Minto, its subsidiaries, and relating companies, which has already been produced to counsel for Dr. Himel or is produced pursuant to paragraphs (a) and (b) herein, shall be treated as confidential, by the party relying on the financial information either directly or indirectly. Such financial information shall not form part of the public record contained in the court file. Information relating to the value of assets held by Mr. Greenberg and his personal income is not subject to this sealing order.

(f) Minto shall be given notice of any further motions in this proceeding and notice of the trial so that at the commencement of the argument of any further motions and at the commencement of the trial, Minto may have an opportunity to make submissions as to whether or not any part of the hearing should be closed to the public. The judge hearing the request may make such order as he or she considers appropriate.

(g) Counsel for Minto shall provide me with a list of the documents or portions of documents that were filed by all parties on these motions that Minto submits should be sealed, before May 28, 2010. I will then determine what documents or portions of documents filed on the motions shall be sealed and advise all counsel. Each party shall then be responsible for filing a redacted version of all of their materials on the motion, so those redacted documents can be placed in the Continuing Record. I will then re-seal all of the original material filed on the motions with the exception of the authorities' briefs, so a record of all of the information before me is preserved.

75 If there is any issue settling the terms of my order a 9:30 appointment with me may be arranged.

Costs

76 Dr. Himel was completely successful on her motion for disclosure. Mr. Greenberg took no position on that motion. As I found Mr. Greenberg had no legal authority to compel production of those documents, save for bringing his own third party production motion, he is not responsible for any of these costs.

77 Mr. Greenberg did not succeed on either of his motions. Minto succeeded in obtaining a sealing order, but only to the extent already consented to by Dr. Himel. Had Minto conceded that it should disclose the requested documents, a motion would still have been necessary, but could have been dealt with on consent more expeditiously. Minto did not succeed in sealing the entire court file, or on its motion to exclude the public from future hearings or its claim for injunctive relief.

78 In my view, Dr. Himel should have her costs of her disclosure motion from Minto. As for Minto's and Mr. Greenberg's motions for a sealing order and to exclude the public from future hearings, as Dr. Himel consented to the limited sealing order sought by Minto in its notice of motion she should have her costs of Mr. Greenberg's and Minto's motions to seal the entire file and exclude the public from future hearings. She should also have her costs of Minto's motion for injunctive relief.

79 I received cost outlines from all counsel but did not hear submissions on costs as I reserved my decision on the motion. Dr. Himel has claimed costs on a substantial indemnity basis, including the fees and disbursements of Mr. Roebuck, in the amount of $139,597 and on a partial indemnity scale in the amount of $79,306. I do not know if there were any offers to settle that should be taken into account. Furthermore, given the amount claimed for costs, counsel should be given an opportunity to make brief written submissions which are to include the basis if any for awarding Dr. Himel costs on a substantial indemnity scale, confirmation that Mr. Roebuck was retained as outside counsel in light of Minto's motion claiming injunctive relief against Dr. Himel's legal advisors and any other submissions counsel wish to make to support their position. Counsel for Dr. Himel shall have until May 10 to

provide their submission, counsel for Mr. Greenberg and Minto shall have until May 20 to respond. Any reply shall be provided by May 25, 2010.

N.J. SPIES J.

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1 GF7 Holdings Inc. was permitted to participate in the Applicant's disclosure motion and bring its own motion to seal the court file pursuant to the endorsement of Justice Mesbur dated January 8, 2010.

2 **This Decision has been redacted, as set out herein; see [..], to protect the confidentiality of Minto's financial information referenced in this decision. The original decision released to the parties without redactions, and materials filed on the motion that contain references to any of Minto's financial information have been sealed by my order subject to any further order of this Court.**

3 Counsel for Minto and Mr. Greenberg conceded that it should be up to the trial judge to decide if the public should be excluded for part or all of the trial.

4 *[2009] O.J. No. 2732*, *72 R.F.L. (6th) 376* (S.C.J.) at para. 27

5 *R.S.O. 1990, c. B.16*

6 *People's Department Stores Inc (Trustee Of) v. Wise*, *2004 SCC 68*, *[2004] 3 S.C.R. 461* at para. 32.

7 See for e.g. *Betel v. Betel*, [2008] W.D.F.L. 4253, *[2008] O.J. No. 1060* (S.C.J.) at para. 11, and *Hanna v. Hanna*, *[2009] O.J. No. 2210*, [2009] W.D.F.L. 4798 (Ont. S.C.J.) at para. 53.

8 *(1995), 129 D.L.R. (4th) 52*, *26 O.R. (3d) 39* (Ont. C.A) at para. 15.

9 *Marcoccia v. Marcoccia*, *2009 ONCA 162*, *246 O.A.C. 111* at para. 9.

10 See for e.g. *Boisvert v. Boisvert*, *[2006] O.J. No. 2760* (S.C.J.) at paras. 72-73.

11 *Bookman v. Loeb*, *[2009] O.J. No. 2741*, *72 R.F.L. (6th) 388* (S.C.J.) at paras. 21 and 26

12 *R.S.O. 1990, c. C.43*

13 *(2007), 85 O.R. (3d) 55*, *[2007] O.J. No. 411* (S.C.J.) at para. 77

14 *2010 ONSC 789*, *[2010] O.J. No. 502* (S.C.J.) at para. 33

15 *[1994] 3 S.C.R. 835*, *[1994] S.C.J. No. 104*;

16 *[2001] 3 S.C.R. 442*, *[2001] S.C.J. No. 73*

17 *[2004] 2 S.C.R. 332*, *[2004] S.C.J. No. 41*

18 *[2005] 2 S.C.R. 188*, *[2005] S.C.J. No. 41*

19 *[2002] 2 S.C.R. 522*, *[2002] S.C.J. No. 42*

20 *[2002] O.J. No. 2548*, 24 C.P.C. (5th) 184 (S.C.J.) at para. 15

21 See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* *(1994), 56 C.P.R. (3d) 437*, *[1994] F.C.J. No. 1141* (T.D.), at para. 2.

22 *[2003] O.J. No. 352*, *168 O.A.C. 73* (C.A.) at para. 10.

23 *2002 CarswellOnt 3091*, *[2002] O.J. No. 4179* (S.C.J.) at para. 24.

24 M.S.K. v. T.L.T., supra.

25 at paras. 10 and 11.

26 *Nova Scotia (Attorney General) v. MacIntyre*, supra, at Part 5.

End of Document

Tab 24

Sopinka, Lederman & Bryant

The Law of Evidence in Canada

THIRD EDITION

Alan W. Bryant
Sidney N. Lederman
Michelle K. Fuerst

LexisNexis

sale of land, there is no reason why an exception should not be created with respect to statements in other types of signed ancient documents, 20 years or older that are produced from the appropriate custody, admitting them as evidence of the truth of the facts contained in them in proceedings involving issues other than those arising between a vendor and purchaser in a land sales transaction.[388]

6. *Statements in Public Documents*

§6.295 In the belief that public officers will perform their tasks properly, carefully and honestly, an exception to the hearsay rule was created for written statements prepared by public officials in the exercise of their duty. When it is part of the function of a public officer to make a statement as to a fact coming within his knowledge, it is assumed that, in all likelihood, he or she will do his or her duty and make a correct statement.[389] The circumstance of publicity also adds another element of trustworthiness. Where an official record is necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected provides an additional guarantee of accuracy.[390] Before this exception to the hearsay rule comes into play, however, the following preconditions, cumulatively providing a measure of dependability, must be established:

(1) The subject matter of the statement must be of a public nature.
(2) The statement must have been prepared with a view to being retained and kept as a public record.
(3) It must have been made for a public purpose and available to the public for inspection at all times.
(4) It must have been prepared by a public officer in pursuance of his or her duty.[391]

§6.296 The condition that the document be available for public inspection is not a requirement in the United States, as it only provides a modest additional assurance of reliability. Laskin J.A., in *R. v. P. (A.)*,[392] raised doubt about its

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388 Draft *Uniform Evidence Act*, Bill S-33, 1980-81-82 (withdrawn: see generally, S.A. Schiff, *Evidence in the Litigation Process*, 4th ed. (Toronto: Carswell, 1993), at 683-86), s. 62(1)(d).

389 *Finestone v. R.*, [1953] 2 S.C.R. 107, [1953] S.C.J. No. 34 (S.C.C.); *Voitko v. Sabados* (1973), 38 D.L.R. (3d) 234, [1973] S.J. No. 75 (Sask. Q.B.).

390 *Sturla v. Freccia* (1880), App. Cas. 623, [1874-80] All E.R. Rep. 657 (H.L.); *Mercer v. Denne*, [1904] 2 Ch. 534, affd [1905] 2 Ch. 538 (C.A.).

391 See R.W. Baker, *The Hearsay Rule* (London: Pitman, 1950), at 138; *Thrasyvoulos Ioannou v. Papa Christoforos Demetriou*, [1952] A.C. 84 (P.C.); *R. v. Kaipiainen*, [1954] O.R. 43, [1953] O.J. No. 712 (Ont. C.A.); *R. v. Zundel* (1987), 31 C.C.C. (3d) 97, at 167-68, [1987] O.J. No. 52 (Ont. C.A.), leave to appeal refused [1987] 1 S.C.R. xii, 61 O.R. (2d) 588*n* (S.C.C.).

392 (1996), 109 C.C.C. (3d) 385, [1996] O.J. No. 2986 (Ont. C.A.).

CT-2017-008

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

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